

Working Paper 2011-1

Overseas Pensions Policy: the next steps

February 2011

by

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The authors extend their thanks to the Human Rights Commission and the Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington, for their contributions to the research and the forums on Overseas Pensions.

The Retirement Policy and Research Centre

The Retirement Policy and Research Centre is pleased to publish this Working Paper on recommendations for reform of the policy for and treatment of overseas pensions in New Zealand.

This Working Paper builds on the previous research on overseas pensions policy in New Zealand published by the Retirement Policy and Research Centre, and the two Forums held in 2010. The work has been supported by the Human Rights Commission, and aided by the contributions of Associate Professor Andrew Smith, The Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington.

The Working Paper makes specific recommendations for a reform of the inequities and anomalies that currently exist in overseas pensions policy. Some recommendations are for administrative change, and should be implemented immediately. Other recommendations require a significant policy change and should be informed by a national debate prior to legislative change.

The Retirement Policy and Research Centre encourages the government to act with urgency in 2011.

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Executive Summary

Under section 70 of the Social Security Act 1964, the Chief Executive of the Ministry of Social Development can reduce the payments of New Zealand Superannuation (NZS) to individuals who qualify for the pension but who receive an analogous overseas pension.

The Retirement Policy and Research Centre (RPRC), with the support of the Human Rights Commission, has produced a number of reports on aspects of this 'Direct Deduction Policy' (DDP). These are accessible on the RPRC's website (www.rprc.auckland.ac.nz).

In 2010, the RPRC organised two public Forums – in Auckland (1st February) and Wellington (25th August).

The RPRC's research and consultation makes a case for reform of either current practices or of the governing legislation itself. Several reforms are possible, assuming:

- First, an environment where the present practices with respect to the DDP are revised;
- Secondly where the environment is re-shaped from first principles, recognising the role of eligibility for NZS and the complex nature of state-administered, overseas pensions and their differing objectives.

The RPRC suggests that changes are urgently required and hopes that this report provides a basis for some timely action.

The RPRC acknowledges the Human Rights Commission for its material and practical support; and the Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington, for its contribution to the two Forums, and assistance in organising the Wellington Forum.

RPRC reports⁵

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⁵ All reports and working papers are available from www.rprc.auckland.ac.nz.

1. Synopsis of the issues

New Zealand's current overseas pension and pension portability policies fall short of the principles of equity, transparency, sustainability, economic efficiency and administrative simplicity in a variety of ways as outlined in the various RPRC reports.

Section 70 of the Social Security Act 1964 (SSA) requires a deduction from New Zealand Superannuation (NZS) of overseas pensions that are deemed by the Chief Executive of New Zealand's Ministry of Social Development (MSD) to be analogous to NZS.⁶ The reductions apply even if the New Zealand resident has entitlement to NZS by meeting the residency requirement, by having been resident for 10 years or more, with at least five of those years having been after the age of 50 (the '10(5) requirement').

The purpose of section 70 is to eliminate the possibility of a person receiving two state pensions covering the same contingency. Section 70 has been reviewed on a number of occasions by the MSD but has remained unchanged despite clear difficulties and inconsistencies in its application. Those difficulties are evidenced by the many complaints brought to the MSD, as well as to the Human Rights Commission (HRC), the Retirement Policy and Research Centre (RPRC), Members of Parliament and the media.

Recent amendments to the New Zealand Superannuation and Retirement Income Act (NZSRI Act) have largely addressed the potential inequities for pensioners who leave New Zealand after they qualify for NZS. The amendments however have not addressed the anomalies and inequities for those who retire in New Zealand with an entitlement to an overseas state pension. They have also introduced some further inconsistencies. For example, immigrants subject to section 70 who choose to stay in New Zealand are treated differently to those who decide to leave. Out of date bilateral reciprocal Social Security agreements⁷ now compound the anomalies.

New Zealand's pension system and its relationship to those of other countries has been reviewed by the MSD on at least four occasions between 2003 and 2008. The MSD made almost identical recommendations on the basis of each review (2003; 2004; 2005; 2008; Ministry of Social Development 2008), including advocating the following:

- Discontinue the policy of deducting a person's overseas pension from their partner's NZS entitlement, and make a consequential amendment to the Special Banking Option (SBO) so that only one partner needs to choose this option
- Remove foreign state pensions built up by voluntary contributions from the scope of section 70 of the SS Act;
- Clarify the wording of section 70 so that it is in plain English, and set out the treatment of each country's pension regulations; (Ministry of Social Development, 2008, pp. 13 - 21).

In 2011, these three recommendations from MSD have not been adopted, and section 70 remains unchanged despite clear difficulties in its application including possible human rights implications. The RPRC urges the government to adopt these recommendations, discussed in more detail in Part 4 of this paper. They do not require any amendments to the current legislation. The RPRC also urges the government to address other anomalies and inequities in the treatment of overseas pensions, as set out in Parts 5 and 6.

⁶ "The benefit, pension or periodical allowance, or any part of it, is in the nature of a payment which, in the opinion of the chief executive, forms part of a programme providing benefits, pensions, or periodical allowances for any of the contingencies for which benefits, pensions or allowances may be paid under ... the New Zealand Superannuation and Retirement Income Act 2001 ... which is administered by or on behalf of the Government of the country from which the benefit, pension or periodical allowance is received ..." (The Social Security Act, 1964, section 70(a)).

⁷ New Zealand has Social Security Agreements with Australia, Canada, Denmark, Greece, Ireland, Jersey and Guernsey, the Netherlands, and the UK.

There are some situations when the use of the DDP is appropriate even though the affected retirees may disagree; however, in some cases where the DDP is applied, in the RPRC's view, the retirees are justifiably aggrieved (Lazonby 2007; Dale, Lazonby et al. 2009; Dale, St John et al. 2009; Littlewood, St John et al. 2009; Littlewood and Dale 2010; St John and Dale 2010).

Clarity and consistency have both been lacking and the RPRC has concluded that the current policy with respect to the use of the DDP requires urgent attention.

2. Next steps

In the course of this research, the RPRC developed a range of possible reforms that would improve the current environment, including two main options for long-term solutions to the problems. Both these options would require legislative amendments.

The suggested changes are grouped in sections below:

- Part 3 assumes an environment where the present legislation with respect to the DDP persists, but it is applied with greater transparency and consistency.
- Part 4 suggests separate, special, and immediate attention for Australian emigrants and immigrants, given our strong economic and social ties.
- Part 5 assumes an environment re-shaped from first principles, recognising the complexity of state-administered overseas pensions and their differing objectives.

The changes contemplated in Part 5 are of a more fundamental nature and in some cases affect the future entitlements of all New Zealanders' reaching the state pension age, whether or not they have lived or worked overseas.

The RPRC notes that while the government has stated that no changes would be made to NZS, many of the inequities in the treatment of overseas pensions can be resolved by administrative changes of the kind described in Part 3.

3. Changes in practices, assuming the status quo

The framework provided by section 70 can be improved by administrative changes.

3.1 Family status discrimination

One egregious aspect of the current DDP practice, that appears to meet the narrow test for discrimination under the Human Rights Act, is abatement of a person's NZS by reason of their partner's overseas pension.⁸ At present, a 'Non-pension Spouse' may lose some or all of their NZS because the partner's overseas pension income is greater than their individual NZS entitlement.

For each of a married couple living in New Zealand with no overseas pension deemed analogous to NZS, the entitlement to NZS is fixed and paid without regard to the other spouse's NZS entitlements or income.⁹ However, if either of the couple is entitled to an overseas pension that is subject to the DDP, NZS changes from a pension that is separately calculated for each spouse to one that is calculated for the household.

The official concern is that if there is a concession for the current position with regard to those who are entitled to NZS, other 'beneficiaries' may also claim similar treatment in respect of other (non-age-pension) benefits. This concern seems unjustified because NZS for those aged over 65 is not a welfare benefit. It is fundamentally a *universal* pension, granted as an individual entitlement under separate legislation and without regard to the pensioner's own 'other income', let alone the spouse's income.

⁸ See <http://www.hrc.co.nz/home/hrc/resources/resources.php#case> for HRC Complaints Information, and Fact Sheets covering discriminatory laws; discrimination by the public sector and the private sector.

⁹ The exception is where a 'young' spouse of a superannuitant applies for NZS before reaching age 65.

There is no logic in denying NZS to someone unfortunate enough to marry the 'wrong' person when, if they were not married, or were married to someone else, they would receive the full amount. The Retirement Commission's 2010 Review stated:

If one partner's NZS is fully reduced to zero because the overseas public pension amount is greater than the rate of NZS, the excess amount is then applied to directly reducing the other partner's NZS. In some cases it can mean that a New Zealand citizen who has lived and worked all their lives in this country receives no NZS because their partner receives a public pension from overseas. This is an inconsistent piece of policy that goes against the principle of universal individual entitlement and needs to be changed. (Retirement Commission 2010)

And again on p. 130 of the Retirement Commission's 2010 Review:

In some situations a person can lose complete entitlement to NZS in their own right as a result of their partner's personal overseas state pension offsetting the entitlement of both of them.

The RPRC recommends fixing this indefensible anomaly immediately. There is little administrative cost involved in making the recommended change. Given that in 2009 the MSD data shows only 124 pensioners affected, and retrospective payments need not be incurred, the additional NZS costs are likely to be minimal. While the numbers are likely to rise, the annual cost of fixing this anomaly would be approximately \$2-3 million a year.¹⁰

3.2 Clarity regarding DDP-affected pensions

For the CEO of the MSD to decide a particular overseas pension should be taken into account in the calculation of NZS, and that the DDP should apply, it is sufficient, as stated in section 70(a) of the SS Act, that the pension is "administered by or on behalf of the Government of the country from which the benefit, pension or periodical allowance is received". Importantly, as Smith (2009) emphasises, under the DDP, the total amount of a pension paid to a claimant will be solely determined by New Zealand.

Inconsistencies in what pensions are considered to be of like nature to NZS have been identified during the RPRC's research. The MSD appears to make its decisions based on which entity is "...providing benefits, pensions, or periodical allowances". The RPRC suggests that the "nature of [the] payment" (another key expression in section 70), or the underlying philosophy of the benefit concerned should be more material than the identity of the provider.

The test of the 'state as the pension provider' has led to a number of inconsistencies in the application of section 70. For example, the Tier 2 Canada Pension Plan is included in the DDP, while the equivalent compulsory Chilean arrangement, delivered by private providers, is not. The UK provides another anomalous example, where the state-provided 'State Second Pension' (S2P)¹¹ is included in the DPP; and the alternative, equivalent, 'contracted-out' entitlement is not included.

The alternative scheme is required by UK law to cover the same contingencies that the S2P covers; and the sponsoring employer and employees receive reductions in their National Insurance contributions to pay for the contracted-out benefits. Thus, apparently, if a government administers the overseas pension, it is included for section 70. If it is privately administered, although contribution is compulsory and mandated by the government, it is not included in the DDP.

¹⁰ This probable over-estimate is based on 2009 data and assumes full entitlement to NZS for the Non-pension Spouse has to be restored. The total budgeted cost of NZS in 2010/11, as published by the Treasury, is \$8.8 billion (<http://www.treasury.govt.nz/budget/2010/ise/v10/105.htm>).

¹¹ Previously called the 'State Earnings Related Pension Scheme' or SERPS.

Another acknowledged difficulty is that some countries' public pensions perform a dual function: they are designed to give retirees an acceptable standard of living;¹² and they provide benefits directly related to the person's period of employment and remuneration, what, in New Zealand would be a workplace-related provision. Such a 'hybrid' scheme operates, for example, in Greece.

Clearly, a single rule cannot be devised to cover all situations. A possible solution, consistent with the principles of the SS Act, would be a partial deduction for a pension such as the Greek one, determined on a pension-by-pension basis.

Once the principles of what constitutes a pension analogous to NZS have been identified, such pensions where the DDP would apply, and their country of origin, should be published by the MSD in all relevant brochures and on all relevant websites. The detailed application of the DDP to the pensions from countries covered by a Social Security Agreement also needs to be easily accessible.

The main countries, as can be seen from Table 1 (sourced from the MSD; quoted in St John and Dale, 2010), comprise the UK, Australia, the Netherlands, Canada the USA and China. We recommend proceeding with the suggested reforms on a country-by-country basis, prioritised by the numbers of affected people.

3.3 Improved information

Table 1: Pensioners affected by section 70 - by country of origin

	2004	2009	% increase
Australia	914	6,051	562%
Canada	306	952	211%
China	166	461	178%
Fiji	45	108	140%
Germany	87	217	149%
Ireland	91	179	97%
Netherlands	2,400	3,444	44%
Switzerland	82	181	121%
UK	37,754	42,671	13%
USA	98	397	305%

Personal stories related by superannuitants about the treatment of their overseas pensions suggest the MSD applies the current rules inconsistently. Also, unfortunately, it seems the MSD local offices are providing inconsistent and misleading advice about entitlements.

Pensions and social security are a complex area of public policy, particularly in application of the relevant legislation. This explains some of the inconsistent decisions and advice. The RPRC suggests the emotional and financial cost for all parties of many pointless reviews and appeals could have been avoided if the rules and review decisions were published in an accessible format and by country of pension origin.

The reasons behind the classification decisions for each pension should also be published and should be subject to review and appeal by interested individuals, not necessarily just affected pensioners as is presently the case. Having exhausted that process, the review and appeal decision should apply to all affected individuals, even-handedly and openly.

The RPRC also suggests that individuals should be able to apply for a decision, with the appropriate review/appeal processes, before reaching the entitlement age for NZS. This would allow them to make appropriate financial planning decisions for retirement.

Pension systems in different countries are very different and are changing all the time. It would be necessary to ensure the information provided was regularly checked and updated as required.

¹² This is analogous to the fundamental objective of NZS.

The written material available to immigrants needs review. For example, the MSD's *Departures and Arrivals* brochures suggest an immigrant "may be entitled to two pensions". The erroneous impression is that the overseas pension does not affect the immigrant's future NZS entitlements. Legally, there may be two pensions but, as the MSD's web site explains:

*Generally, you will get paid the same amount as those who have lived all their lives in New Zealand. This amount may be made up of a combination of your New Zealand and overseas benefit or pension payments...*¹³

Each country's brochure should specifically address each pension from that country to which an immigrant might be entitled and how that pension might affect the calculation of NZS under the DDP, with examples to illustrate their effect. This position must be clear before immigrants select New Zealand as their destination, not when they reach retirement age.

This issue affects pensions from all countries, not just from those nine countries with which New Zealand has a Social Security Agreement. Unambiguous information needs to be available in all countries from which New Zealand expects to attract migrants.

These issues noted above were also raised in the Retirement Commission's 2010 *Review of Retirement Income Policy*, where Recommendation 4.6 suggests that the MSD implement programmes to:

- Provide information and advice for recent and prospective migrants and returning New Zealanders on the implications of the direct deduction policy for their future retirement income.
- Improve the public availability of decisions on the classification of overseas pension schemes whose pension payouts are subject to the direct deduction policy.
- Explain the rationale behind each pension scheme classification decision.

4. The special case of Australia

The case of Australia seems particularly anomalous, and the RPRC suggests the situation requires special attention for both the short- and the long-term.

Australians who emigrate to New Zealand after the state pension age are potentially much more favourably treated than New Zealanders who emigrate to Australia in similar circumstances. The numbers of those affected by section 70 whose country of origin is Australia have been growing faster than any other country group¹⁴ (see Table 1).

At the same time, there are more than 500,000 former New Zealand residents now living in Australia. If they are not presently above the pension age (to increase in Australia from 65 to 67 between 2017 and 2023),¹⁵ most will eventually face the possibility of losing part or all of the Australian Age Pension through the income/asset tests. There are also proposals to strengthen the income test and drop the asset test.

In the future, with an increasing state pension age in Australia, a harsher income test, and because 'totalisation'¹⁶ can be applied under the Social Security Agreement, it may become relatively attractive for New Zealanders to return home to retire, especially if New Zealand does not increase the state pension age. This would increase the burden on the working age population of New Zealand, without the benefit of the earlier tax

¹³ See <http://www.workandincome.govt.nz/individuals/travelling-or-migrating/getting-an-overseas-benefit-or-pension-in-nz.html#Howmuchcanyouget2>

¹⁴ In part, this fast growth reflects changes made in 2002 to the way that governments of the two countries share the pension costs.

¹⁵ See http://www.centrelink.gov.au/internet/internet.nsf/individuals/ssp_age_pension.htm

¹⁶ Where a period of residence in one country counts as residence in another.

contribution from these retirees. These issues are addressed in Smith (2009), and in the RPRC's two Options papers (Littlewood and Dale 2010; St John and Dale 2010).

The RPRC recommends the formation of a working group that carries out its research and discussions in public¹⁷ with the objective of harmonising provisions between Australia and New Zealand. That group's objective would be to replace the pension sections of the current Social Security Agreement with Australia.

5. Longer-view legislative changes and options

5.1 NZS-specific rule

Section 70 of the SS Act applies to all benefits administered by the MSD, including NZS. Having a single legislative provision that covers all benefits provided by the MSD, and co-ordinating retirement income arrangements of two or more countries, multiplies that complexity. It requires that the MSD has a wide discretion.

Section 70 as it applies to NZS under the SS Act is a legislative artefact. All the operative provisions for NZS were shifted in 2001 to the NZSRI Act but section 70 was 'left behind' in the 1964 Act. The RPRC recommends that the 2001 Act be amended to include an equivalent to section 70, designed specifically for NZS. This may require a legislative change to the SS Act. In some of the benefit 'machinery' provisions, the NZS Act is already cross-referenced (e.g. section 71); in other cases where NZS itself may be at issue (e.g. section 71A, section 76), the reference is to the NZS benefit; finally, in other cases, there is no specific reference to NZS at all (e.g. section 70A and 72). In other words, there seem no insurmountable barriers to creating a modernised replacement for section 70 in the NZSRI Act.

With a separate decision-making power with respect to NZS, the MSD could make decisions on retirement income benefits without needing to be concerned with potential precedents that might affect other benefits administered by the MSD. With that separate power, for example, the human rights issue covered in section 4.1 above could be resolved, recognising the particular characteristics of the NZS benefit design.

5.2 Principles-based reform of section 70

In contrast to New Zealand's 'all-or-nothing' test,¹⁸ where once a modest residency requirement is met, the pensioner is entitled to NZS in full, nearly all countries calculate pensions by reference to periods of residence and/or periods of employment and/or contributions in that country (or the period of residence/employment of a spouse/partner). Shorter residence, employment or contribution means a smaller state pension. This system obviates the need for a DDP or an equivalent 'harmonisation' provision. To the extent that overseas pensions are portable, each country bears the pension costs for periods of residence/employment in that country. The RPRC does not recommend such a change to NZS as it would remove the simple, clear, universal and equitable basis of NZS.

The RPRC has described two possible principles-based reforms to the DDP in earlier papers. Options 1 and 2 both require changes to legislation. In summary:

Option 1: Increase the residency requirement for entitlement to NZS from the current 10(5) rule to a single test of 25 years' residence between ages 20 and 65. Where there is a Social Security Agreement, totalisation of years of residence would be possible but only one pension (NZS) would then be payable. If 25 years had not

¹⁷ In a similar way to the Savings Working Group.

¹⁸ New Zealand is not alone in this regard: Australia, Mauritius, Samoa, Nepal, Lesotho, Namibia, Botswana, Bolivia, Brunei, Kosovo and Mexico City all provide equivalents to NZS.

been completed by age 65, an income-tested welfare pension may be payable. (St John and Dale 2010). Option 1 would need to be considered in the context of its interaction with immigration policies and may need some flexibility, depending on the particular countries and the profiles of likely immigrants.

Option 2: If the applicant for NZS has a pension from overseas that is analogous to NZS, the entitlement to NZS would be 1/540th of NZS for each month of residence in New Zealand between ages 20-65. Any entitlement to an overseas pension would not be affected; the MSD would not need to know the amount or other terms of the overseas pension (Littlewood and Dale 2010).

The RPRC has formulated these options, which are not the only possibilities, to focus a much needed debate on issues surrounding the DDP and overseas pensions policy.

The notably short list of countries with which New Zealand has agreed Social Security Agreements possibly reflects disapproval from other countries of the DDP. A principles-based reform of the current DDP may clear the way for further Agreements. The RPRC supports this as a public policy objective.

Once decisions have been made on both the short-term changes (described in section 4) and the longer-term reforms contemplated by sections 5 and 6, all Social Security Agreements will need to be reviewed, and perhaps new agreements could be created.

6. Conclusion

The intention of this paper is to provide a basis for necessary reform to occur in New Zealand's overseas pensions policy.

The RPRC suggests that the changes proposed in Part 4 be implemented promptly as they would involve modest cost while they would greatly improve the equity of New Zealand's overseas pensions policy.

Part 4 (Australia) and Part 5 (longer-view options) need a fully researched, open discussion with all affected parties, including potentially affected pensioners.

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