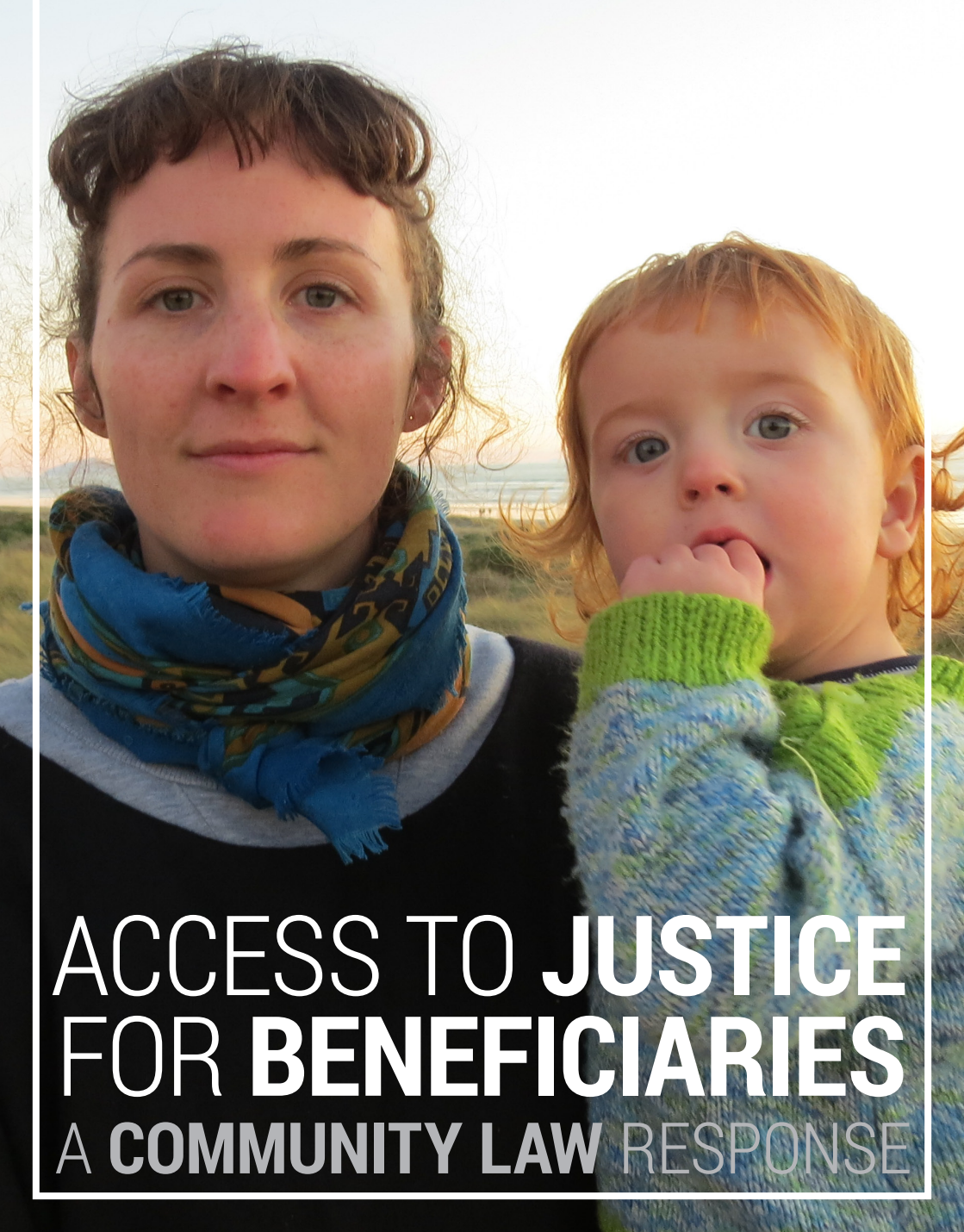




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ACCESS TO JUSTICE FOR **BENEFICIARIES**

A **COMMUNITY LAW** RESPONSE

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Access to Justice for Beneficiaries: Online Survey Report of Community Law Centres and Beneficiary Advocacy Groups
(Community Law Canterbury, April 2013)

Access to Justice for Beneficiaries: Literature Review
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Booklets for beneficiaries and community advocates:

Appealing to a Medical Appeals Board

Reviewing a decision at a Benefits Review Committee

Appealing to the Social Security Appeal Authority

ACCESS TO JUSTICE FOR **BENEFICIARIES**

A **COMMUNITY LAW** RESPONSE

Kim Morton, Claire Gray, Anne Heins, Sue Carswell

A COMMUNITY LAW CANTERBURY
ACCESS TO JUSTICE RESEARCH PROJECT

October 2014



This report is dedicated to the beneficiaries who so generously agreed to be interviewed for the project.



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Contents

Executive summary	7
Introduction	15
Aims of the research	15
Background	16
An overview of research methodology	22
Government departments relevant to this research	26
Outline of the report	27
PART 1 Receiving benefit entitlements	29
1.1 Introduction	29
1.2 Experience of the benefit system	29
1.3 Accessing benefit entitlements	38
1.4 Conclusion	55
PART 2 Benefit review and appeal processes	59
2.1 Introduction	59
2.2 Medical Appeals Boards	63
2.3 Benefits Review Committees	82
2.4 Social Security Appeal Authority	106
2.5 Conclusion	118
PART 3 Benefit fraud	121
3.1 Introduction	121
3.2 Need for legal advice	123
3.3 Lawyers' inadequate knowledge of welfare law	124
3.4 Power imbalance	126
3.5 Reviewing the debt	128
3.6 Conclusion	128

PART 4 Responding to beneficiaries' legal needs	131
4.1 Introduction	131
4.2 Accessing legal support	131
4.3 Suggested responses by community law centres	148
4.4 Conclusion	162
PART 5 Conclusion	165
Implications of research for the Ministries of Social Development and Justice	170
 Glossary and acronyms	 173
References	177
Acknowledgements	181
APPENDIX 1 Social Security Act 1964 purpose and principles	183
APPENDIX 2 Methodology	185
APPENDIX 3 Research tools	193

Executive summary

This research examines the legal needs of people on benefits, through the lens of welfare law. Welfare law refers to the legislation and legal principles that cover the social security (benefit) system.¹ Our research aimed to gain both a broad perspective of the systems, processes and services beneficiaries encounter, and individual experiences of accessing entitlements, in order to more fully understand beneficiaries' legal needs. Our goal was to identify beneficiaries' legal needs in relation to welfare law and determine how these needs can best be met to assist community law centres (CLCs) develop their services to beneficiaries.

The research method was primarily qualitative as it focused on people's experiences and this information was contextualised with statistical data from government agencies and CLCs, a review of national and international literature, and an online survey.

In total 50 in-depth interviews were conducted, 21 interviews with representatives of agencies with involvement in the benefit system, and 29 interviews with beneficiaries; and a focus group undertaken with five beneficiaries. While the interviews with beneficiaries and agency representatives were done prior to the July 2013 welfare changes, where relevant the report highlights specific implications of those changes on beneficiaries' legal needs.

The purpose of the research was to investigate beneficiaries' legal needs therefore beneficiaries were recruited on the basis that they had one or more of the following experiences: had some difficulties accessing entitlements; had been investigated for benefit fraud; had challenged benefit decisions; had used a benefit review or appeal process. Purposive sampling was used to recruit beneficiaries where these criteria were made explicit.

¹ In New Zealand the terms welfare, benefits and social security system are used interchangeably.

8 EXECUTIVE SUMMARY

Interviews with agency representatives provided a range of diverse perspectives from MSD staff, benefit review and appeal process panel members, and beneficiary advocates and community advocates who have daily involvement with beneficiaries. Their knowledge and experiences supplemented the experiences of the beneficiaries we interviewed.

The research did not set out to ascertain the level of satisfaction with Work and Income and MSD's services in general by surveying a representative sample of beneficiaries, but rather to gain an understanding of beneficiaries' legal needs in relation to welfare issues so that community law centres could respond. The findings should be read in this context.

Additional statistical data was obtained from MSD and MOJ, and from an online survey with 17 community law centres and 14 beneficiary advocacy groups. This report is the main research report arising from the research project, and it draws on two other reports prepared for this project (*Access to Justice for Beneficiaries: Literature Review* and *Access to Justice for Beneficiaries: Online Survey Report*).

MOJ and MSD were provided with the opportunity to review the draft report for factual inaccuracies. We appreciated the feedback they provided, which has been incorporated into this final report.

Key findings

General experience of the benefit system

Poverty and inadequacy of income is the main problem for people on benefits.

Beneficiaries experience an inherent imbalance of power when dealing with the government department that makes decisions about their entitlements at both the institutional and individual case manager levels.

Beneficiaries felt they were disadvantaged by a case management system that required them to see a different case manager on each visit (although Work and Income do provide dedicated case managers for some groups of beneficiaries).

While participants reported a variety of positive and negative experiences, beneficiaries' negative experiences as clients of Work and Income and stigma attached to being on a benefit overwhelmingly permeated their interaction with the benefit system at all levels.

Accessing benefit entitlements

While MSD has a policy of providing beneficiaries with “full and correct entitlement”, beneficiaries believed that this does not generally happen in practice.

Their experiences showed inconsistency in benefit decisions. Contributing factors included complexity of the criteria for benefits, a perception that case managers withhold information about entitlements, reliance on internal MSD policy that appeared inconsistent with the legislation, and pressures on case managers.

There were significant issues relating to communication and understanding the criteria for benefits. For example, when completing applications for benefits, beneficiaries often did not understand the criteria and what information they were expected to provide. For some beneficiaries, their frustration at having applications for entitlements declined was often made worse by poor communication from MSD as to the reason for the decision.

Some groups of beneficiaries encountered particular challenges accessing entitlements. These related to applications for health and disability payments, and youth payments. Beneficiaries experienced difficulties with independent assessments that were undertaken as part of the application process, and which were the basis for declining benefit applications.

The most significant enabler to receiving entitlements was to have an advocate or informed support person to help apply for benefits and/or challenge Work and Income decisions.

Advocates often used key contacts within Work and Income to successfully challenge decisions without resorting to legal review and appeal processes.

Benefit review and appeal processes

The processes that are established under the Social Security Act to review and appeal benefit decisions are critical to the integrity of the benefit system. These processes are Medical Appeals Boards, Benefits Review Committees and the Social Security Appeal Authority.

10 EXECUTIVE SUMMARY

However the research found that there are a number of barriers to beneficiaries using these legal review and appeal processes, including not knowing that these processes exist, a lack of confidence to challenge a decision and a fear of the implications of doing so.

Beneficiaries felt they had insufficient information about the review and appeal processes and how to prepare for them. Having access to improved information would reduce anxiety about challenging decisions, make it more likely they would attend hearings, and enable them to be better prepared for hearings.

Across the three review and appeal processes there appears to be a relatively high proportion of applications that are withdrawn prior to a hearing, and the reasons for withdrawn applications are not well understood.

Beneficiaries without capacity to represent themselves at legal review and appeal processes need representation in order to fairly participate and to help address the power imbalance that exists between beneficiaries and MSD. Although limited data was available, levels of representation across the three review and appeal processes appear to be low.

Characteristics of the legal review and appeal processes themselves mean that beneficiaries may be significantly disadvantaged if they do not have access to advocacy or legal help. This includes having no right of appeal for MAB decisions, the composition of panels, and a lack of independence in the BRC panels.

Many decisions appear to be made without the beneficiary attending the hearing. This could disadvantage the beneficiary because they have do not have the opportunity to tell their side of the story. The research shows that with the BRC process, the case is less likely to be successful if the beneficiary does not attend the hearing and, in relation to MABs and SSAA cases, some participants emphasised the importance of attending the hearing.

Despite difficulties using the review and appeal processes, challenging a decision through these processes was an empowering act for some beneficiaries. Not only did it signify a turning point in the resolution of a dispute with Work and Income, it was also a way of addressing the power imbalance they experienced with Work and Income.

Confidence in the review and appeal processes would be enhanced by greater transparency as to their activities and feedback mechanisms for users.

Medical Appeals Board

Beneficiaries' health conditions and disabilities mean they face particular challenges taking medical appeals, making it critical that they have access to legal help and advocacy.

While MABs are independent of MSD, beneficiaries do not perceive this to be the case.

Participants' experiences of MAB hearings were largely negative. Examples provided included unsuitable hearing rooms, the lack of a clear hearing process, a feeling that they were not listened to, and support people not being allowed to speak.

MAB panel members' lack of legal knowledge and of the principles of natural justice appears to disadvantage beneficiaries.

Beneficiaries' experience shows the main legal need for medical appeals is representation. Although legal aid is available for MAB cases, beneficiaries are not informed of this option and it appears to be rarely obtained (if at all) for MAB cases. Other legal needs included information about the medical appeals process; advice about the law and MSD's decision-making processes for benefits based on medical criteria; and help to understand Work and Income's report about the decision being appealed.

Beneficiaries and advocates felt it was unfair there is no right of appeal against decisions of MABs. In the absence of a right of appeal, a decision can only be challenged by judicial review. This legal process is complex and not easily accessible to beneficiaries.

MAB activities are characterised by a lack of external scrutiny because their decisions are not publicly available and there is no right of appeal. In this context, the findings suggest improved access to legal help for medical appeals will improve beneficiaries' access to justice.

Benefits Review Committee

Strengths of the BRC process include having an independent community representative on each BRC and having a right of appeal against BRC decisions.

12 EXECUTIVE SUMMARY

There is a low level of knowledge amongst beneficiaries about the benefit review process.

MSD data from 2010/11 and 2011/12 showed nearly half of the cases decided by BRCs are on papers only; just over a quarter of hearings involved clients present without a representative; clients with a representative made up 18% and 21% of hearings each year respectively.

Although beneficiaries faced difficulties attending hearings, it was important that they attended and even more so attended with a representative. During 2010/11 and 2011/12 there were differences in BRC hearing outcomes between categories of attendance with decisions more likely to be overturned if beneficiaries attended with a representative (20%-24%). The least chance a client has of getting a decision overturned is in BRC hearings based on papers only (4%-5%).

Experiences of BRC hearings were mixed, with more tending to be negative. The most significant factors contributing to a positive or negative experience were the perceived objectivity of the panel members, and how well managed the proceedings were.

Beneficiaries' main legal need for benefit reviews is representation. Representation for reviews of decisions established through fraud investigations was seen as particularly important because of the complexity of cases, the amount of money in dispute, and an imbalance of power. However, legal aid is not available for BRC hearings. Other needs for BRCs were legal information about the process and how to prepare for it, legal advice about the case and assistance with preparation for hearings.

Social Security Appeal Authority

The SSAA provides independent scrutiny of decision making in the benefit system because it is fully independent of MSD and its decisions are available to the public. However the length of time taken to finalise appeals to the Social Security Appeals Authority suggests that beneficiaries' access to justice could be improved.

The SSAA's court-like environment and MSD having representation by an experienced appeals officer or lawyer, means that in order to fairly participate in the SSAA, legal representation is imperative for many beneficiaries. Over a three-year period, less than a third of cases taken to the SSAA had representation, and beneficiary advocates provided the majority of that representation.

Despite legal aid being available, there are significant obstacles to getting legal representation for the ssAA. Contributing factors are apparent barriers to accessing legal aid, the cost of private practice lawyers, and lawyers' lack of expertise and specialisation in welfare law.

Benefit fraud investigations

The power imbalance between MSD and beneficiaries influences beneficiaries' decision making during fraud investigations and, in the absence of legal advice, beneficiaries feel compelled to comply with MSD sanctions. This indicates that quality legal advice and representation in the early stages of fraud investigations is critical. However some of the beneficiaries interviewed felt they were not adequately informed of their right to seek legal advice.

Beneficiaries need quality representation in relation to both criminal offences and debts created as a result of fraud investigations. While legal aid appears to meet legal need in relation to criminal offences, lawyers' poor knowledge of welfare law compromises quality services.

While fraud investigators' decisions to create a debt and decisions about benefit entitlement can be reviewed at a BRC, legal aid is not available and beneficiaries face difficulties accessing representation for these cases. Such cases are time consuming and expensive, because they take considerably longer to prepare for than other types of cases.

Responding to beneficiaries' legal needs

Beneficiaries' legal needs with welfare law are on a spectrum ranging from information to representation and are determined by an individual's capacity, the legal process they are using and the complexity of the case. Representation is beneficiaries' greatest unmet legal need.

Although beneficiaries access help with benefit problems from community agencies and private practice lawyers, there are gaps in the services available to meet beneficiaries' legal needs.

Community law centre statistics show that welfare law work undertaken by CLCs nationally is a very small proportion of their total work, despite the high needs demonstrated by this research.

Beneficiaries' entitlements are governed by a complex web of legislation and Work and Income policy, however welfare problems

14 EXECUTIVE SUMMARY

are not seen as legal problems. This is a major barrier to beneficiaries seeking legal help.

Other significant barriers to accessing legal help are the cost of lawyers' services, limits on the availability of legal aid and apparent barriers to accessing legal aid.

Awareness levels of community law centres, their services and who is eligible to access them were found to be low.

Across the legal sector, there is a low level of knowledge of welfare law and little involvement of lawyers. This means the legal sector contributes little external scrutiny of the benefit system.

Beneficiaries experienced variability in services received from CLCs with welfare law problems, with some finding CLCs were not well equipped to handle these issues. Community agencies and beneficiary advocates endorsed this variability.

The complementary skills of beneficiary advocacy groups and community law centres could be applied, ideally collaboratively, to respond to beneficiaries' legal needs. These needs will most effectively be met through good inter-agency relationships between CLCs and BAGs.

Within the legal sector, community law centres are best placed to step up to respond to beneficiaries' legal needs with welfare problems as they provide free legal services, have legal expertise, offer national coverage and are resourced to meet the legal needs of the most disadvantaged groups in the community.

In order to do this the research has suggested a number of strategies for CLCs: better articulating CLCs' vision; providing greater assistance to beneficiaries with reviews and appeals; prioritising representation; identifying underlying welfare problems; advocating for change; building CLC capacity with welfare law; improving inter-agency relationships; maximising access to CLC services; and expanding community engagement and education.

Introduction

Aims of the research

The *Beneficiaries' Access to Justice Research Project* examined the legal needs of people on benefits in Aotearoa New Zealand and specifically aimed to identify beneficiaries' access to justice in relation to:

- accessing benefit entitlements
- benefit fraud investigations
- challenging benefit decisions, including using benefit review and appeal processes.

The primary goal of the research was to provide information that can assist community law centres (CLCs) to develop their services to beneficiaries in the area of welfare law. The proposed outcomes of the study were:

- Understanding beneficiaries' experience of the benefit system as a foundation for delivering community legal services.
- Understanding the barriers and enablers to beneficiaries accessing benefit entitlements and engaging in benefit review and appeal processes.
- Finding evidence of beneficiaries' legal needs with welfare law.
- Understanding the barriers beneficiaries face accessing legal services in relation to benefit disputes.
- Identifying the particular role CLCs could take to respond to beneficiaries' welfare law needs, and seeking feedback about community law centres' provision of welfare law services and areas where services could be developed and improved.
- Identifying key messages for CLC information resources for beneficiaries.
- Contributing towards building research and evaluation capacity within community law centres.

16 INTRODUCTION

The scope of the research includes: Work and Income benefits and Integrity Services (fraud investigation) decisions,¹ the use of Medical Appeals Boards (MABs), Benefits Review Committees (BRCs) and the Social Security Appeal Authority (SSAA) to challenge decisions. The report does not discuss higher-level courts, with the exception of appeals and judicial review proceedings in the High Court. In addition there is a brief discussion of legal needs in relation to criminal prosecutions arising from benefit fraud investigations.

While the focus of the research is on how community law centres can respond to beneficiaries' legal needs, the research also includes suggestions about areas of Ministry of Social Development (MSD) and Ministry of Justice (MOJ) responsibility. These suggestions are based on issues raised by research participants, such as improvements to the benefit review and appeal processes. Detailed analysis and proposals for reform of the existing review and appeal processes are, however, outside the scope of this report.

Background

Why research beneficiaries' legal needs in relation to benefit disputes?

Community Law Canterbury embarked on the *Beneficiaries' Access to Justice Research Project* in 2012 with funding from the Department of Internal Affairs Lottery Community Sector Research Fund. The impetus for the research was our belief that the legal needs of people on welfare benefits in Aotearoa New Zealand were not well recognised or understood. Despite the apparently high need for legal help with welfare law problems, CLCs nationally appeared not to undertake much work in the area of welfare law, and there appeared to be significant differences between CLCs in provision of support for beneficiaries with welfare law. Anecdotally we had identified a number of barriers faced by beneficiaries in receiving entitlements and in challenging benefit decisions.

¹ Decisions by International Services, Senior Services and StudyLink are therefore outside the scope of the research.

At the national Community Law Centre Hui in September 2010, a Community Law Canterbury presentation *Beneficiaries – Access to Justice* proposed that research might be a valuable way of examining the legal needs of beneficiaries through their experience of the benefit system.

Our plan to research beneficiaries' legal needs was cemented by finding there was very little research on the legal needs of beneficiaries in New Zealand. In recent years there has been rapid change in the benefit system and in welfare law. There have also been changes to CLCs' funding and service delivery, with reductions in funding and restrictions placed on the types of legal services they are funded to provide. In this context our research became more pressing and raised fundamental questions about the role of CLCs, particularly in regards to addressing the legal needs of beneficiaries.

The legal framework for the benefit system

The benefit system is governed by administrative law, which is concerned with the powers given to public authorities, the processes used by those authorities to make decisions, and mechanisms available to control those powers and processes. In this report we use "welfare law" to refer to the legislation and legal principles which cover the welfare system.

The key legislation that covers the benefit system is the Social Security Act 1964 and its associated regulations and ministerial directions. The purpose of the Act is wide-ranging and also subject to regular amendment.² The Act sets out the criteria that must be met in order to receive financial support, establishes obligations for people who receive this, imposes sanctions if they do not comply, and provides for review and appeal processes to challenge Work and Income decisions. The Act also governs benefit fraud investigations and creates benefit fraud offences. It permits the Minister of Social Development to establish specific welfare programmes and to issue regulations that provide direction as to how Work and Income is to administer the Act. There is a strong and increasing emphasis on support to help people prepare for and undertake paid work and on providing financial support only where

2 Section 1A Social Security Act 1964. Please see appendix 1 for the purpose statement.

other avenues have been exhausted. The Act includes a set of general principles that reinforce the focus on work and the importance of work to achieve social and economic wellbeing.³ In addition to the legislation governing the benefit system, the common law principles of natural justice, developed through case law, provide a framework of fairness and reasonableness for departmental decision-making. Judicial review provides a mechanism for challenging decisions on grounds that they are not lawful, procedurally fair or reasonable.

Internationally, welfare law is considered to be an important component of poverty law, which refers to legislation and activities that address legal issues associated with poverty, such as housing, homelessness, state entitlements and debt.⁴ Although poverty law is not a well recognised legal framework in New Zealand, welfare law can be viewed as one of a number of areas of law which particularly affect people living in poverty.

The community legal services landscape

In examining the legal needs of people on benefits, two groups of community agencies were identified as being central to this research: CLCs and benefit advocacy groups (BAGS). In addition it is recognised that a wide range of other community agencies support beneficiaries to receive entitlements and challenge decisions they disagree with.

CLCs are funded to provide legal services to people with insufficient means to pay for legal services.⁵ Beneficiary advocacy services, while not recognised or funded as community legal services, provide information, advice, advocacy and representation to beneficiaries. Although CLCs

3 Section 1B Social Security Act 1964. Please see appendix 1 for the general principles.

4 Also known as “public interest lawyering”, there is an extensive body of literature in the United States of America (USA) about poverty law (see Wexler, S. (1970) *Practicing Law for Poor People*. *Yale Law Journal*. 79, 1049–67 and Trubeck, L. (1995) *The Worst of Times... and the Best of Times? Lawyering for poor clients today*. (1993) *Fordham Urban Law Journal*. 22, 1123–1140.)

5 Legal Services Act 2011, section 3 purpose statement provides: The purpose of this Act is to promote access to justice by establishing a system that—
(a) provides legal services to people of insufficient means; and
(b) delivers those services in the most effective and efficient manner.

and beneficiary advocacy services are different in many respects, they have some common goals and a shared client group.

There are approximately 20 beneficiary advocacy groups (BAGs) located around Aotearoa New Zealand, although not all areas are served by an advocacy group. Like CLCs, they are autonomous community agencies, with some belonging to a national association – the Beneficiary Advocacy Federation of New Zealand – and others operating completely independently. Some BAGs receive funding from the Ministry of Social Development's Citizens Support Fund. All rely on grant funding to meet their operating costs.

There are 24 community law centres across Aotearoa New Zealand providing services in over 140 locations. All are generalist services, meaning they work across a wide range of legal problems, with the exception of three specialist services: Youth Law; Auckland Disability Law; and Ngāi Tahu Māori Law Centre, which provides legal services in relation to Māori land. Legal services related to welfare issues are included within the generalist legal services provided to the public by CLCs.

CLCs are funded by the Ministry of Justice, under the Legal Services Act 2011, to provide community legal services (information, advice, representation, legal education), law reform and advocacy.⁶ In 2012/13 CLCs received national funding of \$10.97 million from funds derived from interest on solicitors' trust accounts and core MoJ funding. Most CLCs supplement their core government funding with grant funding.

Each CLC is independent and run either as a charitable trust or an incorporated not-for-profit organisation, with oversight of a governance board. Most CLCs operate with significant assistance from volunteers, such as law students and private practice lawyers. CLCs come together through working groups, national hui and other networks to exchange ideas and develop strategies to improve how they work.

Two national bodies exist to support community law centres: Community Law Centres o Aotearoa (CLCA) and the Coalition of Community Law Centres (CCLC). The long-established Coalition of Community Law Centres is a union of community law centres and is

6 Although the Legal Services Act enables MoJ to fund CLCs to provide law reform and advocacy services, it is no longer contracting CLCs for these services.

20 INTRODUCTION

funded by a member levy. It represents the interests of member centres. Within the Coalition, Ngā Kaiāwhina Hapori Māori o Te Ture/Māori Caucus undertakes policy development and advocacy in relation to needs of Māori and kaupapa Māori service models for community law centres.

CLCA was set up in 2011 as a national body to represent all law centres, and is funded by MOJ. Its role is to advocate for CLCs, to support law centres to provide quality services, to help with coordination between centres and with MOJ, and to affirm Te Tiriti o Waitangi/The Treaty of Waitangi. Another key role is to lead CLCs in their collective negotiations for funding. CLCA is based in Wellington, and has elected board members from across Aotearoa New Zealand, many of whom are closely associated with regional community law centres.

In a provocatively titled article *Are Community Law Centres Finished?* Simon Rice addresses the pressures on community law centres in Australia and options for response (Rice, 2012). While it is beyond the scope of this research to examine the wider challenges confronting CLCs in Aotearoa New Zealand, it is not possible to look at CLCs welfare law services without also addressing the questions of community law centres' vision, identity, and effectiveness. Rice sees Australian CLCs as being largely (but not solely) driven by conditions of funding, without reflection about identity.

Consistently reciting the mantra of independence, and taking comfort in the fading glow of a radical past, CLCs fail to reflect deeply on their contemporary identity and role. When compared to the canon of 'poverty lawyering' in the US, the excellent but thin body of CLC related literature in Australia suggests that CLCs have spent very little time thinking about what they are and why they exist. As a result, CLCs have tended to derive their identity from action more than from reflection, from the rush of being engaged in the journey more than from a vision of the goal. (Rice, 2012 p. 17)

Rice (2012) notes that CLCs share an identity defined in part by getting funding from a common source, subject to common conditions. Beyond those commonalities, what CLCs do and why they do it differ widely. Rice's (2012) views resonate in Aotearoa New Zealand, as CLCs here share those characteristics with our Australian counterparts, and

research about the work of community law centres is also thin on the ground.⁷ The research provides an opportunity for CLCs to take up the challenge articulated by Rice (2012), to reflect on law centres' role and to examine their effectiveness and reach, despite the day-to-day demands on law centres.

Examining beneficiaries' legal needs

Underpinning this research are the concepts of legal need and access to justice for disadvantaged people. A leading assessment of legal needs in Australia, the LAW Survey (Coumarelos et al., 2012), asserts that the concept of legal need should include a broad range of problems, including those that are not recognised by people as legal problems, that potentially have a legal resolution that is unknown to people, that are resolved outside the formal justice system or by non-legal means, and problems that are ignored or unresolved.

Using a broader approach, unmet legal need can be better estimated as legal problems that remain unresolved, or are resolved unsatisfactorily, regardless of whether any action is taken and regardless of whether there is any involvement of lawyers or the justice system. (Coumarelos et al., 2012 pp. 4–5).

The LAW Survey also emphasises the importance of access to justice for disadvantaged people remaining a priority.

Disadvantaged groups not only have non-legal needs by virtue of their socioeconomic status, but also are particularly vulnerable to a wide range of severe legal problems and are more likely to struggle with the problems they face. People with a disability are especially vulnerable to legal problems, although other disadvantaged sections of the community also have heightened vulnerability, including single parents, the unemployed, people living in disadvantaged housing and Indigenous people. (Coumarelos et al., 2012, p. xix)

The LAW Survey identifies beneficiaries amongst the most disadvantaged groups in the community, who often experience multiple disadvantages.

⁷ Although Australia is said to have little research and analysis on community law centres, the *Australian Alternative Law Journal* includes many articles about community law centres (www.altlj.org).

22 INTRODUCTION

Beneficiaries are not however a homogeneous group. As Sarat (1990) notes, their life situation varies greatly.

...the welfare poor are not a natural social group. They neither share a distinctive background nor common ties of sentiment; they vary greatly in their life situations, their ability to survive without public assistance and their disposition to do so. (p. 348)

Beneficiaries interviewed for this study included: parents caring for disabled children; parents caring for children of extended family members; solo parents, young parents; young people who were unable to live with their parents; people with long term health conditions and disabilities, such as physical disability, intellectual disability, and brain injury; refugees; people who had survived serious violence and sexual abuse, including abuse in state care; and people who had been in prison. The interviews gave some insight into the complexity and reality of the lives of people on benefits.

An overview of research methodology

The kaupapa of the Lottery Community Sector Research Fund is building capability in community agencies in research and evaluation. The research was therefore carried out by Community Law Canterbury, with support of experienced researchers. A more detailed account of the research methodology can be found in Appendix 2.

Our research aimed to gain both a broad perspective of the systems, processes and services beneficiaries encounter, as well as individual experiences, in order to more fully understand beneficiaries' legal needs and inform CLCs' service development.

The research method was primarily qualitative as it focused on people's experiences and this information was contextualised with statistical data from agencies (MSD, MOJ, CLCs), a review of national and international literature, and an online survey.

In total 50 in-depth interviews were conducted, 21 interviews with representatives of agencies with involvement in the benefit system and 29 interviews with beneficiaries; and one focus group done with five beneficiaries. While the interviews and focus groups were done prior

to the July 2013 welfare changes, where relevant the report highlights specific implications of those changes on beneficiaries' legal needs.

The views of community law centres and beneficiary advocacy groups nationally were sought through an online survey, and a meeting with the National Beneficiary Advocate Consultative Group provided further information.

Information from the interviews, agency statistics, online survey and literature review was triangulated, so that our research questions were analysed from a range of perspectives and could be contextualised with other data. Common themes were identified that strengthened the findings from beneficiaries' interviews or in some cases highlighted the variability of people's experiences. Statements from individual beneficiary interviews are included to illustrate a research theme and are not necessarily representative of all beneficiaries' experiences.

This research project comprises three reports: this report, which is the main research report, and two supplementary reports done for the project (*Access to Justice for Beneficiaries: Literature Review* and *Access to Justice for Beneficiaries: Online Survey Report*).

MOJ and MSD were provided with the opportunity to review the draft report for factual inaccuracies. We appreciated the feedback they provided, which has been incorporated into this final report.

The interviews

The research design purposely sought a diverse group of participants to gain a general overview of people's experiences accessing different types of benefit entitlements and engaging with different types of legal processes. Interviews with professionals supplemented interviews with individual beneficiaries as they were able to provide a broad perspective from their experiences working with many beneficiaries.

Of the 34 beneficiaries who participated:

- 11 identified as Māori, 4 Pasifika, 1 Asian, and 22 Pākehā. (Some people identified with more than one ethnicity.)
- 19 were women, 15 were men.
- 4 were aged 18–24; 14 were aged 25–44; 13 were aged 45–64; and 3 were aged 65 and over.

24 INTRODUCTION

Twenty-three beneficiaries had experience of health conditions or a disability, or of applying for/receiving assistance for a family member with a disability. Participants' experience of disability included intellectual, physical, mental illness and addiction. One participant was deaf.

A wide range of benefits were discussed in the interviews including: Unemployment Benefit (2), Sickness Benefit (6), Invalids Benefit (18), Domestic Purposes Benefit (7), Domestic Purposes Benefit Care of Sick and Infirm (1), Emergency Benefit (1), Independent Youth Benefit/Youth Payment (4) and Unsupported Child Benefit (1).⁸

Other benefits also discussed in the interviews included Childcare Subsidy, Child Disability Allowance, Disability Allowance, Special Benefit/Temporary Additional Support, Special Needs Grants (including Food Grants, Steps to Freedom and Funeral Grant), Advance Payment of Benefit, Training Incentive Allowance, Accommodation Supplement and earthquake related grants.

Of the 34 beneficiary participants, 20 beneficiaries had experience using a legal review or appeal process. Five participants had lodged a medical appeal to a Medical Appeals Board; 12 had appealed to a Benefits Review Committee and 3 people had experience appealing to the Social Security Appeal Authority. Six beneficiaries had experience of being investigated for benefit fraud.

Agency representatives provided a range of diverse perspectives from MSD staff, benefit review and appeal process panel members, beneficiary advocates and community advocates who have daily involvement with beneficiaries. Their knowledge and experiences supplemented the experiences of the beneficiaries we interviewed. The 21 agency representatives interviewed for the study included 1 welfare law advisor, 1 private practice lawyer, 1 community law centre lawyer, 4 MSD staff, 3 beneficiary advocates, 8 community advocates/community agency workers, and 3 panel members of benefit review and appeal processes (1 member respectively from the Social Security Appeal Authority, Benefits Review Committee and Medical Appeals Board).

All participants signed an informed consent form and were offered the opportunity to check quotes taken from their interviews to be used

8 The interviews were undertaken prior to the 15 July 2013 benefit changes when three core benefits replaced the existing main benefits.

in this report. To indicate which grouping of participants information and quotes have come from we have used the term “beneficiary” to indicate one or more of the 34 beneficiaries interviewed, unless otherwise stated. Agency representatives are generally referred to by their designation for example, “community advocate”. Where we have used the term “participants” this refers to both beneficiaries and agency representatives who participated in the study.

The term “beneficiary” is sometimes used in a belittling way, reflecting the stigma those on benefits can face (and as one participant pointed out, it is generally not used to describe superannuitants).⁹ In this report we use the term “beneficiary” to reflect the diverse group of people whose circumstances mean they need means-tested benefits from Work and Income.

Limitations of the research

The research did not set out to ascertain the level of satisfaction with Work and Income and MSD’s services in general by surveying a representative sample of beneficiaries, but rather to gain an understanding of beneficiaries’ legal needs in relation to welfare issues so that community law centres could respond. The findings should be read in this context.

While the researchers have endeavoured to recruit broadly to provide an overview of beneficiaries’ experiences with legal needs there is variability in the sample sizes within subcategories, with some groupings being quite small. This is also a limitation of the research.

Experience of participants of different ethnicity

When it came to beneficiaries’ experience as clients of Work and Income, receiving entitlements and challenging benefit decisions, there was no substantial difference in experience between ethnicities in our sample. However some reference was made by Māori participants to difficulties receiving Work and Income assistance with cultural needs such as unveilings, and one Māori participant who had taken a medical appeal felt that it was not a level playing field because of the ethnicity

⁹ Beneficiaries’ experience receiving New Zealand Superannuation is outside the scope of the research.

of panel members on the Medical Appeals Board. (A similar criticism was levelled in relation to the lack of gender diversity on MABs). The cultural data available in respect of reviews lodged at Benefits Review Committees is included in this report.

Interviews with some Māori participants indicated long-term impacts of intergenerational poverty and extreme disadvantage, but, in focusing on the legal needs of beneficiaries, the research design did not enable in-depth exploration of this experience and their interaction with the benefit system. We suggest more in-depth research could be done with a larger sample of Māori beneficiaries.

Government departments relevant to this research

Ministry of Social Development (MSD)

This research discusses areas of work that fall under the Ministry of Social Development (MSD). MSD's structure is made up of three areas: policy, service delivery and corporate.

Two areas of this research fall within MSD's service delivery area: Work and Income and Integrity Services.

Work and Income provides income support and employment services and is a single point of contact for people needing help to search for work, income support and in-work support. The Youth Services Support Unit is a specialist team within Work and Income responsible for administering entitlements and overseeing support for young people. The administration of Medical Appeals Boards is also undertaken by Work and Income.

Integrity Services works to reduce fraud and abuse, maximise debt collection, strengthen integrity and minimise risk across MSD.

One area of the research falls within MSD's corporate area: the administration of Benefits Review Committees through MSD's Corporate and Governance unit (Client Advocacy and Review).

Ministry of Justice (MoJ)

The areas of research concerning services provided by the Ministry of Justice (MoJ) include: community legal services (output class 3) and legal

aid services (output class 4). There are two further areas of research that relate to MoJ's Operations Group: the Social Security Appeal Authority and the High Court.

Outline of the report

The report is presented in five parts. Part 1 of the report discusses the benefit system and beneficiaries' experiences as clients of Work and Income. It also discusses beneficiaries' experience accessing entitlements and strategies used to challenge benefit decisions outside of the legal review and appeal processes.

Part 2 examines beneficiaries' experiences challenging benefit decisions using legal review and appeal processes. While a detailed assessment of these processes is outside the scope of this research, we highlight areas in which the review and appeal systems themselves impact on beneficiaries' fair participation.

Part 3 considers people's experience of benefit fraud investigations and identifies the particular legal needs beneficiaries have in relation to these investigations.

Part 4 draws together the different legal needs beneficiaries have with welfare law, including access and barriers to legal help, and makes specific recommendations for community law centres' services.

Finally, Part 5 sets out the report's conclusions.

PART 1 Receiving benefit entitlements

1.1 Introduction

Work and Income administers a wide range of benefits, provided for under the Social Security Act 1964 and its regulations, which require an assessment of a person's situation against criteria (usually including income and asset assessment). A distinction is generally made between *main benefits* such as Supported Living Payment (the renamed Invalids Benefit) that provide the main source of income and *extra help* benefits such as Temporary Additional Support that provide add-on assistance to people living in hardship. Individuals and families who receive extra help benefits may or may not also receive a main benefit.

This section covers beneficiaries' experiences as clients of the benefit system, receiving entitlements and informally challenging benefit decisions.

1.2 Experience of the benefit system

1.2.1 Adequacy of income

A recurring theme in the interviews was the insufficiency of social security entitlements and the inadequacy of this income for meeting every-day living costs. The adequacy of welfare benefits has been the subject of much research undertaken recently in Aotearoa New Zealand, particularly regarding the situation of children of families with benefits as their main source of income (see Alternative Welfare Working Group (2010b pp. 121–139) and Expert Advisory Group on Solutions to Child Poverty (2012)). The Expert Advisory Group on Solutions to Child Poverty (2012) records the high levels of child poverty in Aotearoa New Zealand, which have grown to a current level of up to 270,000 children (as many as 25% of all children), with Māori and Pasifika children featuring at double the rate of Pākehā children. Māori and Pasifika children are

Key findings: Experience of the benefit system

- Poverty and inadequacy of income is the main problem for people on benefits.
- There is an inherent imbalance of power between beneficiaries and the government department that makes decisions about their entitlements at both the institutional and individual case manager levels.
- Beneficiaries felt they were disadvantaged by a case management system that required them to see a different case manager on each visit.
- While participants reported a variety of positive and negative experiences, beneficiaries' negative experiences as clients of Work and Income and stigma attached to being on a benefit overwhelmingly permeated their interaction with the benefit system at all levels.

also approximately twice as likely as Pākehā children to be living in severe poverty (Expert Advisory Group, 2012 p. 7). Children living in sole parent families are more likely to live in poverty compared to two parent families, with a contributing factor being the low level of welfare benefits, relative to the poverty line (Expert Advisory Group, 2012 p. 6).

Beneficiaries we interviewed spoke about struggling to meet their daily needs and taking measures to live very frugally. One participant expressed it as “not having enough in the benefits on Monday night to pay for Tuesday’s bread, that type of real poverty stuff. And they treat it like you’re trying to rip them off or something.” Another beneficiary described the measures she had taken to meet her family’s basic living costs, and despite these measures there was not enough money. She commented on the lack of empathy she had encountered at Work and Income “about what it’s like to raise kids on a benefit with \$100 for food, clothing, doctors, everything day in and day out. That if you needed something, well it was your fault for not managing your pitiful allowance. It was harrowing to go to WINZ.” In her view being sent to budgeting, when there was not enough income to meet basic costs, was futile: “How do you get blood out of a stone?”

A beneficiary advocate reinforced the view that the requirement that beneficiaries undertake budget advice in order to access hardship entitlements was pointless when weekly expenditure routinely exceeded income.

...the budgeting services say, over and over again, these people do not have enough money, there's no point in advising people when they don't have enough to live on...

A beneficiary aligned the adequacy of benefits with maintaining a state of poverty.

Basically benefits keep you living in the state of poverty. Benefits were structured for short term. I mean they originally were structured, you know, for people who were out of work for two, three, four weeks, ... to pay basically just your basic living costs, nothing else... and then that state of poverty, you know, and they keep lumping more and more things on you. For instance there was a time when you were on a benefit, if your washing machine broke down, they would pay for another one. Now you've got to pay the money back.

A welfare law advisor also identified adequacy of income as a major issue.

Adequacy is the key issue. And that's not an issue we can deal with by way of an improved benefits review system or improved social security appeal – none of that's going to address the basic issue of adequacy.

1.2.2 The Work and Income environment

Participants were critical of the environment in Work and Income offices. Offices were described as very impersonal with, for example, no toys for children, the presence of security guards, clients having to stand in long queues, and no provision of toilets for beneficiaries' use. A beneficiary described the unwelcoming environment of Work and Income offices.

Welfare has become a business. That beneficiaries are now seen as clients reflects this. WINZ premises are colourless, impersonal open plan environments that have no semblance of privacy. Reinforcing the notion of alienation is the ubiquitous presence of security guards and the banks of security cameras.

A MSD case manager surmised the Work and Income environment was deliberate, suggesting that:

...they don't make it super nice because I guess the government doesn't want to be seen to be making the environment nice.

32 RECEIVING BENEFIT ENTITLEMENTS

Complaints about the lack of privacy featured strongly in beneficiaries' interviews, with participants relating first having to explain the purpose of their visit to the Work and Income receptionist in front of others in the waiting room and then having to repeat this in an open plan office to a case manager. One beneficiary felt "publicly humiliated" by not having access to private interview rooms, and a beneficiary advocate reported that she had seen case managers respond to requests for privacy with a hostile attitude. A beneficiary described feeling dehumanised by the lack of privacy.

... you stand in the queue and there's three or four ahead of you, and as they're going down you can hear it, ... there's that whole process where you're not seen as a person...we're treated as non-human.

Work and Income provide specific case managers for some groups of clients, such as those who have complex needs and people receiving intensive support looking for employment. However, most clients do not have an allocated case manager and see whoever is available. Beneficiaries found it frustrating seeing a different case manager every time and having to constantly explain their situation rather than having an ongoing relationship with a case manager. This tended to emphasise the perception that the benefit system was dehumanising.

But I don't like having to explain my situation every time I go... I'm embarrassed by it. Constantly going over your situation and providing proof of everything every single time.

1.2.3 Imbalance of power

Many participants referred to an imbalance of power between an individual beneficiary and Work and Income, reflecting not only the information and resources held by Work and Income, but more importantly, the power case managers have over income to pay for essential needs.

An American study proposed that for those on welfare benefits the law is viewed as an all-encompassing relationship of dependency and powerlessness.

...being on welfare means having a significant part of one's life organised by a regime of legal rules invoked by officials to claim jurisdiction over

choices and decisions which those not on welfare would regard as personal and private. (Sarat, 1990 p. 343)

Their law is a law of power and compulsion, and their experience of being inside, but yet excluded, is one indication of the way that power is exercised over the welfare poor. (Sarat 1990, p. 346)

The power imbalance was referred to in many interviews, such as the need to “stay on the right side” of case managers to ensure that receiving entitlements was not compromised. A private practice lawyer highlighted the impact of this on beneficiaries.

Beneficiaries are uniformly scared stiff of the Department [Work and Income]. The Department's got the axe above their head; they can cut off their benefit. I think that's enormously intimidating... they've got huge power over these people, power of the most basic rights: food, clothing and shelter. And if you've got children too and you're terrified of having your benefit cut off, you're immediately completely disempowered.

One community advocate had observed the treatment of beneficiaries at Work and Income appointments, noting that it took a very skilled case manager to sensitively approach clients, given that “it's where you get your money from”.

...You can feel the punitive or the kind of authoritarian [approach], you know like, this is where the rubber meets the road, and I'm like the state, and I'm the one that oversees this money coming out and you've got to do this... almost like the parent. And the critical parent... you can see people just kind of cowering, just kind of going into themselves.

A Work and Income case manager acknowledged the power imbalance that exists in the benefit system.

If I was looking at it from a beneficiary's point of view, I think that it must be really aggravating. Because you already probably feel quite powerless as a beneficiary because your financial security's decided by powers ... And then you kind of have [the] face of your case manager, but it's a different case manager every time, so it's kind of just like a faceless power that's deciding how much money you have and don't have. And then you have your long wait time. I mean, it's not a very welcoming environment.

A beneficiary similarly emphasised her experience of the power imbalance.

34 RECEIVING BENEFIT ENTITLEMENTS

Probably just my memory of it is just feeling interrogated all the time, feeling like I was asking for something I wasn't entitled to... And just the whole justification – having to justify my situation. And it was, when, with a brain injury you fatigue easily anyway, and having to put so much energy into fighting a system that I had full entitlement to.

1.2.4 Treatment by Work and Income case managers

The negative treatment of beneficiaries by some case managers dominated the recollections of the beneficiaries we interviewed, who said they found it very difficult being a client of Work and Income. They described feeling intimidated. One person described feeling physically ill whenever they entered Work and Income offices: “Your stomach churns and you literally feel sick.” These feelings were expressed in the strongest terms by a number of beneficiaries.

I hate it [Work and Income] with a passion. I hate it. I hate going there, I hate dealing with the people, I hate everything about it, I hate ringing them. It's degrading ... and I feel more degraded the older I get, having to go and ask for help.

I don't like it. Because I feel demeaned and belittled every time I go there.

Work and Income's service charter provides clients should be treated with respect.¹ The interviews, however, suggested that this did not always occur. Referring to circumstances in her life that were outside her control and that had led to the need for a Work and Income benefit, a beneficiary highlighted the importance of respect.

We are human, we're on a benefit, but not all of us have been on it our whole lives. And things happen, and sometimes you can't change the fact that you have to go onto a benefit, [they] could at least give us some respect.

Other beneficiaries provided examples of their experiences of negative communication with case managers.

¹ See Work and Income www.workandincome.govt.nz/individuals/your-rights-and-responsibilities/our-service-charter.html which states “Our Service Charter: includes the right to: be treated with courtesy and respect, cultural sensitivity and be given fair, non-judgmental service”.

There's some really rude people in there, some that just don't acknowledge you, don't even look at you. You know, you're waiting for your appointment or they refer you to that desk and you stand there, they don't look at you and they just tell you to sit down. It's not really cool – you can't just decide they don't deserve a hello.

Really one of the biggest things is the attitudes of the workers. I mean you almost get the impression it's coming out of their own pocket, that you've asked them to give up their wages to actually help you.

Case managers' negative treatment of beneficiaries led some participants to question how this impacted on receiving their entitlements, as one beneficiary explained:

Because you get someone who's in a snotty mood for your appointment, and you can easily come away thinking: did they just give you a couldn't care less anyway decision, or weren't in the mood, or you know, not looking that up today sort of thing. You don't know. You don't know if you've been dealt with fairly.

A Work and Income case manager surmised that the demands of the job were a factor in negative attitudes towards beneficiaries and speculated that this was a coping strategy for some staff.

Well they're not horrible to the clients, they're actually, most of them speak to the clients with great respect, and are really great with them. But in the staff room they're really critical... we once had a training day and it was like 'a Ministry of Social Development employee is friendly, efficient and easy to deal with'. And a lot of people were outraged that they were expected to be friendly, efficient and easy to deal with clients. Because these clients are so difficult to deal with themselves. And I can see how that's happened, like I can see how people have put a barrier up to protect themselves, because it is a really hard job.

The day-to-day demands on Work and Income case managers were referred to by several participants.

Work and Income case managers are overworked, overstretched, get lots of new instructions and information fired at them. (Community advocate)

36 RECEIVING BENEFIT ENTITLEMENTS

Because if you've seen 12 clients a day and you've made 12 promises, as much as you have every intention to do it, are you going to remember all those 12 promises? (Work and Income case manager)

Some participants acknowledged that negative treatment by case managers could be representative of an institutional culture, rather than individual case managers acting in an unhelpful manner. This view is reinforced by a report from the Alternative Welfare Working Group (2010a, p. 12) that found evidence of a culture that dissuades beneficiaries from making applications for benefits that they are entitled to.

This culture was also referred to by a beneficiary who, despite acknowledging a number of good experiences with case managers, thought the benefit system aimed to minimise entitlements.

So there are nice people, I'm not saying they're all bastards, but the machinery they're working with can't help, you know, the whole mechanical stuff of it is designed to make sure you get less not more.

Community advocates reported a variety of experiences with case managers from negative through to quite positive stating at times some case managers work well with community agencies to access help for their clients, and showed skill, compassion and understanding. Some beneficiaries similarly reported positive treatment and service from some case managers.

1.2.5 Foregoing entitlements

There was some evidence of beneficiaries foregoing entitlements from Work and Income and instead obtaining help from other agencies such as food banks and mayors' welfare funds because of previous negative experiences. Some beneficiaries believed there was a deliberate strategy by Work and Income to decline assistance, forcing people to seek help from non-government agencies.

WINZ is shocking. I've even not just bothered going in there because I know how much stress it can be. I'd rather go to [the food bank] and get a food grant from them than going to WINZ and dealing with that stuff.

In another example a community agency worker surmised that people from the Pasifika communities had missed out on entitlements following

the Canterbury earthquakes because help was sought from extended family instead of accessing Work and Income entitlements.

And it's also a cultural problem for us because we tend to go inwards to our extended family for help, we don't go out... And we didn't put our hands up. Now people are in desperate need. There is real poverty out there.

1.2.6 Stigma

Beneficiaries we interviewed described the stigma they experienced because they received a benefit. Stigma comes not only from Work and Income but also the wider community. Words like “bludger” and “scum” appeared throughout the interviews with one person described being made to feel like a “bludging lowlife bum”, and another beneficiary as a “second class citizen that deserves nothing”. Many beneficiaries we interviewed referred to people who worked the system receiving benefits they may not be entitled to and felt that all beneficiaries were unjustly “tarred with the same brush”.

Most people feel intimidated by having to go in there. Some people feel ashamed because they've never had to ask for a food parcel or something like that.

Some beneficiaries felt they were made to feel like a criminal for receiving a benefit.

But after a while you need stuff. And for that to be acknowledged and for it to be given fairly instead of, you know, treating you like you're a thief or a criminal for dare asking for help.

1.3 Accessing benefit entitlements

1.3.1 Introduction

In order to determine entitlements under the Social Security Act, decision makers must consider a person's circumstances and whether they meet the legal criteria. Decision makers use Work and Income's internal policy guidelines for guidance about how the law is to be interpreted. A person applying for a benefit must provide specific information to prove their situation and in some cases external assessments by professionals are required. Under the Social Security Act, decision-making powers are vested in the Chief Executive of MSD, although most decisions are

Key findings: Accessing benefit entitlements

- While MSD has a policy of providing beneficiaries with “full and correct entitlement”, beneficiaries believed that this does not generally happen in practice.
- Beneficiaries' experiences showed inconsistency in benefit decisions. Contributing factors included complexity of the criteria for benefits, a perception that case managers withhold information about entitlements, reliance on internal MSD policy that appeared inconsistent with the legislation, and pressures on case managers.
- When completing applications for benefits, beneficiaries often did not understand the criteria and what information they were expected to provide.
- Some groups of beneficiaries encountered particular challenges accessing entitlements. These related to applications for health and disability payments, and youth payments. Beneficiaries experienced difficulties with the independent assessments that were undertaken as part of the application process, and which were the basis for declining benefit applications.
- Beneficiaries' frustration at having applications for entitlements declined was often made worse by poor communication from MSD as to the reason for the decision.
- The most significant enabler in receiving entitlements is to have an advocate or informed support person to help apply for benefits and/or challenge decisions.
- Advocates often used key contacts within Work and Income to successfully challenge decisions without resorting to legal review and appeal processes.

delegated to case managers. Some decisions, however, can only be made by senior staff or by the Chief Executive in person. For example, only the Chief Executive can make decisions about the exercise of corrective power (backdating a benefit in certain circumstances).

1.3.2 Access to entitlements

Our interviews indicate a widely held view that Work and Income staff withhold information about entitlements. The Social Security Act is complex and not easily accessible to beneficiaries.

When I was a solo mum and young, I felt like they weren't telling me what I was entitled to. I had to find it out for myself then go in and ask questions.

Another beneficiary described trying to find out about entitlements as “pulling teeth” and observed:

It's almost like you've got to hear through a friend of a friend that they're receiving this, ask about it.

A Work and Income case manager said the pressures on case managers to see clients within allocated times meant they lacked time to go through entitlements in detail.

I think a lot of clients have no idea what their rights are. And like it's not really explained to [them]. But then if you've got a case manager who's got an hour with you, an hour max with you and then they have all these things they have to get through, are they really going to have time to explain all your rights as well? There's no time.

A beneficiary advocate also felt there was a lack of awareness about entitlements and suggested an educational campaign was needed to better inform people.

They have low income workers who are entitled to accommodation supplement, disability allowances, they have no idea.

Participants relayed instances of being told they were entitled to a benefit, but essential information was omitted, such as Food Grant payment cards' credit expiring within three days.

40 RECEIVING BENEFIT ENTITLEMENTS

A health professional reflected the views of many participants when she said:

It should be absolutely mandatory that you are told about every single benefit whether you comply with the rules around it, or not. You should be told about it. Now you're just told about one. And actually you could apply for all of them, but you're not told they even exist so you can't.

1.3.3 Inconsistencies in benefit entitlement decisions

A key theme to emerge from the interviews was inconsistency in information about entitlements and decision making. Participants reported variations in decisions from case manager to case manager, office to office, and different areas of the country. This mirrors a finding in other New Zealand research that “unhelpful and often obstructive staff” at Work and Income provided inconsistent or incomplete information about benefits (Chile, 2007 p. 8). Another study examined the allocation of Special Benefit in Te Tairāwhiti, where, despite extreme poverty, allocation levels were very low. The study concluded that beneficiaries were unaware of the Special Benefit, that MSD is inefficient in providing full entitlements and there was unnecessary poverty for many beneficiaries (Delahunty, 2003).

Some beneficiaries found that information about entitlements was more freely available from a Work and Income call centre than from offices, although there were inconsistencies between the two.

It's like you can ring them up on the phone, and they say, 'yes, we can do this to help you, and you could be entitled for that.' But you get down to their office and it's completely different. It's like they're not going to give you anything.

I would make sure that the information they give you on the phone or the website is the same as when you go for your appointment... they should be more connected and integrated like that, you know, not saying 'that person on the phone shouldn't have told you that'.

One beneficiary applied for a Funeral Grant towards the cost of her child's funeral and was advised she was entitled to up to \$1,600. When she later presented bills for funeral expenses, she was told she would only be reimbursed for certain costs.

‘...no, we stipulate what parts we pay for’... So it was then I found out that they pay for catering but they don’t help you with the death certificate... and I would have thought that the death certificate and the actual funeral service would have been more important for them to cover than the food for people to eat afterwards. But no.

She also recalled receiving inconsistent advice when trying to get help with dentist costs.

And I’ve gone in three or four times over one thing before and I’ve got a different person each time, like with my teeth, when I had to get my teeth fixed. And one person said they’d grant it, so I went in and got the quotes and everything done, and then the next person said I wasn’t entitled to it.

A community agency worker supported the view that there are inconsistencies in benefit decisions around the country.

Our budget advisors get together and say, ‘oh, if you go to Work and Income and ask for that for your client, they’ll get it.’ ‘No, they don’t get it in our area.’ That kind of stuff. So we get people together from all over the country and that really highlights the inconsistencies in decisions.

This supports a finding from an Allergy New Zealand study on the Child Disability Allowance, that decisions to decline applications for Child Disability Allowance for food allergy and related risk of anaphylaxis “appear to be made on an ‘ad hoc’ basis, with inconsistency seen across all levels of the application from the doctors to the WINZ officers” (Allergy NZ, 2010 p. 1). The report recommends Work and Income develop a more consistent understanding of which health related conditions fit the criteria to avoid inconsistencies in processing applications for the Child Disability Allowance.

A case manager we interviewed suggested that variations in decision making could occur as a result of regular ongoing policy changes. Updates are provided regularly to case managers but, she advised, it can be hard to keep up.

Yeah you get an email, it will be like: oh, and now we don’t pay for board arrears. And then the next day it’s like: oh, now we are paying board arrears again. And stuff like that.

42 RECEIVING BENEFIT ENTITLEMENTS

There has been a reduction in areas where case managers can exercise discretion when making entitlement decisions. The exercise of discretion refers to situations where a decision maker is able to make an entitlement decision, within general guidelines, based on a specific set of circumstances. A welfare law advisor explained the impact of the move to less discretion.

[Its] just a mathematical formula. So you either fit the formula or you don't. So in that sort of area there's a lot less room for advocacy because the rules have become concretised if you like.

While the removal of discretion could arguably lead to more consistent decision making and fewer disputes, discretion allows case managers to offer assistance to those they deem to be most in need. It also, as the quote above suggests, provides the opportunity for advocates to make a case for particular clients in need.

1.3.4 Law and policy

While entitlement decisions are based on the Social Security Act and case managers have recourse to the provisions of the Act, in practice, day-to-day decisions are made using internal Work and Income Manuals and Procedures (MAP). These policies are detailed guidelines for how the legislation is to be interpreted. Decision making based on internal policy has been criticised in the past for being out of step with the law (for a discussion of the failure of alignment between legislation and internal policies see Alternative Welfare Working Group, 2010b, pp. 61–64 and Joychild, 2001).² A welfare law advisor referred to instances where MSD policy had been inconsistent with the legislation.

² An example of Work and Income policy not reflecting legislation was MSD's failure to incorporate the Court of Appeal's judgement on the relevant principles to apply to questions of marital status in *Ruka v Department of Social Welfare* [1996] NZFLR 913, which led to the Joychild Report. That report found "strong evidence that the incorrect legal test had been applied" in cases involving relationships in the nature of marriage between 1 November 1996 and 31 December 2000, and recommended that all overpayments established during this period be reviewed.

The policy which is all the case manager will refer to is wrong. It is inaccurate, it doesn't reflect what the legislation says. And so they're making decisions based on that.

Beneficiaries also expressed concern that case managers did not have a good grasp of the legislation.

Case managers do not know the law... This seriously disadvantages the applicant as case managers work solely on computer generated policy documents and bullet pointed instruction sheets that guide them...

The detailed requirements of the Act can be difficult to navigate, and as noted above, case managers rely on internal MSD policy to make decisions. A Work and Income case manager explained:

So, what you're trained in, it starts with the law. So it starts with the Social Security Act of 1964, and then: here's the interpretation – and that's what we do. And so we have an online database thing called MAP which has information about every single thing that WINZ does. And at the bottom it has what it's referring to in the Act... But I mean, is it from the law? Like we've just been told that it's from there. I mean it probably will be, but, I've never looked into whether the interpretation could be considered correct. I guess it has because it's been around since 1964 and there probably would have been court cases and stuff to test it out.

1.3.5 Entitlements incorporating independent assessments

Interviews indicated that some types of benefits with more complex eligibility criteria and decision-making processes, including independent assessments, are particularly difficult to access. Two types of benefit appeared to fit into this category: health and disability entitlements and youth payments. While the research has limited data in this regard, the experiences of beneficiaries attempting to access entitlements in these areas, outlined below, indicated this warrants further examination.

Beneficiaries' experience accessing health and disability entitlements

MSD uses particular processes when making decisions about benefits based on medical eligibility criteria. For these benefits, medical evidence is obtained by the beneficiary from their doctor or other health

44 RECEIVING BENEFIT ENTITLEMENTS

professional and recorded on a *Work Capacity Medical Certificate*³ or *Child Disability Allowance Medical Certificate* as part of the application process.⁴

A Work and Income case manager makes an entitlement decision taking into account all the evidence available. Work and Income also employ Regional Health and Disability Advisors who help with case managers' decision making by reviewing paperwork, obtaining additional information from doctors or specialists, and making recommendations about entitlement.

Additional medical evidence can be obtained from doctors funded by MSD (known as designated doctors), at either the case manager's or the beneficiary's initiative. The health professional who has completed the medical certificate may also recommend an appointment with a designated doctor. A designated doctor meets the beneficiary and completes a report about their case for the case manager's consideration when making an entitlement decision. In the year ending September 2012 Work and Income received 405,873 Work Capacity Medical Certificates and, of these, Work and Income made 1,558 referrals to designated doctors for second opinions.⁵

The experience of several participants indicates that decision making relating to medical entitlements could be improved. One beneficiary,

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- 3 Work Capacity Medical Certificate V12A – July 2013. The notes for health practitioners that accompany this medical certificate state: "A medical certificate doesn't affect whether a person is eligible for financial support from Work and Income. Rather it provides information that helps Work and Income decide which benefit is most appropriate, and whether or not a person will be required to look for suitable work (full or part-time)." Medical certificates, however, are used by Work and Information to determine entitlements. Work Capacity Medical Certificate – Information for health practitioners (www.workandincome.govt.nz/community/health-and-disability-practitioners/work-capacity-med-cert-health-practitioners.html)
 - 4 The challenges faced by medical professionals in completing medical certification are discussed in 'Writing Medical Certificates – a review of the standards for doctors, Medical Council of New Zealand, July 2013. Issues canvassed include the release of a patient's information to a third party, the potential for conflict between clinical judgement and moral judgement, and protocols where a doctor is contacted for additional information following completion of a medical certificate.
 - 5 Social Services Committee Social Security (Benefit Categories and Work Focus) Amendment Bill, Requests for Follow-up from 14 November 2012 meeting, www.parliament.nz/resource/0000254422

who attended a designated doctor's appointment for the renewal of her Invalids Benefit, reported that the designated doctor refused to examine her, despite a request that she do so. This participant could not see how the doctor could make a decision about her health without examining her, and felt that she was not upholding her doctor's oath. She recalled the designated doctor's response when she asked for an examination.

And she said, 'No, I'm just here to answer the questions for WINZ' ... And she just asked me lots of questions and just was more interested in did I have a criminal record, and when was the last time a man lived in my house.

The beneficiary then received a letter from Work and Income.

They'd made a decision, the designated doctor, that I was to be off the Invalids Benefit. And that I was to be back working full time in six months. And I pleaded with her [the designated doctor] to wait until I'd seen [medical specialist], and she'd made that decision without me seeing a specialist. She could see – I couldn't even walk hardly.

In that case, Work and Income's decision was later overturned by a Medical Appeals Board.

Another beneficiary reported that while the designated doctor said she would recommend the beneficiary stay on the Invalids Benefit, she later recommended she move to a Sickness Benefit, which is paid at a lower rate. The decision to transfer the beneficiary to a Sickness Benefit in that case was also overturned by a Medical Appeals Board.

Despite having guidance from Regional Health and Disability Advisors, some beneficiaries felt that there was a lack of understanding by case managers about medical conditions requiring the provision of appropriate support and services.

One of the big things for me was the lack of understanding around the needs of somebody in a wheelchair. So you've got your Disability Allowance, for example, which covers your main things like heating, transport, all those sorts of things, medical costs. But for me I was incurring a lot of [other costs].

Beneficiaries' experience accessing youth entitlements

Law changes that came into effect in August 2012⁶ established new processes for young people to access Work and Income entitlements. These include online applications, establishment of the Youth Services Support Unit, and wraparound support by contracted youth services providers.

While our interviews indicate that the wraparound service model of contracted youth support services has some benefits for young people, interviews with young people and their advocates identified young people face particular challenges when applying for Youth Payments. There were instances of the Youth Services Support Unit making decisions about entitlement without having adequate information, poor quality of independent assessment reports, and Work and Income case managers not considering the full criteria for these benefits when assessing eligibility.

After initially screening an applicant, Work and Income may request a report from a contracted psychologist to ascertain whether the young person meets the criteria for a Youth Payment. The psychologist meets the young person and also talks to their parents and other relevant people. One young person described her meeting with the independent assessor.

I don't think anyone can understand your whole point of view within half an hour. That's my opinion. Like no one's going to understand everything... I did make a pre-list of what I wanted to go through. And I asked him, 'can I get my list out so I can talk to you about it?' And he was like, 'no, I'd prefer if you would just sit there and I will ask questions and you will just talk to me about what's happened.' Which I found was kind of like putting me off of my process of what I wanted to say.

Two other beneficiaries interviewed also reiterated the feeling that their assessments were too quick for the psychologist to gain a comprehensive understanding of their situation.

It felt, you know, it was disappointing. To go in there and saying that, no, you don't meet the standards... It was a quick five or ten minute meeting.

6 The Social Security (Youth Support and Work Focus) Amendment Act 2012

And I thought we were going to be in there for at least half an hour discussing.

They did a five-minute assessment. It should have been longer but it was only five minutes, to try and gather my situation, [as] to whether I was going to be eligible. And she asked really sort of glazy questions and didn't actually really get the full picture. Which is why they declined it, based on the information that was collected at that first five-minute meeting.

A community advocate endorsed the young people's views that they did not get a fair deal in these independent assessments.

I don't believe that they're asking the right questions. I don't believe they're taking their time to interview the client and giving the client the opportunity to actually speak up, and not listening to what the client has said. But the reason I know that is because I get feedback from the clients. They get very upset.

There were particular risks to young people who were declined Work and Income payments, as the community advocate explained:

Oh, it's huge. To watch a young person turn to drugs and alcohol because she felt her life was over, that there was nothing there, why bother, because no one cares. You know: you're just another organisation that slammed a door in my face. And it wasn't until I spent a whole day with her and got her sister to write a letter, it was a really emotional day for her, and just talking about everything. But they wrote everything down, and that was so, had so much impact that her decision got overturned that afternoon and was paid out the following day. Now this young girl is a totally different person. She's gained 15 credits so far, at school. Her attendance has gone from being 40% to 90%, she's there every day. She hasn't touched drugs, she hasn't touched alcohol, and she sees a future. Now that's the difference it makes.

Our research is based on interviews with a small sample of young people, and in light of their vulnerability and their experiences, further research could be undertaken to assess outcomes of the new approach to welfare delivery and the support needs young people have.

1.3.6 Barriers to receiving entitlements

Difficulties completing benefit applications

Completing benefit applications was a barrier for some beneficiaries, particularly where literacy and financial literacy was low. Online applications were a particular area of difficulty. Beneficiaries also reported challenges getting documents together and paperwork being lost by Work and Income.

But the amount of information they want you to get, and trying to extract all that information is probably the time-consuming part. And they do tend to lose stuff and then they claim that they don't get it.

I've handed in forms well before they're supposed to be handed in, and they've gone, 'oh, we can't find them, you're not getting paid'... and each time I've had to get a food parcel or go to City Mission and see if they can help me. Because WINZ won't give me the money for food.

Applications for medical entitlements could be particularly difficult in the view of one community advocate.

I mean to get a Disability Allowance is actually quite a complicated process, you've got to go to your GP, get your certificate. The GP has to put on your certificate what you are entitled to. And what I used to do for the clients was I'd get a little sticky note and I'd write down everything that the GP could [include] – you know, so heating was included and transport and all that sort of stuff. But then you have to go and get all your verification which is kind of mind boggling, if you're on an Invalids Benefit or you're a person who's got an undiagnosed brain injury and is on Unemployment. You know.

A beneficiary advocate emphasised the hurdles people with mental illness faced navigating the requirements to establish eligibility for benefits.

Some of the times what WINZ is asking for is a lot of documentation from a lot of different agencies. If you're mentally unwell it's really hard to do the work to get this stuff in. So a lot of the time he'd get the wrong document or he wouldn't get it in or he wouldn't know how to access the information that they wanted, and so he'd just give up. And so then his benefit will be cut and then he'd just spend weeks floating around

drinking, taking drugs, staying on people's couches and things, because he didn't know what to do, what the next step was to have that money back.

Beneficiaries also discussed a lack of flexibility in the way applications are processed. Examples were given of hardship applications being delayed until an appointment with a budget advisor could be obtained. One beneficiary relayed a friend's experience:

A friend of mine, she's got a baby, 7 weeks old, the washing machine broke down. Now she's got other kids and she rang up WINZ to see what they could do: 'oh no, no, you've got to go to a budget advisory before we can let you have money for a washing machine.' She said well, I had an appointment to go to budget advisory, but then I ended up in hospital having my baby premature, and they're not open again for another two weeks. And they said, 'oh it's too bad'. She's got a baby, she's got other kids, she's got to do her washing by hand for two weeks because the rules say she's got to go and see a budget advisor.

1.3.7 Enablers to receiving entitlements

Beneficiaries, community advocates and beneficiary advocates reported strategies they used to ensure that correct entitlements were received.

Researching entitlements, for example on the Work and Income website, before appointments with Work and Income was a strategy used by beneficiaries.

... if you look on the website, there's all these things that you qualify for, and then you go into the office and you say 'I've made an appointment for this because I qualify, my daughter qualifies for ... I'm entitled to it so I'd like to fill out the forms and apply for it please.'

I'll do a bit of research and find out what I'm entitled to, but they'll fight against that and say, 'no, where did you get that information from?' And I'm like, 'well, I've been trying to figure out what I'm actually entitled to because you guys won't even tell me what I'm entitled to.'

Arriving at a Work and Income office with information about what benefit to ask for and using the right terminology was described as particularly useful. A community agency worker had some practical advice for her clients.

50 RECEIVING BENEFIT ENTITLEMENTS

When someone comes in it's always a good idea to say to them 'ok, don't go into your case manager and say I need money'. What you go in and say... and I give them the actual benefit that they're entitled to, and say, 'this is what I'm entitled to and this is what I need, this particular benefit.' Because there's no question about it. And then you get better results from that.

Other strategies included taking notes at appointments and having a review of decision form with them at appointments should an application be declined.

The most significant enabler to receiving entitlements reported was working with an advocate. Advocates may be specialist beneficiary advocates or from community agencies whose clients include beneficiaries. They often help clients compile relevant information including gathering documentation from other public service and government agencies (for example, health or police records). The Federation of Family Budgeting Services estimate 50% of the paperwork they deal with relates to Work and Income entitlements.

So our people help them work out what their entitlements are and then send them off with all the right words to say – sometimes it's not that Work and Income aren't giving you your entitlements, but if you don't ask for the right thing by the right name, you don't get it. So budget advisors have got all the manuals and resources to make sure they equip the customer with the right things to ask for, support levels or they'll advocate on their behalf.

Similarly, when asked about the success rate of advocates assisting clients to reapply for benefits, one community agency worker replied:

In a lot of the cases [the re-application for the benefit is successful]. Especially where we have the really good relationships [with Work and Income staff]. And especially where we can provide more information that maybe the customer didn't realise they could give to help the situation.

Advocates are often able to facilitate more constructive communication between clients and Work and Income staff. In the view of a Work and Income case manager the attendance of advocates at client meetings worked in the client's favour. She advised that someone would be seen

more quickly if they had a support worker with them, getting around the long wait times for appointments, and reported that case managers were often “on their best behaviour” when dealing with a beneficiary accompanied by an advocate.

But the thing about the advocates, there is a lot of worry about advocates. Like in terms of with the benefit, like the thing with the benefit reviews that we have to make sure that, with the benefit changes we have to make sure that we’re there and we don’t make any bad calls because the advocates are waiting for us to make bad calls... so there’s that kind of feeling of we don’t want to give the advocates any ammunition against us.

Beneficiaries also reported being treated differently if they had a support worker with them.

Years ago I actually took one of the ladies from Refuge in with me and their attitude towards me changed completely. They weren’t believing me, like my brother [passed away], I went in there to ask for a petrol voucher to go back for his unveiling, they didn’t believe me, ... Because it was important, being Māori, that we do the unveiling and everything. But they tried to say I was lying. And I came home in tears. Like I was completely and utterly ... beside myself, the way I was treated... so when I took in the lady from Refuge, they just turned around and changed completely. And they completely changed their tune and they were trying to give me everything they possibly could. Because they knew I was telling the truth then and I had Refuge behind me. And Refuge was not going to allow them to treat me in that way because I was important to them.

Agency representatives highlighted that their staff often had more time to spend with clients than Work and Income case managers, enabling them to better understand the client’s full circumstances. One community agency worker stated:

Sometimes [the problem is the case manager’s] skills in getting the information out of the client to make sure they’ve got all the right information to make that decision. And sometimes the clients are really, really hard to get the information out of, the clients aren’t forthcoming with the right information. We spend quite a lot of time in our training with advisors about developing the relationship with the client to be able to get all the right information out of them – it’s a trust relationship.

52 RECEIVING BENEFIT ENTITLEMENTS

And it's very hard for a government employee to develop that trust relationship with the client.

Similarly, a community advocate said:

It's the type of person you've got to put in that [case manager] role to be able to say, you know, talk their talk... Say to them: 'I understand how you're feeling...' You know, so it's ok to open up and talk about it. And they will open up and talk about it. You know, when you're sitting there with a big book in front of you, it's like they're in the principal's office being told off because they're wanting some money. So it's really hard [for the beneficiary].

1.3.8 Communicating decisions

Participants reported confusion over the communication of decisions from Work and Income. A Work and Income staff member thought that if the rationale for decisions was explained more fully there would be more acceptance of decisions. Work and Income communicate decisions either verbally or in writing. Letters, however, often only state that an application has been declined because the criteria for payment was not met, without fully explaining the criteria the applicant was required to fulfil. Beneficiaries felt they should be told the reasons for a decision.

Yeah. I think you should know why it's been declined so that you can then address it... And to be declined because you don't fit the criteria is not enough information.

Those beneficiaries who had been declined verbally also reported instances of not fully understanding the decision. A beneficiary queried the decision to decline Childcare Subsidy for one of her children.

I told her that they paid the rest of my kids and I don't understand why you're not paying for [child] and she was like 'well, I can't answer that. If you want to review it you can.' I was like, 'yeah, I do...' She got frustrated with me because I'm pretty simple. And I was telling her I don't understand and I was pointing on the piece of paper. And she was getting frustrated with me because I didn't understand and she was just like, 'oh, they'll explain it to you when you go to the review'. But I didn't go back.

As MSD letters include a standard statement about review rights, not receiving a decision in writing may disadvantage beneficiaries because they do not receive formal notification of their right to review a decision.

1.3.9 Strategies used to informally challenge benefit decisions

Although there are legal mechanisms to review benefit decisions, the research indicates that many decisions are informally revisited by beneficiaries and their advocates. While there were some unconventional approaches to exerting pressure on Work and Income, including getting media involved, the main informal way in which agencies reportedly assisted beneficiaries to challenge benefit decisions was through developing relationships with key staff at MSD.⁷

A community agency worker recalled a situation where a beneficiary who applied for assistance to pay for emergency dental treatment was told he must first attend a budget advice session. The community agency he turned to for help rang their contact at Work and Income's head office.

I got straight on to the phone to my national contact, they rang the [local] Work and Income centre, and relayed to them: if this guy's back down there in five minutes, we want his grant approved.

Another community advocate explained how they had been able to help people who had been turned down for benefits, by ensuring Work and Income have a full picture of a person's situation. They would first spend time with the person to understand their circumstances: "You need to start painting a picture and telling a story ... [about] needing to be on this benefit". They would then help gather supporting documents and ensure these are sent through to a contact person within Work and Income. As a result, decisions are sometimes changed without having to go through a formal review process.

Such use of negotiation to review entitlement decisions has advantages and disadvantages over formal review and appeal processes, both for Work and Income, and for clients. For the individual clients involved, the benefits are likely to outweigh the negative elements. Firstly, clients who have a dispute with Work and Income are often in a desperate

7 The role of formal organisational relationships between agencies and MSD is discussed in Part 4.

54 RECEIVING BENEFIT ENTITLEMENTS

situation financially, and informal intervention is likely to resolve the issue far more quickly. An advocate stated:

We'd be inclined to try and negotiate first and use that [legal review] as a last resort. Simply for the reason that when a customer comes to see us in a desperate situation they need a solution now. And so we try and get it quickly today, not wait until their bills happen. And then purely practical: the person can't survive today, they need this problem fixed, not because we don't want to use the appeals process, because we want to help the client in the best way.

Furthermore, negotiating resolution of a dispute with Work and Income is likely to be significantly less stressful for beneficiaries than initiating a legal review or appeal, which may take many months to complete. A community advocate explained:

You know, it [the benefit review process] might, it takes a whole day basically, if we sit there for quite a long time and talk about stuff. And it's really intimidating for them. So it's not nice. And there's a lot of emotions there and there's a lot of stuff that people don't want to talk about but you have to. And telling all these people that I don't actually know...

Informal reviews also offer advantages for Work and Income. The administration costs involved in legal review and appeal processes are significant (e.g. co-ordinating suitable times and venues for review panels, organising and paying for transport of participants and panel members and payment of panel members). The costs associated with review and appeal processes will often outweigh the value of the entitlement under dispute. For example one participant related an appeal over a petrol voucher valued at under \$100 that, at the time of the interview, was still unresolved 6 months after it began.

While there was some evidence that issues raised by advocacy groups are fed back to Work and Income, getting decisions resolved informally risks masking problems with decisions made by individual case managers or wider systemic problems with Work and Income operating procedures. The invisibility of informal reviews means that no accurate statistics can be gathered. While Work and Income collects statistics of the number of decisions that are reviewed using the legal review and appeal processes, informally reviewed decisions will not

be included in this data. Statistics and feedback can be used to train staff in their administration and decision-making processes around entitlements, as well as to identify systemic issues that may be occurring. Feedback from legal review processes is used by MSD in monthly and quarterly reporting and trend analysis. Furthermore statistics of legal reviews are also available publicly under the Official Information Act, providing evidence in support of improvements (or otherwise) to the administration of social security benefits.

1.4 Conclusion

A key problem for beneficiaries is adequacy of income. Beneficiaries and advocates alike spoke of the difficulties in trying to “make ends meet” from government entitlements. The requirement for beneficiaries to attend appointments with budgeting advisors in order to be eligible for hardship allowances was noted as particularly futile given the inadequacy of their incomes to meet living expenses. This was one of the negative experiences that beneficiaries reported in relation to the benefit system.

In addition beneficiaries described the dehumanising effect of the delivery of welfare in Aotearoa New Zealand. There is an inherent imbalance of power between beneficiaries and the government department that makes decisions about their entitlements at both the institutional and individual case manager levels. Beneficiaries felt they were disadvantaged by a case management system that required them to see a different person on each visit.

Beneficiaries and community advocates reported a variety of experiences with case managers from negative through to quite positive. However, many beneficiaries described overwhelmingly negative treatment they had received as clients of Work and Income, descriptions that were supported by representatives of community agencies. This negative treatment had a pervasive influence on their interaction with the benefit system at all levels, including trying to access entitlements and challenging decisions.

Experiences of stigma, in relation to benefits, appeared to be widespread. While participants acknowledged there is some abuse of the benefit system, they felt all beneficiaries were “tarred with the same

brush". As a result of their experiences, some people reported foregoing entitlements from Work and Income, and accessing support from non-governmental agencies, to minimise their interaction with the benefit system.

Despite a policy of providing people with full and correct entitlements, our findings indicate that beneficiaries, advocates and agencies believe that many people do not receive all payments that they are entitled to. A key problem in accessing entitlements is that Work and Income do not always inform people about the range of entitlements they may be eligible for. There was a widely held view amongst those that we interviewed that there is a culture of withholding entitlement information. Even where beneficiaries had researched their entitlements before appointments, participants reported benefits they believed they were entitled to being declined.

Participants highlighted inconsistencies in benefit decisions and a lack of knowledge from case managers about the law that social security entitlements are based on. Instead, they relied on Work and Income policy when making decisions. Demands on case managers mean they have limited time to spend with each client and do not always correctly assess each client's situation. Some beneficiaries also reported problems fulfilling Work and Income requirements for benefit applications, especially when there were low levels of legal and financial literacy. People with health conditions and disabilities, and young people, face particular challenges in establishing they meet criteria for benefits, and questions were raised about the quality of independent assessments that are used by Work and Income case managers to make entitlement decisions. These beneficiaries are particularly vulnerable if entitlements are incorrectly declined.

Having access to independent information and advice about the criteria for entitlements was reported to be helpful for beneficiaries in gaining full entitlements. Particularly significant were the attendance of an advocate or informed support person at Work and Income appointments and an advocate's knowledge of benefit criteria and practical help in gathering the information required to complete applications.

When applications were declined, Work and Income's communication about why they were declined was thought to be poor, both in letters and

at appointments. As a result beneficiaries reported not knowing if they had grounds to challenge decisions. When decisions are challenged, many are reconsidered by Work and Income outside of the legal review and appeal processes. The key enabler to effectively challenging decisions was to have support from an advocate, who could leverage special relationships with key Work and Income or MSD staff to get decisions changed. A major advantage of this approach is that disputes may be resolved more quickly, and with less stress, than through a formal review process. However, revisiting entitlement decisions informally may mask the nature and extent of problems with original decision making.

Key findings: Benefit review and appeal processes

- There are a number of barriers to beneficiaries using legal review and appeal processes, including a lack of confidence and a fear of the implications of doing so.
- Beneficiaries did not feel well informed about the review and appeal processes and having access to information would reduce anxiety about challenging decisions, make it more likely they would attend hearings and enable them to be better prepared for hearings.
- Across the three review and appeal processes there appears to be a relatively high proportion of applications that are withdrawn prior to a hearing. The reasons for withdrawn applications are not well understood.
- Beneficiaries without capacity to represent themselves at legal review and appeal processes need representation in order to fairly participate and to help address the imbalance of power that exists between beneficiaries and MSD. Although limited data was available, levels of representation across the three review and appeal processes appear to be low.
- Characteristics of the legal review and appeal processes themselves mean that beneficiaries may be significantly disadvantaged if they do not have access to advocacy or legal help. This includes having no right of appeal for MAB decisions, the composition of panels, and a lack of independence in the BRC panels.
- Many decisions appear to be made without the beneficiary attending the hearing. This could disadvantage the beneficiary because they do not have the opportunity to tell their side of the story. The research shows that with the BRC process, the case is less likely to be successful if the beneficiary does not attend the hearing and, in relation to MABs and SSAA cases, some participants emphasised the importance of attending the hearing.
- Despite difficulties using the review and appeal processes, challenging a decision through these processes was an empowering act for some beneficiaries. Not only did it signify a turning point in the resolution of a dispute with Work and Income, it was also a way of addressing the power imbalance they experienced with Work and Income.
- Confidence in the review and appeal processes would be enhanced by greater transparency as to their activities and feedback avenues for users.

PART 2 **Benefit review and appeal processes**

2.1 Introduction

Our research shows that while beneficiaries often challenge decisions outside of the legal review and appeal processes, they also use the formal processes available for challenging benefit decisions. Part 2 of the report examines the legal processes under the Social Security Act 1964 for review and appeal of benefit decisions and the legal needs that arise from these.

There are three legal processes for challenging decisions: Medical Appeals Boards (MABs), Benefits Review Committees (BRCs) and the Social Security Appeal Authority (SSAA).

MABs provide a formal administrative review process for beneficiaries to challenge case managers' decisions based on medical criteria. They are administered by MSD but boards do not include MSD staff. There is no right of appeal against a decision of a MAB. BRCs review decisions relating to benefit eligibility and debts. BRCs are not independent of MSD in either their administration or decision making, although panel membership does include one community representative.¹ Decisions of BRCs can be appealed. The SSAA is independent of MSD in its administration and decision making, and is administered by the Ministry of Justice (MOJ). It deals with appeals made against BRC decisions along with decisions made by MSD's Chief Executive.

Social Security Appeal Authority decisions may be appealed to the High Court and, if unsuccessful, further appeals may be made to the

¹ The status of BRCs was the subject of a Supreme Court case in 2008 which found the BRC is purely an administrative body conducting an internal review of decisions, as it does not have sufficient independence to be categorised as a judicial body. It distinguishes BRCs from Medical Appeals Boards and the SSAA, saying that the BRC's function is to conduct an internal review of official's decisions, just as the Chief Executive might do in person (*Arbuthnot v Chief Executive of Work and Income* [2008] 1NZLR 13).

Court of Appeal and ultimately the Supreme Court. Appealing to these courts is not addressed in this report (other than a brief discussion of ssAA appeals to the High Court and High Court judicial review).

The importance of review and appeal processes is highlighted in a report by the Australian Commonwealth Ombudsman, arguing “a good system of internal review is one that is transparent in process, and affords a quick, inexpensive and independent review of decisions” (Asher, 2011 p. 3).

The right of review is important. When the process is working effectively, internal reviews resolve problems which inevitably arise daily in a large and complex organisation like Centrelink. It reduces demands on tribunals such as the Social Security Appeals Tribunal (ssAT). It engenders community confidence in the guardianship of public monies. It is a form of quality assurance for administrative decision making, and provides an opportunity for organisational learning. (Asher, 2011 p. 1)

Participants strongly supported having legal processes to challenge benefit decisions and a culture within MSD that promotes reviews and appeals. There was recognition that mistakes could be made, and there was value in having someone look at it with “fresh eyes”. It also gave people the chance to talk to someone face-to-face about the problem, and have their story listened to. Some participants thought that by successfully challenging a decision they believed to be wrong, others would benefit from having the law correctly applied.

Barriers to exercising the right of review or appeal

Information supplied by MSD shows that approximately five million decision letters are sent out each year, which contain a standard statement about review rights and, of these decisions, a very small proportion are reviewed (0.0001%). MSD acknowledges there have been occasions where review rights have been omitted but that this is extremely rare (D. Anderson, personal communication, 8 August, 2014).

Participants in our research identified a number of potential barriers beneficiaries face in using formal benefit review and appeal processes to challenge decisions.

Knowledge of review and appeal processes was a significant factor. Twenty of the 34 beneficiaries we interviewed had used one of the legal processes to challenge a decision. Of those who had not, some knew

that such processes existed, but had little information about what was involved. Others were not even aware that there were legal processes that could be used to challenge decisions.

Another barrier identified was having the capacity to take a review. One participant, who successfully challenged Work and Income's decision to decline Unsupported Child's Benefit for a child in her care, felt that some people would be intimidated in the review setting, and would have difficulty articulating their case.

That they wouldn't even know how to get across what they're trying to say, or what the point is that they're trying to make I think. Being able to explain it. You know, I didn't have a problem explaining what I wanted to get across. And I wasn't kind of intimidated. And I would have gone to the next level if I had to. I was, yeah, there was nothing that they said that made me believe they were right. But I think most people wouldn't bother. I know a lot of people that would not have bothered.

For some people, taking a review would be well outside the limits of their experience, as one participant who handled a benefit review on behalf of a beneficiary explained:

These people would no more have gone to review on their own than fly to the moon. Because they wouldn't know how, they wouldn't know how to get there, they wouldn't know how to – they wouldn't be able to get their head around it. That's why we did it for them on their behalf.

One beneficiary tried to review a decision about her Disability Allowance and found the process so long and tiring to the point "where you want to give up".

It comes down to the energy as well. They wear you down. They really wear you down. And you just give up.

A community agency worker identified confidence, language and literacy difficulties, as well as a culture of not complaining, as barriers to using review and appeal processes.

It's the confidence to do so, and knowing that you're actually right. Confidence in yourself to know 'no, no, I am right, I should get this'. And the confidence to do something about it. There's language barriers, there's educational literacy barriers. You have to fill in a whole lot of official-looking forms, some people just turn off. But there's a New Zealand psyche that we just get on with it and don't complain as well.

One beneficiary said although he had disagreed with Work and Income's decisions in the past, he had not used a benefit review or appeal process "largely because I don't want to cause them problems. There's almost a bit of fear." He felt he would be labelled as a troublemaker with Work and Income. "But people say, 'well, you know, the law is without fear or favour'. But then again you don't know what's going on behind closed doors." In the Commonwealth Ombudsman's report, Asher echoes these sentiments in the Australian context.

There are some Centrelink customers who are loathe to complain even if they believe a decision is wrong. This is a distinct at risk group from which no request for review will be forthcoming. They may be customers with a limited capacity to 'jump through the hoops' of a protracted review process. They may be confused with contact with a variety of reviewing officers. They may simply wish to avoid possible contact, or have a fear of retribution. They may be at odds with the ODM [original decision maker] or believe that review is futile. (Asher, 2011 p. 3)

Asher also refers to anecdotal evidence that some beneficiaries are dissuaded from reviewing a decision, or have a fear that if they ask for a review there will be negative consequences for them (Asher, 2011 p. 3). One beneficiary advocate in our research gave an example of pressure being brought to bear on a beneficiary not to review a decision, saying that a case manager had stated in writing that she had tried to dissuade a client from seeking a review. MSD's view is that there are rare occasions when review rights have been denied, with only two instances of this being raised by the National Beneficiary Advocate Consultative Group in the last three years (D. Anderson, personal communication, 8 August, 2014). The extent of such behaviour is not known, however we believe it may be more widespread than these figures indicate.

Our research emphasises the importance of people knowing they have a right of review or appeal, and what it involves, in order to be able to effectively exercise this right. An understanding of what enables beneficiaries to challenge decisions and the barriers they face in doing so, is crucial to achieving improved access to justice. The following sections examine beneficiaries' experience using each of the review and appeal processes and implications for CLCs.

2.2 Medical Appeals Boards

2.2.1 Introduction

The Medical Appeals Board is a legal forum for beneficiaries to challenge case managers' decisions made on medical criteria. The MAB is independent of MSD in its decision making, but not in its administration.

This section examines beneficiaries' experience taking medical appeals in order to understand their legal needs. Five beneficiaries interviewed for this research had taken a medical appeal. Of these, one had their

Medical Appeals Boards: Key findings

- Beneficiaries' health conditions and disabilities mean they face particular challenges taking medical appeals, making it critical that they have access to legal help and advocacy.
- While MABs are independent of MSD, beneficiaries do not perceive this to be the case.
- Participants' experiences of MAB hearings were largely negative. Examples provided included unsuitable hearing rooms, the lack of a clear hearing process, a feeling that they were not listened to, and support people not being allowed to speak.
- Participants' experience of MAB hearings indicates that panel members' lack of legal knowledge and of the principles of natural justice appears to disadvantage beneficiaries.
- Beneficiaries' experience shows the main legal need for medical appeals is representation. Although legal aid is available for MAB cases, beneficiaries are not informed of this option and it appears to be rarely obtained (if at all) for MAB cases. Other legal needs included information about the medical appeals process; advice about the law and MSD's decision-making processes for benefits based on medical criteria; and help to understand Work and Income's report about the decision being appealed.
- Beneficiaries and advocates feel it is unfair there is no right of appeal against decisions of MABs. In the absence of a right of appeal, a decision can only be challenged by High Court judicial review. This legal process is complex and not easily accessible to beneficiaries.
- MAB activities are characterised by a lack of external scrutiny because their decisions are not publicly available and there is no right of appeal. In this context, the findings suggest improved access to legal help with medical appeals will improve beneficiaries' access to justice.

Snapshot: Medical Appeals Boards

What are Medical Appeals Boards? MABs are decision making panels which are organised by MSD and which have external panel members. They consider applications for medical appeals and make decisions.

Established by: Section 10B of the Social Security Act 1964.

Membership: Three panel members (who are medical practitioners, rehabilitation professionals or other people with expertise in vocational support for people with illness or a disability).

Appointment process: Appointments are made by the Chief Executive. Panel members' fees are negotiated with individual members and are based on their costs to provide their time, taking into account their skills and experience.

Responsibility for MABs: Work and Income National Office. Regional MSD staff organise hearings and hold MAB data.

In jurisdiction: Work and Income decisions made on medical evidence in relation to eligibility for Child Disability Allowance, Supported Living Payment and Jobseeker Allowance (formerly Invalids Benefit, Sickness Benefit, and DPB Care of Sick and Infirm), work obligations and work preparation obligations on medical grounds, and drug testing of beneficiaries. MABs also decide whether there were good reasons for a late application for medical appeal.¹

Outside jurisdiction: While based on medical criteria, decisions about Disability Allowance must be reviewed by BRCs.

Powers: Confirm (agree with) or overturn (change) the original decision.

How to apply: On a medical appeals form or by letter.

Procedure on appeal: The decision is first checked by Work and Income staff (an internal review). The internal review may include a referral to a designated doctor for a second opinion, where the beneficiary agrees to this. If the decision stays the same, the appeal automatically goes to a MAB for a decision. MSD arranges a MAB hearing.

¹ An application for medical appeal must be submitted within three months of the benefit decision being made, although this time can be extended if there are good reasons for the delay in putting it in (section 10B(2) Social Security Act 1964).

Legal aid and costs: Legal aid is available for medical appeals. MSD does not pay any advocates costs. MABs do not have the power to order MSD to pay the beneficiary's costs of taking the appeal. MSD will pay for transport costs of attending the hearing.

Hearing process: MSD's *Medical Appeals Board: A Resource for Board Members* contains some procedural guidelines for MABs. The beneficiary can attend a hearing with an advocate, representative or support person. A Work and Income representative will attend the hearing only if the beneficiary is present. MABs can adjourn to request further evidence if required or to consider additional information presented at the hearing. Appeals can be decided on papers if the beneficiary does not attend the hearing.

Decisions: Decisions can be unanimous (all three MAB members agreeing) or by a majority (one person dissenting). Where a member dissents their reasons for their different conclusion must be included in the MAB's report. A decision is given in writing. MAB decisions are not available to the public.

Performance standards: Timeliness standard of 40 working days for completion of medical appeal.

Right of appeal: None.

Public reporting of MAB activities: None.

dispute resolved before the hearing and the other four people attended a MAB hearing. One had no representation, three were represented by a community lawyer or caseworker and/or a beneficiary advocate, and one attended a hearing with the support of a community advocate. Nine other participants interviewed about their experience of Medical Appeals Boards included: two beneficiary advocates; one welfare law advisor; one community advocate; one private practice lawyer; one Medical Appeals Board panel member and three MSD staff.

MSD provided some statistics for MABs under an Official Information Act request:

- For the nine-month period 1 July 2012 – 31 April 2013, 490 medical appeals were lodged. Of those, 400 had been completed, and 90 were being internally reviewed or waiting to have a hearing scheduled.

- Of the 400 completed appeals: 68 (17%) were withdrawn; 41 (10%) were overturned at internal review; and 291 (73%) went on to a Medical Appeals Board.
- Of the 291 appeals that proceeded to a Medical Appeals Board, in a quarter of the cases MSD's decision were overturned (76 or 26%), and 74% (215) of MSD's decisions were upheld.

Further MAB data would be required to examine trends over time and identify whether this is indicative of a typical year or not.

2.2.2 MAB procedures and administration

Once an application for medical review is made, MSD reviews the original decision internally by having it checked by a Work and Income staff member. If the decision remains the same, the appeal proceeds to a MAB hearing. MSD arranges three panel members (from a pool of MAB panel members) to sit on a particular case. The beneficiary appealing the decision is invited to attend and Work and Income has a staff member at the hearing if the beneficiary is present. The MAB considers the evidence and makes a decision on the case, which is provided in writing to the parties. The decision of the MAB is final and binding on both parties: neither the beneficiary nor MSD can appeal it. A MAB's process and decision can however be judicially reviewed by application to the High Court; this is discussed below at Section 2.2.4.

Oversight of Medical Appeals

While MSD has a central unit to manage the Benefits Review Committee process, the medical appeals process is not managed within this, and is instead managed regionally, with local staff arranging hearings and holding MAB data.² Work and Income's national office provides some limited oversight. A MSD staff member felt this could be improved.

So is there adequate oversight? No there is not. Is oversight being requested? Yes it has. All the Medical Appeals Boards have asked for that. They wanted feedback, they do operate in isolation, they don't know how the others work. There's never been a meeting of them all together for

² Aspects of the administration of MABs are canvassed in an article in the NZ Doctor (Ratcliffe, 2013).

example. We've never had a national forum of Medical Appeals Boards or anything like that.

There is currently no national quality management process in place for MABs, other than the timeliness standard of 40 days that is included in guidelines for panel members (*Medical Appeals Board: A Resource for Board Members* p. 11).

Panel membership of MABs

Medical Appeals Boards are made up of three health professionals such as medical practitioners, rehabilitation professionals, or other persons having appropriate expertise in the fields of vocational training or vocational support for persons with sickness, injury, or disability (section 10B). There is no national system for training of panel members, and training is provided on an ad hoc basis. MSD has identified the need for improvements in MAB members' training and is planning to address this.

While there are some specialists among the Medical Appeals Board members, most Medical Appeals Board members are general practitioners. MSD reported facing challenges in finding suitably skilled health professionals to serve as board members, as a staff member explained:

So, there are some regions that have a number of panels, others that struggle to maintain even a basic panel.

MSD's view is that MAB panel members must be suitably qualified to hear the case. This does not mean that all members are required to be specialists in the specific area, but they must be able to assess the medical information provided, identify where they need further information, and apply the medical evidence and submissions to the relevant legislation. MSD argued that in most cases general practitioners are ideally positioned to hear appeals (D. Anderson, personal communication, 8 August 2014). However in our interviews there was strong criticism of MAB panel members' lack of expertise in some cases, with several beneficiaries feeling the panel was not suitably qualified to deal with their cases. A private practice lawyer also highlighted the importance

of MAB members having the expertise to determine a case involving a beneficiary's mental health.

Because he [the appellant] was challenging, ... he wanted mental health experts because he had a mental health disability. They [MSD] put generalist people on the Board. And they were general practitioners. The chair of the Board specialised in child health. And this is a man who's 49 with a mental health problem. Yeah. And alcoholism and mental health. And [panel member] just showed the most woeful ignorance of very basic things around mental health. So I think, my argument is that they should be putting people on who match the person's disability or health status.

2.2.3 Beneficiaries' experiences of MABs

Pre-hearing information for beneficiaries

MSD's process is to send a letter with general information about the hearing process when an appeal application is lodged, and they state that clients are encouraged to contact the coordinator if they want further information (D. Anderson, personal communication, 8 August, 2014). Beneficiaries interviewed who had taken a medical appeal, however, felt ill-informed about the process. A MAB panel member interviewed agreed that it appeared people were not well informed about Medical Appeals Boards. One beneficiary went so far as to say "You're really kept in the dark. It was designed to make us go away."

Another beneficiary who took a medical appeal without any support reported that he had not understood what information he needed to provide. He had been told to submit information five days before the hearing, but had no idea what he should provide. He felt the history of his disease and how he had contracted it was relevant to his case, but in the hearing was told this information was not required.

Withdrawn applications for medical appeals

MSD statistics for the nine-month period 1 July 2012 – 31 April 2013 showed that 17% of lodged medical appeals were withdrawn before a MAB hearing. Reasons for withdrawal are not well understood, although a MSD staff member surmised this could be because once the decision was explained to them they were comfortable with it, or because MSD realised the decision was wrong and fixed it.

And often we find when we pull together all the information... when that correction of information is run through with the client they say, they decide that in fact they're comfortable with the decision. Sometimes we find we're not comfortable with the decision we've made and change it.

Other people interviewed identified reasons for withdrawal of medical appeals such as the cost of obtaining medical evidence and people not having sufficient confidence or knowledge to take an appeal. One beneficiary who had been unable to find someone to represent her at a MAB hearing said she was about to withdraw her appeal, and only went ahead with it when she managed to find a community lawyer to represent her.

Location and timing of hearings

While MAB hearings are often held in Work and Income offices, they are sometimes held in doctors' consulting rooms. From the perspective of one Medical Appeals Board panel member, holding hearings in doctors' rooms is a good thing; "to all intents and purposes it is like going to your doctor". But beneficiaries and beneficiary advocates reported that holding hearings in a doctor's room was inconsistent with their expectation of a legal hearing process. One person who attended a MAB hearing to support a family member's medical appeal described the setting.

And so there's three of us and three of them. ... we're in a little room now and ... we were sort of almost face-to-face. There's no table, it's a doctor's surgery room – there's a bed over there for patients to get up on, there's a desk over there to sit down and talk to your doctor.

Having hearings away from Work and Income was regarded as a strength by a MSD staff member as it reinforced the MAB's independence, but only if the surroundings were appropriate.

There was the belief that it should always be away from Work and Income. Yet in fact some of the best ones that are being run now are being run in say, Community Links, community rooms. So they're sizeable rooms and have got facilities and all the things that are required. While it might be attached to a Work and Income, part of a Work and Income office I suppose, it is a separate room and the people in there are essentially non-Work and Income people.

Some beneficiaries we interviewed reported feeling uncomfortable having hearings in an unsuitable environment, with one describing the Work and Income meeting room her MAB hearing was in as “claustrophobic”.

A MSD staff member responsible for organising MAB hearings expressed concerns about the limited location options when scheduling hearings, because she felt this would be a barrier to people attending.

In addition to holding hearings in doctors’ rooms, the time of hearing was also found to be a problem for some beneficiaries. A beneficiary advocate reported MAB hearings being scheduled at the end of a working day at 5pm or later.

Participation at hearings

MSD was unable to provide statistics on the numbers of MAB hearings that are attended by the appellant (the beneficiary appealing the decision). However a MAB panel member reported:

We get a number of no-shows, and that is extremely difficult, sort of having to make a decision based upon the written material in front of you. And I’d have to say that it doesn’t work to the client’s favour to not turn up because there’s so much more that can’t be written down.

While quality medical evidence is critical for a Medical Appeals Board appeal, a MSD staff member pointed out that the best person to describe the impact of the condition is the person themselves and identified the opportunity to hear that impact as one of the benefits of the medical appeals process.³

The beneficiaries interviewed felt little allowance is made for their disability/illness and how challenging it might be for a beneficiary to attend a MAB hearing. Their serious health conditions and anxiety and stress related disorders meant that taking a medical appeal was extremely difficult. The timing and location of hearings, inadequate information

3 The importance of attending a hearing is reinforced by a preliminary finding from a pilot study in the UK examining reasons why appeals were allowed in their Social Security and Child Support Tribunal. Judges were asked to record the reason for the appeal being allowed and of the 64% of decisions which had reasons attached, 40% of appeals allowed were due to “cogent oral evidence” (convincing and well-argued information) provided by the appellant (DWP, 2012).

about the medical review process, and not having a representative were also identified as barriers to people attending a hearing. One beneficiary who attended a MAB hearing said, “I wouldn’t have gone if I hadn’t taken [community law caseworker] I think.”

Beneficiaries’ experiences at MAB hearings

Participants reported finding the lack of a clearly defined process for the hearing itself contributed to a lot of uncertainty and stress about medical appeals. One person who attended a hearing to support a family member felt he had to fight to be heard.

The only reason we ended up with a good result is because we were totally prepared. And they couldn’t bully us. They tried desperately to bully us. Because there’s no process, they could bully us. There’s no, ‘righty-oh, Mr [name], we’ll hear from you now. Ok, [representative] we’ll now talk to you, now [family member], we’ve heard from those two, now we’re going to hear your story and ask you some questions.’ It isn’t anything about that at all. It’s like, you just speak quickly.

Several beneficiaries felt the lack of a right to appeal increased the stress involved in the process as there was only one chance to argue your case.

I couldn’t believe that something that I’d been told I had no right of appeal or review [against], was treated with such [a casual approach]; well I mean I’d have thought it was almost a court situation.

And the bit that panicked me about that was if I didn’t get it right at this review, I’m screwed. There isn’t a next step. And I thought actually that of itself is intimidating. It’s good to know but it is intimidating.

These views were endorsed by a welfare law advisor we interviewed, who said it was “grotesquely outdated” that there was no right of appeal against decisions of MABs.

Both advocates and a MAB panel member commented on the difficulties beneficiaries faced when appearing at a MAB hearing. One factor that made hearings challenging was the medical evidence being discussed and medical terms used. A MAB panel member said:

[A hearing] is potentially a little intimidating for people because there are three medical people present. But we attempt to make it as informal and relaxed as possible.

72 BENEFIT REVIEW AND APPEAL PROCESSES

A community advocate, who had attended MAB hearings to support her clients, felt the perception of doctors meant it could be challenging for some appellants.

...while we've gone a long way from seeing doctors as God, there is still, especially among people who have limited education or qualifications and have been unskilled workers, there's still that power difference. They're the boss.

The atmosphere of MAB hearings was commented on by several participants. One beneficiary described the atmosphere of his MAB hearing as very cold. In another case a beneficiary was put under such stress during a Medical Appeals Board hearing she had to leave the room.

Yeah. Three guys who I could just tell from the outset weren't interested in hearing anything that I had to say. They didn't want to know anything about my story. They, I mean I was shaking ... And I wasn't as far along in my recovery as I am now. And the table was shaking and I had to leave, I was hyperventilating. And then I got back in and they said, you know, 'we don't want to hear what's happened to you. I don't see how it impacts on your ability [to work], on our decision.'

In contrast, another beneficiary who went to a Medical Appeals Board hearing with the support of a community law case worker felt she had a fair hearing and described the MAB panel members as "really interested ...those three doctors could see I was in absolute agony. And I just told them my history." In her case, the MAB accepted the specialist doctor's opinion over the opinion of a designated doctor, and overturned Work and Income's decision to take her off the Invalids Benefit and put her on a Sickness Benefit. Despite feeling she had had a fair hearing, participating in the hearing had a big impact on her.

I burst into tears at the end, because I was in pain and it was just so overwhelming. And I've got lots of confidence.

One participant who had supported a family member through the medical appeal process told us the MAB hearing he attended was rushed because of the demands of the doctors' practice, and that this undermined the credibility of the whole process.

Well, you have to say that what we faced was not a panel. They may call that a panel of doctors but all it was three doctors who rushed in with half an hour to spare, chatting about, and trying to make some decisions about your life, so that's not a panel.

He summed the MAB process up:

I mean no bones about it – it's a completely crap, awful system, and frightening, and de-powering, [there] is no bit where the beneficiary can feel comfortable. There's nothing. You're not made to feel comfortable.

Despite MSD guidelines preventing MAB members from examining appellants as part of the MAB hearing process (*Medical Appeals Board: A Resource for Board Members* p. 17), the research indicates that these guidelines are not always followed. A MAB member reported carrying out examinations and a beneficiary reported being asked to remove items of clothing during a MAB hearing to enable panel members to examine him.

2.2.4 Advocacy and legal support

Right to bring a representative and support person

MSD guidelines for MABs specify that the beneficiary can choose to have a representative and/or a support person at a MAB hearing. MSD was unable to provide statistics on the number of cases where appellants were represented at MABs and statistics about the number of MAB cases taken by community law centres and beneficiary groups were also not available (although based on figures for CLC representation on welfare law cases nationally this is likely to be very small, as discussed in Part 4 of this report).

Some participants' experiences suggested there were difficulties for beneficiaries having representatives or support people with them at MAB hearings. Several advocates and support people reported being told they could not speak at the hearing. A participant who was present at a MAB hearing to support a family member said, "I guess my overall impression is of being told to shut the hell up, and that's really, that's the overriding thing."

Legal needs

The critical legal need identified was representation at the MAB hearing. The role of a representative at a MAB hearing includes ensuring natural justice requirements are met, helping an appellant structure and cover their key points, and to clearly articulate submissions which apply the medical evidence to the legislative criteria. Other legal needs for medical appeals identified in this research are: information about the medical appeals process and assistance to prepare for a hearing; advice about the law and MSD's decision making processes for benefits based on medical criteria; and help to understand and interpret Work and Income's report about the decision being appealed. Factors to emerge from the interviews that highlighted the importance of having legal help were having no right of appeal against a decision of a MAB, the lack of clear hearing procedure, some inconsistency in application of MSD guidelines by Medical Appeals Boards, and the effects of beneficiaries' medical conditions on their ability to prepare for a MAB hearing and to represent themselves.

It appears, however, that representation is not easy to find for MAB hearings, with one beneficiary reporting difficulties accessing community law centre services and another stating he was unable to find anyone to represent him at his MAB hearing. Legal aid is available for medical appeals,⁴ however, information about legal aid is not included in any of the information MSD provides beneficiaries about medical appeals.⁵ It is therefore likely that many beneficiaries are unaware of this option. MOJ was unable to extract data as to numbers of applications for legal aid for Medical Appeals Board hearings (N. Cooper, personal communication, November 3, 2013). However, this research found that there are small numbers of applications for legal aid for appeals to the ssAA (see Section 2.4.4). The introduction of an application fee for civil legal aid is likely to be a significant additional barrier to beneficiaries accessing legal aid for appeals to the Medical Appeals Board. It appears that that few people applying for a medical appeal are able to obtain legally aided representation by a private practice lawyer.

⁴ Section 7(1)(e)(v) Legal Services Act 2011.

⁵ MSD's factsheet, *A Guide to Medical Appeals* (July 2013), informs beneficiaries of the right to bring a lawyer to the hearing but does not mention the option of applying for legal aid.

The implications of MAB decisions can be far reaching, particularly if a person's main benefit is at issue. Having legal help will enable beneficiaries to identify the evidence they need to present to a MAB and to effectively communicate that evidence to the Board. A MAB panel member interviewed said people will sometimes bring an advocate, but it was very rare for people to have had legal advice, and he could not recall the last time when legal advice was evident in a MAB case he had been involved with. He felt that having an advocate or support person at the hearing could provide moral support, and noted that presenting a case to a MAB requires particular skills. Having an advocate present could make a significant difference to the hearing outcome.

You've got to be driven by the facts of the case. It's just really that one knows that – these are people who are, for one reason or another, disadvantaged. And so the complexity of them presenting their case in a logical, carefully thought-out manner is quite high. And so it's not always their skill set.

For one beneficiary we interviewed, the challenges of taking a medical appeal, combined with having serious health conditions, meant the legal help she received from a community law centre was critical. The community law caseworker helped her prepare her case and attended the hearing with her. Although a confident person, she felt she could not have done it without this support.⁶ Another beneficiary put pursuing a medical appeal down to the help she had from a community lawyer and her child's medical specialist: "But if I hadn't had a lawyer and a professor, and not everyone's got those up their sleeve, and I'm lucky that I have, I would have just walked away from it."

A MSD staff member recommended greater availability of advocacy services, noting that it would be helpful if medical professionals could also refer people to advocates. She believed that how well legal needs are

6 For another account of the impact of having an advocate represent a beneficiary at a Medical Appeals Board, see 'Featherston 'suicide' pair win appeal', Wairarapa Times Age, August 15 2013. The appellant is reported as saying "Don't give up. Find an advocate and keep battling. We are so humbled by [advocate's] support. He guided us." www.nzherald.co.nz/wairarapa-times-age/news/article.cfm?c_id=1503414&objectid=11107582

met for medical appeals is dependent on whether appellants are able to find an advocate.

Judicial review of a Medical Appeals Board process

In the absence of a right of appeal against a MAB decision, a decision can only legally be challenged by an application for judicial review to the High Court. Grounds for a judicial review are procedural unfairness; the MAB acting outside the scope of its powers; or making a decision that is so unreasonable that no reasonable person could have made the finding. A judicial review is heard by the High Court, and although could theoretically be taken by a person without representation, most people would need legal representation to bring a judicial review. Beneficiaries face substantial barriers to having access to judicial review as a mechanism to challenge Medical Appeals Board processes and decisions. Some of the hurdles a beneficiary would have to contend with are lack of knowledge about this option, few lawyers in New Zealand who have expertise in welfare law and difficulty locating a lawyer to take such a case on, the cost of private practice lawyers and limits on the availability of legal aid.

2.2.5 MABs – Issues and challenges

Assessing work capacity

MSD's processes require that MABs assess a person's capacity to work in an appropriate job for the specified number of hours (part-time or full-time) given their health condition or disability. The MAB can not take into account the availability of jobs, as this is not a medical ground relating to the person's health condition or disability (D. Anderson, personal communication, 8 August 2014). A private practice lawyer explained the difficulties panel members face, though, in determining if a person is capable of working 15 hours a week without knowing what the work is.

But MSD [say] 'no, don't worry about the jobs, just so long as they can do 15 hours a week.' But the big issue is what the work is that the GPs are being asked to assess a person for. The panel in one case simply made up jobs they thought my client could do without any expertise or

knowledge of that particular workforce. Their proposed jobs were mostly ones he could never have done as either he did not have the necessary qualifications or there was no market for that work. For example, as he spoke another language they said he could be a translator working from home – ignoring his minimal educational qualifications; lack of work equipment (his computer was more than ten years old) and total lack of demand for work from an unqualified translator with his language... they're not vocational rehabilitation specialists, they know nothing about such areas.

Knowledge of law and natural justice

MABs are required to make decisions on medical criteria in line with the relevant legislation, although members are not required to have legal backgrounds. MABs have the option of asking for submissions from both parties where there is a dispute about law, such as the interpretation of legislation.

Medical Appeals Boards must also follow the rules of natural justice (principles of fairness) when conducting hearings and making decisions. MSD guidelines for board members contain some examples of MAB natural justice requirements, such as the right to have an advocate or representative present. However with an apparent lack of training for MAB members and selection of panel members on the basis of medical skills rather than legal knowledge, beneficiaries' experiences suggest that panel members are not always aware of these requirements and how to implement them.

Some participants also expressed concerns about the quality of written decisions provided by Medical Appeals Boards. While MSD has created a template for Medical Appeals Boards decisions, feedback from advocates and community lawyers suggests some boards do not have a good understanding of how to prepare a written decision which applies the medical evidence to the law. For example one advocate reported seeing a decision in which the section headed *findings* was blank and the MAB's reasoning and application of the law was not set out. This may reflect the fact that while panels have medical expertise, there is a lack of training on legislative requirements. An MSD staff member observed:

... they're throwing their medical knowledge to a legislative process. But they're not legal minds. So the gap in the Medical Appeals Board might

78 BENEFIT REVIEW AND APPEAL PROCESSES

be that ... they've probably made a reasonable assessment of medical facts, but [not] of the law.

The requirement that MABS provide reasons for their decisions is firmly established⁷ and Minister of Social Development Paula Bennett recently confirmed in response to a question in the house that MAB are required to provide reasons for their decisions: "The Board is required to provide a report that sets out its deliberations, its reasoning and its decisions on all points that were raised. Work and Income send this report to the client along with a letter detailing what the outcome means for them."⁸

Because MAB decisions are not publicly available and there is no right of appeal, there is no independent scrutiny of MAB decision making or recording of their decisions. One private practice lawyer interviewed had filed a judicial review against a Medical Appeals Board and MSD's Chief Executive on the basis of perceived flaws in a Medical Appeals Board's process. The case was settled which, while providing a good result for the client, meant that MAB procedural issues were not highlighted.

I mean MSD were very keen to settle as they didn't want their system subject to judicial accountability. They knew we had strong legal points about the illegality of parts of their processes but they wanted to continue to use them against all other sickness beneficiaries without challenge. In the end they made an offer my client could not refuse. He would not have got as good in the High Court. We settled and discontinued the proceedings. He really wanted to make a statement too and try and improve the situation, he had to take that offer because his health was so bad.

The robustness of the medical appeal process would be enhanced by having performance standards and a system for monitoring performance against those standards. Such a process exists for MSD's other benefit review process, Benefits Review Committees. Consideration could also be given to strengthening the membership of MABS by including one

7 In *Te Aonui v McDonald*, unreported, HC, Rotorua 4 February 2004 CIV 30-463-549, a judicial review against the chairperson of a Benefits Review Committee, the court held that MSD Benefits Review Committees are required to provide reasons for their decisions. The findings in that case apply to MABS.

8 Paula Bennett, Minister of Social Development, written answer to a Parliamentary question 5842 13 May 2013

member with legal knowledge and skills. This could be beneficial in light of recent amendments to the Social Security Act which mean that MABS' jurisdiction is extended and they will be required to interpret a much broader range of legislation.⁹

Timeliness of medical appeal decisions

MSD guidelines set the target timeframe for medical appeals as 40 working days. While no statistics were available from MSD as to MAB's performance against this standard, beneficiary advocates and beneficiaries reported that medical appeals could take many months to resolve. The timeliness of medical appeals is critical following law changes which took effect from 15 July 2013, under which people who lodge medical appeals against decisions to transfer them from Supported Living Payment (formerly Invalids Benefit) to Jobseeker Support will only be able to have their Supported Living Payment continue for up to 28 days while the dispute is being resolved.¹⁰ An MSD staff member explained the potential impact of delayed hearings on beneficiaries.

But for those clients who might lodge an appeal, if they don't get to their Medical Appeals Board within that four weeks, they'll be on a lower rate which is Jobseeker Support Sickness – or Jobseeker Support – ... for a single person, it's about a \$60 difference a week which is a lot of money.

2.2.6 Summary

The medical appeals process is a critical avenue for review of benefit decisions made on medical criteria, particularly in light of the concerns expressed by some participants about Work and Income's processes for assessment and decision making in this area which are discussed in Part 1 (1.3.5). Under the Social Security (Benefit Categories and Work Focus) Amendment Act 2013 the jurisdiction of MABS is expanded. The implications of this are two-fold: the grounds of appeals considered by MABS will be much broader and the number of medical appeals is likely to increase. At the same time, there is now a 28-day limit on the

⁹ Section 10B Social Security Act 1964

¹⁰ Section 80BD(8) Social Security Act 1964. Prior to July 15 2013, a person who had appealed a decision that they did not meet the medical criteria for an Invalids Benefit would have their Invalids Benefit continued until the appeal was determined.

payment of Supported Living Payment where entitlement to this benefit on medical grounds is disputed.

Medical Appeals Board decisions are final: neither the beneficiary nor MSD has a right of appeal. In this respect MAB decisions are different to decisions made by MSD's Benefits Review Committees, which can be appealed to the Social Security Appeal Authority. Beneficiaries felt it was unfair that there was no right of appeal, as it put them under great pressure. This view was supported by beneficiary and community advocates. A right of appeal can also be regarded as a fundamental natural justice requirement in recognition of the fact that decisions can be incorrect. In addition, appeals would provide a level of external scrutiny of Work and Income and MAB decision making.

Beneficiaries faced a number of barriers to using the medical appeal process. The environment of hearings and conduct of some board members was criticised, for example where hearings were held in doctor's consulting rooms and advocates and support people were not allowed to speak. While MSD staff and the MAB panel member interviewed highlighted the independence of Medical Appeals Boards as a strength of the process, the perception of beneficiaries and beneficiary advocates was that the MAB process favours both Work and Income and the MAB panel members.

The health condition or disability of the beneficiary made the experience of a MAB particularly challenging. There is evidence from a United Kingdom study conducted with solicitors, advice agencies and clients about presentation and resolution of welfare issues "that justiciable problems cause, or are accompanied by, considerable stress, anxiety and physical and mental health problems". In addition to any resolution of the legal problem, "advice, help and representation typically leave the client feeling more informed and calmer, with reported reductions in stress levels and associated health problems" (Moorhead & Robinson, 2006 p. ii). We contend that this finding is particularly relevant for medical appeals, where the legal problem at issue is the beneficiary's health.

The key enabler to effectively taking a medical appeal was having a representative at the MAB hearing. Having legal help or advocacy made a big difference to participants' experience of the process. Representation was perceived to be an essential legal need due to the poor health of the

participants, little access to legal information about the medical appeals process, uncertainty about hearing procedure, a perception that not all MABs have the legal knowledge required to undertake their role, and the perceived lack of impartiality of some panels. The lack of appeal rights also increased the importance of representation, because there is only “one shot” at challenging a decision made on medical criteria.

There are a number of issues that emerged from the research in relation to MABs that potentially have a direct impact on beneficiaries’ access to justice. While MAB members bring medical expertise to the board, they do not necessarily have legal knowledge and skills. Furthermore panel members do not always have the specific medical expertise required for a particular case.

MAB activities are characterised by a lack of independent scrutiny due to a four main factors: MAB decisions are not available to the public; beneficiaries have no right of appeal; limited statistics are available; and there is no public reporting on the activities of MABs. Improvements in these areas could result in improved access to justice for beneficiaries.

Implications for CLCs

The research supports CLCs actively promoting their services to people who may need legal help and representation with medical appeals. Reaching beneficiaries through health and disability support agencies and channelling information through the health sector such as primary health organisations, doctors, in waiting rooms at doctors and hospitals, and health and disability support agencies were suggested strategies. Holding community forums and education programmes on medical entitlements and medical appeals, along with information resources about what taking a medical appeal involves, is likely to increase beneficiaries’ access to legal help for these welfare problems.

CLCs could prioritise legal services to clients for medical appeals, particularly representation at hearings (and build capacity in this area if that is needed). CLCs could also improve their capacity to judicially review Medical Appeals Board decisions.

2.3 Benefits Review Committees

2.3.1 Introduction

Benefits Review Committees (BRCs) review benefit decisions (except decisions made on medical criteria) and debts, including debts established through fraud investigations. Each panel comprises two MSD staff and one community representative.

This section examines beneficiaries' experiences reviewing Work and Income decisions at Benefits Review Committees in order to understand their legal needs.

Key findings: Benefits Review Committees

- Strengths of the BRC process include having an independent community representative on each BRC and offering a right of appeal against BRC decisions.
- There is a low level of knowledge amongst beneficiaries about the benefit review process.
- MSD data from 2010/11 and 2011/12 showed nearly half of the cases decided by BRCs are on papers only; just over a quarter of hearings were clients present without a representative; and clients with a representative for 18% and 21% of hearings each year respectively.
- Although beneficiaries faced difficulties attending hearings, it was important that they attended and even more so with a representative. During 2010/11 and 2011/12 there were differences in BRC hearing outcomes between categories of attendance with decisions more likely to be overturned if beneficiaries attended with a representative (20–24%). The least chance a client has of getting a decision overturned is in BRC hearings based on papers only (4–5%).
- Experiences of BRC hearings were mixed, with more tending to be negative. The most significant factors contributing to a positive or negative experience were the perceived objectivity of the panel members and how well managed the proceedings were.
- Beneficiaries' main legal need for benefit reviews is representation. Representation for reviews of decisions established through fraud investigations was identified as particularly important because of the complexity of cases, the amount of money in dispute, and imbalance of power. However legal aid is not available for BRC hearings. Other needs include legal information, legal advice about their case and assistance with preparation for BRC hearings.

We interviewed twelve beneficiaries about their experiences with BRCs. Of those, eight were not represented at the BRC hearing by an advocate or lawyer (although two had the support of community advocates at the hearing) and four were represented (one by a private practice lawyer, two by community lawyers and one by a beneficiary advocate). Eighteen other participants had extensive experience and knowledge of BRCs in their professional capacity. These were a community representative panel member on a BRC, a Social Security Appeal Authority member, four MSD staff, three beneficiary advocates, six community advocates/community agency workers, one welfare law advisor, one private practice lawyer and one community lawyer. Statistical and other data was provided by MSD.

This section begins with a brief discussion of the internal review stage of BRCs and ethnicity of applicants, followed by an overview of the administration and operation of Benefits Review Committees and examination of beneficiaries' experience of the benefit review process. Statistics relating to the outcome of BRC hearings are discussed at Section 2.3.4.

In the three financial years 2010/11 to 2012/13 between 4000–5100 review applications were lodged each year. Table 1 shows what happened to the applications lodged during the internal review process before they reached the BRC hearing stage. The percentages are based on the total cases lodged each financial year, with the exception of 2012/13 where 14% were still pending at the end of the financial year. The findings are fairly consistent over the three years and analysis of a longer timeframe would need to be conducted to detect any trends:

- About a quarter of cases lodged (25–27%) were withdrawn across the three years.¹¹
- About a third of cases lodged (31–36%) were overturned by internal review across the three years.

11 MSD analysis of reasons for withdrawn review applications showed clients decided not to proceed with the review after a case manager explained the basis for an unfavourable decision and the client gained a clearer understanding; some reviews had been recorded as withdrawn when the decision had in fact been overturned; and clients decide to withdraw their review once they have received the MSD report to the Benefits Review Committee (D. Anderson, personal communication, 8 August, 2014).

Snapshot: Benefits Review Committees

What are Benefits Review Committees? Committees that are organised by MSD and have both staff and external members. They consider applications for benefit reviews and make decisions.

Established by: Section 10A Social Security Act 1964

Membership: Three panel members (one community representative and two MSD staff members).

Appointment process: Appointments of community representatives are made at the discretion of the Minister for Social Development. Community representatives are paid under the Fees and Travelling Allowances Act 1951.

Responsibility for BRCs: The MSD Client Advocacy and Review Team, Corporate and Governance, National Office.

In jurisdiction: A wide range of Work and Income decisions about benefits and debts (including debts established by fraud investigations). In addition, BRCs decide whether there were good reasons for a late application for review of decision.¹

Outside jurisdiction: The BRC does not have the power to decide disputes about corrective action (back payment of benefit based on an error by MSD)² or benefit decisions that are made on medical grounds (which are dealt with by MABS). BRCs also cannot review MSD decisions in relation to criminal offences arising from benefit fraud investigations.

Powers: Confirm (agree with), vary (change in part) or overturn (disagree with and change) the original decision.

How to apply: On a benefit review form or by letter.

¹ An application for review must be submitted within three months of the benefit decision being made, although this time can be extended if there are good reasons for the delay in submission (section 10A(1B) Social Security Act 1964).

² Section 80AA Social Security Act 1964

Procedure on appeal: The decision is first checked by Work and Income staff (an internal review). If the decision stays the same, the appeal automatically goes to a Benefits Review Committee for a decision. Reviews are arranged by coordinators from different units within MSD: Work and Income, StudyLink, Senior Services, and Integrity Services.

Legal aid and costs: Legal aid is not available for benefit reviews, nor are any representatives' costs covered by MSD. Benefits Review Committees do not have the power to order MSD to pay the beneficiary's costs of taking the appeal.

Hearing process: Hearing procedure for BRCs is contained in a *MSD Review of Decisions Resource Kit*. Hearings are usually held at Work and Income offices. A beneficiary can attend a hearing with an advocate, representative or support person. A Work and Income representative attends the hearing, only if the beneficiary is present. BRCs can adjourn to request further evidence if required. Cases can be decided on papers if the beneficiary does not attend.

Decisions: Decisions can be unanimous (all three BRC members agreeing) or by a majority (one person dissenting). A BRC decision is given in writing. Where a member dissents the reasons for their different conclusion must be included in the BRC's report. BRC decisions are not available to the public.

Performance standards: MSD has performance standards for BRCs in area of timeliness (32 working days), quality of decisions, fair process (natural justice) and professionalism. Auditing is undertaken of performance standards.

Right of appeal: A beneficiary has the right of appeal against a BRC decision to the Social Security Appeal Authority. MSD does not have a right of appeal. (There is no right of appeal on decisions about out of time (late) applications).

Public reporting of BRC activities: None.

Table 1: Internal review outcomes of BRC applications for the years 2010/11 – 2012/13

BRC applications	2010/11	2011/12	2012/13
Cases lodged	5066	4310	4605
Due to cases pending at end of financial year a proportion are recorded as unresolved at the end of each financial year. Outcomes are later recorded when resolved.	-	-	635 (14%)
Outcomes of BRC applications internally reviewed			
Total cases lodged – 2012/13 minus unresolved cases	5066	4310	3970
Cases withdrawn	1240 (25%)	1099 (25%)	1066 (27%)
Cases overturned by internal review	1692 (33%)	1324 (31%)	1435 (36%)
Overturned as clients want to continue to BRC	10 (0.2%)	2 (0.05%)	4 (0.1%)
Original decision upheld	2006 (40%)	1782 (41%)	1351 (34%)
Original decision partially upheld	118 (2%)	103 (2%)	114 (3%)
Proceed to BRC hearing	1592 (31%)	1341 (31%)	1278 (32%)

Source: Adapted from data provided by the Ministry of Social Development

- In 2010/11 and 2011/12 40% and 41% of cases respectively had the original decision upheld at internal review. This dropped to 34% in 2012/13.
- A very small proportion (2–3%) had the decision partially upheld at internal review across the three years.
- Nearly a third of cases lodged (31–32%) proceeded to a BRC hearing across the three years.

Table 2 shows the ethnicity of beneficiaries lodging reviews to BRCs for a two-year period 2010/11 – 2011/12. To provide an indication of whether the ethnicity of those lodging reviews is proportional to the ethnicity of those on the main benefit types we have provided a comparative

Table 2: Ethnicity of beneficiaries lodging reviews to the Benefits Review Committee in 2010/11 and 2011/12

	2010/11	As at June 2011	2011/12	As at June 2012
Ethnicity	BRCs – ethnicity of those lodging reviews	Ethnicity of those on main benefit types	BRCs – ethnicity of those lodging reviews	Ethnicity of those on main benefit types
Māori	1197 (23%)	106,375 (32.4%)	957 (22%)	106,001 (33%)
NZ European	2460 (49%)	144,724 (44.2%)	2159 (50%)	138,726 (43.4%)
Pacific People	248 (5%)	26,402 (8%)	200 (5%)	26,038 (8.2%)
Other	967 (19%)	50,316 (15.4%)	847 (20%)	49,276 (15.4%)
Unspecified	194 (4%)		147 (3%)	
Total	5066	327,817	4310	320,041

Source: Adapted from data provided by the Ministry of Social Development for BRCs and accessed website for national level data regarding characteristics of those on the main benefits www.msd.govt.nz

column.¹² What is suggested is that proportionally less Māori (10–11%); and to a lesser extent NZ European (5–7%) and Pacific People (3%) lodged reviews to BRCs than their proportion of those on main benefits. Data collection differences may account for these differences but it does raise the question, particularly in regards to Māori, how accessible the review process is for different groups. Conversely the “other” and “unspecified” groupings appear to lodge more reviews than their proportion of those on main benefits.

2.3.2 BRC procedures and administration

Within 24 hours of receiving a request for a review, the applicant should be sent an acknowledgement letter, along with information sheets about the review process and where to go for free legal help or advocacy. MSD then undertakes an internal review. If it decides the original decision was correct, the case automatically goes to a Benefits Review Committee. MSD

¹² This comparison should be treated cautiously as there are a number of data differences such as annual versus quarterly statistics; all main benefits versus those eligible for BRC which exclude those benefits reviewed by MAB; and merging of ‘unspecified’ and ‘other’.

arranges three panel members to sit on a particular case (two MSD panel members and one community representative). The beneficiary reviewing the decision is invited to attend and a Work and Income staff member is present at the hearing if the beneficiary attends. The BRC considers the evidence and makes a decision on the case, which is provided in writing to the parties. The decision of the BRC can be appealed to the SSAA, and on a point of law, to the High Court, Court of Appeal and Supreme Court.

Oversight of BRCs

The review process is overseen nationally by the Client Advocacy and Review Team at MSD's national office, which is responsible for providing support, ongoing reporting, monitoring of operational processes, and developing the support tools and systems to continually improve the effectiveness of the review process. It provides quality assurance and procedural advice to staff and stakeholders on the review of decision and Benefits Review Committee process.¹³ The delivery of the review function is the responsibility of Work and Income, StudyLink, Senior Services and Integrity Services.

The Client Advocacy and Review Team arranges the appointment and training of community representatives. Panel members receive regular information from this unit and BRCs can seek advice about procedural or jurisdiction issues from it.

There is no process for user feedback about the experience of BRCs. The research indicates that despite policy guidelines and strong support for BRCs, there is some variation in the operation of BRCs and panel members could benefit from further training.

Panel membership of BRCs

Work and Income staff members

Two members of each BRC panel are Work and Income staff who have had no prior involvement in the case. MSD guidelines for all panel

¹³ Performance monitoring of BRCs covers transparency of decisions, fair process (access to natural justice), and professionalism. Monthly performance monitoring is undertaken of Review of Decision and Benefits Review Committee reports. Statistical results are compiled and analysed, and feedback provided to relevant MSD staff and BRC community representative panel members in the form of individual feedback forms and general feedback and statistics (D. Anderson, personal communication, 8 August 2014).

members cover the importance of impartiality. The view to emerge from the interviews is, however, that Work and Income staff have conflicting roles as both MSD staff and BRC panel members. A BRC community representative panel member believed some MSD staff were “press-ganged” into being panel members of BRCs and felt that their dual roles could lead to a lack of impartiality.

There’s all sorts of ingrained beliefs I guess from having worked there. Some of them ... are actually scared of how they’re going to be perceived by their bosses or people who are above them in the Department if they were to make this or that decision. Some of them still think that [despite being] on the committee, that they’re representing the Department, that they are the Department rather than an independent fact finder.

A beneficiary advocate felt the culture of Work and Income strongly influenced the conduct of Work and Income panel members.

I mean you work for the Ministry, you’re sitting on that panel, what are the chances you can think outside of the square? It’s not that good. You get some that are quite good, they can take that Ministry hat off, but some of them just can’t. They work for the Ministry, end of story. They can’t see past that.

Community representatives

There are 82 community representatives on BRCs around the country. Research participants had mixed experience of the community representative panel members. Some participants identified having a person from the community as a real strength of the BRC process. A community advocate said:

There needs to be an independent there. Yeah. They’re not part of Work and Income. I think, well, Work and Income, some people that work for Work and Income become not so compassionate and understanding. It’s just a job. And it’s just blank. So I think to have an outsider come in and put a bit of fresh air in there, to say: well hold on a minute, this, this, and this. And: all right, yeah, ok. Definitely need to have an outsider.

Not all participants perceived the community representatives to be working well. One participant drew on his experience at a number of review hearings as both a beneficiary and a beneficiary advocate when he said:

90 BENEFIT REVIEW AND APPEAL PROCESSES

None of them [BRC community representative panel members] have been particularly forthcoming in any way, shape or form, either by contributing anything constructive to the debate or challenging either my position, or indeed, as I would expect, they have to challenge on my behalf some of the issues that were raised against Work and Income.

Independence and impartiality

The composition of BRCs means they are not fully independent of MSD and while members may be acting as objectively as possible, there can be perceived bias. This was highlighted by a BRC community representative panel member.

I think, you know, you're dreaming if you thought you could dress that up as independence. And I'm just talking about apparent bias. I mean there is apparent bias there, it's just as simple as that. There may not be actual bias, but there is from time to time. But there's certainly apparent bias. It's just a fact. You can't have two people who work for MSD, and exclusively apply MSD policy in their jobs, on a committee of three where the quorum's two and ask people to believe that it may not be biased.

Beneficiaries' feelings about independence varied, depending on how well the BRC listened and understood their case. Some beneficiaries from the outset felt the BRC would be biased in favour of Work and Income and their experience of the hearing itself confirmed their fears.

I felt that it would be: this is what WINZ wants, this is how WINZ works, this is what WINZ is going to do. I never once felt certain or safe enough to know that I was ok and they were going to help me. I didn't feel that there was any impartialness. They were very much, you know: we're here for WINZ, not you.

One beneficiary described the benefit review process as "rubber stamping", saying from the BRC hearings he had attended he felt the Work and Income panel members invariably took the side of Work and Income. He thought this was due to the BRC being an internal process, with a collegial atmosphere, and that in upholding Work and Income's decisions, panel members relied on the beneficiary having a right of appeal they could exercise if they were not happy. However, other beneficiaries' experience was that the panel was impartial. Factors mentioned included professionalism of panel members, the way the

panel questioned the parties, and having enough time allowed for the hearing. One beneficiary described the BRC panel as “absolutely neutral”.

They were definitely neutral. Which I wasn't sure what to expect because when you know that they've got two representatives from WINZ and then an outside member in a panel of three, you don't know what to expect. And in all honesty I probably thought, I would have thought, yeah: this is going to be a little bit swayed isn't it? But, no, the outside person [BRC community representative panel member] was very professional and the questions that all of them asked were good. And they weren't rushing anything.

Several participants expressed concern about having fraud investigators as panel members on BRCs reviewing debts established by their own investigation unit. In the view of a welfare law advisor, this raised a conflict of interest.

... in any other walk of legal life you'd assume that a small group of people operating in a specialist area talk about things between themselves. So the idea that this group of people haven't discussed at some stage or other informally about this case is pretty remote, pretty far-fetched. So if you're a beneficiary accused of fraud you're going to this specialist committee where at least one [panel] member there will be from the same unit as the person who's effectively prosecuting, sort of offering the case for the Ministry.

While it is accepted that BRCs are not independent of MSD, beneficiaries' experiences suggest that there is some variation in the extent to which BRC panels are perceived to act with impartiality.

Pre-hearing information for beneficiaries

The MSD information sheets *A Guide to Review Hearings* and *Reviews and Appeals* provide general information about the review process. However many beneficiaries felt there was a lack of information about what taking a benefit review involved. This made the process daunting for some people, who resorted to contacting other agencies like Citizens Advice Bureau for information about the process. One beneficiary said:

I didn't know anything about their protocols, or who's going to be at that meeting or anything like that, yeah. I didn't know.

92 BENEFIT REVIEW AND APPEAL PROCESSES

Another beneficiary felt that while Work and Income decision letters include information about reviewing a decision, MSD did not provide enough information about what that means.

I got a letter in the mail once they'd turned me down, the next day, stating that I could go through a review process if I didn't like their decision. And it seems that that's all they ever have at the bottom: if you do not like the decision, you are entitled to go through a review process. But it doesn't tell you how to go through the review process. It doesn't tell you how to apply for the process. It doesn't tell you any of that.

A BRC community representative panel member highlighted the difficulties some beneficiaries have, in understanding the written information provided by Work and Income before the hearing.

I think probably the main problem from my perspective is that they don't understand why a decision was made or how it was made. And most of the people who go to a review, they're faced with a whole lot of pages of legislative bumph which doesn't really tell them in a kind of succinct way how the decision's been made. Or, you know, legally why the Department claims that it was made and their decision was right.

Participants also reported some administrative errors prior to their BRC hearings, such as a representative not being notified of the hearing date, a beneficiary not being sent the report in advance of the hearing and postponements due to delays in sending information. One beneficiary experienced a number of hearing postponements and delays.

And we set it for August. And we had May which they postponed, and then we had June which we had to postpone because we didn't have the pertinent information, they hadn't sent it yet even though we'd requested it and then when they did they only sent half of it so we had to wait for the rest of it to come. And then July's one was postponed by them. And then August, got a very very nasty letter from them saying: this is when it's happening, if you do not attend then we are going to say that you owe this money and you will have no further chance of reviews. So, not my fault, so why send me a letter like that when it's not my fault?

Understandably, delays in the scheduling of hearings had an impact on people as another beneficiary explained:

Yes. It was, yeah, I think it was, I waited over five or six months before the meeting came up. They kept delaying it because they couldn't make it or things like that, to come and see me and do the decisions. ...Yeah, it was depressing. Because I could have done with my money.

2.3.3 Experiences of BRCs

Location of hearings

MSD guidelines for BRC coordinators and panel members cover the need to ensure that hearings are held in suitable rooms. While most BRC hearings are held at Work and Income or MSD offices, alternative venues can include marae, and community meeting rooms.

Participants made suggestions for improvement in the hearing environment, including not using a room located near the waiting area, and that it is big enough for the number of people present. For example, a beneficiary advocate found himself in a very cramped BRC hearing room and felt his client's privacy was compromised.

The meeting was held in a tiny room with a round table, there were six of us ... But apart from that, it was right next door to the waiting room. There was a big glass partition separating this office from the waiting room. ...I would suspect that [people in the waiting room] would hear... because there was some quite personal issues being discussed.

A community advocate linked the hearing environment with beneficiaries' overall feeling of discomfort about being in a Work and Income office, suggesting that it would be preferable to have hearings on "neutral ground".

Beneficiaries' experiences at BRC hearings

The experiences of beneficiaries at BRC hearings ranged from positive to negative and there were a number of issues identified. For example, delays in start times and panel members not being prepared for a hearing were felt to indicate a lack of professionalism.

The way hearings were conducted also had an impact on beneficiaries.

But it was just so cold. It was almost like it was – you're in interrogation, you were being interrogated for something that you hadn't actually done. That was how I felt... It was just cold and calculated. There was nothing

friendly about the whole process. They say that it is. So not. It's just not. ...it didn't seem like they [panel members] were really that interested, personally. I don't think they were, I think they just had this, their policy, they had the guideline, their policy that they follow, and that's all they were concerned about ... And it was like they didn't really want to be there, it was almost like they couldn't wait to get out of there, you know.

Participants reported instances where the conduct of MSD staff members at Benefits Review Committee hearings fell well short of professional standards. In one case, a MSD staff member, who had conducted a fraud investigation, and was presenting MSD's case to a BRC, was aggressive towards the beneficiary at the hearing. The beneficiary recalled:

But then [MSD's presenter] was attacking me through the whole [hearing]. Like he was trying to make me look really bad. And just through the whole thing, and not just over [the case]. But over other questions and stuff like that. And he was just really, really mean to me. And he broke me down into tears.

The intervention by the chairperson in this case highlighted the importance of the process being well managed to ensure the beneficiary receives a fair hearing.

But the head [chairperson] of it, he was absolutely lovely. He made me feel really comfortable. He made me, when he saw me cry, he comforted – he actually comforted me. When [MSD's presenter] started being a dick, he jumped on him instantly and said, 'you're not allowed to treat people like that, this is a review board, we're here to hear the facts, not your personal vendettas.' So it was really nice. It was a good process.

A number of beneficiaries reported instances when the BRC was well managed. One beneficiary, a young person, found the hearing environment very supportive and an important chance to discuss his case face-to-face. His application for Youth Payment had been declined and he had waited around eight months for a hearing. During that time he had no income. Not being able to talk to Work and Income in person about his case (because youth benefits are administered by a remote Work and Income unit) had made things very difficult. Finally the BRC hearing gave him the opportunity to be heard.

It was calm. It felt nice to be able to talk to people. And they were understanding Yeah, they were very helpful. We found out more information in that one day than we did the whole eight months, or however long it took.

Although the BRC ultimately overturned Work and Income's decision and granted a Youth Payment, the stress of the delays with having his review heard had taken their toll.

It's just given me a lot of worry. Because I was thinking about, throughout this whole time, while waiting for if I wasn't going to get it, then I would have just left school and then get a job so I can live here and pay for board ... Because I am doing the carpentry course as well, so I was thinking of just stopping that and just finding any job. That's all changed now, yeah.

Where a beneficiary attends their BRC hearing, an MSD or Work and Income staff member also attends to present MSD's case. Being in close proximity to the case manager was reported to be intimidating for some beneficiaries unless the situation was well managed by the committee. However the alternative, when the original decision maker did not attend, was also reported to be unsatisfactory.

And so you often don't get the same case manager who has made the decision. And when you do they are treated almost with kid gloves by the chairperson, and they're protected and nurtured in a way because many of them I think are quite anxious and don't like presenting a case.

Where the original decision maker did not attend the hearing, some beneficiaries reported that MSD representatives were ill-informed about the case they were presenting. This undermined the integrity of the review process and signalled that a beneficiary's review was not taken seriously. A community advocate who was supporting a beneficiary at a hearing saw it as not only a waste of everyone's time, but unsettling for the person she was supporting.

I found that the person who represented the MSD, they need to read up a lot more and realise what the case is about. Because when asked questions they can't answer it. So why put someone there, waste resources, when they don't know anything. So, not, not ok and not reassuring for the client. She's looking, or he's looking, going: what, you don't know what's going on? Why are you sitting at the table? So that needs to be seriously addressed.

BRC application of the rules of natural justice

MSD guidelines for panel members cover the importance of acting in accordance with the principles of natural justice. While many BRCs applied basic rules of natural justice, some participants reported examples where this was not the case. For example, one beneficiary encountered a problem while she was outside the hearing room waiting for her hearing to start.

The Board or Committee was in there and [MSD's presenter] was in there before I even got in there. So I was left sitting outside while [MSD's presenter] was in there talking... I felt that I should have been able to hear what he was saying. Now it was my review. So anything that he was saying was pertinent to me which I had every right to hear.

Another example of breaches of natural justice provided by participants was the failure by MSD to include relevant documents in papers prior to a BRC. For example, independent clinical assessments were not provided to a BRC because of privacy concerns, despite being essential for the panel's decision.

Attending hearings

A number of factors may influence a beneficiary's ability to attend a hearing. In addition to the lack of information about the hearing process and fear and uncertainty about what it may be like, cost, transport difficulties and a lack of confidence to appear in front of a panel of strangers were identified as reasons. Our research, however, identified that it is important for beneficiaries to attend their BRC hearing. From the BRC panel's perspective it could make a difference to how they assessed a situation. A community representative panel member told us:

...but it's not until you actually look at people and hear them forming and answering questions that you get the true picture. Often things that, the assumptions you've made from reading the papers are shown to be incorrect.

MSD provided data on attendees at BRC hearings including outcomes and whether the client and/or their representative attended or if the hearing proceeded based on papers only. The data showed the majority of cases that proceeded to BRC hearing had the original decision upheld

(82–84%) across the three financial years 2010/11 to 2012/13. A small proportion had the original decision varied so it was partially upheld (6–7%). Only 10–12% of cases had the decision overturned. Further analysis was done to see if having a representative made any difference to outcomes for the years 2010/11 and 2011/12. Table 3 provides data for 2010/11 and 2011/12 on attendees and the BRC outcomes, in summary:

- Nearly half of the hearings held are based on papers only with no client or representative attending.
- Clients are present without a representative for 28% of hearings and with a representative for 18% and 21% of hearings each year respectively.
- A very small proportion of hearings were held with only a client representative (4% and 5% of hearings each year respectively).

Comparing outcomes for each category of attendance:

- In hearings based on papers only over 90% of cases resulted in the decision being upheld.
- In hearings where the client appeared without representation about 80% of cases resulted in the decision being upheld.
- In hearings where a client and their representative attended 70% of cases were upheld in 2010/11 and 62% in 2011/12.
- In the small number of hearings with only the client representative in attendance 84% and 79% of cases resulted in the decision being upheld.

While a longer data series would be necessary to do a trend analysis, the data from 2010/11 and 2011/12 indicates that a client and their representative attending a hearing had the best chance of overturning a decision (20–24%) or getting part of the decision changed (9% and 13% partially upheld), compared to the other categories of attendance. Clients attending without representation appeared to do marginally better than just a client representative attending. The least chance a client has of getting a decision overturned is in BRC hearings based on papers only where only 4% and 5% were overturned with an equally small proportion resulting in variations to the decision. These findings suggest that the client attending their hearing is very important and even more so attending with representation.

Table 3: Attendees at BRC hearings and committee decisions

Attendees	Committee decision	2010/11	2011/12
Client	Not reviewable	-	1
	Overturned	55 (12%)	56 (15%)
	Partially upheld	36 (8%)	25 (7%)
	Upheld	361 (80%)	298 (78%)
	Total	452 (28%)	380 (28%)
Client and client representative	Not reviewable	1	1
	Overturned	59 (20%)	67 (24%)
	Partially upheld	26 (9%)	37 (13%)
	Upheld	205 (70%)	173 (62%)
	Total	291 (18%)	278 (21%)
Client representative	Not reviewable	-	-
	Overturned	8 (11%)	11 (15%)
	Partially upheld	3 (4%)	4 (5%)
	Upheld	60 (84%)	58 (80%)
	Total	71 (4%)	73 (5%)
Papers only	Not reviewable	1	1
	Overturned	41 (5%)	22 (4%)
	Partially upheld	30 (4%)	21 (3%)
	Upheld	706 (91%)	566 (93%)
	Total	778 (49%)	610 (46%)
Total cases considered by BRC		1592	1341

Source: Adapted from data provided by the Ministry of Social Development

Table 4: BRC Committee decisions 2010/11 to 2012/13

BRC hearing outcomes	2010/11	2011/12	2012/13
Cases proceeded to BRC hearing	1592	1341	1278
Confirmed original decision by MSD (upheld)	1332 (84%)	1095 (82%)	1058 (83%)
Varied original decision (partially upheld)	95 (6%)	87 (6%)	87(7%)
Revoked original decision (overturned)	163 (10%)	156 (12%)	132(10%)
Not reviewable	2	3	-

Source: Adapted from data provided by the Ministry of Social Development

2.3.4 Outcomes for beneficiaries

Of the cases that proceeded to a BRC, over 80% of Work and Income's decisions are upheld (agreed with). A small proportion of cases is partly upheld, and between 10 and 12% of cases are overturned, as summarised in Table 4.

The process itself can be very difficult for beneficiaries. Despite this, some participants felt empowered by taking a review and encouraged others to review benefit decisions. For these participants, the review offered the opportunity to challenge the power imbalance between them and Work and Income. One beneficiary explained the impact of reviewing a decision.

Being better informed now, knowing what my entitlements are to go through a review, yeah, I'd do it again in a heartbeat and I would tell everybody else to go for it.

Another beneficiary thought that most people would gain confidence from taking a review, describing it as "not as bad as walking into Work and Income".

2.3.5 Advocacy and legal support

MSD provides contact details for agencies beneficiaries can go to for free, independent legal/benefit advice. This is available on MSD websites and

should also sent out when an application for review is made. However some participants reported that they were unaware of this.

Legal needs

We identified in Part 1 that the reasons for benefit decisions are not always communicated well to beneficiaries. Without legal help to prepare for a benefit review, it is very difficult for beneficiaries to understand the law that applies to their case. In one BRC community representative panel member's experience:

Very, very seldom does anybody ever, when they're on their own and they haven't got an advocate or something, very seldom do they ever quote any passages of legislation or anything like that. They're all focused on the merits of what's happened to them, or the injustices of it.

However BRC decisions are made on the legislation and not the perceived fairness of the case. One beneficiary linked the importance of legal help to the fact that legislation is the basis for BRC decisions.

You'd definitely go in feeling confident with them. Because they have to go with what's in legislation. There's no emotions involved. It's not really grey... to me it looks like there's not so much room for the grey area. This is the legislation and you follow it, full stop.

As noted in our analysis above, having advocacy or legal help makes a difference to the outcome of the benefit review process. Another specific legal need identified was information about the review process itself.

When Work and Income declined one beneficiary's application for an emergency Special Needs Grant, the beneficiary felt she needed a lawyer to challenge Work and Income's decision, despite having support from Women's Refuge, the Police and her family. This came at a cost, as legal aid is not available for benefit reviews.

I had to find my own legal representation. They very much – I think they were hoping that with the review I would just give up. But I couldn't for a starter. They didn't give you anything, they didn't help in any way to whether, you know, you could have a lawyer there. They didn't tell us we were allowed a lawyer. They didn't tell us that we were allowed to have anybody with us. It was very much: you're on your own; if you can find out any information about what you're allowed and what you're not allowed in the review, then good on you, good luck.

For this beneficiary, having a lawyer to represent her at the BRC was critical. Her lawyer's knowledge of the Social Security Act, their practical knowledge of what would happen in the review, and clarity about what each would say in the hearing, made all the difference. "If I hadn't had my lawyer I would have been screwed."

A young person interviewed reflected on the impact of having a community lawyer help her prepare for the review, and represent her at the hearing.

If I didn't have her with me I probably would not have had my benefit. Because I wouldn't have picked out the things that she found. And I would have probably been really emotional in that tribunal because if I'd been there by myself, and she [Work and Income's representative at the hearing] would have been like saying what she would have been saying, like pretty much shutting me down as soon as I would say anything, then I would have just been in tears.

Having advice and help not only assisted beneficiaries to present their cases at BRCs, a community representative panel member on BRCs reported that it was helpful for the Committee as well. Having an advocate or lawyer could help structure a hearing and clarify the outcome sought by the beneficiary.

Legal needs with BRC reviews of decisions arising from fraud investigations

In Section 3 we examine the legal needs of beneficiaries in relation to fraud investigations. Here we include a brief discussion about the review of decisions arising from fraud investigations by Benefits Review Committees. Such decisions include the establishment of debts, the imposition of a financial penalty, and decisions to cancel benefits.

The nature of BRC cases arising from fraud investigations means that access to legal help is particularly important. The imbalance of power, between MSD and the fraud investigation unit, and the beneficiary, which is discussed in Section 3, may make it particularly challenging for a beneficiary to fairly participate in a BRC hearing about decisions made as a result of a fraud investigation. The complexity of the law is a further factor making legal representation essential. For example, fraud overpayments may be established when a person has received a

single person benefit but is alleged to be in a relationship like marriage. The legal test for marriage relationships has developed through court decisions and is not easily accessible to a non-lawyer or beneficiary advocate. Without legal advice, many beneficiaries will not know if they have a legal basis on which to challenge a debt.

Fraud investigations can result in decisions to create substantial overpayments and there are serious implications of beneficiaries having no access to legal advice or representation at a BRC hearing where a large overpayment is being reviewed. Debts arising from fraud investigations can also involve complex legal issues relating to the relationship between criminal and civil outcomes of investigations, which are not easily accessible to beneficiaries. An unrepresented beneficiary is extremely unlikely to be able to understand and effectively mount legal arguments in these kinds of cases.

2.3.6 BRCs: Issues and challenges

Policy interpretations of legislation

A key theme to emerge from this research is the extent to which Work and Income policy, as opposed to legislation, is relied on when deciding benefit entitlements.¹⁴ A Benefits Review Committee is required to consider a review against legislation, however this distinction is not always well understood by panel members. A BRC community representative panel member explained:

And so they've [MSD staff members] grown up with policy, and so then they believe – policy to them is reality. And so then you have this constant fight trying to say, 'well hang on, that's not necessarily the law, that's what the Department says but it's not necessarily the law.' So that is frustrating.

¹⁴ MSD resources for staff when making and reconsidering decisions include MAP (Manuals and Procedures), support from onsite trainers and managers, Helpline, Legal Services, Client Advocacy Review Team and My Lean (online training on legislation and reviews and appeals). As part of the performance monitoring process, MSD aims to check the correct legislation has been applied. (D. Anderson, personal communication, 8 August 2014)

A welfare law advisor reinforced this view, saying that the papers provided by MSD to beneficiaries about benefit reviews may have blurred MSD policy and welfare law.

Quite often the initial letter from the Ministry will set out a proposition as if it's the law when in fact it's the Ministry's policy. So a person will sometimes go into the hearing with a misconception as to what the law actually says.

Without advocacy or legal help, many beneficiaries taking benefit review cases will not understand this distinction and the potential impact on their case.

Hearing procedure

The *MSD Review of Decision Resource Kit* sets out recommended BRC hearing procedure, however there is some variation in how panels implement these guidelines and this leads to uncertainty for people attending BRC hearings. A community lawyer contrasted ACC review hearings, where the process is clear and offers the opportunity for each party to present their information in an uninterrupted fashion.

Prior to attending the ACC review process you're informed of how the meeting will be structured. So you're aware that the applicant will come in, that they will get to present their case, then the department will have the opportunity to respond and then you will get a right of reply. You understand the reviewer will be able to ask both parties additional questions and at that at the end of the hearing the reviewer will go away and come back with a decision at a later time.

2.3.7 Summary

Like Medical Appeals Boards, the Benefits Review Committee process is an important forum for challenging Work and Income and Integrity Services (fraud investigation) decisions. BRC decisions can be appealed to the Social Security Appeal Authority, enabling a level of external scrutiny of BRC decision making.

BRCs are well supported and oversight of their activities is undertaken by the Client Advocacy and Review Team at MSD's national office. While acknowledging there are limitations with the BRC process, in particular

that it is not independent of MSD, the research identified having an independent community representative on each BRC and having a right of appeal against BRC decisions as strengths of the process.

A theme to emerge from interviews is the low level of knowledge about the benefit review process. Many beneficiaries reported not knowing what taking a review involved, how to prepare for it, or how to present a case to a BRC. There appears to be a need for improved information on what to expect and how to prepare for a BRC hearing. For example prominently displaying information about the review process in all Work and Income waiting rooms, in addition to more comprehensive information being supplied to people who apply for a review.

Experiences of BRC hearings themselves were mixed. While the Benefits Review Committee process is designed to be informal and accessible, beneficiaries' experiences suggest that attending a hearing can be very daunting. Suggested improvements included holding hearings at rooms independent of Work and Income, or using more suitable hearing rooms at site offices and improving training for panel members. The most significant factor that appeared to influence a beneficiary's experience of a BRC hearing was the perceived objectivity of the panel members. Some beneficiaries and community agency workers reported positive experiences at BRCs, saying that in their experience BRC panels acted impartially. However others had a negative experience. Participants who had a poor experience at a BRC largely put this down to a perception of bias and unprofessional conduct by panel members or MSD presenters.

Inconsistency in operation of Benefits Review Committees means that vulnerable beneficiaries who may not have the confidence or experience needed to present their case in the BRC environment can be disadvantaged. Young people were identified in the research as particularly vulnerable when challenging a decision through a BRC.

Beneficiaries have particular legal needs when taking a benefit review. These needs include: legal information (the right to review and what taking a review involves), advice about the law that covers their case, and help to prepare for their review. With help and support before the hearing, some beneficiaries are able to represent themselves at a Benefits Review Committee hearing. For people who do not have this capacity, representation is a necessity.

Representation at BRC hearings is also essential for decisions resulting from fraud investigations. In addition to the potential impact of an imbalance of power and resources between MSD and the beneficiary, these cases can involve substantial evidence, complex legal issues, and large amounts of money in dispute.

Implications for CLCs

As legal aid is not available for BRC hearings community law centre lawyers are best placed to fill the identified gap in meeting representation needs for BRC hearings. Particular consideration could be given to informing people who wish to challenge a decision arising from a fraud investigation of the services community law centres can provide in the way of advice, assistance and representation.

In response to the identified lack of information about what taking a benefit review involves, CLCs could produce information resources for beneficiaries and community advocates.

2.4 Social Security Appeal Authority

2.4.1 Introduction

The SSAA is an independent judicial tribunal which hears appeals against BRC decisions and decisions made by MSD's Chief Executive in person.

This chapter examines beneficiaries' experiences of bringing appeals to the SSAA, in order to understand their legal needs.

Three people were interviewed about their experiences appealing to the Social Security Appeal Authority and attending Authority hearings. These were two beneficiaries, and one person who acted on behalf of a beneficiary. One person had taken more than one appeal. Two people appeared at the Authority hearing without a representative (although one had had help from a community lawyer who wrote submissions for the case) and one was represented (by a beneficiary advocate).

Eight other participants with experience of the SSAA were interviewed. These were a member of the SSAA, a welfare law advisor, two beneficiary advocates, a private practice lawyer, a community lawyer and two MSD staff. Written information was provided by the Ministry of Justice and the Ministry of Social Development.

Key findings

- The SSAA provides independent scrutiny of decision making in the benefit system because it is fully independent of MSD and its decisions are available to the public.
- The length of time taken to finalise appeals to the Social Security Appeals Authority suggests that beneficiaries' access to justice could be improved.
- The SSAA's court-like environment and MSD having representation by an experienced appeals officer or lawyer, means that in order to fairly participate in the SSAA legal representation is imperative for many beneficiaries. Over a three-year period, less than a third of cases taken to the SSAA had representation, and beneficiary advocates provided the majority of that representation.
- Despite legal aid being available, there are significant obstacles to getting legal representation for the SSAA.

Table 5: Appeals lodged to the SSAA and withdrawn before hearing from 2010/11 – 2012/13

Year	Appeals lodged	Appeals withdrawn
2010/11	192	47 (24%)
2011/12	142	83 (58%)
2012/13	155	45 (29%)

Source: Adapted from data provided by the Ministry of Justice

Statistical information provided by MOJ (Table 5) for the financial years 2010/11 to 2012/13 shows the number of appeals lodged at the SSAA and the number withdrawn before hearing. The figures show the SSAA receives a relatively small number of appeals when considering the majority of BRC decisions are upheld. In 2011/12 a particularly high proportion of appeals (58%) were withdrawn compared to 24% and 29% in the other years. A longer time series would be required to assess whether this was unusual. MOJ does not hold data on the reasons for withdrawal, including the numbers that were resolved by the Ministry of Social Development. However, feedback from the Authority was that almost all appeals withdrawn were due to settlement prior to the hearing. We suggest this is an area for further research.

Ministry of Justice figures for the same three year period show some variation in the outcomes at the SSAA, with 15% (14), 31% (23) and 23% (22) of appeals allowed each year respectively, and 85% (78), 69% (52) and 77% (75) not allowed.

2.4.2 SSAA procedures and administration

Oversight of the SSAA

SSAA appeals are administered by the Ministry of Justice's Wellington office of the Tribunals Unit. This involves SSAA case management, including receiving appeal applications, arranging hearings and communicating with parties about hearings. Information provided by MOJ emphasised that it performs its role with impartiality and is not

Snapshot: The Social Security Appeal Authority

What is it: An independent tribunal based in Wellington.

Established under: Section 12A of the Social Security Act 1964.

Membership: The Authority consists of a chairperson (lawyer) and two lay members.

Appointment process: Appointments are made by the Governor General on recommendation of Minister of Social Development (in consultation with the Minister of Justice). Payment is made under the Cabinet Fees Framework.

Responsibility for SSAA: Ministry of Justice, Tribunals Division.

In jurisdiction: Appeals against Benefits Review Committee decisions and decisions made in person by the MSD Chief Executive.

Outside jurisdiction: No authority to hear appeals against decisions of a Medical Appeals Board.

Powers: Confirm (agree with), modify (partly change) or reverse (disagree with and overturn) the decision appealed against.

How to apply: A beneficiary (or other person) affected by a BRC decision or Chief Executive's decision can apply for an appeal using a *Notice of Appeal* form or letter.

Procedure on appeal: MoJ arranges a hearing. MSD prepares an appeal report (12K report).

Location of hearings: Primarily in Auckland, Wellington and Christchurch and in other regions where required. Hearings can also be conducted via videoconference.

Legal aid and costs. Legal aid is available for appeals to the SSAA. Where an appeal is successful, the SSAA can order MSD pay the appellant's costs in bringing the appeal. Costs can only be awarded against the beneficiary or person taking the appeal, if the Authority decides there were not reasonable grounds for lodging an appeal.

The Authority can also require MSD to pay part or all of the costs incurred by the SSAA.

Where the beneficiary or other person appealing appears at a SSAA hearing, MSD must pay their actual and reasonable travelling and accommodation expenses. Costs of representatives or witnesses to travel to hearings are not paid.

Hearing process: The case is re-heard. The SSAA has broad powers to hear evidence. Hearings are held in private, although the Authority can decide to have a public hearing (providing that the interests of the parties and other people involved will not be adversely affected).

Decisions: The SSAA usually has three members, although the SSAA can sit with only two members present. The decision of a majority is the decision of the Authority, and where the members are divided in opinion, the chairperson's decision will be the decision of the Authority.

Decisions are given in writing. Decisions are published with names removed and are available online through the New Zealand Legal Information Institute.

Performance standards: None.

Right of appeal: Both MSD and the beneficiary have the right to appeal a SSAA decision to the High Court on questions of law (where they believe the Authority got the law wrong).

Public reporting of SSAA activities: None

able to advocate for parties or provide advice, beyond communicating procedural matters.

Through its Appeals Team, MSD monitors trends and follow-up action required as a result of SSAA decisions. A MSD appeals committee discusses implications of appeal decisions, as a MSD staff member explained:

We have an appeals committee here within the Ministry, that we get together every time the decisions are released from the Appeal Authority, and we will go through them. So we have representatives from legal, from policy, from all the service lines... and we look at the decisions to make sure that: are our guidelines up to how they should be; is there any criticism; is there any service related issues here? And are we going to seek leave to lodge an appeal ourselves? ... Or are we going to change any of our processes based on those decisions?

For example the Authority provided feedback that Work and Income clients were not receiving a breakdown of alleged debts, making it

difficult for beneficiaries to understand the basis for the debt and whether they had grounds to dispute it.

Members of the SSAA are recruited through a process of nomination via government agencies and the Law Society. Panel members are appointed by the Governor General, on the recommendation of the Minister of Social Development (in consultation with the Minister of Justice). The Social Security Act does not set out criteria for appointment to the Authority, although MSD's policy specifies that it is highly desirable that the chairperson and deputy chairperson are qualified lawyers with experience of litigation and statutory decision making processes. In contrast, interpreting legislation is not listed as an essential skill for lay members: the key criteria are their connection with, and ability to reflect, the interests of the broader community (E.Garland, personal communication, August 1, 2013).

The Authority is fully independent of MSD and provides external scrutiny of MSD decision making because its decisions are published.¹⁵

Location and timeliness of hearings

SSAA hearings are held primarily in Auckland, Christchurch or Wellington but hearings are held in other regions when required. In the last year hearings have been scheduled in Blenheim, New Plymouth, Hamilton and Dunedin. MSD pays travel costs to enable the beneficiary to attend the hearing, but does not meet the costs of their lawyer or advocate, or witnesses to attend.

¹⁵ For a recent SSAA decision that illustrates the value of external scrutiny of the Ministry's decision making processes, see NZSSAA11 [2013]. The case involved an appeal application by a mother, against the Ministry's decision to grant Unsupported Child Benefit for her daughter's care. In allowing the appeal, the Authority took the unusual step of recommending MSD make an ex-gratia payment to her (a payment based on a moral rather than a legal duty), due to its unsatisfactory performance. The Authority stated MSD had failed to properly investigate the application for Unsupported Child's Benefit, and concluded it had wrongly granted it. At issue was a record made by a Ministry staff member about the family's circumstances that was "untrue and possibly even false" and the Authority recommended the Chief Executive investigate the circumstances in which this UCB was granted, stating: "This was not a simple case of a staff member making an error in the assessment of eligibility". The Authority also criticised MSD for reducing the appellant's benefit without notice. Further, once the appeal had been lodged, MSD took more than five months to file the 12K (appeal) report, and when it did so, failed to address the central issue.

There is no time standard for completion of SSAA cases. Data supplied by the Ministry of Justice recorded the average time (number of calendar days) taken to complete appeals from lodgement to the issue of the decision as 214 days in 2010/11; 314 days in 2011/12; and 230 days in 2012/13. However information provided by the Authority points to a number of factors that may contribute to the time taken to complete appeals. The figures supplied include situations beyond the issuing of a decision (for example where appellants lodge a notice of appeal to the High Court and a case stated must be prepared – in such situations a case remains open although the Authority’s decision has been issued). The length of time may also be influenced by adjournments where a case involves a prosecution, cases relating to the exercise of corrective power under section 80AA of the Social Security Act await reconsideration by MSD, delays in MSD lodging the 12K appeals report, or where an adjournment is sought by either party.

When an appeal is lodged, a hearing is allocated. This is usually 12–14 weeks from the date the appeal is filed. In most cases a decision is issued in the six weeks following the hearing.

The length of time it can take to have an appeal determined may be very difficult for beneficiaries struggling on low incomes, particularly if the dispute relates to their main source of income. Recognising the need for speedy resolution where entitlement to a main benefit is at issue, the Authority has on occasion issued an oral decision at the conclusion of the hearing and provided reasons for the decision at a later date.

2.4.3 Beneficiaries’ experiences of SSAA

Pre-hearing information for beneficiaries

When sending BRC decisions to beneficiaries, MSD letters inform people of the right to appeal a decision to the SSAA, the time limit for applying, contact details for the SSAA and a link to the MoJ website for an application form.

The MoJ fact sheet *A Guide to Making an Appeal* clearly sets out information about appealing to the SSAA and the hearing procedure so that beneficiaries and their representatives know what to expect. The beneficiaries we interviewed who had taken cases to SSAA did not,

however, feel well informed prior to attending the hearing. While MoJ provides good information about the appeal process, interviews with beneficiaries who had taken an appeal felt they needed more practical information about how to prepare their case and how to present it to the SSAA.

Once an application for appeal has been lodged, MSD prepares an appeal report setting out the case and including all relevant documents used to make the decision. This report is known as the 12K report and an appellant should receive a copy prior to the appeal. One Authority member interviewed recalled instances where the 12K report may have been misleading to beneficiaries, where MSD's arguments were based on their policy, which was MSD's interpretation of the law, rather than the law itself. This resonates with Sections 1.3.4 and 2.3.6 of our report, in which we highlighted that both day-to-day decisions at Work and Income and decisions at BRCs may be made using internal MSD policy rather than directly referring to the Social Security Act itself.

Participation at hearings

Although MoJ was unable to supply statistics showing the number of appellants who attend SSAA hearings, a member of the Authority reported that 90% of appellants attend the hearing. In her opinion it definitely made an impact, and she noted it was rare for someone to succeed on appeal without having attended the hearing.

Environment of SSAA hearings

The Authority is a judicial tribunal and hearings are held in a courtroom where the environment is a lot more formal than a BRC or MAB hearing. One Authority member regards this as a strength, arguing that the formality of the hearing reflects the seriousness of the appeal. The Authority's inquisitorial process, and the time that is allowed for self-represented appellants to express their views, is evidence of an environment that is appropriately formal while being more relaxed than a court. However a beneficiary who represented himself at the SSAA felt that the environment could be daunting.

You know, elevated bench with a chairperson sitting in the middle, and the two [members] on either side, and the formalities and rituals around it, you know: all rise, please stand, you know, walk in.

Feedback about experience using SSAA

Appellants are also not currently provided with a process for providing feedback about their experience at the SSAA.¹⁶ Providing an avenue for feedback could identify improvements to the SSAA process.

2.4.4 Advocacy and legal support

Beneficiaries have specific legal needs when preparing for a SSAA hearing. This includes having information about what to expect at the Appeal Authority hearing, understanding the relevant legislation and case law, analysing MSD's appeal report, preparing legal arguments, organising evidence to present, and preparing written submissions. Effectively presenting an appeal to the SSAA requires a level of knowledge of legal processes as well as of the law that applies to the case. While the information provided by MoJ about appealing to the SSAA emphasises the importance of presenting a case clearly, an Appeal Authority member reported that there is a great deal of variation in the level of preparedness, with some appellants arriving unprepared.

Although the Authority is an independent judicial tribunal, feedback from some beneficiaries, advocates and lawyers interviewed was there can be an imbalance of power in the hearing for unrepresented beneficiaries, with MSD represented in most cases by an experienced appeals officer, or MSD lawyer. A private practice lawyer explained:

Well I mean it's [SSAA hearing] even more legal [than other benefit review and appeal processes]. They really, really have to have some type of assistance. And I think there's an imbalance, from my observation, you've got the MSD person there who the tribunal appears to defer to in terms of expert departmental knowledge.

¹⁶ The Authority is outside the jurisdiction of the Judicial Conduct Commission, which is limited to judges' conduct. MoJ advised complaints about SSAA members' conduct are dealt with by the Authority's chairperson; if a complaint concerns a chairperson it is referred to the Minister responsible for the Authority (J. Marjoribanks, personal communication, July 31, 2013).

A welfare law advisor reiterated this:

The level of formality, it's an inquisitorial process, which means it's not bound by any of the preceding decision making. Which on one level would seem user-friendly, but if you're a beneficiary appearing for yourself, against a Departmental lawyer who will be able to quote chapter and verse, of whatever the lawyer's asking you, and the Chairperson who's asking you questions at the same time, you're probably going to feel pretty much outflanked.

While a beneficiary described the positive impact of having an advocate represent him at the SSAA, a beneficiary advocate expressed the view there could be advantages in being represented by a lawyer, due to familiarity with the court environment, experience presenting evidence and adversarial experience.

Ministry of Justice statistics indicate there is variation in the extent to which beneficiaries are represented at the Social Security Appeal Authority.¹⁷ While in the 2012/13 and 2011/12 years respectively 38 and 40 beneficiaries were represented of 97 and 75 cases decided, in 2010/11 only 25 beneficiaries were represented of 92 cases decided.¹⁸ Low numbers of representatives appearing at hearings was also indicated by the Authority member interviewed, who estimated 80% of people were not represented at the Authority. Figures provided for SSAA cases for three calendar years (the period January 2010 – December 2013) showed that a total of 339 SSAA decisions were issued, in respect of 329 cases (more than one decision was issued in some cases). Of these cases, 102 (31%) of appellants were represented by a lawyer or beneficiary advocate. In 19 cases people were represented by lawyers and in 70 cases by beneficiary advocates. The beneficiary advocates who appeared at SSAA hearings were generally Wellington-based. Another 14 appellants were represented at a SSAA hearing by a family member (M. Wallace, personal communication, 5 May, 2014).

17 MoJ figures about representation refer to appellants who at some point during the life of their appeal had representation (not necessarily at the SSAA hearing itself).

18 While numbers of appeals lodged in a given year and the numbers that were withdrawn were available, the actual number of cases heard would vary in any given year (due to the fact that some cases were lodged in one financial year but not heard until the next).

Legal aid is available for appeals to the ssAA.¹⁹ In deciding whether to grant civil legal aid, MOJ considers a person's income and assets, the nature of proceedings, prospects of success and whether the proceedings are in the public interest.²⁰ The Ministry of Justice's *Guide to Making an Appeal [to the ssAA]* includes information about possible entitlement to a grant of legal aid to help with legal costs, but legal aid is not mentioned in MSD letters to beneficiaries advising them of BRC decisions and the right to appeal to the ssAA, nor in MOJ letters to people who have lodged an appeal.

Very few applications are made for legal aid for appeals to the ssAA. For each of the last three financial years (July 2010 – June 2013) legal aid applications for the ssAA numbered only 7, 8 and 6 respectively, and the number of legal aid grants approved were 2, 3 and 3 respectively (N. Cooper, personal communication, August 3, 2013). Although the reasons for these low numbers are not known, factors that may contribute include not knowing about the availability of legal aid and not being able to find a lawyer to represent them on legal aid.

The Social Security Appeals Tribunal in Australia has a pilot legal advice scheme underway to “assess the impact that the provision of early legal advice to self-represented applicants can have on the efficiency of proceedings before the Tribunal” (L. Anderson, personal communication, August 12, 2013). Under this scheme the Tribunal identifies complex matters and/or vulnerable applicants who do not have a representative and offers an appointment with a legal aid provider. The interview takes place at the Tribunal's premises and the Tribunal is advised of procedural outcomes only, such as that the case is ready to proceed for a hearing or appeal withdrawn. Such a scheme is a model that could potentially be adopted for New Zealand's Social Security Appeal Authority, where it appears a high proportion of appellants are not represented. Importantly, such a scheme could result in the ssAA operating as a gateway to legal help for vulnerable beneficiaries.

Appeals against decisions of the ssAA may be made on questions of law only. These appeals are made to the High Court, where legal representation would be required by most beneficiaries, and for which legal aid is available.

¹⁹ Section 7 (1)(e)(v) Legal Services Act 2011.

²⁰ Section 10(6)(e) Legal Services Act 2011.

2.4.5 SSAA: Issues and challenges

Imbalance of power in the hearing

A key issue to emerge in relation to the SSAA process is the potential power imbalance in the hearings when beneficiaries have not had access to legal advice and representation. To improve access to information about appeals, the information sheet *A Guide to Making an Appeal* could be included with MSD letters to beneficiaries communicating BRC decisions and advising of the right of appeal. Likewise information on where to get legal help and advocacy for appeals and the availability of legal aid could also be included with all BRC decision letters. Such information might influence a person's decision to lodge an appeal.

The inquisitorial nature of the Authority's process

The SSAA's process is inquisitorial, meaning that it re-examines all the facts of a case, and it is not limited to the matters raised in the appeal. As a result, the Authority can make determinations on matters that were not in dispute between the parties. A member of the Authority expressed the view that it would be entirely inappropriate for the Authority to grant an entitlement where in its view all of the eligibility criteria had not been met; where an issue arises during a hearing that appellants want further time to produce evidence about, this is generally given.

Several participants explained the impact the Authority's inquisitorial process could have on clients.

That's very unfair to clients because they're having to suddenly start defending things that were never actually part of the original decision. (Beneficiary advocate)

I just think the Appeal Authority should be limited to the issues that are still in dispute between the parties. If the Ministry says we accept that, we accept that and we accept that, but we don't accept this, then that's what the appeal should be about. The Authority shouldn't be able to go back to something that's already been settled between the parties and say, well actually, we think this. (Beneficiary advocate)

We appealed against the overpayment that the Department had [created], and the Appeal Authority trebled it. (Welfare law advisor)

It is therefore important that beneficiaries who are appealing to the Social Security Appeal Authority understand the Authority's inquisitorial process and that the Authority's determination may address issues that were not in dispute between the parties, potentially worsening an appellant's position. An important role for lawyers and advocates is therefore to address the merits of a client's case and to advise clients of the possible outcomes from taking the appeal.

2.4.6 Summary

The ssaa is an important avenue for beneficiaries to have their entitlements examined because it provides independent scrutiny of decision making by Work and Income, MSD and BRCS. Having ssaa decisions available to the public means there is some transparency of decision making. Accountability and transparency would be enhanced by the introduction of an annual report for the ssaa that includes performance measures and outcomes.

The research identified a number of strengths of the ssaa process, including the comprehensive appeal report MSD is required to prepare for the ssaa, which in some cases results in appeals being settled by MSD before an Appeal Authority hearing. Further strengths of the process highlighted by a member of the Authority were its independence, members' knowledge about welfare law, and the Authority's ability to spend longer hearing a case than the amount of time an original decision maker had with a client.

The sample of interviewees for this section was small and our findings highlight a need for further research in this area. The key theme to emerge in relation to the ssaa is that for many beneficiaries, representation is imperative. There is a distinct imbalance of power between MSD (which is represented by an experienced appeals officer or lawyer) and unrepresented beneficiaries who do not have the capacity to represent themselves effectively at an Authority hearing. However the research indicates that in less than a third of cases, appellants are represented by a lawyer or beneficiary advocate. Much of the representation that is done is undertaken by beneficiary advocates, signalling there is little involvement of lawyers in representing beneficiaries at the ssaa.

While legal aid is available for ssAA appeals, evidence shows it is rarely applied for. Promotion of the option of legal aid and providing information about private practice lawyers with experience and expertise in welfare law may improve beneficiaries' access to legal representation.

The average time taken to finalise ssAA cases indicates the need to improve the timeliness of hearings particularly for those beneficiaries' who are dependent on benefits as their main source of income. Increasing the number of panel members, holding more hearings in regions and increasing the use of videoconferencing may help reduce delays. Access to hearings could be improved by the payment of costs for witnesses, advocates and lawyers to travel to attend the hearing.

Finally, a process for ssAA user feedback could be established.

Implications for CLCs

Given the low levels of representation at the ssAA, the extent of representation that is being provided by beneficiary advocates, and apparent barriers accessing legal aid, CLCs could prioritise ssAA representation. The areas the ssAA primarily sits (Auckland, Wellington and Christchurch) raises the possibility of ssAA representation specialists being available in CLCs located in those areas (particularly as MSD does not pay the travel and associated costs for representatives to attend ssAA hearings). CLCs may need to consider pathways to their services for beneficiaries who are appealing to the ssAA and to building specialist capacity in welfare law in order to effectively represent appellants. CLCs may also assist with appeals against decisions of the ssAA to the High Court, whether through representation or supporting beneficiaries to access legal aid and private practice legal representation.

2.5 Conclusion

The benefit system incorporates rights of review and appeal against benefit decisions made by Work and Income and MSD. However, the research showed there were a number of barriers to exercising these rights. A lack of information about reviews and appeals was a significant factor, with some beneficiaries not knowing they had a right of review, and others feeling they had little information about what was involved.

Beneficiaries identified other barriers such as a lack of confidence, a lack of support and not having the energy to pursue a dispute, difficulty finding representation and fear of the implications of reviewing decisions. Limited ethnicity data that was available in relation to BRCs suggest some cultural groups' participation in reviews is at lower levels than the rates of benefit receipt. Our research emphasises the importance of barriers to accessing review and appeal processes being understood and addressed.

In respect of the three benefit review and appeal processes themselves, this research has demonstrated there are significant differences in areas such as panel membership, independence, administration, conduct of hearings, right of appeal and the availability of statistics about their work. However, some common themes emerged across all of the processes. A lack of information about reviews and appeals was a concern for participants. The information that is provided to beneficiaries about these legal processes could be improved, particularly advice on how to prepare for a review or appeal and what the hearing process involves. It also appears that a relatively high proportion of review and appeal applications are withdrawn prior to the hearing, and the reasons for this are not well understood. Finally, the importance of attending hearings was emphasised. There was evidence of low levels of attendance at BRC hearings, with statistics showing that almost half of BRC cases are decided on papers only. Statistics about attendance at MAB and SSAA hearings were not available, however several participants thought that attendance at MAB and SSAA hearings was higher. Attending the hearing was regarded as an important factor in having a benefit dispute fairly considered, and can make a difference to the outcome.

Representation by lawyers or beneficiary advocates was seen as the most significant legal need and while limited data was available about the extent of representation, levels of representation appear to be low. Representation at benefit review and appeal hearings tends to be undertaken by beneficiary advocates. Participants reported there was a gap, however, between the need for representation at MABS, BRCs and the SSAA and services available to meet that need. While improvements can be made with the timing and content of information about legal help to beneficiaries, other pathways for access to legal help for unrepresented

beneficiaries could be considered (such as the pilot scheme in Australia to offer unrepresented appellants legal advice). The research supports CLCs prioritising representation of beneficiaries in the area of benefit reviews and appeals.

Despite the difficulties some beneficiaries faced taking reviews and appeals, many of the beneficiaries interviewed found it to be an empowering experience, and one they would recommend to others. The opportunity to meet face-to-face with the panel members was seen by some as a turning point in the resolution of long standing disputes with Work and Income. It also helped address the imbalance of power between beneficiaries and MSD.

Improvements to the administration of reviews and appeals could be made by MSD and MOJ such as establishing mechanisms for user feedback. Transparency of the activities of the review and appeal processes would be improved by instituting statistical reporting in a consistent format across the three review and appeal processes.

PART 3 **Benefit fraud**

3.1 Introduction

MSD defines fraud as having occurred following a decision by their Fraud Investigation Unit to prosecute (Ministry of Social Development, 2011). Investigations are initiated when MSD suspects an individual of collecting a welfare benefit that they are not legally entitled to. During the 2010/2011 financial year, 16,266 fraud investigations were carried out. Marriage-type relationship cases, where an individual was suspected of living in a relationship in the nature of marriage while receiving a benefit, made up nearly half (47%) of all cases investigated by MSD. Over a third (35%) of cases involved people investigated for receiving a benefit while working (Ministry of Social Development, 2011). Investigations of the latter are relatively straightforward and rely largely upon data matching

Key findings

- Quality legal advice and representation in the early stages of fraud investigations is critical.
- The power imbalance between MSD and beneficiaries influences beneficiaries' decision making during fraud investigations, and in the absence of legal advice, beneficiaries feel compelled to comply with MSD sanctions.
- Beneficiaries are not adequately informed of their right to seek legal advice.
- Beneficiaries need quality representation in relation to both criminal offences and debts created as a result of fraud investigations. While legal aid appears to meet legal need in relation to criminal offences, lawyers' poor knowledge of welfare law compromises quality services.
- While fraud investigators' decisions to create a debt and decisions about benefit entitlement can be reviewed at a BRC, legal aid is not available and beneficiaries face difficulties accessing representation for these cases. Such cases were time consuming and expensive, because they took considerably longer to prepare for than other types of cases.

of employer, Inland Revenue or bank records. Marriage-type relationship investigations are usually longer and more complex as information is gathered from many different sources, including interviews.

Despite current political discourse emphasising the extent of welfare fraud, the figures suggest that it is not widespread in New Zealand. Analysis of MSD published data for 2010/11 indicates that less than 4% of investigations lead to prosecutions for fraud. This amounts to 0.1% of the total number of people receiving benefit payments (Statistical Report, 2011). Data provided by MSD for 2011/12 shows that of the 10,735 fraud investigations and reviews conducted, 742 (7%) led to prosecutions. These figures are in line with fraud prosecutions in a number of overseas jurisdictions. In Australia, analysis of data from 1997/08 to 2008/9 reveals that 0.04 % of welfare recipients are convicted of fraud each year (Prenzler, 2011). The United Kingdom Department for Work and Pensions estimated that in 2012/13, approximately 2.1 % of all beneficiaries were overpaid as a result of fraud or error (DWP, 2013). Of this figure 0.7% is estimated to be a result of fraud and the remainder overpayments from either claimant or departmental error.

Within a Canadian context, Mosher and Herman (2004) have argued that benefit fraud is largely a result of errors or a lack of understanding of a complex social welfare system. This view is supported by research in other countries, which has drawn attention to the categorisation of all forms of welfare overpayment (administrative and applicant errors, misunderstandings as well as deliberate claims to which individuals are not entitled) as benefit fraud (Chunn & Gavigan, 2004; Walsh & Marston, 2010). Such studies belong to a small body of international research that seeks to highlight the varied and complex reasons leading to an individual being investigated for benefit fraud. While our research suggests some alignment with this international research, analysis of the reasons leading to investigations for fraud was beyond the scope of the project. The focus of this section is instead to highlight the legal needs of those who are investigated for benefit fraud and key issues in responding to those needs.

3.2 Need for legal advice

From our discussions with advocates and community agencies who work with beneficiaries, the most pressing legal need was identified as legal advice in the very early stages of the investigation process. Professionals working with beneficiaries reported that they were often not contacted until after the initial interview between a beneficiary and a Work and Income fraud investigator. For some of their clients this was because they did not realise the seriousness of the investigation. For others it was a fear of the consequences of being investigated combined with not knowing where to go for help.

So if you're a beneficiary you really need advice right from the word go. And of course people don't. They will sit on a letter, they'll be petrified quite often, they won't know what to [do].

We interviewed six beneficiaries who had been investigated for fraud. Without exception none had contacted a lawyer in the early stages of the investigation. One beneficiary sought help from a beneficiary advocates group as the investigation progressed, but did not have representation for her initial interviews with the investigator. Beneficiaries advised they did not know where to go to find help. A number of beneficiary advocates and community advocates expressed the view that their clients were significantly disadvantaged by this lack of representation. It seems likely that there is little understanding of the weight of statements made to Work and Income investigators and the fact that such statements can be used as evidence in court. Research in Canada has suggested that those being investigated for welfare fraud are often not aware that the information provided in such interviews can be used against them in criminal proceedings (Mosher & Herman, 2004). In an argument with much relevance for New Zealand, the authors note this is particularly concerning given that prosecution cases may rely heavily upon the information gathered during such interviews (Mosher & Herman, 2004).

MSD does not currently inform people who are being investigated for fraud of their right to legal advice or representation. According to an MSD response on this matter, a standard letter is sent to clients under investigation advising that they may bring a support person to an initial interview with an investigating officer from the Fraud Investigation

Unit. The letter does not contain any recommendation that they should seek legal advice (D. Raines, personal communication, August 26, 2013).

There was also some suggestion from several participants that those under investigation had not received this letter prior to a fraud investigator making contact in person. A community lawyer observed:

The Department are still using a cold call investigation process where they turn up at people's houses, they do not make it clear enough that they have the opportunity to seek legal advice before they answer questions.

A beneficiary interviewed for a fraud investigation confirmed this was also her experience.

Interviewer: Did anybody explain to you the process of the investigation?

Beneficiary: No. They just knocked on the door.

MSD expressed the view that the right to a lawyer is only activated when a person is arrested or detained, and as MSD does not arrest or detain beneficiaries they are not required to inform people of this right. MSD further stated that to advise beneficiaries about seeking legal advice would indicate they had predetermined the outcome, before any evidence has been gathered (D. Anderson, personal communication, 8 August, 2014). However, the research indicates that access to legal advice early in a fraud investigation is likely to assist a beneficiary to understand the parameters of the investigation, their rights and responsibilities, and the legal implications of investigations. Access to legal advice will ensure the most vulnerable members of the community have appropriate support during a fraud investigation.

3.3 Lawyers' inadequate knowledge of welfare law

Our research indicated that as investigations proceed many beneficiaries do eventually seek legal advice. MSD advised that when a client is sent a court summons to face fraud charges they are served with papers containing information on obtaining free legal advice in accordance with the Criminal Procedure Act 2011 (D. Raines, personal communication, August 26, 2013). A very strong concern to emerge from interviews with advocates and community agencies, however, was in relation

to the knowledge base of many lawyers who work with beneficiaries. Inadequate knowledge by lawyers of the benefit system and welfare law was reported to have had a significant impact on beneficiaries they represented.

The problem is ...that most lawyers have no working knowledge at all of the benefit system.)

They don't have a feel for it [welfare law] and they don't specialise enough in [benefit fraud cases].

MSD expressed the view that resources provided through its website would allow any lawyer to familiarise themselves with the law and MSD policies, and that there is no evidence to support the view that lawyers take a less motivated approach to representing beneficiaries in pursuit of their entitlements (D. Anderson, personal communication, 8 August, 2014). However several experienced beneficiary advocates spoke of dealing with clients who had been advised by solicitors to plead guilty in benefit fraud cases, regardless of their culpability.

One of the problems [this agency] encounters ... is that very often people being prosecuted for social security offences are not adequately represented by defence lawyers. So they're advised to plead guilty – we see files relatively regularly where a client will bring in a file after they put in a plea of guilty, and it stands out a mile that they probably weren't guilty, they shouldn't have been advised to plead guilty. So you've got some very busy defence lawyer advising people to plead when arguably they had a tenable case.

And it's because solicitors have told them to do it [plead guilty]. Because it makes their job easier... because sometimes they don't know a lot about social welfare law and it's a lot easier to say 'plead guilty – if you can put it an early plea, plead guilty, they'll go a bit easier on you'.

Criticism of the quality of legal services to the poor is not new (see for example Feldman, 1994; Rhodes, 2004). While much of the published criticism has been in relation to legal aid provision in the United States, there is some indication from our research that beneficiaries in New Zealand, and in particular those accused of benefit fraud, are not receiving quality legal advice. This is a pressing concern given that they are a particularly vulnerable group for whom good legal advice

and representation can provide crucial access to justice. We would argue also that, unlike other groups within New Zealand who seek legal help, the quality of legal services provided to beneficiaries in relation to entitlements can impact on their capacity to fulfil essential daily needs.

3.4 Power imbalance

A third theme to emerge from our research, in relation to fraud, was the power imbalance between MSD and its clients. International research with those on welfare has also drawn attention to this. Such research has highlighted a sense of powerlessness amongst beneficiaries who perceive they are at the mercy of people with the authority to deny essential resources (Sarat, 1990; Seccombe, 2007). Our research emphasised that this belief particularly came into play during fraud investigations.

Beneficiaries investigated for fraud reported concerns that investigations could lead not only to convictions but also to repercussions with future benefit payments. While MSD advised it is not possible to hide an overpayment created as a result of a fraud investigation within their systems, one person we interviewed who had misunderstood the abatement level for her benefit was told that, if she paid the money back, the investigator would not pass any information to Work and Income. This would protect her ongoing relationship with them.

I had to pay it back. Or it could go to court...I agreed with everything, and ... said I would pay it back. Because they said they'd keep it out of Social Welfare so I wasn't continuously going to get penalised...

Several of the women interviewed highlighted a fear that their children could be removed from their care.

That's the impression I got. That I was collecting all this money that I shouldn't have been. And since I was on the DPB I just said straight away, they're going to take the kids.

In its feedback MSD stated threats to remove children from a beneficiary's care would not be tolerated from investigation staff (D. Anderson, personal communication, 8 August 2014). However another beneficiary who was subsequently cleared of any wrongdoing reported being directly threatened by an investigator regarding custody of her son.

He threatened me. In front of my mother. “If you do not do this [confess to being in a relationship], you will be in jail, and you will lose your son”.

The impact of this power imbalance, coupled with the fact that these women were not receiving independent legal advice, was to comply with sanctions imposed by MSD for fear that by not doing so they would face criminal charges.

I just had to agree because they were saying I was going to be worse off if I didn’t.

There was no way I was going to lose my kids, so I had to, I just agreed. So I didn’t want them taking my kids off me... I ended up with that big bill.

The resultant debt was significant with one beneficiary describing having just \$9 per week remaining after paying rent to feed and clothe her children.

While beneficiaries emphasised the struggle they had in making repayments to MSD, in the majority of cases they were unaware of their right to review a debt. Instead they expressed gratitude that at least they had escaped more severe repercussions. Research with those accused of welfare fraud in Canada led researchers to conclude that “the fear of a possible criminal charge ... forces recipients to agree all too readily to administrative sanctions such as terminations or overpayments in hopes of avoiding a criminal charge” (Mosher & Herman, 2010 p. 25). Our research would suggest a similar impact in this country. Such findings emphasise the importance of acknowledging the potential impact of power imbalances between MSD and those it investigates and in particular the influence this may have on a beneficiary’s ability to give informed consent to an interview and to make decisions in relation to the investigation.

3.5 Reviewing the debt

MSD fraud investigations can result in a debt being created.¹ MSD systems give clients the option of reviewing debts at a BRC. Unlike fraud cases in the criminal court, those taking up this option are not entitled to legal aid and must hire a private lawyer or rely on the availability of free legal services or a beneficiary advocate. A private practice lawyer, who has represented beneficiaries in the past, reiterated the impact of the debt on beneficiaries and the particular need for representation.

The thing that really worries me is how many people are out there with huge debts that have been established against them through an administrative system, no overview, and they're so terrified that they might be criminally prosecuted that they're very grateful that the decision's been made not to. And ... no one independent has properly reviewed that debt.

The same lawyer stressed the need for legal aid due to the time consuming (and consequently expensive) nature of such cases arguing that they took considerably longer to prepare in comparison to others: a factor that may also impact on a beneficiary's decision to review the debt.

3.6 Conclusion

Three strong themes emerged from our discussions in relation to benefit fraud: the impact of not receiving legal advice; the inadequate knowledge of lawyers in relation to the benefit system and welfare law; and a power imbalance between MSD and its clients.

It would appear that beneficiaries who are being investigated for benefit fraud have specific legal needs that, according to our research participants, are not being met. Quality legal advice and representation in the early stages of fraud investigations is crucial when the fundamental issue of the ability of individuals to meet their basic daily needs is at

¹ The consequences of a fraud investigation include decisions about eligibility, the establishment of a debt where MSD concludes money has been received by a beneficiary that they were not entitled to, a penalty fee of up to three times the amount of the debt, and criminal charges being laid for offences under the Social Security Act 1964 and/or the Crimes Act 1961.

stake. This is emphasised by our research findings that individuals felt compelled to comply with MSD sanctions without seeking independent advice or reviews.

MSD feedback on our report confirms that it is MSD policy to advise those under investigation of their right to a support person, and, once a decision is made about a beneficiary's entitlements, they are informed of their right to review and appeal that decision. Furthermore, MSD makes it clear that threats to remove children in order to coerce admissions from clients would not be tolerated from investigation staff (D. Anderson, personal communication, 8 August 2014). However our research has highlighted the power imbalances that exist in relation to fraud investigations, and the impact of these power imbalances, which we argue must be recognised and addressed. We contend that it is the responsibility of MSD to ensure that those being investigated are fully informed of their right to legal advice and representation.

We would also argue that, while providing criminal legal aid to those beneficiaries accused of benefit fraud appears to meet legal need in relation to criminal offences, the competence of those lawyers in delivering representation services needs also to be taken into consideration when assessing if beneficiaries accused of benefit fraud are receiving adequate access to justice.

As discussed in Part 2, the nature of fraud cases make representation particularly important for reviews of fraud debts, and beneficiaries face challenges reviewing fraud debts at BRCs, because legal aid is not available for these cases.

Key findings: Responding to beneficiaries' legal needs

- Beneficiaries' legal needs with welfare law are on a spectrum ranging from information to representation and are determined by an individual's capacity, the legal process they are using and the complexity of the case. Representation is beneficiaries' greatest unmet legal need.
- Although beneficiaries access help with benefit problems from community agencies and private practice lawyers, there are gaps in the services available to meet beneficiaries' legal needs.
- Community law centre statistics show that welfare law work undertaken by CLCs nationally is a very small proportion of their total work, despite the high needs demonstrated by this research.
- Beneficiaries' entitlements are governed by a complex web of legislation and Work and Income policy, however welfare problems are not seen as legal problems. This is a major barrier to beneficiaries seeking legal help.
- Other significant barriers to accessing legal help are the cost of lawyers' services, limits on the availability of legal aid and apparent barriers to accessing legal aid.
- Awareness levels of community law centres, their services and who is eligible to access them were found to be low.
- Across the legal sector, there is a low level of knowledge of welfare law and little involvement of lawyers. This means the legal sector contributes little external scrutiny of the benefit system.
- Beneficiaries experienced variability in services received from CLCs with welfare law problems, with some finding CLCs were not well equipped to handle these issues.
- CLCs and BAGs have complementary roles in responding to beneficiaries' legal needs. These needs will most effectively be met through collaborative relationships between CLCs and BAGs.
- Within the legal sector, community law centres are best placed to step up to respond to beneficiaries' legal needs with welfare problems as they provide free legal services, have legal expertise, offer national coverage and are resourced to meet the legal needs of the most disadvantaged groups in the community.
- In order to do this the research has suggested a number of strategies for CLCs: better articulating CLCs' vision; providing greater assistance to beneficiaries with reviews and appeals; prioritising representation; identifying underlying welfare problems; advocating for change; building CLC capacity with welfare law; improving inter-agency relationships; maximising access to CLC services; and expanding community engagement and education.

PART 4 Responding to beneficiaries' legal needs

4.1 Introduction

In previous sections we have highlighted the various experiences of beneficiaries in their interactions with Work and Income and MSD. Some of these have involved non-legal problems such as the quality of service received as a client of Work and Income, while others involved legal problems such as reviewing Work and Income decisions and benefit fraud investigations. In this section the focus is on beneficiaries' legal needs and options for CLCs' service delivery to improve beneficiaries' access to justice. By legal needs we mean problems with Work and Income that have a basis in law and a potential legal solution.

The section begins with a discussion of the legal needs of beneficiaries and highlights the ways in which community advocates, beneficiary advocates, community lawyers and private practice lawyers have responded to these legal needs. It is clear that beneficiaries' legal needs can be and are met by a wide range of agencies. The focus of our recommendations, however, is on the particular contribution CLCs can make to meeting beneficiaries' legal needs.

4.2 Accessing legal support

4.2.1 A spectrum of legal needs

The importance of having legal help as one mechanism for addressing the imbalance of power between beneficiaries and Work and Income has already been highlighted in this report. Our research has shown that beneficiaries' legal needs with welfare law can be viewed on a continuum. At one end the lowest level of legal needs involve legal information about welfare entitlements, followed by legal advice and legal assistance,

through to the most intensive legal support: representation. This research has shown the importance of beneficiaries' having access to legal assistance and representation for cases at MABS, BRCs and the ssAA, for appeals to the High Court against decisions of the ssAA, and judicial review. The research also highlighted the need for legal advice and representation during fraud investigations and in respect of the criminal and civil outcomes of investigations.

A person's capacity is the key factor determining the level of legal intervention and support needed. As the forum for resolution becomes more formal and court-like, for example the Social Security Appeal Authority and the High Court, legal representation becomes particularly important.

In addition to legal help to individuals, the research emphasised the importance of community legal education, advocacy and law reform reflecting beneficiaries' experience receiving entitlements and using review and appeal processes.

4.2.2 Where do people turn for help?

Looking first at the legal sector, some beneficiaries interviewed had legal help from private practice lawyers and community lawyers. Statistics are not available about the extent of welfare law work undertaken by private practice lawyers, although it appears to be small.

The community legal sector's involvement with welfare law is also limited. Statistics for the 24 community law centres nationally show that less than 2% of their services to clients involve welfare law. Of a total legal services delivery of 94,600 hours in 2011/12, only 1478 or 1.6% involved legal services on welfare law. CLC reports show that only 45 people with welfare law disputes were represented by community law centres nationally in 2010/11 and even fewer in 2011/12 (26 nationally). National figures for CLCs in 2010/11 show that in addition to those represented, in the area of welfare law, legal assistance was provided to 177 clients, advice to 158 and information to 271 clients. In 2011/12, 180 clients with welfare law problems received legal assistance, 180 received

advice, and 317 received information (B. Fox, personal communication, March 28, 2013).¹

Community law centre respondents in the Access to Justice for Beneficiaries: Online Survey cited lack of resources as one factor limiting the amount of welfare law work they could do (*Access to Justice for Beneficiaries: Online Survey Report* 2013, p. 10).

The research identified beneficiary advocacy groups as a key place to get help with problems with Work and Income. Support provided by beneficiary advocates included information, advice, assistance and representation. Statistics were not available from beneficiary advocacy groups but they report that demand is high. Some advocates reported that there was a desperate need for representation of beneficiaries but that they were unable to meet this due to demands on their services. Participants referred to a number of factors that limited advocacy groups' capacity to meet demand, including difficulty getting adequate funding, and the transient nature of some advocacy services. This mirrors a finding in the *Access to Justice for Beneficiaries: Online Survey Report* (2013, p. 10), that beneficiary advocacy groups all noted a strong lack of resources to do their work adequately, relying heavily on volunteers, with high turnover and burnout, and a lack of administrative support.

The beneficiaries we interviewed described having advocacy and support from a range of community agencies. The impact of this support and intervention is discussed in Part 1.

Citizens Advice Bureau (CAB) statistics showed that, over the last two financial years, CAB handled more than 6,000 enquires a year relating to Work and Income benefits (excluding superannuation) (A. Hubbard, personal communication, July 12, 2013). Several participants interviewed identified CAB as the first port of call for welfare problems.

The Federation of Family Budgeting Services reported that an estimated 70% of their clients are beneficiaries and a large part of their work involves ensuring people are receiving their entitlements. Budget service workers have at times supported their clients by attending benefit review hearings.

¹ The actual figures for representation may be higher than the statistics show due to irregularities in recording, where a welfare law matter may be recorded under another related area of law such as family. Irrespective of this, figures for CLC representation on welfare law are low.

The important role played by community agencies in supporting beneficiaries to access entitlements and challenge decisions could be better supported by community law centres. Suggestions by participants included CLCs having a 0800 number for back-up specialist advice about welfare law, and clear referral pathways for beneficiaries with welfare legal problems where community advocates have identified that these problems are beyond their level of expertise.

4.2.3 Barriers to beneficiaries accessing legal help

Not knowing you have a legal problem

Our research indicated that for many beneficiaries, welfare and law are not linked. There is a widely held perception that benefit problems are not legal problems and that they therefore do not potentially have a legal solution. An experienced community advocate believed the people she supports did not know there is a legal basis to welfare entitlements.

I don't know whether ... the people we work with, would actually a lot of the time realise it was a legal issue that could go to review or could go to appeal. I don't know if they know that and understand that there's a Social Security Act that they can challenge a lot of the stuff on. I don't know. Because years ago we used to do a course here called *You and Your Rights*. And it was about teaching people how to become their own advocate around benefits, around a whole lot of stuff, but around benefit stuff. And a lot of people didn't actually know that all this had a legal basis to it.

While participants had help from lawyers with family law disputes such as separation, care of children and relationship property, they were often unaware that their welfare problems also had potential legal solutions. One participant, for example, contacted a community law centre for advice about custody of a child. She was also dealing with Work and Income about an Unsupported Child Allowance and although this was declined and she wanted to challenge that decision, she did not discuss this with the law centre.

I don't think I really thought about it. I definitely wanted the legal opinions on the interim custody. Like I don't even think it crossed my mind to get assistance with that question [Unsupported Child Allowance being declined].

Another beneficiary explained how people generally perceive legal issues.

The reality is that law and beneficiary issues are not married up. We don't understand that they are the same thing... you [community law centres] have to create a picture to the beneficiary that there's some way that you can help a beneficiary. Because they don't understand that, if they're going to court or a neighbour's harassing them, or their dog's been taken away by the City Council, then that's the law, you know, they need to understand that. But if they're taking off my benefit – community law? Well, that's not law, you know.

A private practice lawyer summed up beneficiaries' lack of access to legal help.

They're not legally literate. You know, they know their story inside out but they're just so worn out and depressed and harassed. There's a huge gap in the interface between them and lawyers.

This finding is also supported in international research, which has found that while welfare recipients will contact a lawyer for legal help with problems such as custody or relationship breakdowns, lawyers were not the main advisors for benefit problems as people were often unaware that these had a legal solution (Coumarelos, Wei & Zhou, 2006; Moorhead, Sefton & Douglas, 2004).

Cost of getting legal help

For those who do seek help for welfare law problems, cost is a significant barrier. One beneficiary described beneficiaries as “easy targets” without the means to go to lawyers and challenge decisions.

If beneficiaries could access legal help life would be so much easier for them. But they can't. They can't afford it. I can't afford to pay for half an hour with a lawyer, the prices they charge.

A beneficiary advocate emphasised the financial issues beneficiaries face:

It's very rare for a beneficiary or someone trying to get a benefit to have much money, if any. People are usually badly in debt and sinking into further debt by the day. It's very rare for any lawyer to want to go near them. Most people wouldn't probably think of approaching a lawyer because they know that they can't pay.

As this advocate noted, private practice lawyers are beyond the reach of most beneficiaries and legal aid is not available for BRC cases. While legal aid is available for appeals to MABs and the SSAA, as noted in Part 2, lack of knowledge of its availability, and the difficulty in locating lawyers with expertise in welfare law and the willingness to take on these cases can present significant barriers.² The introduction in September 2013 of a \$50 application fee for civil legal aid is likely to present a further obstacle.

Not surprisingly, free legal services were identified as a strength of community law centres.³ A beneficiary said:

It would be very important that it's free. And I think that a lot of people would benefit from knowing the right solutions and the law and the rules.

Even where people knew of community law centre services, they were not always sure if it was free.

That's the problem. At your own cost. And even with Community Law, I mean there is a cost isn't there, to a certain degree? Or is that a donation or something?

Awareness of community law centres and their services

A major theme that emerged from interviews with beneficiaries and some agencies, was the low levels of knowledge about community law centres. This included never having heard of CLCs, to being unclear about what services they provided, or thinking the services were limited to legal information and advice. This is consistent with a finding from the LAW survey of 20,716 people in Australia that found the awareness rate of community law centres in Australia to be just 36% (Coumarelos et al., 2012, p. xvi).

A community advocate interviewed had not heard of community law centres.

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- 2 A further obstacle to accessing private practice lawyers may be difficulty identifying a lawyer to approach. The NZ Law Society's website *Find A Lawyer* has no obvious category for benefit/welfare law, although does have a category for administrative law (www.lawsociety.org.nz/for-the-community/find-lawyer-and-organisation)
 - 3 There is some inconsistency among CLCs with at least one CLC charging low fees for services to clients (Mangere Community Law Centre) and other centres considering charging fees due to pressures on funding.

I didn't know about it, didn't know anything until I met [community lawyer]. And as an organisation we didn't know either. Well, no one told me so I assume we didn't know.

One beneficiary had previously had advice from a community law centre, but didn't know what their role was beyond advice.

But I don't know if they [community law centres] would visit the Social Security, if they'd do an appeal with the manager. So I don't know. I don't know what their role is exactly. My experience is that I go to Community Law for advice. I've never gone to court. I don't know what their role would be... I don't know if they would go to court or what the process would be.

Another beneficiary thought community law centres just had trainee lawyers.

Um, yeah, well I actually only thought that you guys were just trainees. So I've rung you a few times, like down south and that, but yeah I just didn't think that youse were that smart. I said to [community law worker] on the phone about, oh I thought they were just training and she goes, they are real lawyers. (*Laughs*).

One beneficiary advocate advised that CLCs are perceived to be a referral agency for private practice lawyers and that lawyers have a significant degree of control of community law centres.

That's an issue that we've understood – that law centres are controlled by lawyers to a degree: that as long as the work is referred on to them after one or two free consultations. So some people view the law centres as a middle ground to make sure that not too much work is escaping lawyers. That's one issue.

A beneficiary felt that her local community law centre had been well advertised in the past, but less so recently. She suggested:

Get it out there again. Because you guys used to be really all over the place, you knew that you were available, but over recent years you don't see advertisements for the free legal help any more. So, maybe get out there, have pamphlets, especially in the WINZ offices. Things like that. Maybe doctors' offices too in case they're having a medical thing. So if they're doing a medical appeal or something like that doctors' offices, hospital, places like that where people do have legal problems, to do that. The court house. So people know it's all there.

4.2.4 Legal sector's knowledge and engagement with welfare law

One of the factors making legal help important for welfare problems is the complexity of legislation. The Social Security Act has been changed frequently since its enactment in 1964. Despite the complexity of the law itself, it is an area of law that is under-populated by lawyers. There is a dearth of textbooks covering welfare law⁴ and welfare law itself is seldom taught in university law courses.⁵ This raises the issue of the level of knowledge of welfare law within the legal sector. The research indicated low levels of knowledge of welfare law among private practice lawyers, particularly in relation to benefit fraud, and little understanding of the workings of the benefit system. Feedback from a member of the Social Security Appeal Authority was that, in her experience at the Authority, lawyers' knowledge of welfare law was often limited. In contrast to beneficiary advocacy services, community law centres work in a number of different areas of law and need to ensure they have up to date knowledge in all these areas. Although most of the community law centre respondents in the online survey (*Access to Justice for Beneficiaries: Online Survey Report 2013*, p. 26) reported feeling very well or moderately well informed about welfare law, their demonstrated lack of involvement with welfare law cases means welfare law is not often put into practice.

One beneficiary advocate interviewed spoke of the limited involvement of lawyers, saying:

...because this [welfare] is an area where generally you don't have lawyers, most people don't think about lawyers in this area. So most people think about advocates or they'll try to go in there and fight it out on their own.

A recent High Court case (an appeal against a decision of the Social Security Appeal Authority) demonstrates the importance of having lawyers' involvement in the benefit system, and legal representation to address welfare law issues. In his decision, Judge Kos expressed the view that in the context of welfare law, "parliament is dealing with the expectations of the poor and disadvantaged" and in that particular case

4 A social security text is to be published in 2014 by Māmari Stevens/Thomson Reuters.

5 In 2013 welfare law was only taught at one New Zealand university: Victoria University. It is listed as a University of Canterbury course but was not offered in 2013.

the appellant had “lived and died in poverty”. Judge Kos also commented on the role that Community Law Canterbury had played in representing the beneficiary on appeal to the High Court, “without which these issues would not have been ventilated”⁶

According to a private practice lawyer interviewed, the scarcity of lawyers working in this area of law signals there is a lack of oversight of the administration of the social security system.

It’s a hugely complex piece of legislation, and it’s the least littered by lawyers, if you get what I mean. The Ministry has almost like this huge monopoly, and they’re protected by not having the normal accountability, that legal oversight. You know, when lawyers are involved everything toughens up. Like the Ministry of Economic Development, the bankruptcy system, whatever, wherever there are lawyers there’s attention and there’s a balance that has to be struck between rights, all sorts of rights. With beneficiaries there’s no one pulling the other way.

A number of factors may prevent private practice lawyers taking on welfare law cases. As the name suggests, “poverty law” does not pay and, as noted above, there are limits on the availability of or access to legal aid. In addition social security cases can be complex and involve substantial amounts of evidence, as a private practice lawyer explained:

The other thing about these cases, they’re the most resource intensive of my time. They’re just phenomenally resource intensive. You see those four boxes of documents over there, that’s one beneficiary. That’s one person. I had to get their whole file to see what had been going on over a period of years to be able to properly act for them.

4.2.5 Beneficiaries’ experiences accessing legal support from CLCs

Interviews with beneficiaries indicated variability in their experiences of seeking legal help from community law centres.

Some beneficiaries interviewed were very happy with the legal help they received from community lawyers, although several commented on the difficulty they had accessing CLC services. One beneficiary felt it

6 Brosnahan v The Chief Executive of the Ministry of Social Development [2013] NZHC 2618.

was only because they got a particular community lawyer on the phone that they were offered an appointment, suggesting that others might not be so lucky.

One beneficiary who was represented by a community law case worker at a Medical Appeals Board hearing rated the assistance she received highly.

I thought they were amazing. Ten out of ten. [Community law case worker] would even ring you at home and see how you were. And she was actually interested. And 'did you have your op? How did you go?' You know, I don't know if other lawyers would be so compassionate. I find this place very compassionate.

Another beneficiary, a young person, described getting help from a community lawyer as a "really good experience".

I actually got referred to you guys through my friend... because I told her what had happened – she was like, 'you've been declined? This isn't right. You need some support, you need to find someone who can lead you in the right direction pretty much.' And said that there was a free [service] that I could just go to.

Other participants reported less positive interactions. One beneficiary had mixed experiences when he approached a community law centre on two separate occasions for help with welfare law problems.

One was reluctant to see me [when I tried to make an appointment by phone] and took a negative view of unemployed beneficiaries... On giving a potted history of my case he advised he couldn't help...[when I met him] his tone moderated significantly in the face-to-face situation but he still gave the impression he was a reluctant participant. On another occasion, at the same community law centre, a lawyer offered me substantial support, advice and guidance, although [could not represent me]. That said she encouraged me to present the case myself.

A beneficiary expressed frustration about trying to get help from CLCs with a medical appeal, because the community law centres he approached insisted on referring him to other agencies. As a result, he was not able to find someone to represent him at his Medical Appeals Board hearing and he felt he was distinctly disadvantaged by this. This beneficiary's experience aligns with other New Zealand research into

the unmet legal needs of people with disabilities, finding participants had a lack of confidence in the staff at community law centres and their ability to deal with the legal problems specific to people with disabilities (Diesfeld et al., 2006).

Another beneficiary, who had dealt with community law centres on other occasions, sought advice about a welfare law problem. He felt they were not well equipped to handle it.

I actually did go and ask them about this – I actually recently went and saw them, and did ask them about this problem, one of the problems pertaining to WINZ, and they actually said they didn't know a lot about all that, you know, they're trainee or practicing lawyers. And they recommended that I go to [a beneficiary advocacy service].

A beneficiary who approached a community law centre for help to challenge a debt that had been set up by Work and Income after a fraud investigation was also referred to the local beneficiary advocacy service (which was able to represent her). She similarly felt that the community law centre did not have sufficient knowledge of welfare law to advise her. She would have liked the community law centre to give her some legal advice about her case, as well as more information about the place she was being referred to.

It would have been nice... [for] community law knowing that kind of stuff as well. So that I could have more information on what was happening. And then move forward to a place like [advocacy service] with that information. Because all I knew was that they helped with the benefits... So that's what was needed, to be given the full information about what the service was. And then move forward if I wanted onto that.

She also saw advantages in having help from a community law centre because a community lawyer would be able to help with other legal needs, not just the benefit review.

I would have liked to have had an independent lawyer, one that could follow through for me. So that after all the review and everything, then the compensation thing, instead of me scrambling to find somebody to help me get through that, that just followed on.

4.2.6 Agencies' experiences of CLCs

Beneficiary advocates expressed frustration at the inconsistency of community law centre services around Aotearoa New Zealand, advising that some CLCs provide excellent service relating to welfare law and others are not well informed in this area. The *Access to Justice for Beneficiaries: Online Survey Report* (2013, p. 7) noted there is a great deal of variation between CLCs in the amount of work done with beneficiaries on welfare issues, despite their focus being on those on low incomes. In MSD's experience, working closely with beneficiary advocacy groups, clients seeking assistance from community law centres are frequently referred to beneficiary advocacy groups because of a lack of specialised knowledge of welfare law (D. Anderson, personal communication, 8 August 2014).

A beneficiary advocate sought greater consistency of CLC services.

I mean it would be good if every law centre within reason provided the same services to start with. Because at the moment you can move around New Zealand and you can go to a place like [city] – they go along, they do BRCS, they do appeal authorities [Social Security Appeal Authority cases]. You can move across to [city] and they won't have a bar of it. And you can move to another area of New Zealand and you might find that once again you're getting exceptional service ... on welfare, and you can move 100 miles down the road and they don't know what the hell you're talking about.

A community agency worker endorsed this view, saying she had experienced inconsistent levels of expertise in another area of law, and it was therefore hard to confidently make referrals to community law centres.

Our budget advisors find they have really different experiences around the country, both in accessibility, in being able to get to a person, and in getting quality advice – in financial stuff ... so in some places they're brilliant, and in some places we have really good relationships with some of the community law centres around the country. And in other places they're either not easy to access or we haven't quite got the same confidence in the financial field of stuff.

She suggested CLCs could improve the quality and consistency of services by having minimum standards and a strong national body to support regional centres.

In our national organisation we have minimum standards and we guarantee a certain skill level across all the areas that we're likely to work in. ... So just in referring to community law centres, it's not really clear to us necessarily what they do and don't have the expertise in, and not all have the same expertise. If you made them all belong to a strong national body that trained them in the stuff they needed to know.

Complementary role of CLCs and Beneficiary Advocacy Groups

Meeting beneficiaries' legal needs involves both beneficiary advocacy groups and CLCs. From participants' experience what is most important is that the help is free, provided from a strong foundation where beneficiaries' experiences are understood and delivered by people with knowledge of welfare law and the benefit system. There are some differences in approach of beneficiary advocacy groups and CLCs, which may influence beneficiaries' choice of where to access services, and which demonstrate the complementary roles beneficiary advocacy groups and CLCs have.

Community law centres employ qualified lawyers and operate within the parameters of professional legal practice (although some also have caseworkers who are not qualified lawyers and work under the supervision of lawyers). While there are some legally qualified people working within beneficiary advocacy services, they do not generally employ lawyers although they may have pro bono support from private practice lawyers who come from a strong beneficiaries' rights advocacy perspective. Advocacy services are often well informed about the experiences of beneficiaries and there is a perception among both CLCs and beneficiary advocacy groups that CLCs are under-informed in this area (*Access to Justice for Beneficiaries: Online Survey Report*, 2013, p. 7).

In recognition of the expertise beneficiary advocacy groups have in social security legislation, MSD provides support to beneficiary advocacy groups through its Citizen Support Fund of \$292,000 per year. This fund was set up in response to identified needs of beneficiaries who have

difficulty articulating their circumstances, and provides for advocacy up to the level of reviews and appeals.

Beneficiary advocates described their organisations as having more flexibility than community law centres. They reported developing relationships with Work and Income staff at a regional or national level and using these contacts at different times during a dispute to try and get it resolved. In contrast, taking a formal legal approach to disputes, as law centres were thought to do, was perceived to be less advantageous and more time consuming for clients. Beneficiary advocacy group respondents in the online survey (*Access to Justice for Beneficiaries Online Survey Report* 2013 pp. 6–7) reinforced this perspective, saying factors influencing good outcomes for beneficiaries include engaging with MSD as soon as possible and maintaining respectful working relationships with MSD. One beneficiary advocate explained:

But what I think a lot of the law centre people – because they don't do many [legal reviews], and some don't do any – they don't realise that there is also other reviews outside of this [legal review process]...before you lodge a review you have a chat. Well that's getting a service manager to review what the case manager said. Then you can lodge a review. And while the review's being processed you're still having a chat to try and talk them into doing what you think is legally and morally correct. And even after the Benefits Review Committee is another little process because you now lodge it to the Social Security Appeals Authority. So you're now dealing with MSD's appeal authority lawyers and they can strongly suggest to the service manager that [the] BRC got it wrong.

There may also be advantages for a beneficiary in having a beneficiary advocate represent them at an administrative review (MAB or BRC) hearing. With an advocate present, MSD is not able to have a lawyer attend, whereas if the beneficiary attends with a lawyer, the rules of natural justice mean that MSD may also be represented by a lawyer.

There can however be distinct advantages to involving a lawyer in a case. One community agency worker described the impact a lawyer's letter could have when trying to resolve a dispute for a client.

I mean I know I used to work really closely together with the community law centre, I could do most of the stuff for the client, but actually a lawyer's letter was going to make the difference with their situation, with

a creditor or whatever. They'd just say, 'yeah, yeah, you give it to me, with the client, we'll write the letter for you,' it was a really good relationship.

A private practice lawyer expressed the view that while beneficiary advocates do a great job, they are not lawyers and so may not have the same knowledge of the law and legal processes, or attract the same level of respect.

Beneficiaries can't afford lawyers. And beneficiary advocates can go so far but, they're not lawyers. In one case I had to argue that the court couldn't expect the beneficiary advocate to know this and therefore the court shouldn't expect the issue to have been raised. I was responding to a Ministry argument that the beneficiary could not bring a matter up on appeal as she had not raised it in the Authority. And the High Court accepted that... But she was lucky and had a lawyer. I don't think beneficiary advocates get respected as much as lawyers do by the Department.

In representing clients in legal review and appeal forums and in court, both beneficiary advocates and lawyers go beyond representing the interests of an individual. Being supported to take a stand against MSD is a signal that there is a level of accountability to people on benefits. A beneficiary advocacy service had been recommended to one beneficiary because they were "like the watchdogs if you like". He felt that without the exceptional help he had from the beneficiary advocate, he would not have been taken seriously.

Without him I wouldn't be where I am, with this whole thing. I'd be just probably fobbed off and just forgotten about. And generally just, you know, and WINZ would be thinking: oh well, we've just managed to, we don't have to worry. You know, they have won or succeeded or whatever you want to call it.

The research strongly indicates the benefits of beneficiary advocacy groups and community law centres working closely together so that a beneficiary's circumstances, the nature of their dispute, the forum for resolution, and an organisation's capacity to take on a case can be considered when responding to beneficiaries' legal needs. Further, the level of demand for legal help for beneficiaries indicated by this research suggests that the skills and resources of both beneficiary advocacy groups

and community law centres need to be available and ideally delivered collaboratively to most effectively meet beneficiaries' needs. By sharing information about beneficiaries' welfare law problems systemic issues will be more easily identified and enable a coordinated approach to addressing those problems.

4.2.7 Other legal problems experienced by beneficiaries

It is well established in other research that disadvantaged people typically have multiple inter-related legal issues or clusters of legal issues. For example Moorhead's (2006) study observed that 40–50% of clients in 12 agencies (solicitors, advice agencies – CABS, community law centres and local authority providers) presented with multiple problems that crossed specialist boundaries.

The most common clusters we saw were around housing, benefits and debt and relationship breakdown. As important as the clusters themselves, however, was the tendency for a broad range of different problems to occur for clients in unpredictable ways. Problems that involved relationship breakdown/children, home ownership, mental health, domestic violence, employment and homelessness problems gave rise to the most complex, and arguably the most serious, problems. (Moorhead 2006, p. i)

The legal needs of beneficiaries identified in an Australian study were welfare problems, housing (tenancy, homelessness), family, domestic violence, neighbour problems, and money/debt (Judith Stubbs & Associates, 2010).

Beneficiaries interviewed for our study had experience of other legal problems including criminal offences (particularly shoplifting), child support, removal of children from parents' care, relationship separation and debt. Several advocates interviewed said in their experience loan sharks and housing problems were commonly linked to benefit problems.

Particular areas of law identified by participants as leading to interaction with private practice lawyers, primarily through the legal aid system, were criminal charges, historic sexual abuse claims, and family law disputes involving separation, custody and protection issues. One beneficiary interviewed, who had a dispute with Work and Income, had

a number of other legal problems at the same time that she needed help with.

I actually rang Legal Aid Services and said, 'this is my issue, I'm trying to find a lawyer that will help'... And they sent me along to the District Court who in turn sent me to a wonderful lawyer who fought and won very very quickly all the orders that I needed and everything else. So I was very lucky in that respect. But again it was, you've got to find it. That's hard. It's very hard when you're very daunted by everything.

A community advocate saw the potential for community law centres to help beneficiaries with a range of legal problems, for example when a client was charged with burglary and required a lawyer.

He needed a lawyer and his dad came to the rescue. But, you know, they do get up to stuff like that and generally it's their parents or their parents' friends that recommend people, rather than an organisation. But if we had that in our organisation that the clients were aware of that, that's what we deal with as well, that we work with you closely as a community law office, then we would offer that.

Another community agency worker emphasised the links between financial pressures and family violence issues, and her agency's holistic approach to the multiple issues faced by families.

I only touch on Work and Income because financial stress is a contributor to family violence, so is alcohol and drugs, health and all that poverty, they all contribute to family violence according to indicators. Because what people come here with is one or more of those – they're looking for resources, but when I actually do my assessment, because I do a cultural and social assessment, the family violence is underpinning everything and they're right there. And that is critical.

Beneficiary advocates are in a good position to identify other legal issues their clients have and can be a gateway for people to access legal help. One advocate commented that people simply do not know where to go for help.

They come because they've got a benefit issue. But when you're talking to them lots of other issues come in as well. You know, they'll start talking about they've got this problem and that problem, and I think, oh my goodness. And that's not so bad for those clients because I can say 'look,

if you're really having trouble and you've got no one who has any idea about this sort of thing, go down and see Community Law, and someone there should be able to give you some advice, or advise you where you can go.'

This has important implications for beneficiaries' access to justice and the way legal services are provided. People who present with a welfare law problem may have a number of related legal problems they need help with. Conversely, people who present to CLC with other legal problems may have an unidentified related legal problem with a welfare benefit.

4.3 Suggested responses by community law centres

4.3.1 Vision and strategy

Many community law centres have processes in place to evaluate their services and to identify improvements. Community law centres are, in addition, going through a period of transition in response to Ministry of Justice funding requirements and a shift to results based accountability reporting to ensure that services are well targeted to the most disadvantaged communities and achieving good results. A common theme to emerge in interviews with both beneficiaries and people from agencies was that community law centres need to better articulate their vision, purpose and services to the community. As autonomous services, CLCs do not yet have a national vision or mission statement that clearly expresses the aspirations of, and services available from, community law centres, or who is eligible to receive community law centre services. CLCA has, however, recognised the need for a national vision and mission statement and undertook work towards this in 2013. CLCA has also developed a national community law brand that is used to varying degrees around the country. The research indicates the need for CLCs to continue to work to develop a national statement of their purpose and role, along with more consistent use of the community law brand. Positioning law centres as specialists in poverty law may help distinguish community law centres from other parts of the legal sector and reflect the prioritising of community law centre resources to the most disadvantaged.

4.3.2 Role of CLCs

Assistance with legal reviews and appeals

Community law centres have a role to play in providing information to beneficiaries about the legal review and appeal processes, assisting with preparation of their cases and, where beneficiaries do not have the capacity to represent themselves, representing them. Community legal education programmes could focus on challenging decisions, and centres could offer toolkits for people who are taking reviews and appeals. Specifically CLCs could:

- Prioritise legal services to clients for benefit reviews, medical appeals and appeals to the Social Security Appeal Authority, particularly representation at hearings (and build capacity in this area if that is needed).
- Improve capacity to judicially review Medical Appeals Board decisions.
- Focus on the legal needs of beneficiaries who are reviewing overpayments established through benefit fraud investigations due to the legal complexity of these cases.
- Pursue options with MOJ to facilitate appellants' access to CLC services for SSAA hearings, for example by including a leaflet about CLC services in MOJ information to appellants, or implementing a scheme such as the Australian pilot scheme where unrepresented appellants are offered legal advice.
- Represent appellants, or facilitate legal aid representation for beneficiaries, on appeals to the High Court against decisions of the SSAA.

Representation of beneficiaries

The most significant unmet legal need beneficiaries have with welfare law is representation. The research indicates that beneficiary advocacy groups alone cannot meet beneficiaries' representation needs. A beneficiary advocate felt there was a big demand for representation services, because private practice lawyers did not take this work on. As a consequence beneficiaries were left without access to representation. Community law centres could fill this gap.

I would dearly love to see [CLCs] being more available to represent beneficiaries. A significant problem in [city] is the lack of lawyers prepared to take on cases involving benefit issues.

Representation may involve direct negotiation with MSD, representing beneficiaries in legal review or appeal processes and in judicial review or appeal to the High Court. While CLC core funding from the Ministry of Justice has traditionally included funding for representation,⁷ in 2013 MOJ signalled a reduction in funding for representation in favour of the lower levels of legal support, arguing that “it is extremely important that community legal services are focused on the early resolution of legal problems, without recourse to expensive court processes.” (*Ministry of Justice Roadmap to Transformation: outline of future direction*).⁸ Consequently, in 2013/14 community law centres faced a reduction in funding for representation with the potential loss of all funding for representation for the 2014/15 year.⁹ The rationale for this reduction was set out in a letter to community law centres.

We believe there is a balance to be struck with an appropriate focus on legal advice and assistance that prevents matters escalating to where they require representation (N. Fyfe, personal communication, May 17, 2013).

CLC's legal practice model aims to resolve disputes at the earliest opportunity, thus preventing disputes escalating. However, in many cases a welfare law dispute may have already escalated before an approach to a CLC is made. This research has clearly demonstrated the reasons why representation of the most vulnerable beneficiaries is required and that the most significant factor influencing the level of legal help needed is a person's capacity to handle the dispute themselves. This mirrors a key theme in LAW, the Australia-wide survey of legal needs, the importance of an individual's capacity to resolve legal problems (Coumarelos et al., 2012 pp. 36–37). Other factors include the complexity of the relevant law, the nature of the legal forum and the amount of money at stake.

7 Legal Services Act 2001: section 3 “community legal services” is defined as legal services and law reform and advocacy; “legal services” is defined as advice and representation, legal information and law-related education.

8 Minister of Justice 8 April 2013 and Ministry of Justice 9 April 2013 p. 2.

9 The Ministry of Justice agreed to fund CLCs for representation services for 10% of total clients nationally for the 2014/15 year.

The research has identified apparent barriers to beneficiaries accessing legal aid for representation in welfare law cases. Community law centre lawyers could in theory provide representation to beneficiaries on legal aid. However, there are particular obstacles that CLCs would need to overcome in order to do this. The experience and competence requirements for a legal aid lead provider are set out in the Legal Services (Quality Assurance) Amendment Regulations 2013. Most community law centres will not have a solicitor who would meet those requirements and thus be eligible to be accredited as a lead provider. A community lawyer would therefore need to be supervised by someone outside the community law centre for this aspect of their practice, and this could involve significant costs.

The research highlights the importance of the Ministry of Justice's funding model for community law centres reflecting the legal needs of beneficiaries with welfare law, particularly their need for representation, and that CLCs continue to be able to provide representation for beneficiaries with welfare law disputes. Addressing barriers that prevent CLC community lawyers representing clients with welfare law disputes on legal aid (where it is available) could also increase beneficiaries' access to representation.

Identifying underlying welfare problems

Very often a beneficiary who is seeking legal help with other issues such as family, employment or immigration may have a legitimate dispute with Work and Income but may either not raise it, or be unaware that the welfare problem potentially has a legal solution. Research elsewhere has highlighted the importance of community lawyers reviewing clients' welfare entitlements before completing a case (Rich, 2009 p. 65).

A welfare law advisor gave an example of family lawyers needing to know about benefit entitlements in situations of family break-up.

Now a classic example, DPB, and breakdown in marriages, the average family lawyer should know the ins and outs of exactly what happens with split or shared custody, exactly what the rules are. But if you go to a leading New Zealand text book on family law, DPB [Domestic Purposes Benefit] gets a footnote saying: this is a complicated topic, your client is best advised to consult the department.

Community law centres could consider developing a client interviewing approach that explores potential legal issues with welfare entitlements, where a client is seen for another legal issue.¹⁰

Advocate for change

CLCs are in a unique position within the legal sector in that they provide integrated legal services, including legal education and law reform. In an Australian context CLCs' proactive work is seen by some as their real strength.

The potential of CLCs to reach beyond direct service delivery, and engage in proactive advocacy and policy work is in my view, their greatest strength. (Noble, 2012 p. 23)

Although the Legal Services Act 2011 enables the Ministry of Justice to contract community law centres to deliver advocacy and law reform, under the Ministry of Justice Roadmap changes, in 2013/14 MOJ is no longer contracting CLCs to undertake law reform or advocacy.

The research shows there is little involvement of the legal sector with welfare law. One consequence of this is that systemic welfare law issues, which affect a number of beneficiaries, are not effectively addressed. The opportunity to leverage outcomes affecting a number of people from individual case work undertaken by community law centres is discussed in Rich's (2009) report *Reclaiming Community Legal Centres: Maximising our potential so we can help our clients reach theirs*. Rich (2009) suggests that community law centres' case work criteria should incorporate cases which are likely to have a wider impact than the individual client, termed "focused case work" or "impact case work" (Rich, 2009 p. 64).

Community law centres could more effectively advocate for change by having systems to identify practices that prevent beneficiaries receiving legal entitlements or barriers preventing beneficiaries having access to justice, including "impact case work" as part of CLCs' case work selection criteria and representing beneficiaries in court on matters that are in the public interest.

The challenge for community law centres in the current funding environment is to prioritise and resource law reform and advocacy

¹⁰ See Moorhead (2006) for strategies community legal services may employ to identify underlying welfare problems.

activities and to collaborate to undertake this work. This could include coordination of advocacy activities through CLCA or through a specialist CLC welfare network. Improved systems for sharing information between CLCs and with BAGS would enable CLCs to work more effectively in welfare advocacy and law reform.

4.3.3 Welfare law – building capacity in CLCs

A key theme to emerge from the research is the inconsistency in the welfare law services provided by different community law centres around the country, and this is a barrier to people receiving the help they need.

Training, access to welfare law resources and a code of practice for people representing clients at review and appeal hearings were suggested by participants as strategies to improve capacity and quality.

One benefit advocacy group had provided comprehensive training to a community law centre about reviews and appeals and saw the potential for shared capacity building.

I didn't really talk about the guts of the law, I thought they could go and find that out for themselves. But reviews and appeals: the barriers, what it was like and what it was like for clients. And I talked about getting that review report that's as thick as your newspaper, and how that puts people off. And those kinds of things. And actually the lawyers were quite interested in were we, as advocates, constructing a good legal case that could then carry on through the appeal process without there being stuff that couldn't be pulled in later.

Beneficiary advocacy groups felt well informed on welfare law, but needed support in the form of access to legal databases. Some beneficiary advocates felt they could do with better practical skills for representing people at review and appeal hearings. There is potential for community law centres' legal expertise to be used to assist advocates with cases they are handling, and for beneficiary advocates to train community lawyers in aspects of welfare law.

Community law centres could explore options for training by (and for) beneficiary advocates. Approaching this on a national basis would enable more law centres to participate in training by experienced welfare advocates.

4.3.4 Specialist network model

The challenge – and opportunity – for community law centres in New Zealand is to build capacity and organise themselves in such a way that a degree of specialisation in welfare law is possible and all centres are able to provide consistent, quality services in welfare law. Specialist law centres exist in New Zealand in areas of youth, disability and Māori land, and there is recognition of the need to develop kaupapa Māori services across all community law centre services.¹¹ An informal network exists for ACC legal issues.

Australia has adopted a specialist network model where 16 of the over 200 community law centres that make up Australia's National Association of Community Legal Centres Inc. (NACLC) are members of the National Welfare Rights Network. These centres specialise in welfare law and Centrelink administration of welfare benefits. The Network also develops policy and advocates for beneficiaries based on a set of principles and rights. The aim of Network members is "to reduce poverty, hardship and inequality in Australia by providing case work to individuals to ensure they can exercise their rights, fulfil their obligations, meet their responsibilities and maximise their entitlements under the Australian social security system, and advocating for the maintenance of a Social Security system that has rights and entitlements, obligations and responsibilities, detailed under and protected by law" (www.welfarerights.org.au).

New Zealand could establish a similar specialist network within existing community law centres that would be responsible for the promotion and coordination of welfare law activities between centres. Its role could include providing specialist advice on welfare law to all centres; preparing education material; building welfare law capacity within community law centres; leading relationships with MSD, Beneficiary Advocacy Federation of New Zealand and other key community agencies; and advocating for change. Having a specialist network could address the difficulties identified in this research in finding representation for appeals to the SSAA. CLCs located in areas

¹¹ Ngā Kaiāwhina Hapori Māori o Te Ture/Māori Caucus Proposal for Kaupapa Māori Services 2012.

the Authority sits could undertake this role on behalf of CLCs in other regions. The specialist network could host a website with welfare law resources, information, research, media stories and tools to make these more easily accessible to the public. Leadership to the legal sector on welfare law, such as offering professional development to lawyers, is a further role a specialist network could undertake.

4.3.5 Interagency relationships

Beneficiary Advocacy Groups

The research showed that outside some good personal relationships between staff of agencies and goodwill between agencies, there is no formal system for sharing knowledge and resources between CLCs and BAGs to most effectively respond to beneficiaries' legal needs. A beneficiary advocate saw the way forward as CLCs and BAGs working together to see how the unmet legal need could be best met.

I think it's important for community law centres to enhance relationships like they have here with local advocacy organisations. Because local advocacy organisations ... do normally have a good on the ground knowledge of how the complex benefit system works. And the centres could gain invaluable experience from tapping into that pool of knowledge.

One initiative is underway, which will explore collaboration between Community Law Canterbury and the Beneficiary Advisory Service, with funding from the Working Together More Fund. This includes working together to prepare a series of leaflets promoting both advocacy services and community law centres as places to get help with benefit problems.

Ministry of Social Development

There is no formal relationship between Community Law Centres o Aotearoa and the Ministry of Social Development nationally, although some regions have developed local relationships. In contrast, beneficiary advocacy groups have a strong and well-established relationship with MSD. This is recognised in the Terms of Reference for the MSD National Beneficiary Advocate Consultative Group (NBACG) which meets with

MSD on a quarterly basis. Advocates also have an escalation process to the national Client Advocacy and Review Team.

Having a national relationship with MSD would enable community law centres to more effectively meet the legal needs of beneficiaries. Such a relationship could include training (both for and by CLCs), legislation and policy updates, feedback about review and appeal processes and information about SSAA and court decisions. A national relationship would provide a formal opportunity to raise recurring issues with MSD and highlight areas where policy appears to be inconsistent with law. Through such a relationship, CLCs could discuss ways MSD could help enable their clients to access free legal help, such as through co-location with Work and Income or facilitating access to legal help for unrepresented beneficiaries prior to review or appeal hearings. A MSD staff member welcomed good relationships with BAGs and CLCs.

I am increasingly the advocate of the fact that we're all on the same page trying to help the same people. We should be working together, not against each other. That should not be an adversarial environment. I think there has been a degree to which that has been so. And both sides have got to take responsibility for that, I don't think it's one side or the other... there's actually been a more progressive move towards saying: well, you know, we should be working together. How do we solve the issues?

A beneficiary interviewed suggested a relationship between CLC and Work and Income could potentially increase access to legal assistance "where it actually becomes part of [Work and Income] practice to actually offer clients, you know, community law, or to at least advertise it in some sort of way". There is a possibility of Work and Income acting as a gateway for disadvantaged people to access community legal services, for help with welfare law and other legal problems. For example, MSD's integrated case management system for at-risk families could provide opportunities for CLCs to promote access to their services to this vulnerable group.

Ministry of Justice

CLCs have a formal relationship with the Ministry of Justice which contracts them to deliver community legal services. The research

identified areas where the delivery of CLC services to beneficiaries could be improved, and MoJ as the funder of these services is an important stakeholder in discussing how these issues could be addressed. The research also identified a number of other areas of MoJ's work which impacts on beneficiaries' access to justice through delivery of legal aid and operation of the SSA, which points to the potential of extending the existing relationship between CLC and MoJ to those areas.

4.3.6 Maximising access to community law services

A toll-free benefits information and advice line

Participants suggested having a 0800 number for independent advice about benefits including advice about entitlements and options for resolving disputes. Such a national service could act as a gateway to local community law centre or benefit advocacy group services. In addition to providing information to beneficiaries, this phone line could provide easy access to back-up specialist advice for community advocates who are supporting beneficiaries in their disputes with Work and Income.

Location and co-location

Participants identified the physical location of community law centres' offices as critical to being accessible to people most in need. Not only is it important that people can actually get there, CLCs' location is also symbolic of being accessible to the most vulnerable people.

With 24 community law centres around Aotearoa New Zealand to maximise accessibility, co-location and outreach clinics should be an important part of all centres' planning. A community agency worker explained the benefits of co-location.

And some of our budget services are co-located in buildings with community law centres, and they just pass the people backwards and forwards, they take them by the hand and deposit them. And in that case we'd often have an agreement with the community law centre, where they'd see our people at short notice or something.

Another participant saw real benefits of having a number of agencies in one place.

Because things get lost in translation. And as much as people won't admit it, if you build relationships within departments, if I work at a place, and I'm starting to build a relationship with you in work, but dealing with cases, and you know how each other works, and you get to understand what situations fit and what don't, you can get so much more done.

Coumarelos et al., (2012) recommend a case management approach involving a co-ordinated effort by agencies ensuring that services are streamlined to best meet client's needs. The most disadvantaged clients require legal and non-legal services to be integrated.

...legal service provision is often siloed by the type of legal problem and the legal jurisdiction, with different legal services providing specialised assistance for particular legal problems. The fragmented nature of legal service delivery is not ideal for providing comprehensive justice for disadvantaged people, who are vulnerable to a broad range of multiple, interrelated, serious legal problems. Rather, such people would be more likely to benefit from more holistic legal service provision, including not only more systematic legal triage and referral services but also more intensive, tailored, client-centred or case management approaches as required. This approach requires teamwork with legal and non-legal service providers. (Coumarelos et al., 2012, p. 245)

Within the current network of community law centres, an example of this integrated approach is 155 Whare Roopu Community House in Whangarei which incorporates a community centre, youth programme and community law centre under one roof. Their services include whānau support and counselling.¹² Existing research highlights the potential for fully integrated legal and health services, citing the example of the West Heidelberg Community Legal Service in Australia¹³ and recommends that further research is conducted on services combining health and legal services (Buck et al., 2010 p. 183).

Access to CLC help facilitated by MSD/MoJ

CLCs could consider negotiating ways MSD and MOJ could facilitate access to their services nationally. This could include the provision of

¹² For details of their services see www.whare.org.nz

¹³ For a discussion of the West Heidelberg model, see Noone, M. (2012) Integrated Legal Services: Lessons from West Heidelberg CLS *Alternative Law Journal*. 37:1, 26–30.

information about CLC services to people who apply for a review or appeal and investigation of a pilot scheme similar to that being trialled in the Australian Social Security Appeals Tribunal where unrepresented appellants are offered independent advice prior to their hearing.

4.3.7 Community engagement and education

Legal rights are meaningless if people are unaware of them and the means through which they can be effected (Coumarelos et al., 2012, p. 209). Legal information and community legal education can be effective in improving knowledge of free legal services and helping people to know that their welfare problems have legal implications and solutions. The key information strategy identified in this research to effectively increase access to welfare law services to beneficiaries is to frame welfare problems as legal problems and to explain how law centres can help. One beneficiary said:

...beneficiaries need to know there are people out there that are prepared to help them. And it needs to be put out really really strongly that community law can in fact do something about this – if you can.

Legal education

The experience of the beneficiaries we interviewed suggests that a fresh emphasis could be placed on legal education on welfare law. Community legal education programmes could be delivered covering welfare law targeted to particular groups, including Māori, Pasifika, young people, teen parents, people with disabilities and health conditions, refugee communities, the elderly, and recently released prisoners. In addition, the identified lack of information about review and appeal processes strongly indicate that community legal education, particularly to community advocates, would be an effective strategy to improve beneficiaries' knowledge about these processes and to help them to navigate them.

Community law centres do provide some legal education on welfare law. However, MOJ statistics showed that in the two years ending June 2012, more than half of community law centres nationally recorded no education services on welfare law (H. Baggott, personal communication, May 2, 2013). In 2010/11 nine CLCs delivered a total of 188 hours

education on welfare law and in 2011/12 twelve centres delivered 175 hours on welfare law (out of a total education hours delivered nationally of 14,608 and 19,351 respectively) (D.Tait, personal communication, 14 February, 2014).

A number of factors may contribute to the low levels of welfare law education undertaken by community law centres, such as not identifying this as a priority area, low levels of knowledge of welfare law or of the experiences of beneficiaries. A lack of welfare law education resources may also be a barrier – for while CLCs have recognised the importance of sharing education resources, this has not yet happened in a systematic way. Having a specialist welfare law capacity within CLCs, which could prepare education materials for CLCs nationally, might address one barrier to delivery of community legal education on welfare law.

Hui and forum for beneficiaries providing legal information and education can be an effective strategy for linking welfare and law and increase access to community law centre services. Several beneficiaries suggested CLCs provide opportunities for beneficiaries to talk about their experience of the welfare system, which would help CLCs to understand what people are dealing with. One beneficiary had attended a welfare workshop at a community law centre.

I did know about Community Law. But that's how I got involved in regards to disabilities and benefits and things like that. It is in there and that's when you start hearing everybody else's stories, and going 'yeah, there's quite a bit of this going on.'

Some beneficiary advocacy groups deliver comprehensive benefit law education programmes for community advocates and some MSD Citizen Support Fund funding is dedicated to this. With limited resources nationally, however, the reach of beneficiary advocacy groups is restricted and given that CLCs receive specific funding to provide legal education to disadvantaged communities, there is potential for CLCs' resources to be directed to expanding community legal education on welfare law.

Information is power: resources for reviews and appeals

As noted at the beginning of Section 2.1 having access to information about the legal processes for challenging a benefit decision is a significant

unmet legal need. The research collated key messages beneficiaries and agencies thought should be included in resources:

- **Leaflets:** a series of plain language leaflets about receiving entitlements, fraud investigations, benefit reviews, medical appeals and appealing to the Social Security Appeal Authority. It is suggested these leaflets frame welfare problems as legal problems and promote both beneficiary advocacy services and community law centres as places to get legal help and advocacy. They could provide links to websites such as community law centres.
- **Information kit for beneficiaries who are going to represent themselves at a review or appeal hearing:** the information kit could include how to prepare for and present their case, what information to request from Work and Income, and how a hearing operates. It could include a sample of written submissions for reviews and appeals. A good model for this kind of kit is found in Australia: Appealing to the Social Security Appeals Tribunal (Welfare Rights Centre and Legal Aid NSW).
- **Web based information:** a website would be useful and would help avoid a frustrating search. One participant favoured having websites you could access from the community law website that they can go to which will tell them their legal rights and obligations. While web based information is important and easily updated, the research indicated information for beneficiaries should not be exclusively web-based as many do not have easy access to the internet.

A beneficiary summed up the type of information that would be useful:

Their rights and obligations for a start. What services that they can access to help them, easy terms to understand, of your rights, what you're entitled to, and things like that. Something like that would be a godsend to a lot of people.

Participants suggested CLCs disseminate information at a wide range of places including Work and Income offices; doctors waiting rooms, Pacific health providers, Iwi health providers, hospitals, MPs offices, community centres, Citizens Advice Bureau, members of the Federation of Family Budgeting Services, and Whanau Ora agencies. Translation

into different languages, NZ Sign language and Easy Read were identified needs.

In response to the need identified for information about review and appeal processes, three booklets have been prepared by Community Law Canterbury and Beneficiary Advisory Service (Christchurch): *Appealing to a Medical Appeals Board*, *Reviewing a decision at a Benefits Review Committee* and *Appealing to the Social Security Appeal Authority*.

4.4 Conclusion

Beneficiaries' legal needs range from information, advice and assistance through to representation, and are determined by a person's capacity, the legal process they are using and the complexity of the problem. Our research shows that beneficiaries' greatest unmet legal need is legal representation.

A wide range of community agencies provide valuable assistance to beneficiaries who have disputes with Work and Income. However, when disputes are entrenched, complex or unable to be resolved without recourse to legal review and appeal processes, representation by a lawyer or beneficiary advocate with legal knowledge and skills is often required. This research highlights the gap between beneficiaries' legal needs and the help that is available. Despite the high needs, welfare law work undertaken nationally is a very small proportion of CLCs' work.

There are substantial barriers to accessing legal help. Welfare and law are not linked, meaning that people may not know their welfare problem is something they can get legal help with.

Cost is a major barrier to accessing legal help. The cost of private practice lawyers is prohibitive for most beneficiaries, unless they can access legal aid. Legal aid is not available for all benefit review and appeal processes, and where it is available, it is little used. Welfare law cases can be time consuming and complex.

There appears to be a low level of awareness of the purpose of community law centres, their services, and who is eligible to access them. For beneficiaries we interviewed who did know about CLCs, there was a great deal of uncertainty about how far a community lawyer could take a case, and whether CLCs services were free. There was also uncertainty

about the staffing of CLCs with a perception that CLCs had “trainee” lawyers. CLCs could better articulate their vision, role and services.

Across the legal sector, there is a low level of knowledge of welfare law and little involvement of lawyers. This is particularly so in the area of benefit fraud. As a consequence there is little independent scrutiny of the welfare system in contrast to other areas of law, which have a high degree of oversight.

There was variability in beneficiaries’ experiences accessing legal help from CLCs with some people having a good experience, and others being turned away. Automatic referral to a beneficiary advocacy service was criticised, as was being informed that a community law centre did not have expertise in welfare law. Agencies supported beneficiaries’ accounts of variability, saying there was inconsistency in both the nature and quality of services provided by CLCs on welfare law.

Effective representation of beneficiaries requires knowledge of both the law and legal processes to assert beneficiaries’ legal rights. Both CLCs and beneficiary advocacy services can therefore respond to beneficiaries’ legal needs and their services can be seen as complementary. There are some differences in the approaches taken by CLCs and BAGS, such as BAGS’ track record of negotiated solutions in part due to long-established relationships with key Work and Income staff. CLCs can provide free legal services to beneficiaries with welfare law problems, and provide an integrated legal service for clients with multiple legal issues. In addition CLCs’ qualified lawyers can provide legal representation in court on welfare law cases.

What is most important is that free quality representation is available to beneficiaries who do not have the means to pay for legal services and do not have the capacity to resolve welfare disputes themselves, and that together BAGS and CLCs act as a “watchdog” over the administration of the welfare system. Beneficiaries’ legal needs with welfare law will be most effectively met through good inter-agency relationships between CLCs and BAGS.

In response to the identified legal needs CLCs could provide greater assistance to beneficiaries with reviews and appeals, and in particular, representation. However, current Ministry of Justice policy is to severely reduce CLC funding for representation and focus on the early

resolution of problems. The research showed that CLCs only provided representation services in a relatively small number of welfare law cases. Due to barriers beneficiaries face accessing legal help from private practice lawyers, and limits on services available from beneficiary advocacy groups, it is critical that CLCs expand their ability to provide representation services for these cases.

Changes to other aspects of CLCs' legal practice work is suggested by this research, including greater focus on identifying underlying welfare problems when clients seek assistance for an apparently unrelated problem. CLCs' unique role within the legal sector of delivering integrated legal services provides an opportunity for CLCs to address beneficiaries' legal needs through advocacy and law reform.

CLCs could build capacity in the area of welfare law. Several mechanisms were recommended to help achieve this: training, utilising the expertise of BAGs, and establishing a specialist welfare network within CLCs. Enhanced interagency relationships were also seen as significant, both with BAGs, and MSD and MoJ.

Strategies to improve beneficiaries' access to CLCs is indicated by the research. Improving phone and physical access, along with exploring options for MSD and MoJ to facilitate beneficiaries' access to CLCs, could be considered.

Despite the extent of beneficiaries' legal needs, little community legal education on welfare law is undertaken by CLCs, and it is suggested CLCs could respond with a national strategy for legal education about welfare law, and collaborate on the preparation of education resources. Finally, the development of information resources for beneficiaries and community advocates would help address the information needs identified in the research. Placing welfare problems within a legal framework will help ensure beneficiaries get fair access to justice.

PART 5 Conclusion

Inadequacy of income is a pervasive issue for beneficiaries and many live in poverty. Receiving full entitlements is therefore critical to survival and impacts on beneficiaries and their children's health and wellbeing (Expert Advisory Group, 2012). The integrity of the benefit system rests on sound decision making about entitlements and on access to review and appeal processes to challenge benefit decisions.

This research set out to examine beneficiaries' experiences of accessing benefit entitlements; review and appeal processes; and benefit fraud investigations. Were beneficiaries able to equitably participate in these legal processes, what were their legal needs, and how well were these needs being met? Given that the purpose of CLCs is to provide legal services to those most vulnerable in our society, our research focused on CLCs' role in meeting beneficiaries' legal needs for welfare disputes and how, as a network, CLCs could improve their response.

We chose a broad approach to encompass a range of benefit types and experiences, including fraud investigations, and informal as well as legal mechanisms for challenging benefit decisions. This included both beneficiaries' experience of asking Work and Income to revisit their decisions, and resolution of disputes using the legal processes Benefits Review Committees, Medical Appeals Boards, and the Social Security Appeal Authority. This research was intended to provide an overview of the legal needs of beneficiaries and indicators for CLC to develop their response.

Two key themes emerged from this research which significantly impacted on beneficiaries' ability to fairly participate in the benefit system: beneficiaries' experience of a power imbalance between them and Work and Income; and the complex web of welfare law and internal policy that is the basis for Work and Income decision-making.

For many beneficiaries the imbalance of power was overwhelming and permeated their interaction with the benefit system at all levels. This

was experienced by beneficiaries in a number of ways: the power case managers have over beneficiaries' day-to-day income and their ability to cut benefits; a belief that information was deliberately withheld by Work and Income staff; and beneficiaries feeling compelled to agree with outcomes of fraud investigations without access to independent advice. Many beneficiaries were said to be "scared stiff" of Work and Income.

Most worryingly, the power imbalance could prevent people from accessing entitlements, or from challenging decisions they believed were wrong. Other research has also found this to be the case (Alternative Welfare Working Group, 2010a; Asher, 2011). Many of the beneficiaries we interviewed who did challenge decisions reported a perceived lack of independence in the way the legal review and appeal processes were implemented. Beneficiaries felt ill-informed about these processes and factors such as panel membership and panel members' conduct exacerbated the feelings of powerlessness. This view was supported by many of the participants. MSD staff on the other hand, believed the review and appeal processes operated fairly for the most part, and did not identify a power imbalance between Work and Income and beneficiaries as disadvantaging beneficiaries who used these processes. Our findings indicate that access to information, advice and representation by a beneficiary advocate or lawyer are key mechanisms to counteract the imbalance of power beneficiaries experience.

Social security legislation is complex, frequently amended and not easily accessible to beneficiaries. Significantly, Work and Income case managers make entitlement decisions based on internal policy guidelines rather than on the provisions of the legislation and some participants thought this could lead to wrong decisions where the policy was not consistent with the provisions of the Social Security Act. It was outside the scope of our research to review the extent to which Work and Income policy is aligned to legislation, or whether it is more a matter of case managers' interpretation of policy that can lead to wrong decisions. However, many participants regarded the reliance on internal policy to be a significant factor in the administration of the benefit system, which potentially disadvantaged beneficiaries when accessing entitlements and challenging entitlement decisions.

The benefit review and appeal processes established under the Social Security Act 1964 were designed to address the inherent imbalance of power of between the state and beneficiaries by enabling benefit decisions to be independently scrutinised. Beneficiaries faced barriers though to using these processes including not knowing about these avenues; a lack of information about what is involved; difficulty finding support and, where necessary, a representative.

How these review and appeal processes are implemented is crucial to beneficiaries' access to justice and the research identified operational issues which beneficiaries felt disadvantaged them. Beneficiaries' experiences also showed that their access to justice was compromised due to characteristics of the processes themselves, for example, having no right of appeal against decisions of MABS, the composition of the panels, and in the case of BRCS a lack of independence of the panel. Three further factors emerged in relation to reviews and appeals: the apparently high numbers of review and appeal applications which are withdrawn prior to a hearing; the low numbers of beneficiaries attending hearings; and the small proportion of beneficiaries who are represented.

Interestingly, despite sometimes having had negative experiences using review and appeal processes to challenge decisions, some beneficiaries reported feeling empowered as a result. They felt that by "standing up to" a department about a decision they believed to be wrong, and exercising their right to have their views heard, they were counteracting a power imbalance that existed between them and Work and Income.

Beneficiaries' experiences indicated there is a spectrum of legal needs ranging from the lower levels of information and advice, to the more intensive support of legal assistance and representation. A person's capacity is the most important factor determining the level of legal help that is needed, but additional factors include the complexity of the dispute and the legal forum the dispute is being determined in. The most significant unmet legal need identified through this research was legal representation for reviews and appeals to MABS, BRCS, the SSAA and appeal or judicial review cases in the High Court. The need for legal advice and representation in respect of benefit fraud was also highlighted.

Despite indications that many beneficiaries required legal representation, there are gaps in services available to meet those needs. Private practice lawyers were thought to be out of reach for welfare law disputes due to beneficiaries' inability to pay for representation, limits on the availability of legal aid and barriers to accessing legal aid when it is available. In the welfare law arena, private practice lawyer representation appears to be concentrated in criminal prosecutions for benefit fraud offences.

Beneficiary advocacy groups provide specialist welfare advocacy services outside a legal practice framework. Although some advocates have considerable legal knowledge and expertise in welfare law, and indications are that the majority of those beneficiaries who are represented in appeals to the SSAA are represented by beneficiary advocates, CLCs could contribute their legal expertise and resources to extend the availability of representation for beneficiaries with welfare law disputes. The research has highlighted opportunities for CLCs to complement the work of beneficiary advocacy services by providing more legal assistance and representation than they currently do.

Within the legal sector, CLCs are best placed to respond to beneficiaries unmet legal needs with welfare law. CLCs employ lawyers, they have significant resources, their services are free, and the network of CLCs provides national coverage. By sharpening their focus on welfare law services and the legal needs of people living in poverty, CLCs will be fulfilling their purpose of providing access to justice for the most disadvantaged people in the community.

However, welfare law forms a very small part of CLCs case-work and community education work. While cost is not a barrier, as it is with engaging private practice lawyers, the research identified other barriers to using CLC services. There were low levels of knowledge about community law centres and the services they provide. Some participants did not know law centres services are free. There was some evidence of a perception that CLCs do not have "real" lawyers and people were uncertain how far a CLC could take a case. Participants also identified inconsistency in the delivery of welfare law services by CLCs around the country with some centres having limited expertise in this area.

Perhaps the most prominent barrier to accessing legal help with a welfare law problem was that welfare was not generally viewed as a legal issue. As a consequence of this, along with the barriers beneficiaries face accessing legal help from private practice lawyers and CLCs, there is little interaction of the legal sector in the area of welfare law. Across the legal sector there are low levels of knowledge of welfare law, including variable knowledge within CLCs.

Strategies for CLCs to improve access to their services include: better articulation and promotion of their services; increasing assistance with reviews and appeals and a commitment to prioritising representation services on welfare law; framing welfare problems as legal problems; preparing information resources for beneficiaries and providing more community legal education; and creating better pathways for beneficiaries to get help from community law centres. Examples include a toll free phone number for advice about welfare law and screening clients who present with other legal problems for underlying welfare law issues.

The research identified that CLCs and beneficiary advocacy groups have complementary roles in the area of welfare law and there are significant benefits of CLCs and BAGs working together to improve beneficiaries' access to justice. Together they can be a "watchdog" over the administration of the benefit system. CLCs have the opportunity to build capacity nationally, such as through establishing a specialist welfare team. Forming a relationship with MSD and broadening out CLCs' relationship with MOJ would enable CLCs to more effectively respond to issues experienced by beneficiaries in accessing entitlements and using review and appeal processes.

The research has indicated where further in-depth research would be beneficial, for example to explore areas such as Māori experience of the benefit system; the impact of stigma on beneficiaries; and the experience of young people accessing benefit entitlements. Options for reform of the benefit review and appeal processes could be developed in a law reform paper.

This project provided the opportunity for community law centres to build expertise in undertaking research, in particular qualitative research techniques, which seek to understand people's experience of

the world. This has helped us to identify elements of a meaningful and effective response to beneficiaries' welfare legal needs. By stepping away from day-to-day demands of law centre work, and seeking an evidence base on which to better understand the experience of beneficiaries, community law centres have taken up Rice's (2010, p. 17) invitation to "reflect deeply on their contemporary identity and role". We believe our research findings will not only inform the delivery of community law centre services to beneficiaries, but will also spark further discussion among centres about law centres' vision, purpose and strategy, and how centres can most effectively respond to people living in poverty.

Implications of research for the Ministries of Social Development and Justice

While the research goals related to community law centres, we anticipated that the research would also result in findings of interest to the Ministry of Social Development and the Ministry of Justice. The report identifies areas as potentially warranting further research, which MSD or MOJ may have the capacity to undertake.

Ministry of Social Development

Themes to emerge from the research that may be of interest to MSD included the potential for MSD and CLCs to have a formal relationship nationally, and for CLCs to adopt a specialist network model which could include increased liaison with MSD. Significantly, participants identified MSD as a potential gateway to community legal services.

The research highlighted the importance of consistency of decision making and good communication, both about the availability of entitlements and reasons for applications being declined.

In relation to benefit reviews and medical appeals, participants advocated prominent displays in all Work and Income offices about reviews and appeals. Participants also felt MSD could improve the information it provides people who are using these processes. For example, information could be included about the option of applying for

legal aid for medical appeals. Through its feedback MSD has indicated it welcomes the opportunity to work with CLCs to consider different approaches to informing clients about the review and appeal processes and the support available.

With medical appeals, suitable hearing rooms and selection of panel members with appropriate expertise for the cases they are deciding were raised. The apparent lack of legal knowledge on MABs was a concern, with suggestions for changing the make-up of the panel, or improved panel member training. Improvements in areas of performance standards and a process for performance management, along the lines of the process in place for BRCs, was advocated. Establishing a right of appeal against MAB decisions could be considered by MSD.

The benefit review process could be improved by further training panel members and taking steps to ensure actual or perceived bias is minimised. In addition to informing beneficiaries they have a right of appeal against a BRC decision to the SSAA, MSD could provide more detailed information about what appealing involves and options for getting help with an appeal.

With both medical appeals and benefit reviews, the desirability of greater transparency of their work through public reporting and establishing a feedback mechanism for users, was indicated by the research.

MSD could address the issue raised in this report that people being investigated for benefit fraud are not adequately informed of their right to obtain legal help. MSD could also improve the information it provides beneficiaries about their legal rights and obligations with a fraud investigation.

Areas identified for possible future research included the experience of Māori accessing entitlements, the impact of the introduction of the Youth Services Support Unit on young people accessing benefits. MSD could also explore the reasons for the low rate of applicants' attendance at BRC hearings and for the high numbers of cases that are withdrawn before MAB and BRC hearings.

Ministry of Justice

The research identified areas of potential interest to MoJ in relation to the Social Security Appeal Authority, including improving information for appellants using the SSAA, improving timeliness of appeals, and establishing a process for user feedback. Public reporting of the SSAA's work could also be considered. To increase the extent of representation at SSAA hearings, MoJ could consider a pilot programme where unrepresented appellants are offered legal advice.

In relation to legal aid, the research raises the issue of access to legal aid for Benefits Review Committee reviews. Consideration could also be given to the barriers preventing community law centres undertaking legal aid work and how these might be addressed.

As the Ministry responsible for funding community law centres, the research has implications for MoJ's CLC funding policy (around funding for representation and allocation of community legal education resources). A specialist network model may also be of interest to MoJ, for it potentially improves consistency and quality of welfare law services, and more effective use of resources than each centre working independently of each other. Finally, the concept of a national toll free phone number such as 0800BENEFITS may appeal to MoJ in its goals of effective national legal service delivery and enhanced access to community legal services for the most disadvantaged.

Areas identified for possible future research included the experience of beneficiaries who appeal to the SSAA and exploring barriers to accessing legal aid for welfare law cases.

Glossary and acronyms

- Acquit** an accused person is found not guilty
- Act** a law created by parliament (also **Legislation**)
- Adjournment** a postponement in legal proceedings
- Administrative law** law covering decisions making by government departments and agencies
- Administrative review** process for challenging a decision by a government department (also **Review**)
- Advice** provision of an opinion about how the law applies to a particular situation
- Advocate** a person who is not a lawyer but provides advice, help and/or representation
- Appeal** a challenge to decision
- Appellant** a person who takes an appeal
- Applicant** a person who applies for a review by a Benefits Review Committee; or a person who applies for a benefit.
- Assistance** legal help to resolve a legal problem, such as writing submissions, and which falls short of representing a person.
- Case law** the law created from the outcomes of previous cases
- Centrelink** Australian government agency administering social security benefits
- Citizens Support Fund** MSD fund for beneficiary advocacy groups
- Civil law** law dealing with disputes between people
- Common law** see **Case law**
- Community law centres** community agencies funded under the Legal Services Act 2011 to provide information advice, assistance, representation and law reform
- Community law case-worker** a person who works in a community law centre, and is not a qualified lawyer, who provides services to community law centre clients under the supervision of a lawyer
- Community lawyer** lawyer working in a community law centre

- Community representative panel member** a member of a BRC appointed to represent the interests of the community
- Corrective power** legal power held by the Chief Executive of MSD to backdate a benefit where, due to an error by a MSD staff member, a person did not apply for a benefit
- Criminal law** law dealing with crimes and their punishments
- Criminal prosecution** legal action taken in court dealing with criminal offences
- Decision** the judgement given by a court or decision-making body after considering the evidence and the law
- Designated doctor** a doctor who gives an independent opinion about whether a person meets medical criteria for a benefit, paid for by Work and Income
- District Court** low level court with civil and criminal jurisdiction
- Evidence** information and documents presented to prove your case
- Fraud** an intentional dishonest act done with the purpose of deceiving others to get some benefit at the expense or disadvantage of other, such as knowingly giving false or misleading information to get a government payment to which you are not entitled
- Hearing** formal meeting with decision-making body to hear evidence
- High Court** the NZ court that is above the District Court and below the Court of Appeal and Supreme Court, can hear criminal and civil cases
- Information** general legal information
- Inquisitorial** a court or tribunal's process where it is actively involved investigating the facts of the case
- Integrated case management** a case management system where government agencies are represented by one case manager
- Investigator** person who gathers evidence to assess whether a crime has been committed
- Judicial review** application to the High Court to challenge a decision that is unlawful, unreasonable or made using unfair process
- Jurisdiction** a court or decision-making body's authority to rule on the case
- Law reform** the process of making changes to law
- Legal advice** giving of a formal opinion by a person, usually a lawyer, about the law or courses of action

Legal aid government help that pays for some or all of your lawyer's fees when you need a lawyer and can not pay for this yourself

Legislation see **Act**

Natural justice rules or principles of fairness, the duty to act fairly

Official Information Act request application for access to information held by a public agency under the Official Information Act 1982

Ombudsman a public official appointed to investigate citizen's complaints against the administrative agencies of government

Original decision maker staff member of MSD responsible for making entitlement decision about a benefit

Participant a person who was interviewed for the research

Poverty law law and activities that affect people living in poverty

Private practice lawyer a lawyer who works in a privately owned business for profit

Pro bono legal help legal services provided in the public interest by private practice lawyers for free

Representation (representative) where a person acts on your behalf for example in a hearing or tribunal

Review see **Administrative review**

Social security system system providing financial assistance for people with inadequate or no income (also **Social welfare system**, **Welfare system**)

Social welfare system See **Social security system**, **Welfare system**

Tribunal a decision making body established under legislation dealing with specialised areas of law. Tribunals are less formal than courts, but their decisions affect the legal rights of a person

Unveiling an unveiling ceremony, or hura kōhatu, signifying the unveiling of a memorial stone, is an important part of Māori cultural practice following a person passing away and usually occurs one year after a person has died

Welfare system see **Social welfare system**, **Social security system**

Witness a person who says what he or she has seen, heard or experienced

Acronyms

ACC	Accident Compensation Corporation
BAGS	Beneficiary Advocacy Groups
BRC	Benefits Review Committee
CAB	Citizens Advice Bureau
CLCS	Community Law Centres
CCLC	Coalition of Community Law Centres
CLCA	Community Law Centres o Aotearoa
MAB	Medical Appeals Board
MOJ	Ministry of Justice
MSD	Ministry of Social Development
NBACG	National Beneficiary Advocate Consultative Group
NWRN	National Welfare Rights Network (Australia)
SSAT	Social Security Appeals Tribunal (Australia)
SSAA	Social Security Appeal Authority
WINZ	Work and Income New Zealand (now officially Work and Income)
YSSU	Youth Services Support Unit

References

- Alternative Welfare Working Group (2010a) *Welfare Justice in New Zealand. What we heard. A summary of submissions made to the Welfare Justice Alternative Welfare Working Group*. Wellington: Caritas
- Alternative Welfare Working Group (2010b). *Welfare Justice For All: Reflections and recommendations. A contribution to the welfare reform debate*. Wellington: Caritas
- Asher, A. (2011). *Centrelink: The Right of Review, Having Choices, Making Choices*. Report by the Commonwealth Ombudsman, Report 4/2011. Canberra.
- Buck, A., Smith, M., Sidaway, J. & Scanlan, L. (2010). *Piecing it together: Exploring one-stop shop legal service delivery in community legal advice centres*, Legal Services Commission. Retrieved from www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010/CLACPiecingItTogether.pdf
- Chile, L. (2007). *Understanding the legal needs of migrant and refugee communities in the Auckland Region*. Auckland: AUT University.
- Chunn, D. & Gavigan, S. (2004). Welfare law, welfare fraud and the moral regulation of the never deserving poor. *Social Legal Studies*, 13(2), 219–243.
- Coumarelos, C., Wei, Z., & Zhou, A.Z. (2006). *Justice made to measure: NSW legal needs survey in disadvantaged areas*. Sydney: Law and Justice Foundation of New South Wales. Retrieved from [www.lawfoundation.net.au/ljf/site/articleIDs/B9662F72F04ECB17CA25713E001D6BBA/\\$file/Justice_Made_to_Measure.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/B9662F72F04ECB17CA25713E001D6BBA/$file/Justice_Made_to_Measure.pdf)
- Coumarelos, C. Macourt, D., People, J., McDonald, H. & Wei, Z. (2012). *Legal Australia-Wide Survey: Legal Need in Australia' in Access to Justice and Legal Needs*. Sydney: Law and Justice Foundation of New South Wales. Retrieved from www.civiljustice.info/cgi/viewcontent.cgi?article=1024&context=access
- Decision of the Social Security Appeal Authority (2013 NZSSAA 11).
- Delahunty, C. (2003) *Poverty and Advocacy: The "Gisborne Impact" Story*. An action research report on the Te Tairāwhiti MSD "Impact" Kotare Trust Research and Education for Social Change.

- Department for Work and Pensions (DWP). (2012). *Social Security and Child Support Hearings: Early Analysis of appeals allowed from pilot data*. Retrieved from www.gov.uk/government/uploads/system/uploads/attachment_data/file/223139/sscs_appeals.pdf
- Department for Work and Pensions (DWP) (2013). *Fraud and Error in the Benefit System: Preliminary 2012/13 Estimates (Great Britain)*. Retrieved from www.gov.uk/government/publications/fraud-and-error-in-the-benefit-system-preliminary-201213-estimates
- Diesfeld, K., Patston, P., McLean, M., Miller-Burgering, W., Vickery, R., & Phelan, T. (2006). *Proposed service delivery model: Meeting the legal needs of people with disabilities in the Auckland region. Report No. 2*. Auckland: Auckland University of Technology.
- Expert Advisory Group on Solutions to Child Poverty (2012). *Solutions to Child Poverty in New Zealand: Child Poverty in New Zealand: Evidence for Action*. Retrieved from www.occ.org.nz/assets/Uploads/EAG/Final-report/Final-report-Solutions-to-child-poverty-evidence-for-action.pdf
- Feldman, M. (1995). Political lessons: Legal services for the poor. *Georgetown Law Journal*. 83, 1529–1632.
- Humpage, L. & Craig, D. (2008). From welfare to welfare-to-work. In N. Lunt, M. O'Brien & R. Stephens (eds) *New Zealand, new welfare* (pp. 41–48). Melbourne: Cengage Learning.
- Joychild, F. (2001). *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*. Wellington: Ministry of Social Development.
- Judith Stubbs & Associates (2010). *Summary report. Planning for legal needs: Legal needs assessment framework*. Retrieved from www.clcnsw.org.au/cb_pages/publications.php?category_id=1206
- Legal Services Act 2011.
- Legal Services (Quality Assurance) Amendment Regulations 2013.
- Ministry of Justice (n.d.) Social Security Appeal Authority: A Guide to Making an Appeal. Retrieved from www.justice.govt.nz/tribunals/social-security-appeal-authority/documents/ssaa-0609-1-G.pdf
- Ministry of Social Development (2011). *The Statistical Report for the Year Ending June 2011*. statistical-report-2011.msd.govt.nz/uploads/files/downloads/MSD-statistical-report-2011.pdf
- Moorhead, R. & Robinson, M. (2006). *A trouble shared: legal problems clusters in solicitors' and advice agencies*. London, UK: Department for Constitutional Affairs.

- Mosher, J., & Herman, J. (2004). Welfare fraud: The constitution of social assistance as crime. In J. Mosher and J. Brockman (eds) *Constructing crime: Contemporary processes of criminalization* (pp. 17–52). Vancouver: UBC Press.
- Noble, P. (2012). The Future of Community Legal Services. *Alternative Law Journal*. 37(1), 22–25
- Prenzler, T. (2011). Welfare fraud in Australia: Dimensions and issues. *Trends & Issues in Crime and Criminal Justice* 421 aic.gov.au/publications/current%20series/tandi/421-440/tandi421.html
- Ratcliffe, L. (2013, April 13). Medical Appeal Board costs treble then drop back. *New Zealand Doctor*. p. 5
- Rice, S. (2012). Are CLCs finished? *Alternative Law Journal*. 37(1), 17–21.
- Rich, N. (2009). *Reclaiming community legal centres: Maximising our potential so we can help our clients reach theirs*. Consumer Action Law Centre and Victoria Law Foundation.
- Rhode, D. (2004). Access to Justice: Connecting Principles to Practice. *Georgetown Journal of Legal Ethics* 17, 369–422.
- Sarat, A. (1990). “The Law is all over”: Power, Resistance and the Legal Consciousness of the Welfare Poor, *Yale Journal of Law & the Humanities*. 2(2), 343–79.
- Social Security Appeal Authority case law database – New Zealand Legal Information database. www.nzlii.org/nz/cases/NZSSAA/
- Social Security Act 1964.
- Social Security (Benefit Categories and Work Focus) Amendment Act 2013.
- Social Security (Youth Support and Work Focus) Amendment Act 2012.
- Walsh, T., & Marston, G. (2010). Benefit overpayment, welfare fraud and financial hardship in Australia. *Journal of Social Security Law*, 17(2), 100–125.

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APPENDIX 1 **Social Security Act 1964**

purpose and principles

1A Purpose

The purpose of this Act is—

- (a) to enable the provision of financial and other support as appropriate—
 - (i) to help people to support themselves and their dependants while not in paid employment; and
 - (ii) to help people to find or retain paid employment; and
 - (iii) to help people for whom work may not currently be appropriate because of sickness, injury, disability, or caring responsibilities, to support themselves and their dependants:
- (b) to enable in certain circumstances the provision of financial support to people to help alleviate hardship:
- (c) to ensure that the financial support referred to in paragraphs (a) and (b) is provided to people taking into account—
 - (i) that where appropriate they should use the resources available to them before seeking financial support under this Act; and
 - (ii) any financial support that they are eligible for or already receive, otherwise than under this Act, from publicly funded sources:
- (ca) to provide services to encourage and help young persons to move to education, training, and employment rather than to receiving financial support under this Act:
- (d) to impose, on the following specified people or young persons, the following specified requirements or obligations:

- (i) on people seeking or receiving financial support under this Act, administrative and, where appropriate, work-related requirements; and
- (ii) on young persons who are seeking or receiving financial support under this Act, educational, budget management, and (where appropriate) parenting requirements; and
- (iii) on people receiving certain financial support under this Act, social obligations relating to the education and primary health care of their dependent children.”

1B Principles

Every person exercising or performing a function, duty or power under this Act must have regard to the following general principles:

- (a) work in paid employment offers the best opportunity for people to achieve social and economic well-being;
- (b) the priority for people of working age should be to find and retain work;
- (c) people for whom work may not currently be an appropriate outcome should be assisted to prepare for work in the future and develop employment-focused skills;
- (d) people for whom work is not appropriate should be supported in accordance with this Act.

APPENDIX 2 Methodology

Research objectives

The Beneficiaries' Access to Justice Research Project aimed to examine beneficiaries' access to justice and legal needs in relation to:

- accessing welfare entitlements
- benefit fraud investigations
- challenging benefit decisions they disagreed with.

The outcomes sought were:

- Understanding beneficiaries' experience of the benefit system as a foundation for delivering community legal services.
- Understanding the barriers and enablers to beneficiaries accessing benefit entitlements and engaging in benefit review and appeal processes.
- Finding evidence of beneficiaries' legal needs with welfare law.
- Understanding the barriers beneficiaries face accessing legal services in relation to benefit disputes.
- Identifying the particular role CLCs could take to respond to beneficiaries' welfare law needs, and seeking feedback about community law centres' provision of welfare law services and areas where services could be developed and improved.
- Identifying key messages for CLC information resources for beneficiaries.
- Contributing towards building research and evaluation capacity within community law centres.

Lottery Community Sector Research Grants have a community development focus as they aim to facilitate research that will be beneficial to communities. This funding supports community organisations to undertake their own research and build their internal research capacity. Community Law Canterbury staff led and implemented the research

with support from experienced researchers. That allowed us to learn by doing with the safety net of advice, guidance and oversight. University students with an interest in community law and access to justice were recruited and trained to assist with conducting interviews and data analysis.

Research design

Our research design utilised different sources of data and methodologies to gain both a broad perspective of the systems, processes and services available to beneficiaries as well as individual experiences of accessing entitlements. The research is primarily qualitative as it focuses on people's experiences and this is contextualised with statistical data and findings from other studies.

To examine New Zealand beneficiaries' experiences in-depth interviews were done with beneficiaries and professionals who work with beneficiaries and are involved in the benefit review and appeal processes.

To inform our research design and analysis a literature review was conducted to identify what other studies, nationally and internationally, had found in regards to beneficiaries' access to entitlements, fair process and legal needs.

The views of community law centres and beneficiary advocacy groups nationally were sought through an online survey, undertaken by Liz Gordon. Seventeen community law centres and fourteen benefit advocacy agencies responded. Further details about the methodology for that survey are in the *Access to Justice for Beneficiaries: Online Survey Report*.

A small number of individual interviews were conducted with professionals from these organisations for a more in-depth account of the work beneficiary advocates and CLC lawyers undertake with beneficiaries.

Statistical data was requested from the Ministry of Social Development and the Ministry of Justice about outputs and outcomes of review and appeal processes. The statistical data provided some context to the qualitative findings from interviews in terms of volumes and outcomes for beneficiaries.

Some quantitative data was also accessed from Community Law Centres about their work on welfare law issues i.e. number of welfare law cases; community education hours devoted to welfare law.

Ethical considerations

The research was planned so that ethical responsibilities were paramount, including informed consent, guaranteed confidentiality and anonymity. The guiding ethical principle for our research was to do no harm.

Ethical review was undertaken by Dr Missy Morton who worked with Community Law Canterbury to develop our understanding of our ethical responsibilities and how to address particular ethical issues, before providing a formal ethics review of the project. Interview tools (information sheet, consent form, interview guide) and processes were developed.

Data collection methods

In-depth interviews

In total 50 interviews were conducted for this research, 21 interviews with agency representatives, and 29 interviews with beneficiaries; and a focus group with 5 beneficiaries. Interviews were undertaken in different areas around New Zealand. The interviews were in-depth based on a semi-structured interview guide that allowed participants to reflect on their experiences, express their views and give the interviewer an opportunity to explore what the participant was saying through prompts. Most interviews were done face-to-face, with only three done by telephone. Interviews took place at homes or offices and ranged from half an hour to two hours.

Beneficiaries who were interviewed received a small gift for taking part in the research and had their transport costs covered. Beneficiaries were also offered places to get support after being interviewed and follow-up appointments with community law centre lawyers if needed.

The section below, Community interviewers, outlines the training and supervision process for interviewers.

Where participants agreed, interviews were recorded and transcribed. Of the 50 interviews done, three interviews were not recorded and detailed notes were taken. Interviews were then coded according to themes and analysed to identify commonalities as well as unique experiences.

A number of interview tools were developed (listed below) for both beneficiary interviews and agency interviews:

- Guidelines for initial contact
- Interview tracking
- Information sheets for agencies and beneficiaries
- Informed consent form
- Interview guide
- Interview summary form for interviewers post interview

Sample of beneficiaries interviewed

The purpose of the research was to investigate beneficiaries' legal needs therefore we purposefully sought beneficiaries who had one or more of the following experiences: some difficulties accessing entitlements; been investigated for benefit fraud; used a benefit review or appeal process. To get a diverse range of experiences about the legal needs of beneficiaries we interviewed beneficiaries on different types of benefits and with different attributes such as ethnicity, age, gender and experience of disability. Participants were recruited through community law centres, benefit advocacy groups and other community agencies.

The research did not set out to ascertain the level of satisfaction with Work and Income and MSD's services in general by surveying a representative sample, but rather to gain an understanding of beneficiaries' legal needs in relation to welfare issues so that community law centres could respond. The findings should be read in this context.

In total 34 beneficiaries participated. The beneficiaries had the following demographic attributes:

- 11 identified as Māori, 4 Pasifika, 1 Asian, 22 Pākehā (Some people identified with more than one ethnicity)
- 19 were women and 15 were men
- 4 were aged 18–24 years; 14 were between 25 and 44 years; 13 were between 45 and 64 years; and 3 were 65 years and over.

Of the 34 beneficiary participants, 23 had experience of health conditions or disability, or of applying for/receiving assistance for a family member with a disability. Participants' experience of disability included intellectual, physical, mental illness and addiction. One participant was deaf.

The research sought the views of beneficiaries on a range of different types of benefits, which at the time of interviews were categorised as: Unemployment Benefit (2), Sickness Benefit (6), Invalids Benefit (18), Domestic Purposes Benefit (7), Domestic Purposes Benefit Care of Sick and Infirm (1), Emergency Benefit (1), Independent Youth Benefit/Youth Payment (4) and Unsupported Child Benefit (1).

Other benefits discussed in the interviews included Childcare Subsidy, Child Disability Allowance, Disability Allowance, Special Benefit/Temporary Additional Support, Special Needs Grants (including Food Grants, Steps to Freedom and Funeral Grants), Advance Payment of Benefit, Training Incentive Allowance, Accommodation Supplement and earthquake related grants.

20 beneficiaries had experience using a legal review or appeal process (5 participants had lodged a medical appeal to a Medical Appeals Board; 12 had appealed to a Benefits Review Committee and 3 people had experience of appealing to the Social Security Appeal Authority). Six beneficiaries had experience of being investigated for benefit fraud.

The interviews and focus group were undertaken between October 2012 and July 2013. Most beneficiaries interviewed were receiving a benefit at the time of the interviews. Three were not, but had received a benefit within the previous three years. Benefit review and appeal hearings had taken place within five years of being interviewed.

Some participants said they were pleased they had the opportunity to have their say, and some expressed the hope that their interview would contribute to improving things for other people.

Sample of agency representatives

Twenty-one agency representatives were interviewed:

- community law centre lawyer (1),
- private practice lawyer (1)
- national or regional workers from beneficiary advocacy services (3)

- welfare law advisor (1)
- national/ regional or local community agency workers and community advocates (8)
- decision makers on review and appeal bodies (3) and
- Ministry of Social Development staff (4).

Community interviewers

Interviews were done by community law centre staff and student researchers who were recruited through Te Putairiki (Māori Law Students Association, University of Canterbury). Researchers received comprehensive training in research methods, interviewing and ethical and cultural responsibilities.

Where possible participants were offered a choice of interviewers. In most cases interviewers worked in pairs, with one person leading the interview and the other providing support. This also made it possible to provide feedback and after each interview the researchers recorded their reflections on how it went (interview summary). Feedback was shared in evaluation and data analysis workshops.

Steps taken to support interviewers and mitigate bias included:

- Research design and development of the interview questions was guided by the advisory group and research supervisor to ensure a rigorous research design and methodology.
- The students and Community Law Canterbury staff conducting the interviews attended several training workshops facilitated by the research supervisor to teach them about interview techniques, ethical practices when conducting interviews, and how to present questions in a non-biased manner. Training included role-playing the interviews and reflecting on interview processes.

Interviewers reflected on the experience of interviewing participants:

I really enjoyed meeting people, sounds kind of quite basic really doesn't it, going into people's homes, and them being so open, it's quite humbling. And I have to say I was a little bit challenged – you know, going to university you're a little bit up in your ivory tower – this is so judgemental – you think people on benefits, they're not too bright at times, which is silly. Some of the things I was hearing in interviews, I was

just so impressed. It was really insightful. It doesn't really matter that they might not have a high level of education, or they might not have even finished high school. ... I was humbled that I'd been so indoctrinated. ... I always thought I'm such a cool guy and I was surprised at how judgmental I was – I wasn't as cool and down with the people as I thought I was.

When I hear the stories about beneficiaries and like all the beneficiary bashing that goes on, ... I do think about how beneficiaries must feel. But then talking to actual beneficiaries about what's been in the news and things, that was really cool. These are the real people that all this rhetoric is aimed at. I really enjoyed being there as part of the project as it gave people a chance to just vent about their stuff – I think that was quite cathartic for a lot of participants – that was satisfying that I felt they were getting something out of it.

The impact of being involved in the project extended to influencing their choice of work:

I've learned a lot about people and as well as about myself. It reinforced what I want to do with my job and career, who needs help, where are the gaps for getting advice and help from. There are so many people that need help and try their best and are so informed but still need help.

Analysis and writing the report

An analysis workshop was held with all the interviewers to provide an opportunity for them to reflect on their experiences and to identify high level findings from the interviews they conducted. This workshop was very successful and participants found that it was a good way of sharing what they had learnt from the interviews, identify major themes for the research to focus on, as well as reflect on personal learnings.

CLC staff and community interviewers interested in taking part in the next stages of analysis were invited to an interview coding workshop. The research supervisor Sue Carswell outlined the basics of coding and, with the aid of a coding schedule, people were allocated interviews to code. There were subsequent meetings of this smaller group to analyse the interviews and this evolved into the writing team.

The writing team was led by Kim Morton, who is the lead author, Claire Gray and Anne Heins with support from the research supervisor

Sue Carswell. They were responsible for synthesising the findings from the interviews, statistics, online survey and literature review to write this report.

To provide quality assurance the following measures were undertaken:

- The writing team met frequently to discuss and internally peer review their findings and each other's writing.
- A draft report was reviewed by professional researchers, Sue Carswell and Liz Gordon, and Community Law Canterbury manager Louise Taylor and their feedback incorporated into the next draft.
- The draft report was then provided to MoJ and MSD to check for factual inaccuracies. Feedback was provided by both Ministries and has been incorporated into the final report.

APPENDIX 3 Research tools



Beneficiaries' Access to Justice Research Project 2012 Information sheet for participants: agency representatives

Community Law Canterbury is doing a research study about the experiences of beneficiaries. We hope that you will agree to take part in this important research.

We want to understand more about beneficiaries' legal needs, and how community legal services could be improved for beneficiaries.

We will also explore beneficiaries' experiences receiving their entitlements from Work and Income, and of challenging Work and Income decisions they have disagreed with. The research will include benefit fraud investigations, and reviewing and appealing Work and Income decisions (through Benefit Review Committees, Medical Appeals Boards and the Social Security Appeal Authority).

The research findings will be used to influence future community legal services and to improve beneficiaries' access to justice.

Invitation

We are inviting community advocates, individuals and agencies who work with beneficiaries to take part in this research.

What it will involve

You will meet with a Community Law Canterbury researcher at a place you agree on, to talk about your experiences. Interviews will take about an hour.

With your agreement, interviews will be audio-taped. Your interview will then be transcribed. Any extracts we wish to use will be sent back to you for checking and agreement.

Your choice

Taking part is voluntary. You can choose not to answer any questions and you can stop the interview at any time. You may also choose to withdraw from the project without penalty.

Confidentiality

What you tell us is kept confidential to the research team. It will only be used for research purposes. Your name will not appear in research reports and nothing will be published that might identify you or where you came from, unless you agree that you be identified.

Anonymity

It is recognised that some participants may be able to be identified due to their position held. Use of quotes or descriptions of your circumstances that would potentially identify you or your agency will only be used with your written agreement. You will be offered the opportunity to check quotes and information taken from your interview about your agency before it is incorporated into any research reports.

What happens next?

If you agree to take part in the study, we will arrange to meet you for an interview at a time and place that is convenient for you.

Any questions, please contact us and we will talk about it.

Kim Morton kim@canlaw.org.nz

Phone 03 382 8278, 022 064 7963, 0508 226 529

Community Law Canterbury, P O Box 18684 Christchurch 8641



Beneficiaries' Access to Justice Research Project 2012

Interview participant consent form – agency representatives

- ☐ The researcher has explained to me the purpose of the research, and my right to choose not to answer any questions I don't like, or to stop the interview, without having to say why. I understand that I may also choose to withdraw from the project, including any information I have provided, up until the research report is drafted.
- ☐ I understand that all information will be kept confidential by the researchers, and will be used only for research purposes.
- ☐ I understand that my name will not be used in any research reports, and that nothing printed in the report will identify who I am, unless my position may unavoidably be revealed by the nature of my comments.
- ☐ I agree to be interviewed for this research study.
- ☐ I know I can have a support person at the interview with me if I choose.
- ☐ I agree for the interview to be recorded.
- ☐ I know that any quotes from my interview that will appear in the research report will be sent to me for checking.
- ☐ I would like a summary of the research once it is completed.

Name

Signature

Date

Any questions, please contact us and we will talk about it.

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Beneficiaries' Access to Justice Research Project 2012

Information sheet for participants

Community Law Canterbury is doing a research study about the experiences of beneficiaries. We hope that you will agree to take part in this important research, which is being funded by the Lottery Community Sector Research Fund.

We want to understand more about your legal needs, and how community legal services could be improved.

We want to find out what your experience has been receiving your entitlements from Work and Income, and if you were unhappy about a Work and Income decision, what you did about it. For example, this may include your experiences of benefit fraud investigation, and reviewing and appealing benefit decisions.

Community Law Canterbury will produce a research report. The research findings will be used to influence future community legal services and to improve beneficiaries' access to justice.

What it will involve

A Community Law Canterbury researcher will meet you at a place you choose, to talk about your experiences. Interviews will take about an hour. You can have a support person with you at the interview.

With your agreement, interviews will be audio-taped. Your interview will then be transcribed, and you will be asked if you would like to check quotes or descriptions of your circumstances we'd like to use in our report.

Your choice

Taking part is voluntary. You can choose not to answer any questions and you can stop the interview at any time. You may also choose to withdraw from the project up until the time the research report is drafted.

Confidentiality

What you tell us is kept confidential to the research team. It will only be used for research purposes. Your name will not appear in research reports and nothing will be published that might identify you or where you came from.

Anonymity

No participants' names will be used and nothing will be published that might identify you or where you came from. Where you have asked us to, we will check any quotes or descriptions of your circumstances that we would like to use in the research report to make sure you do remain anonymous.

Payment

Participants will be paid a koha for participating and will have transport and other necessary costs met.

Any questions, please contact us and we will talk about it.

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Beneficiaries' Access to Justice Research Project 2012

Interview participant consent form – beneficiaries

- ☐ The researcher has explained to me the purpose of the research, and my right to choose not to answer any questions I don't like, or to stop the interview, without having to say why. I understand that I may also choose to withdraw from the project, including any information I have provided, up until the research report is drafted.
- ☐ I understand that all information will be kept confidential by the researchers, and will be used only for research purposes.
- ☐ I understand that my name will not be used in any research reports, and that nothing printed in the report will identify who I am.
- ☐ I agree to be interviewed for this research study.
- ☐ I agree for the interview to be recorded.
- ☐ I would like to check quotes from my interview before they are used in any report. Contact me at:
Mobile _____
Email _____
- ☐ I would like a summary of the research once it is completed.

Name

Signature

Date

Any questions, please contact us and we will talk about it.

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Beneficiaries' Access to Justice Research Project 2012

Focus group consent form – beneficiaries

- ☐ The researcher has explained to me the purpose of the research, and my right to choose not to answer any questions I don't like, or to stop being part of the focus group, without having to say why.
- ☐ I understand that all information will be kept confidential by the researchers, and will be used only for research purposes.
- ☐ I understand that a summary of the discussion, and quotes from the discussion, may be used in the research report.
- ☐ I understand that my name will not be used in any research reports, and that nothing printed in the report will identify who I am.
- ☐ I agree to be part of a focus group for this research study.
- ☐ I agree for the focus group discussion to be recorded.
- ☐ I would like a summary of the research once it is completed.

Name

Address

Phone

Date

Ethnicity

Age

Gender

Signature

Any questions, please contact us and we will talk about it.

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Interview schedules

The interviews covered the following areas:

1. Interviews with representatives of agencies

- The role of the agency and its services to beneficiaries
- Administration of the benefit system: what is working well/not so well with the benefit system
- Where beneficiaries go for help with Work and Income problems
- The main legal issues beneficiaries face
- The barriers beneficiaries face getting legal help
- The accessibility and quality of legal services, and of community law centres
- Legal needs in relation to fraud investigations
- Benefit review and appeal processes: barriers to using these processes, and needs for help and support
- Medical Appeals Boards, Benefits Review Committees and the Social Security Appeal Authority – experience of the operation of these processes and beneficiaries' legal needs
- Information resources for beneficiaries – key messages and suggestions for information dissemination.

2. Interviews with beneficiaries

- Demographic data – age, gender and ethnicity
- Experience as a client of Work and Income, experience on a benefit, the kinds of problems people have had with benefits, their needs for help and support.
- Experience of fraud investigations – nature of investigation, help and support during investigation, outcome of investigation and experience of legal help with criminal and civil outcomes
- Experience challenging benefit decisions (outside of the review and appeal processes), the action taken and outcome
- Benefit review and appeal processes – barriers to using them, knowledge of the processes

- Experience of Medical Appeals Board, Benefits Review Committee and Social Security Appeal Authority: nature of case, information available prior to the hearing, experience of hearing, experience of advocacy and legal help, information needs
- Legal problems people have experienced (other than with benefits)
- Experience getting legal help – barriers to accessing legal help and what would make it easier
- Knowledge and experience of community law centre services, and how CLC services could be improved.

Access to Justice for Beneficiaries:
A *Community Law Response* presents the findings of Community Law Canterbury's research into the legal needs of beneficiaries. The report examines beneficiaries' experiences accessing welfare entitlements, reviewing and appealing benefit decisions, and of benefit fraud investigations. The findings reveal beneficiaries have significant unmet legal needs, ranging from information to representation, and face many barriers accessing legal support. Options are outlined to assist community law centres to improve beneficiaries' access to their services, and the quality, scope and extent of their welfare law services.

