

# INCOME DEPRIVATION AND BENEFITS: THE ROLE OF TRUSTS IN NEW ZEALAND

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## Abstract

Anecdote and the disproportionate number of family trusts in New Zealand suggest that income deprivation is used to facilitate qualification for certain welfare benefits. In this paper, we consider that possibility. We first consider the student allowance, which is means tested on students' parents' income; and, secondly, the residential care subsidy ('RCS'), which tests elderly claimants' income and assets. We also examine policy, legal, and administrative approaches to income deprivation in relation to these benefits.

Despite plausible anecdote, we find no evidence that parental income is manipulated to gain student allowances. However, while the Ministry of Social Development ('MSD') appears to rigorously audit applications for the RCS, the dearth of data collected makes critical analysis of RCS policy and practice with regard to income deprivation problematic. Decision makers' broad discretion, compounded by MSD's inability to provide information on the use of that discretion, amplifies the lack of transparency. The findings in this study support the need for a central register of trusts in New Zealand.

Our findings also suggest the presence of structural inequalities in the benefit systems. We observe the lack of coherence in policy that provides universal assistance to the elderly who are in good health, but expects those in poor health to look to their own resources for support. We also note the anomalous policy outcomes when autonomy is respected for unemployed young people, but not for young people who are studying.

## I INTRODUCTION

A trust is an equitable obligation under which a trustee, who controls certain property, must 'deal with that property either: (a) for the benefit of definite persons ... and any one of whom may enforce that obligation; or (b) for some object or purpose permitted by law'.<sup>1</sup> This English

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common law concept of the trust was imported into New Zealand in the mid-nineteenth century.<sup>2</sup> Subsequent legislation has consolidated the duties and powers of trustees,<sup>3</sup> and the enactment of a further Trusts Bill is in train.<sup>4</sup> The Bill will not codify trust law in New Zealand, with a few exceptions, but will capture and reflect the existing common law position.<sup>5</sup> The extant *Trustee Act 1956* (NZ) does not define a trust, rather it identifies which arrangements fall within the Act's ambit or are excluded.<sup>6</sup> Similarly, the Trusts Bill does not define a trust but, as recommended by the New Zealand Law Commission,<sup>7</sup> defines an 'express trust'.<sup>8</sup> This paper considers express trusts, in particular, family trusts established *inter vivos*.

The originary myth of the trust lies with the knight, who, on departing for the Crusades, transferred legal title of his property to a trusted person to hold for the benefit of the crusader's wife and children.<sup>9</sup> This story may have some historical grounding, or at least persistence, but trusts have always been implicated in avoiding some or other public or revenue law

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<sup>1</sup> Chris Garrow and Greg Kelly, *Garrow and Kelly's Law of Trusts and Trustees* (LexisNexis, 7<sup>th</sup> ed 2013) [1.1].

<sup>2</sup> Section 1 of the *English Laws Act 1858* (NZ) (repealed) provided: 'The laws of England as existing on the 14th day of January 1840, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and been in force therein on and after that day, and shall continue to be therein applied in the administration of Justice accordingly.'

<sup>3</sup> See *Trustee Act 1883* (NZ) (repealed); *Trustee Act 1956* (NZ).

<sup>4</sup> Trusts Bill 290-1 (2017).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Trustee Act 1956* (NZ) s 2 definition of 'trustee'.

<sup>7</sup> Law Commission, *Review of the Law of Trusts: Preferred Approach* (IP 31, 2013) ('NZLC IP 31') [10].

<sup>8</sup> Trusts Bill cl 12. In terms clause 13 of the Trusts Bill, 'An express trust has the following characteristics: (a) it is a fiduciary relationship in which a trustee holds or deals with trust property for the benefit of the beneficiaries or for a permitted purpose; and (b) the trustee is accountable for the way the trustee carries out the duties imposed on the trustee by law.'

<sup>9</sup> Judith Bray, *A Student's Guide to Equity and Trusts* (Cambridge University Press, 2012) 7. For a less colourful narrative, see James Barr Ames, 'The Origin of Uses and Trusts' (1908) 21(4) *Harvard Law Review* 261.

consequence.<sup>10</sup> And so, while much of trust law is inward-looking – governing the triangular relationships between settlor, trustee and beneficiary – trusts often have extraneous consequences.<sup>11</sup> For example, if people in business can divest themselves of their assets through trust settlements, creditors’ claims may be practically defeated. Insolvency law therefore limits the period of trust protection.<sup>12</sup> Furthermore, an express trust designed to conceal the true nature of an arrangement can be declared a sham,<sup>13</sup> but this outcome is exceptional. Because of their flexibility and opacity, trusts are notoriously used in aggressive tax planning and more nefarious activities.<sup>14</sup> Less grandly, in New Zealand, trusts are commonly employed – if anecdote is to be believed – to gain welfare benefit advantages. This possibility is the primary focus of this study. The welfare benefits examined in this paper are the student allowance and the Residential Care Subsidy (‘RCS’).<sup>15</sup>

At least 250 000 trusts exist in New Zealand, a country with a population of 4.7 million, but there may be as many as 400 000.<sup>16</sup> The disparity in the estimates is attributable to the requirement that only income-earning trusts must register with a public authority. Data collected in the 2006 census indicate the common use of trusts. It was reported that ‘167,925

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<sup>10</sup> Dale Pinto and Steward Karlinsky, ‘Darwinian Evolution of the Taxation of Trusts: A Comparative Analysis’ (2007) 10(2) *Journal of Australian Taxation* 251.

<sup>11</sup> It may be argued that a trust that, say, enables a person to withhold property from their ex-partner on divorce is not a private matter because the ex-partner may become dependent on the State. On externalising the costs of property through trusts, see Kent D Schenkel, ‘Trust Law and the Title-Split: A Beneficial Perspective’ (2009) 78 *University of Missouri-Kansas City Law Review* 181.

<sup>12</sup> *Insolvency Act 2006* (NZ) s 204.

<sup>13</sup> *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786; Law Commission, *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts: Second Issues Paper* (IP 20, 2010) (‘NZLC IP 20’) [1.10].

<sup>14</sup> See John Shewen, *Government Inquiry into Foreign Trust Disclosure Rules* (June 2016) <<https://treasury.govt.nz/sites/default/files/2016-06/report-giftdr-27jun2016.pdf>>.

<sup>15</sup> Other benefits facilitated by divestment of property are legal aid, access to public housing and the Working for Families Tax Credits.

<sup>16</sup> NZLC IP 20, above n 13, [2.1].

dwellings, or 12.3 per cent of all occupied private dwellings were held in a family trust by the usual residents of the dwelling' and 18 per cent of couples aged 55-64 had established a trust.<sup>17</sup>

In this paper, we investigate the plausibility of anecdotes about the use of trusts to gain welfare benefits. Each of the 20 District Health Boards in New Zealand has an appropriation to deliver health services, including long-term residential care. Long-term residential care in New Zealand is means-tested. People whose assets or income exceed specified thresholds must contribute financially to the care services they receive. The government contribution for people who do not receive any subsidy is around \$1000 per week.<sup>18</sup> In 2014/15 District Health Boards spent \$983 million on support services for older people, of which 60 per cent (around \$590 million) related to residential care.<sup>19</sup>

Students undertaking an approved course of study qualify for the student allowance if their parents' income is less than a specified threshold. Students may claim this benefit whether or not they live with a parent, or receive financial support from their parents. The student allowance is approximately \$250 per week. In 2016/17, the New Zealand government spent \$509 million on student allowances.<sup>20</sup>

We use an empirical approach to examine whether trusts can be, and are, used in New Zealand to reduce income or wealth in order to qualify for financial assistance from the state. We collected data from publicly available information and through requests under the *Official Information Act 1982* (NZ) ('OIA') made to the Ministry of Social Development ('MSD'). As a natural corollary of this study, we also report on policy inconsistencies that arise from our exploration of the RCS and student allowances.

The primary issue we address in this study is fairness. Can wealthier individuals gain greater assistance from the government for themselves or their family through the use of trusts? We

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<sup>17</sup> Ibid [2.5].

<sup>18</sup> Unless clearly indicated otherwise, all amounts in this article are expressed in New Zealand dollars.

<sup>19</sup> Ministry of Health, *DHB Spending on services for older people* (2016) <<https://www.health.govt.nz/nz-health-statistics/health-statistics-and-data-sets/older-peoples-health-data-and-stats/dhb-spending-services-older-people>>.

<sup>20</sup> New Zealand Treasury, *Vote Social Development – Social Services and Community Sector – Estimates 2018/19* (Wellington, 2018). This appropriation is limited to means-tested allowances for students on approved study programmes.

challenge rules that provide for inconsistent approaches to qualification for financial assistance from the state. We note the inequalities and inequities that result from current approaches, together with a lack of transparency in relation to how robustly the rules are applied in practice.

The paper is structured as follows. We start with a background section that briefly introduces problems with trusts, and outlines relevant literature on taxpayer responsiveness to tax rates. This section also sketches the two welfare benefits that are the focus of this study: the student allowance and the RCS. Section III outlines the data that we have gathered from OIA requests. Section IV discusses this data, and conclusions are drawn in section V.

## II BACKGROUND

In this part of the paper, we outline the problem of trusts, and then discuss the literature on taxpayer responsiveness to marginal tax rates. This body of literature demonstrates that individuals can, and do, manipulate their taxable income. We then discuss the two state benefits that are the focus of this study. The first is the student allowance provided to tertiary students if their parents' income is below the specified threshold. The second is the RCS. The rules applying to both benefits generate incentives for individuals to deprive themselves of income or assets so that they or their family receives greater financial assistance from the state. We discuss both these possibilities. We conclude by making policy recommendations about express trusts.

### A The Problem of Trusts

The New Zealand Law Commission considered why trusts are so popular in New Zealand. The Commission noted 'favourable tax treatment of trusts in New Zealand compared with other jurisdictions' but paradoxically also suggested the absence of 'estate duty, gift duty, stamp duty or capital gains tax' as a reason for the popularity of trusts.<sup>21</sup> The Commission further noted the following advantages:

the ease and low costs of establishing and maintaining trusts. There are few compliance requirements associated with operating a trust in New Zealand. The process for settling a trust

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<sup>21</sup> NZLC IP 31, above n 7, [1.24]. Since the existence of property transfer taxes can be expected to encourage the creation of trusts, one might assume that the absence of those taxes would remove the desire to form a trust. The removal of gift duty means property can be transferred in one go without tax consequences, and so, removal of tax frictions would facilitate divestment of property for other reasons.

is generally private and there is no official public record of trusts or ongoing obligation to submit information to a public body.<sup>22</sup>

Even taking account of this ease of establishment, a person presumably needs to have a reason to form a trust. A likely motivation may be to obtain welfare benefit advantages. Indeed, Nicola Peart observes:

A very common reason in New Zealand for putting assets into trust is the means tested entitlement to State support, such as the residential care subsidy for the elderly. This reason is based on a flawed understanding of the State's powers when assessing an applicant's assets and means for purposes of a state subsidy. It is widely believed that the State will decline a subsidy only if applicants have deprived themselves of assets in the five years immediately preceding their application for state support.

While that is the general practice, the law does not impose a time limit on the asset and means test, and sometimes the State goes back much further than five years. The dramatic rise in family trusts may also persuade the State to amend its practice in the future. Eligibility for state support is therefore not a reliable reason for having a trust, but it remains a very common one.<sup>23</sup>

The 2010 Tax Working Group also noted that trusts 'can be used to shelter income from various social taxes (e.g. child support and student loan repayments) or to enable people to receive social support'.<sup>24</sup> Likewise, the 2018 Tax Working Group submissions paper observes 'the tax system loses coherence if this progressive tax system can be circumvented by, for example, individuals sheltering income in trusts or companies'.<sup>25</sup>

The Law Commission suggested:

Trusts are sometimes seen as a status symbol, and something that every property owner should have ... While in many countries trusts are seen as a structure for the wealthy only, there is widespread settlement of trusts amongst middle income New Zealanders ... Ayers Legal submitted that "[i]t is possible that the New Zealand obsession with trusts also represents in

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<sup>22</sup> Ibid [1.25]

<sup>23</sup> Nicola Peart, 'Can Your Trust Be Trusted?' (2009) 12 *Otago Law Review* 59, 63 (fns omitted).

<sup>24</sup> *A Tax System for New Zealand's Future: Report of the Victoria University of Wellington Tax Working Group* (Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington, January 2010) 28.

<sup>25</sup> *Future of Tax: Submissions background paper* (Tax Working Group, 2018) 19.

part a refusal to accept that trusts are the preserve of the wealthy” and goes on to describe the New Zealand experience as “an egalitarian response to the establishment of trusts”.<sup>26</sup>

While it may seem implausible that one might form a trust as a status good, rather than as an instrument for achieving a particular financial benefit, Peart also posits a ‘me too’ theory to partly explain the disproportionate number of family trusts in New Zealand.<sup>27</sup>

Estate duty planning normalised divesting of property to mitigate tax incidence.<sup>28</sup> ‘The estate duty exemption ... encouraged a wider section of society to transfer assets to a trust to avoid crippling estate duties.’<sup>29</sup> Despite estate duty and gift duty becoming ‘voluntary’ before their abolition – this culture of regular gifting has prevailed and is visible in many extant trust arrangements. Furthermore, ‘[a]lthough estate duty was abolished, the trusts set up when it was in force remained.’<sup>30</sup> New Zealand has, then, a culture of trusts.<sup>31</sup> This culture facilitates income and wealth deprivation for tax and benefit purposes.

## B Taxpayer Behaviour Changes in Response to Tax Rates

The manipulation of taxable income by some taxpayers is well established. The most recent example comes from Shane Johnson and Robert Breunig in Australia, which incorporates over 160 million observations of tax records over the period from 1999-2000 to 2013-2014.<sup>32</sup>

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<sup>26</sup> NZLC IP 31, above n 7, [1.26].

<sup>27</sup> Peart, above n 23, 63.

<sup>28</sup> NZLC IP 20, above n 13, [2.9]. Capital transfer taxes were levied by the *Death Duties Act 1909* (NZ); *Death Duties Act 1921* (NZ); *Estate and Gift Duties Act 1955* (NZ); *Estate and Gift Duties Act 1968* (NZ) (all repealed). See Michael Littlewood, ‘The History of Death Duties and Gift Duty in New Zealand’ (2012) 18 *New Zealand Journal of Taxation Law and Policy* 66.

<sup>29</sup> NZLC IP 20, above n 13, [2.9] (emphasis added). The use of the word ‘crippling’ is remarkable. It is most unlikely that death duties ‘crippled’ anyone.

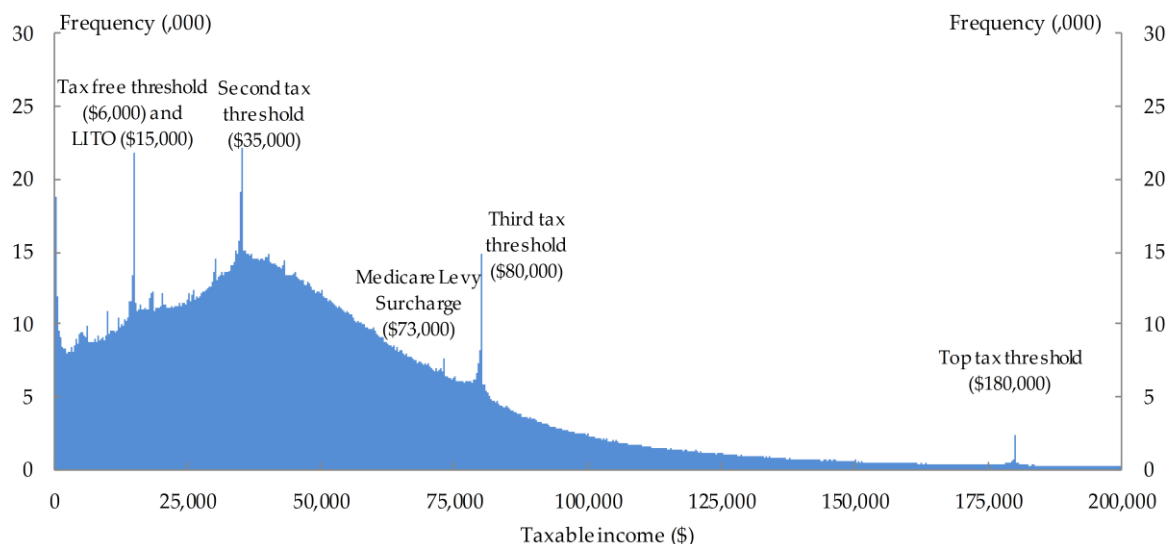
<sup>30</sup> Ibid [2.10].

<sup>31</sup> For example, most Members of Parliament are beneficiaries of trusts: see House of Representatives, *Register of Pecuniary and Other Specified Interests of Members of Parliament: Summary of annual returns as at 31 January 2018* (2018) <<https://www.parliament.nz/media/4798/summary-report-2018-final.pdf>>.

<sup>32</sup> Shane Johnson and Robert Breunig, *Taxpayer Responsiveness to Marginal Tax Rates: Bunching evidence from the Australian personal income tax system* (September 2017)

Johnson and Breunig report statistically significant bunching at all points in the Australian tax system where the tax rate increases, with the most significant occurring for self-employed tax filers at the top ‘notch’ in the tax system. Figure 1 shows Johnson and Breunig’s findings, which clearly shows the bunching at threshold points. The first peak (after the zero income peak) is at the tax free and low-income tax offset point. The second peak is at the next tax threshold. There is a small peak at the Medicare Levy surcharge limit, followed by a large peak at the third tax threshold. The final peak is at the \$180 000 earning point, after which point the highest tax rate of 45 per cent is applicable. This peak is less significant, as there are considerably fewer taxpayers earning above this amount in Australia.

**Figure 1: Distribution of Taxable Income – Australia (2010)**<sup>33</sup>



Johnson and Breunig’s research is particularly compelling as they provide data from 2008 and 2009 when there were changes in the top personal income tax threshold. In 2008, there was a peak of taxpayers reporting income of \$150 000 when this was the top personal income tax threshold. However, this peak moved to \$180 000 in 2009 when the top personal income tax threshold increased to this amount.<sup>34</sup>

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<[https://taxpolicy.crawford.anu.edu.au/sites/default/files/events/attachments/2017-12/breunig\\_au\\_bunching\\_presentation.pdf](https://taxpolicy.crawford.anu.edu.au/sites/default/files/events/attachments/2017-12/breunig_au_bunching_presentation.pdf)>.

<sup>33</sup> Ibid slide 16.

<sup>34</sup> Ibid slide 19.



Other examples of bunching around tax rate thresholds include studies by Raj Chetty and others,<sup>35</sup> and Daniel le Maire and Bertel Schjerning,<sup>36</sup> both using Danish datasets. Similar outcomes are observed in the United States, where Emmanuel Saez finds bunching at ‘kink points’ in the tax system and also where the Earned Income Tax Credit phases-in.<sup>37</sup> However, unlike Johnson and Breunig, who find bunching at all points in the system, Saez only finds bunching at the first kink point when the tax-free threshold ends.

In New Zealand, income smoothing can occur in several ways. However, these opportunities are primarily only available to those who have income that is not earned from salaries or wages. For example, for the self-employed, a spouse could be paid a salary for undertaking notional work in a business. Two \$70 000 salaries incur income tax of \$28 040, whereas one \$140 000 salary incurs income tax of \$37 120. A saving of \$9080 could therefore be made by income splitting. Notional employment of other family members could further reduce income tax liability. While the *Income Tax Act 2007* (NZ) includes anti-avoidance measures to counter this type of behaviour, aside from egregious examples, it would be difficult to establish that salaries paid were not commensurate with work undertaken.

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<sup>35</sup> Raj Chetty, John N Friedman, Tore Olsen and Luigi Pistaferri, ‘Adjustment Costs, Firm Responses and Micro vs. Macro Labor Supply Elasticities: Evidence from Danish tax records’ (2011) 126 *Quarterly Journal of Economics* 749.

<sup>36</sup> Daniel le Maire and Bertel Schjerning, ‘Tax Bunching, Income Shifting and Self-Employment’ (2013) 107 *Journal of Public Economics* 1.

<sup>37</sup> Emmanuel Saez, ‘Do Taxpayers Bunch at Kink Points?’ (2010) 2 *American Economic Journal* 180.

**Figure 2: Taxable Income in New Zealand, 2001, 2008, 2016<sup>38</sup>**

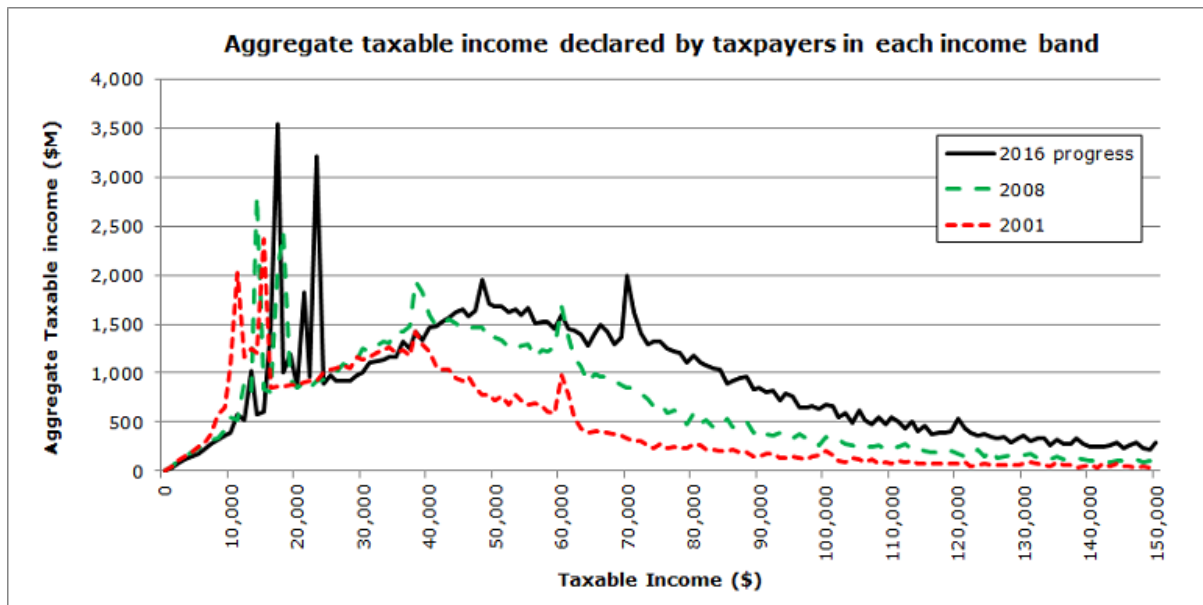


Figure 2 shows similar patterns to overseas studies whereby kinks are visible at the points where tax thresholds change. In 2001 and 2008, the threshold for the highest marginal income tax rate was \$60 000, whereas this was \$70 000 in 2016. In 2001 and 2008, the marginal tax rate increased from 19.5 per cent to 33 per cent at \$38 000.<sup>39</sup> Peaks can be observed at all these points. The values in Figure 2 are reported before the impact of Working for Families tax credits. A ‘minimum family tax credit’ benefit is payable when a family’s income is less than \$23 764. A peak is also observable at this point. However, rather than income manipulation, this may show that many families’ incomes are assisted to the \$23 764 threshold through the welfare system.

We include this information in order to show that income manipulation commonly occurs around tax thresholds. We would therefore expect to see bunching at \$55 000 which is the threshold for student allowance income testing. No such kinking is evident. This may indicate that no income manipulation is occurring or, perhaps, income is being manipulated at \$48 000, the point where rates increase from 17.5 per cent to 30 per cent. Alternatively, no kink point

<sup>38</sup> Inland Revenue Department, *Income Distributions of Individual Customers 2001 to 2016* (2017) <<http://www.ird.govt.nz/aboutir/external-stats/revenue-refunds/income-distrib-individual-customers/income-distrib-individ-customers.html>>.

<sup>39</sup> *New Zealand Yearbook* (\*\*\*\*) <[http://archive.stats.govt.nz/browse\\_for\\_stats/snapshots-of-nz/digital-yearbook-collection.aspx](http://archive.stats.govt.nz/browse_for_stats/snapshots-of-nz/digital-yearbook-collection.aspx)>.

occurs because wide range of income levels between which eligibility for the student allowance abates.

The following section discusses policy underpinning student allowances, and indicates why a motivation exists for parents either to manipulate income or to divest income-earning assets into a trust.

## C Student Allowances

Government expects full-time students, who are aged under 24, to share the costs of their study with itself and their parents.<sup>40</sup> To reiterate, this policy underpinning does not take into account whether a student lives with a parent or whether they receive financial support from their parents. Parents, it seems, are presumed to make up the difference between the full student allowance and the amount payable. But, unlike paying child support, a parent has no legal obligation to provide any support to their adult student child.

The student allowance is a weekly payment intended to assist students with living costs while studying. Domestic students studying in New Zealand are entitled to a student allowance between \$217.02 (living with a parent) and \$257.12 (not living with a parent).<sup>41</sup> The student allowance is governed by section 303 of the *Education Act 1989* (NZ) and the Student Allowances Regulations 1998 (SR 1998/277). Unlike a student loan, the student allowance does not have to be repaid. Students can earn an additional \$217.22 per week before tax before entitlement is affected.<sup>42</sup>

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<sup>40</sup> Ministry of Social Development, *Information for Parents* <<https://www.studylink.govt.nz/starting-study/thinking-about-study/information-for-parents.html#null>>. A ‘parent’ can be a parent, step-parent or other person acting in place of a parent of a student.

<sup>41</sup> Ministry of Social Development, *Student Allowance Rates* <<https://www.studylink.govt.nz/products/rates/student-allowance-rates.html#null>>. We use rates for the 2018/19 tax year in this paper. These rates assume the student is below 24 years of age. Different rates apply for older students, students with children and students with a partner. Income of the student is a further relevant factor.

<sup>42</sup> Ministry of Social Development, *How Income Affects Student Allowance* <<https://www.studylink.govt.nz/in-study/income/how-income-affects-student-allowance.html>>. Factors, such as having a partner who is earning income may also impact on entitlement to student allowances.

In 2016, 41 878 students received a student allowance, with an average value of \$7445.<sup>43</sup> Recipients represent 11.9 per cent of domestic tertiary education students (353 400).<sup>44</sup>

The student allowance is subject to qualification criteria. An applicant must be: a New Zealand citizen or resident in New Zealand for at least three years; usually enrolled in full-time study at an approved education provider; and aged from 18-65 years. Furthermore, to qualify for a full allowance, a student's parents must earn less than \$55 027.96 per annum before tax. When joint parental income exceeds this amount, the allowance abates and is no longer payable when their income exceeds \$95 428.40 (if the student lives with a parent) or \$102 893.42 (if the student does not live with a parent).<sup>45</sup>

Several factors affect the threshold, including household composition. For example, assessment of the joint earnings increases by \$7 000 before tax if the parents provide financial support for other students aged 16-23, or students who are studying at another education provider, such as a secondary school. In addition, the joint earnings threshold increases by \$3400 before tax if the parents live in separate houses. The range of thresholds for the student allowance qualifications may obscure peaks in earnings around thresholds (as discussed in the previous section).

People who qualify for the student allowance may also qualify for an accommodation benefit which is payable weekly with the student allowance. Entitlements differ depending on where the student lives. The maximum benefit, payable in regions, such as Auckland, Tauranga or Wellington, is \$60 per week. A student eligible for the full student allowance and accommodation benefit could receive approximately \$11 000 per annum.<sup>46</sup>

The definition of 'parental income' for the purposes of the student allowance is similar to that in the *Income Tax Act 2007* (NZ) ('ITA 2007') and includes:

- All taxable income;

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<sup>43</sup> Ministry of Education, *Student Loan Scheme Annual Report 2016/17* (2017) 29.

<sup>44</sup> Ministry of Education, *Profile and Trends: New Zealand's annual tertiary education enrolments* (2017) 8.

<sup>45</sup> Ministry of Social Development, *Parents' Income Definition* <<https://www.studylink.govt.nz/about-studylink/glossary/parents-income.html>>.

<sup>46</sup> Calculated as \$257.12 plus \$60 per week for two-thirds of the year. This calculation assumes that the student is not engaging in study over a third, usually summer, trimester.

- Salary and wages, including paid parental leave, weekly accident insurance payments, overseas salary and wages;
- Work and income benefits or student allowances;
- Business income and drawings;
- Interest and dividends;
- Rental income and income from boarders;
- Retirement savings income;
- Attributable trustee income (for settlors);
- Trustee fees;
- Trust beneficiary income;
- Attributable fringe benefits;
- Portfolio investment income;
- Main income equalisation scheme deposits;
- Shareholder income from a closely held company; and
- Payments for income-related purposes that exceed \$5000 per year.<sup>47</sup>

The application form that an applicant student's parents must complete requires income to be broken down into the above components. Income testing typically does not allow for the inclusion of income offsets for the purposes of income testing for the student allowance, although the application form does provide for an explanation of why loss offsets should be permitted.<sup>48</sup>

Unlike income under the ITA 2007, income for the purposes of determining qualification for a student allowance includes income that the parents have directly or indirectly deprived themselves.<sup>49</sup> This income is the primary focus of this study. Parents of students must have an

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<sup>47</sup> Ibid.

<sup>48</sup> Ministry of Social Development, *Student Allowance Parents' form* (2018) <<https://www.studylink.govt.nz/documents/forms/student-allowance-parents.pdf>>.

<sup>49</sup> According to Theresa Donnelly, '[d]eprivation is purely a creature of statute – a social security concept to which there is no general legal equivalent.' See Theresa Donnelly, 'Advising Mature Clients – Residential Care Subsidies and Their Wider Context' (Paper presented at the Trusts & Estates Conference 2018, Auckland, 15 August 2018).

income below the \$55 000 threshold if their children are to benefit from the maximum student allowance. Nevertheless, some benefit accrues up to the zero benefit income level.

MSD has no explicit power to consider non-fraudulent arrangements parents may have entered into to reduce their incomes.<sup>50</sup> However, the Student Allowances Regulations 1998 empower the Chief Executive to terminate or reduce a student allowance:

if the chief executive is satisfied that the applicant or any parent, spouse, or partner of the applicant has directly or indirectly deprived himself or herself of any income resulting in the applicant becoming eligible for that allowance or payment of that allowance at an increased rate.<sup>51</sup>

The Law Commission noted that MSD ‘does not collect information on the number of applicants for benefits where the applicant has a trust, but it does record the number of cases involving a trust that are referred to its financial analysts because of complex financial circumstances’.<sup>52</sup> The Commission also noted that in 2009-10, 479 cases were referred to MSD specifically about trusts. While the Issues Paper is not clear on the particular benefits these cases referred to, it is likely that they include all non-universal benefits.

Table 1 below outlines how many people were prosecuted for fraud as a result of overpayment of the Student Allowance between 2006 and 2016. The total amounts per year and the average value per case of fraud are also shown in Figure 3 for the purposes of demonstrating the downward trend in the total amount defrauded. A general downward trend is also observable in the average value of prosecuted cases. Overall, the total amount of Student Allowance fraud is small and in the most recent year reported totalled just under \$40 000. The OIA request that elicited this advised that the primary reasons for prosecution were: not declaring income; not

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<sup>50</sup> See Students Allowances Regulations 1998 (SR 1998/277) reg 4.

Students Allowances Regulations (No 2) 2018 (2018/178), ‘which come into force on 1 January 2019, amend the Student Allowances Regulations 1998 (the principal regulations). The effect of the amendments is to ensure that a student’s personal income or spousal or partner’s income (as defined in regulation 2(1) of the principal regulations) excludes any direct payment of disability support made by or on behalf of the Crown to the student or student’s spouse or partner, or another person on behalf of the student or student’s spouse or partner, for the purpose of purchasing or obtaining disability support services for the student or the student’s spouse or partner.’

<sup>51</sup> Students Allowances Regulations 1998, reg 44.

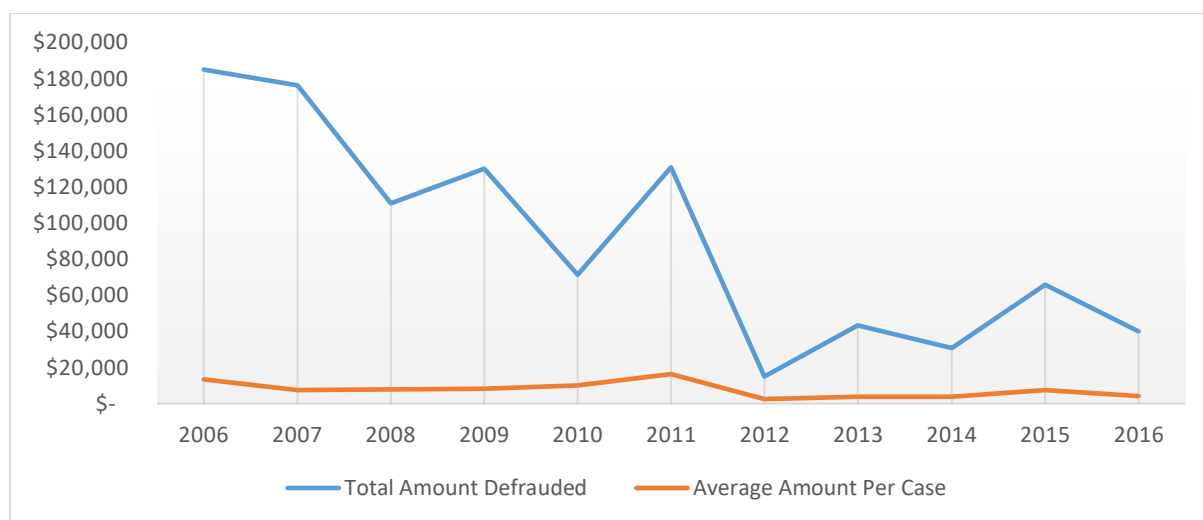
<sup>52</sup> NZLC IP 20, above n 13, [2.19] n 33.

declaring their correct relationship status; or using an identity belonging to someone else to get the Student Allowance.<sup>53</sup>

**Table 1: Prosecutions for Student Allowance Fraud – number of cases and defrauded amount (2006 – 2016)<sup>54</sup>**

Calendar Year	Total number of successfully prosecuted fraud cases	Total amount defrauded (\$)	Average value per case (\$)
2006	14	184 886	13 206.12
2007	24	176 103	7337.62
2008	14	110 914	7922.45
2009	16	130 007	8125.41
2010	7	71 440	10 205.78
2011	8	130 643	16 330.34
2012	6	14 994	2499.06
2013	11	43 152	3922.92
2014	8	30 910	3863.70
2015	9	65 755	7306.10
2016	10	39 993	3999.28

**Figure 3: Prosecutions for Student Allowance Fraud – number of cases and defrauded amount (2006 – 2016)<sup>55</sup>**



<sup>53</sup> OIA request [not made by the authors] <<https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/official-information-responses/2017/march/r-20170329-response-student-allowance-fraud.pdf>>.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

## D Residential Care Subsidies

Sections 136AA to 155 of the *Social Security Act 1964* (NZ) govern long-term residential care in a hospital or a rest home. The purposes of this part of the Act are to:<sup>56</sup>

- (a) specify the circumstances in which certain older persons are required to pay for their own long-term residential care; and
- (b) specify the circumstances in which a funder must contribute toward the cost of those persons' long-term residential care; and
- (c) provide for those persons to apply for a means assessment to determine if, and how much, a funder must contribute toward the cost of their long-term residential care; and
- (d) provide that those persons are not required to pay more than the maximum contribution (which amount is specified by Gazette notice) for their long-term residential care, if that care is provided by a provider who has a contract with a funder to provide long-term residential care to older persons.

Residential care is long-term care provided for older people in rest homes, hospitals and dementia facilities. The term 'residential care', as used in this study, does not apply to 'lifestyle' retirement living options. While facilities may provide short- or long-term care, asset- and income-testing only takes place for long term use of these facilities.<sup>57</sup> In the first instance, DHBs must fund residential care services for older people. However, people, whose assets exceed the applicable value threshold, must contribute to the cost of their own care.

The RCS process commences with a needs assessment. An applicant, who is assessed as requiring dementia or hospital care, does not have to proceed with a financial means assessment ('FMA'). The DHB funds their care.<sup>58</sup> If the applicant is assessed as needing other long-term residential care, they are liable for contracted care costs, up to the maximum contribution amount.<sup>59</sup> Financial assistance may be sought from the government for these costs. This

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<sup>56</sup> *Social Security Act 1964* (NZ) s 136AA.

<sup>57</sup> Ministry of Health, *Residential Care: Questions and Answers* (2018) <<https://www.health.govt.nz/our-work/life-stages/health-older-people/long-term-residential-care/residential-care-questions-and-answers>>.

<sup>58</sup> This applies where the care is provided by a hospital or rest home that is funded under the *New Zealand Public Health and Disability Act 2000* (NZ); *Social Security Act* s 139(1)-(2).

<sup>59</sup> *Social Security Act* s 139(1)-(2).



assistance takes the form of the RCS, which is subject to an FMA based on the concept of ‘a single spousal economic unit’.<sup>60</sup>

The FMA has two components. The first component is an asset means assessment.<sup>61</sup> The asset test assesses the value of the non-exempt assets to determine whether the assets held are above, equal to, or below the applicable asset threshold. Where the individual has assets at or below the threshold, the DHB must fund the difference between the contracted care services and the amount contributed by the person receiving the services. People aged 50-64 who are single and do not have dependent children are not required to undergo an asset test.

The second component is a means assessment as to income.<sup>62</sup> Where the applicant has assets above the threshold, the income test will determine their funding contribution (up to a maximum).<sup>63</sup> Table 2 outlines maximum contributions for a range of territorial local authority regions. These provide the highest and lowest across the country; a range from \$1033.5 per week to \$1124.41 per week. DHBs fund costs for contracted services above the maximum contribution. Notwithstanding the DHB co-contribution, at around \$52 000 per annum maximum contribution amounts are significant (as shown in Table 2). Therefore, the motivation to divest oneself of real property is strong.

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<sup>60</sup> Donnelly, above n 49.

<sup>61</sup> Ibid s 146.

<sup>62</sup> *Social Security Act* s 147.

<sup>63</sup> Ibid. The maximum contribution is the weekly amount, inclusive of goods and services tax, that is set by notice in the *Gazette* under section 152 as the maximum contribution that is relevant to that region. It is the maximum amount that any resident assessed as requiring care may be required to pay for contracted care services provided in that region. *Social Security Act* s 136.

**Table 2: Maximum Contribution Applying in Each Territorial Local Authority Region from 1 July 2018 (main centres)<sup>64</sup>**

Region: Territorial local authority	District Health Board	Maximum Contribution per week (incl GST) (\$)
Whangarei	Northland	1062.25
North Shore City	Waitemata	1120.49
Auckland City	Auckland	1124.41
Manukau City	Counties Manukau	1112.41
Hamilton City	Waikato	1070.51
Tauranga District	Bay of Plenty	1076.32
Napier City	Hawke's Bay	1057.98
New Plymouth District	Taranaki	1057.98
Wellington City	Capital & Coast	1096.55
Nelson City	Nelson Marlborough	1082.55
Westland District	West Coast	973.91
Christchurch City	Canterbury	1005.90
Queenstown-Lakes District	Southern	1078.70
Dunedin City	Southern	1054.06

Asset thresholds for the FMA are provided in the *Social Security Act*.<sup>65</sup> Two thresholds apply. The first, Threshold A, is \$227 125 and applies to every resident assessed as requiring care, where that person either does not have a partner or their partner is also a resident assessed as requiring care.<sup>66</sup> The second, Threshold B, is \$124 279 and applies to every resident assessed as requiring care, where that person has a partner not assessed as requiring care.<sup>67</sup>

For the purposes of the FMA, assets are defined as: ‘the assets of the person and his or her spouse or partner (if any) that are capable of being realised by the person or his or her spouse or partner’.<sup>68</sup> This includes the value of any rights to be paid or repaid money on termination of licence to occupy property, and the value of assets that have been gifted by the person or their partner during the prescribed gifting period immediately prior to the FMA.<sup>69</sup> However, it does not include allowable gifts.

<sup>64</sup> ‘Maximum Contribution Applying in Each Territorial Local Authority Region from 1 July 2018’ in New Zealand, *New Zealand Gazette*, No 2018-go2860, 12 June 2018.

<sup>65</sup> *Social Security Act* sch 27, pt 1, cl 1. The thresholds are adjusted by the Consumer Price Index each year.

<sup>66</sup> References in this paper to ‘partner’ include spouse.

<sup>67</sup> *Social Security Act* sch 27, pt 1, cl 1(2). In some situations, residents may elect to have Threshold A apply rather than Threshold B.

<sup>68</sup> *Ibid* cl 4.

<sup>69</sup> *Ibid*.

Items in the FMA include: property; cash or investments; boats and caravans; licence to occupy contracts; the value of assets gifted away; and loans made to other people, including family trusts.<sup>70</sup> A person's own home is included in the asset test if they do not have a partner, or if both the person and their partner are in long-term residential care. Assets exempted from the FMA include: household furniture and effects; personal belongings such as clothing and jewellery; personal collectables, such as artworks, books and antiques; an interest in one car or similar vehicle; the value of certain compensatory or *ex gratia* government payments; and contributions to certain savings schemes.<sup>71</sup>

Allowable gifts under the Social Security (Long-term Residential Care) Regulations 2005 (SR 2005/183) are donations of property made during the gifting period by the person being means assessed and/or their partner; and have a total value not greater than \$6500 per year.<sup>72</sup> Under the regulations:

If during any year of the gifting period the person being means assessed makes gifts of real or personal property that have a total value exceeding the gifting amount, then the difference in value between the total value of the gifts gifted in that year and the gifting amount may be offset against the balance of the gifting amount in each of the remaining subsequent years of the gifting period.<sup>73</sup>

For the purposes of the FMA, income means: income as defined in section 3(1) of the *Social Security Act*; any benefit received by the person; 50 per cent of amounts received by the person or their spouse by way of superannuation, but not New Zealand superannuation or an overseas pension; and 50 per cent of a life insurance annuity.<sup>74</sup> Income does not include: income from the person's partner that is earned by the personal effort of that person; clothing allowances

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<sup>70</sup> Ministry of Health, *Income and Asset Testing* (2018) <<https://www.health.govt.nz/our-work/life-stages/health-older-people/long-term-residential-care/income-and-asset-testing>>.

<sup>71</sup> Social Security (Long-term Residential Care) Regulations 2005 (SR 2005/183) reg 10.

<sup>72</sup> Ibid reg 9(1)(b)(i).

<sup>73</sup> Ibid reg 9(2).

<sup>74</sup> *Social Security Act*, sch 27, pt 3, cl 5(a)-(d).

payable to the person;<sup>75</sup> the income-from-assets exemption;<sup>76</sup> amounts paid by a funder in respect of the cost of contracted care services provided to the person or their partner; or amounts of income specified in regulations.<sup>77</sup> Income derived from assets is also included in the income test, except for \$992, if the person is single; \$1,983, if the person's spouse or partner is a resident assessed as requiring care; or \$2,975, if the person's spouse or partner is not a resident assessed as requiring care.<sup>78</sup>

Section 147A of the *Social Security Act* is particularly relevant to this paper. This provision covers situations where individuals have deprived themselves of assets and income. Under section 147A(1), where the chief executive is satisfied that a person who has applied for an FMA, or their partner, has 'directly or indirectly deprived himself or herself of any income or property (other than an exempt asset), the chief executive may in his or her discretion conduct the [FMA] as if the deprivation had not occurred'.<sup>79</sup> Similarly, if the chief executive is satisfied that a person who has been means assessed, or their partner, has engaged in income deprivation or property deprivation, the chief executive may again use their discretion to include that income or property in a review of the person's FMA, as if the deprivation had not occurred.<sup>80</sup>

For the purposes of section 147A of the *Social Security Act*, instances of deprivation of property or income include, but are not limited to:

- a) Gifts gifted in the 12-month period prior to the commencement of the gifting period, or in any 12-month period preceding that period, to the extent that the total value of the gifts in each period exceeds \$27,000;

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<sup>75</sup> Under *Social Security Act* s 154 regulations under section 155 may provide for payment of a clothing allowance to residents assessed as requiring care who have been means assessed and found to have assets equal to or less than the applicable asset threshold, or residents assessed as requiring care who have entered into a loan agreement with the Crown under the residential care loan scheme. Under regulation 7(2) of the Social Security (Long-term Residential Care) Regulations 2005, the clothing allowance is \$279.25.

<sup>76</sup> *Social Security Act* sch 27, pt 3, cl 5 definition of 'income-from-assets exemption'.

<sup>77</sup> Ibid cl 5(f)-(k).

<sup>78</sup> Ministry of Health, *Income and Asset Testing* (2018) <<https://www.health.govt.nz/our-work/life-stages/health-older-people/long-term-residential-care/income-and-asset-testing>>.

<sup>79</sup> *Social Security Act* s 147A(1).

<sup>80</sup> Ibid s 147A(2).

- b) A disposition of property at any time before the commencement of the gifting period for no consideration, or consideration less than the market value of the property;
- c) A disposition of property during the gifting period for no consideration or consideration less than the market value of the property at the time;
- d) A failure at any time to exercise any right or entitlement to demand a payment;
- e) A waiver of a right at any time to receive any entitlement or payment;
- f) An investment at any time in non-income-earning assets.<sup>81</sup>

Under the Social Security (Long-term Residential Care) Regulations 2005, the gifting period for the definition of assets starts five years before the date of the FMA.<sup>82</sup> Thus, the *Social Security Act* and its relevant regulations distinguish between the five-year period prior to the person applying for the RCS (this is the gifting period) and the years prior to the gifting period. In the gifting period, only gifts up to \$6500 per annum are permitted and excluded from the definition of assets for the purpose of the asset assessment. Gifts in excess of \$6500 made during the gifting period are included in the asset definition. Case law has established that it is not necessary to establish intent to deprive oneself of assets; instead a deliberate act on the part of the individual is all that is required.<sup>83</sup>

Much of the case law in relation to the RCS relates to gifting. Notwithstanding the cases, it is clear that gifts of \$27 000 or less must be allowed, but any portion in excess of \$27 000 will be a deprived asset that may be factored back into the MSD's asset assessment.<sup>84</sup> Indeed, it has been observed in the courts that operational policy for MSD in relation to applicants for RCS who have trusts is 'to look at gifting prior to the five-year gifting period as a matter of course'.<sup>85</sup> The courts have established there is no time limit on when an act of deprivation may take place.<sup>86</sup> Thus, it is perhaps unsurprising that gifting programmes are well established in New Zealand.

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<sup>81</sup> Social Security (Long Term Residential Care) Regulations, reg 9B(a)-(f).

<sup>82</sup> Ibid reg 8.

<sup>83</sup> *Blackledge v Social Security Commission*, HC, Auckland 17/2/1992, CP 81/87, AP249/89, AP 255/89.

<sup>84</sup> *Broadbent v The Chief Executive of the Ministry of Social Development* [2017] NZHC 1499 [18]. The Court of Appeal granted leave to appeal, and heard the case on 10 July 2018. A decision had not been released as the time of writing.

<sup>85</sup> Ibid [49].

<sup>86</sup> [2012] NZSSAA 155/11.

An interest-free loan scheme exists for people entering into residential care. A person who has been asset tested may apply for a loan under the residential care loan scheme, which is operated by the Ministry of Health if the person's assets are above the applicable asset threshold and the person meets the criteria for eligibility for the loan scheme.<sup>87</sup> The Ministry of Health appropriation for Residential Care Loans for 2017/18 is budgeted at \$15 million.<sup>88</sup>

There are cases where the Authority has found for MSD when individuals have deprived themselves of assets. For example, the observation that 'the appellant and her late husband put their financial resources and their time and energy into building up the resources of the Family Trust rather than their personal estates. The appellant must therefore now look to the Family Trust for her support while she is in residential care'.<sup>89</sup>

### III DATA

We collected data from OIA requests to MSD, the organisation that is responsible for funding both student loans and the RCS. In relation to student loans, we asked:

- Do you check for income deprivation in relation to student allowance applications (i.e. income deprivation by parents or student loan applicants)?

In response to this query, MSD directed us to its Manuals and Procedures website, which outlines the standard operating procedures that MSD follows in relation to deprivation of income. In relation to trusts, the MSD website states:

Deprivation of income can occur in respect of a trust that an applicant, their partner or their parent has a responsibility to administer, manage or has some other form of relationship with (eg a beneficiary). Listed below are some examples of how deprivation may occur in relation to a trust:

- A loan made to a trust without the requirement for the payment of interest
- Investments within a trust which are designed for capital gain rather than earning income

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<sup>87</sup> *Social Security Act* s 153.

<sup>88</sup> New Zealand Treasury, *Vote Health – Health Sector – Estimates 2017/18. Residential Care Loans – Payments (M36)* <<https://treasury.govt.nz/publications/vote-health-health-sector-estimates-2017-2018-html#section-55>>.

<sup>89</sup> [2015] NZSSAA 071/15, 49. See also [2012] NZSSAA 155/11.

- Making a decision to not receive income as a beneficiary of a trust.<sup>90</sup>

The guidelines further explain that the decision on whether deprived income is included in an income assessment involves the exercise of discretion. Decision-makers are advised to ‘take into account the individual circumstances of the situation and decide whether it is fair and appropriate to include the deprived income’.<sup>91</sup>

In relation to the RCS, MSD advised that more information is needed from the person if they or their partner ‘have ever transferred assets to a trust [or] been the settlor, trustee or beneficiary of a trust or estate’.<sup>92</sup> We therefore asked the following questions of MSD under the OIA:

- How many means assessment tests were carried out (in the most recent period you have records for) for the Residential Care Subsidy?
- How many means assessments traced back beyond the first year gifting period?

MSD advised that all applicants for the RCS are financially means tested and this is traced back beyond five years for all applications. The number of RCS applications is outlined in Table 3.

**Table 3: Residential Care Subsidy applications, year ending 31 March 2018<sup>93</sup>**

Quarter ending	Total number of applications
30 June 2017	2100
30 September 2017	2903
31 December 2017	2686
31 March 2018	1919
<b>Total</b>	<b>9608</b>

We also asked MSD:

<sup>90</sup> Ministry of Social Development, *Deprivation of Income* <<https://www.workandincome.govt.nz/map/students/student-allowance/deprivation-of-income-01.html>>.

<sup>91</sup> Ibid.

<sup>92</sup> Ministry of Social Development, *Residential Care Subsidy* <<https://www.workandincome.govt.nz/products/a-z-benefits/residential-care-subsidy.html#null>>.

<sup>93</sup> Information received under the OIA, 9 July 2018, MSD. MSD advises this information is a count of applications, rather than a count of clients. A client may have more than one application during the reported periods.

- How many applications for the RCS were from people who had gifted assets to a trust either before or during the gifting period?

MSD's response advised the information is held on individual client records and it could not be provided. However, we note that information was provided to the Law Commission for the period 2009-10, where the MSD confirmed they processed around 10 000 applications for the RCS that involved a trust.<sup>94</sup>

We also asked:

- How many times in the last five years has the Commissioner used discretion in relation to gifting (as per s 147A of the SSA 1964)?

MSD advised that gifts made in the five years prior to the client applying for the RCS must be included in the means assessment of assets. However, outside the gifting period, the decision whether excess gifting should be included in the financial means assessment of assets is discretionary. Case managers have delegated discretion when considering deprivation of assets or income under s 147 of the *Social Security Act* and the relevant regulation. As with the response to the previous question posed, MSD advised that information about the use of discretion is held on individual client records and so they could not provide the requested information.

As at 31 March 2018, 33 956 people were in residential care.<sup>95</sup> However, the number of people partly or fully subsidised by government is uncertain. An indication is given by a historical review by Grant Thornton, which found that 28.3% of rest home clients were full fee paying.<sup>96</sup>

We, therefore, requested the following information:

- How many individuals are receiving full funding for their residential care as at 31 March 2017 (or latest available year)?
- How many individuals are receiving partial funding for their residential care as at 31 March 2017 (or latest available year)?

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<sup>94</sup> NZLC IP 31, above n 7, [2.17].

<sup>95</sup> New Zealand Aged Care Association, *Aged Residential Care Occupancy for 31 March 2018 Quarter* (2018) <<https://nzaca.org.nz/publications/industry-update/aged-residential-care-occupancy-for-31-march-2018-quarter>>.

<sup>96</sup> Grant Thornton, *Aged Residential Care Service Review* (September 2010) <<https://nzaca.org.nz/assets/Documents/ARSCR-Full-Report.pdf>>.



MSD advised they can only determine if a client is receiving the RCS, not whether they are receiving a full or partial amount. Therefore, only the total of clients receiving an RCS was provided. At the end of March 2018, 18 842 clients received an RCS.<sup>97</sup> Thus, over half (55.5%) of individuals in residential care were receiving either a full or partial subsidy.

The final question we asked MSD in relation to the RCS was:

- How much in the way of residential care loans have been written off over the past five years?

MSD reported that they were unable to report on residential care loans that have been written off as the tracking of the origin of debt is not recorded when debt is transferred between MSD's two debt reporting systems. As with the questions above, where MSD declined to provide the information, they advised the information was on individual client files and therefore could not be provided.

We made the following further requests to MSD on 18 July 2018:

1. How many applications for the residential care subsidy (RCS) were rejected in 2017, 2016 and 2015 (or the three most recent years you have information for)?
2. Are all rejections of the RCS because people do not meet the means test?
3. What is the process when there is excess gifting i.e. the person has deprived themselves of assets, but the person in need of care does not legally have access to the assets?<sup>98</sup>

MSD sent us a response they had made to a similar OIA request, which provided data related to questions 1 and 2. Table 4 outlines this data, which shows the number of RCS applications from people who had not made an application in the five prior years. Table 4 also shows: how many applications were granted; how many applications were declined; and the decision for the outcome.

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<sup>97</sup> Information received under the OIA, 9 July 2018, MSD.

<sup>98</sup> This question arose from case SSA 139/15 in which the Authority observed 'it is not appropriate for a person seeking a government subsidy to spend or gift amounts in excess of the allowable gifting and then claim there is nothing left to pay for care'. However, it is apparent (from other cases) that in some situations this does occur. (SSA 139/15 [2016] NZSSAA 033, 27).

**Table 4: Residential Care Subsidy Applications<sup>99</sup>**

Financial Year	Total Applications	Applications Granted	Applications Declined	Reason for Decline	
				Excess Income/Assets	Other <sup>100</sup>
2014/15	7438	5386 (72%)	2052 (28%)	1048	1004
2015/16	7770	5694 (73%)	2076 (27%)	943	1133
2016/17	7612	5596 (74%)	2016 (26%)	973	1043

The information outlined in Table 4 shows that in the relevant years, 72-74 per cent of applications were granted, while 26-28 per cent of applications were declined. Approximately half of the applications declined in each year were due to excess income or assets.

In relation to question 3, MSD refused under section 19(f) of the OIA to provide a response, as the information is held in notes on individual case files.

#### IV DISCUSSION

The potential gain from entitlement to the RCS (a benefit in excess of \$50 000 per annum) is significant relative to the maximum of \$11 000 per annum for the student allowance and accommodation benefit. Nevertheless, the current means testing for both benefits is problematic. Multiple inequalities arise from current policy.

Since New Zealand provides for health care from general tax revenue, the requirement for the RCS to be partly self-funded is anomalous.<sup>101</sup> The fundamental informing principle of elder care is manifest in New Zealand Superannuation – a universal pension for those aged over 65 years. Medium-term residency is the main qualification, rather than means. A social value is evident of providing financial support for superannuitants, regardless of their circumstances.

<sup>99</sup> Information provided by MSD under an OIA request. This information was provided to another applicant in 2018. Applications counted are the first application in the fiscal year where there has been no application in the five fiscal years prior.

<sup>100</sup> The reason for ‘Other’ for decline of an application may include when the client has died, the application has been withdrawn or insufficient information was provided in the application.

<sup>101</sup> In the United Kingdom, the Conservative government proposed a similar arrangement based on the reasoning that retirees do not pay national insurance contributions. This was proposal was deemed a ‘dementia tax’, and was abandoned. See Patrick Collinson, ‘The tax that pensioners should pay to fund care’ *The Guardian* (online), 20 May 2017 <<https://www.theguardian.com/money/blog/2017/may/20/pensioners-pay-national-insurance-fund-care-theresa-may>>.

As we outline below, current arrangements allow people, who have had sufficient foresight to engage in gifting programmes, to qualify for the RCS. This advance planning defeats the purpose of the asset- and income testing regime, and supports an advisory industry that facilitates income deprivation.

While anecdotal evidence indicates that students' working to meet the costs of living in major cities is negatively affecting their education outcomes,<sup>102</sup> it seems unlikely that this consequence would be sufficient to prompt further government largesse. Alternatively, the government might seek to ensure that students in need receive an allowance, and those students, who do not need state assistance, do not receive it. This seems an impossible task. From a university teacher's position, both pedagogical and pastoral, it is preferable that students have sufficient income so as to be able to focus fully on their studies.

## A Equality

While the formal age of majority in New Zealand is 20,<sup>103</sup> for almost all practical purposes, a person is treated as an adult at 18 or younger. However, the Student Allowance regime presumes parents will provide financial support to their children. In many cases, this does not happen. If the government is concerned about potential abuse by parents of the student allowance, an alternative is to end means testing and grant all students an allowance akin to non-means-tested superannuation or the benefit for unemployed young people.

Jobseeker Support is payable to people over the age of 18 seeking work. There is no expectation that those who are unemployed will look to their parents to provide financial support. Therefore, an unemployed 18-year-old is treated as an autonomous individual from the perspective of state provided assistance, but an 18-year-old who is unemployed and also studying is not.

A conflict in philosophies is evident in New Zealand. At one level, there is a desire to provide universal care for older people, such as through New Zealand Superannuation. However, this clashes with the way that care is provided to those when they become more vulnerable, as this support is means tested. Thus, individuals do not need to look to their own resources for support when they are in good health – only when they are in poor health (excluding dementia). Policy

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<sup>102</sup> See, for example, Amber-Leigh Woolf and Rebecca Moore, 'Big city costs affect students' *The Dominion Post* (Wellington), 4 June 2018, 6.

<sup>103</sup> *Age of Majority Act 1970* (NZ) s 4.

that indicates we are more concerned about our elderly when they are healthy than when they are not lacks coherence and, perhaps, common sense.

Is the policy on the RCS a trade-off for the absence of an estate tax in New Zealand? If this is the implicit policy objective, it makes little sense to subject the RCS to an FMA while providing a universal pension to everyone that is not means assessed.

## B Equity

The current RCS scheme allows applicants to gift \$27 000 per annum before they are deemed to have deprived themselves of income. This is around half of the annual cost of the subsidy. A couple who gift \$27 000 each per annum from the age of 50 to the time they were likely to be in residential care, at say, 80, will have divested themselves of \$810 000. This benefit is only possible for wealthier members of society. Moreover, a person who gifts assets to a trust, such as their house, may still benefit from the use of those assets.

The \$27 000 gifting allowance resembles the gift duty allowance that was repealed on 1 October 2011, although that allowance was for an individual, rather than a spousal unit.<sup>104</sup> But why retain a gifting allowance? There are few reasons why individuals should engage in income deprivation – the obvious one is to ensure qualification for welfare assistance later in life.

Further equity issues arise from allowing exemptions for gifted funds. People who have planned in advance and gifted their assets appropriately, will receive government assistance. However, those who have not planned so effectively and have retained ownership of their assets, will have to pay for their own residential care where assets held are above the threshold. Furthermore, some individuals who have not entered into gifting arrangements may need to dispose of their family home, which is often the principal investment asset, if sufficient planning arrangements have not been made to eliminate the potential liability.

This point was noted by members of the Social Security Appeal Authority when they observed ‘[p]eople with assets and access to advice about allowable gifting are advantaged over those who are less well off and without the knowledge and ability to undertake a gifting

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<sup>104</sup> See *Bridgford v Ministry of Social Development* [2013] NZCA 410 [3].

programme'.<sup>105</sup> However, the same body observed four years earlier: 'it is not fair that they should be put in the same position as a person without a trust'.<sup>106</sup>

As noted in section II, some assets are exempt from the FMA, including jewellery, personal collectables or family treasures or taonga, such as artworks and antiques. People with sufficient wealth could change their investment portfolio from financial investments to tangible assets, such as artworks, in order to ensure qualification for the RCS.

### C Transparency

It became apparent during the course of collecting data for this paper that MSD does not hold sufficient information to comment with any degree of certainty on the use of trusts for the purposes of asset deprivation relating to the RCS. The Ministry could not tell us how many applicants had gifted assets to trusts (either before or during the gifting period).

A further lack of transparency exists on to excess gifting. In response to questions 4 and 5 (as outlined in Section 3), MSD advised 'excess gifting in the gifting period must be included in the means assessment of assets as the excess value gifted counts towards the client's asset total regardless of whether the client has access to the assets'. MSD also reported that 'excess gifting outside the gifting period may be included in the means assessment of assets at the discretion of the decision maker'. Further, MSD could not answer our OIA request about the use of discretion, as information could not be accessed.

We note, however, that officials for both the RCS and student allowances may exercise discretion, 'having regard to all relevant circumstances, is it fair and appropriate to cancel or reduce the allowance?'.<sup>107</sup> While exercise of discretion seems necessary, the inability of the government agency to report on the number of times it is used, or the financial impact that results from the use of discretion, obstructs transparency around both benefits. Limited monitoring of the use of discretion is also indicated.

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<sup>105</sup> NZ SSAA 161/13 [2016] 7.

<sup>106</sup> NZ SSAA 155/11 [2012] 3. This comment relates to people who set up a trust, enter into a gifting programme, but gift too much.

<sup>107</sup> Ministry of Social Development, *Deprivation of Income* <<https://www.workandincome.govt.nz/map/students/student-allowance/deprivation-of-income-01.html>>.

The use of trusts arguably presents the greatest challenge to transparency. While trusts can be used for legitimate purposes, such as providing funds for disabled children, they can also be used to obfuscate ownership, and divest a person of property with the consequence of being unable to pay court ordered damages or restitution. In New Zealand, not only is the number of trusts unknown, the assets held by trusts or the purpose of particular trusts are also unknown.

We further observe that there is high reliance on honesty from applicants for the RCS and the student allowance. This is particularly the case where assets are held in trust. Data matching across government agencies is likely to uncover any undeclared income from traditional sources, i.e., sources where tax is deducted at source. However, assets held in trust where income is not distributed to the beneficiaries seeking government support is unlikely to be easily detected. Moreover, as there is no record of trusts or their beneficiaries in New Zealand, it is not possible for a government department to detect when an applicant does not declare their interest in a trust. We submit that forming a trust should be seen as a legal privilege akin to forming a company. Government might establish a central register for trusts, just as it has done for companies, limited partnerships, charities, and so forth. An interim measure would be to follow Australia in requiring an annual tax return to be lodged for a trust, whether or not the trust derives income.<sup>108</sup> Such a policy would increase transparency around trusts and their uses.

## V CONCLUSION

The two means-tested benefits investigated in this study permit inequalities and inequities among potential recipients and their families. People who engage in programmes to minimise their income or assets gain an advantage over those who do not. Trusts facilitate and exacerbate this disparity. The lack of transparency in relation to trusts, in general, and their beneficiaries, specifically, means it is not possible to accurately determine where family assets are held. Moreover, reliance on individuals' honesty to disclose their assets held in trusts conflicts with an incentive to conceal beneficiary interests. The findings of this study support the call for a central registry of trusts in New Zealand.

An anomaly arises when unemployed young people receive preferential treatment relative to their peers who are studying. We note another anomaly: New Zealand provides greater state assistance for individuals when they are healthy than when they are not.

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<sup>108</sup> NZLC IP 31, above n 7, [2.3].

Future research could extend this study to a number of other state-provided ‘benefits’ including legal aid, state-assisted housing, working for families tax credits and other income-tested welfare benefits. Extending this research to other state-provided benefits would permit further reflection on policy coherence across other forms of welfare assistance.

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