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Compiled by

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North Australia Development Unit

Darwin

September 1989

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Darwin Regional Office

Aboriginal Services Manager - Darwin

Area NT - Benefits Administration

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Western Australian Regional Offices - Comments

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NADU OVERVIEW

The issues raised in any discussion of polygamous marriages are complex. Polygamy demonstrates some of the inadequacies inherent in applying a western style social security system to a very different and traditionally-oriented culture.

Nevertheless, it is possible to address some of those issues raised through sensible and practical application of DSS policies. The "model" of payment policy that has arisen over the last 22 years reflects this. The model grew from a need to adapt DSS payment categories to individual situations of clients. It has attempted to do so with the minimum amount of disruption to traditional patterns of behaviour while maintaining an adequate DSS income for individuals.

As such, the basis of this model should not be disregarded in any future consideration of change to policies on polygamy. More importantly, it should not be dismissed on the grounds that it "does not recognise" polygamous marriages. The reason it cannot recognise these marriages is a failure of appropriate categorisation, not a failure of the system to ensure women receive a DSS payment as the wife of a man. This "categorisation" is not seen as a problem at the regional office level or even with individual clients. It matters little in practice what a payment may be called by the department - the critical factors for clients are the amount, timeliness and conditions of payment.

The current model has the advantage of being tested in the field. Regional staff are generally aware of how it works and the ramifications for clients. Any major change to current policy may have unforeseen and possibly negative effects for men and women who at present receive payments under these arrangements. While this in itself is not justification for continuing with a version of current policy, the other comments in this paper suggest that the proposed alternative models will have definite negative effects for clients.

Current policy has inadequacies, these are noted in this paper and possible options to remedy them are suggested. Both "models" detailed below are based on Model 1 contained in the Central Office discussion paper.

The two recommended policy options are an amalgamation of regional office opinion and take into account their concerns at a practical level. These options also appear to take into account most of the issues raised by policy areas and the SSAT. There is no "one" solution that will satisfy everyone - any final result should have enough flexibility to cover unusual or exceptional circumstances and provide coverage for the greatest number of cases.

NADU Model

- . Husband is eligible for benefit or pension in his own right. He receives payment at the half-married rate.
- . All wives receive a payment equivalent to wives pension/additional benefit at half-married rate. This can be paid through a category of Special Benefit called "traditional spouse".
- . Women receive additional benefit/pension for children in their care. No MGA is payable.
- . All individuals are granted separately. Records should be cross referenced on the system and review periods aligned so that if circumstances alter there is no delay in re-assessing payment.
- . If income of any individual is low (below a certain limit?) or minimal, it will not affect the others' entitlements.
- . If income is significant, payment to the individual concerned can be suspended. The case should be reviewed in person by AILOs to determine who else in the group is being supported and how this will affect the other entitlements.
- . All wives are entitled to Widows Pension (if other criteria met) on death of the husband.

Points to note:

Half-married rate applies to RAA. Rent Assistance is payable to any individual who is eligible.

The review of circumstances following the notification of a significant income would look at how that income is distributed amongst the group and how that income will affect all the entitlements. It is important not to suspend all clients until the full details are known.

It will be quite possible for a husband, say, to be able to support one wife on a certain income. He may not reside with another wife, nor support her. In this case, the first wife would lose her "traditional spouse" payment however the second would continue. These cases need care and a full picture of the interdependency is required before a decision can be made. Each polygamous union involving significant income will need to be treated as a separate case - as it would in non-Aboriginal society.

Under CDEP, individuals will appear on CDEP schedules if they are receiving payments on that scheme. This includes wives whose husbands are receiving CDEP money on their behalf. Wives who do not receive CDEP, if looking after children for example, can continue to receive Special Benefit - Traditional Spouse. Women with children under CDEP can still receive FA/FAS.

Evidence suggests that in the great majority of polygamous marriages there is minimal income and most cases can continue to be assessed without the details required above. It may be appropriate to set a "warning" limit of income under which no action is required. This could be based on a combined free area for the group as a whole, taken on an annual average to avoid one-off payments, such as royalties, dramatically affecting the group.

Staff Preferred Model

This model is, again, a variation of current practice. It is particularly popular amongst regional office staff and most AILOs.

- . Husband receives benefit/pension and claims the first wife. The first or "number one" wife is determined by the husband according to current practice. This payment should be split wherever possible.
- . Second and subsequent wives receive Special Benefit at the half-married rate, perhaps under a "traditional spouse" category.
- . All women receive additional benefit for children in their care. No MGA is payable.
- . Income of the husband/first wife only affects that entitlement. Second and subsequent wives are granted in their own right and are assessed accordingly. Income is not deemed to be shared or distributed between wives.
- . All wives are able to claim Widows Pension on death of the husband if all other criteria is met.

Points to note:

RAA is paid at the half-married rate. Rent Assistance is payable if eligible.

The provisions for persons on CDEP communities noted in the NADU model apply equally under these arrangements.

If income of any of the group is significantly high, it is still possible to review the particular circumstances on a case by case basis.

Review periods for the Special Benefit payments should be aligned with review periods for the principal beneficiary/pensioner.

Other Models

(Models 2,3 and 4)

There was almost universal disagreement by staff with the proposed combined income/assets tests mentioned in the Central Office discussion paper. Staff saw this arrangement as impractical given our current understanding of dependency and DSS payments to remote area Aboriginal clients.

It is considered that without further research into the polygamous arrangements themselves, the department would be taking a substantial risk in introducing such a policy.

Field and benefits staff are of the opinion that there is no single pattern evident in polygamous marriages - there are many variations related to income distribution, location of wives, CDEP and so on that restrict the department if it wishes to apply a universal arrangement. It is even doubtful if further research would show anything more than that all marriages are different and should be treated with discretion.

Extendability

Both models suggested above can be extended to cover cases in non-Aboriginal society.

For a non-Aboriginal case, normal procedure would be to investigate very closely the dependency arrangements of the marriage or defacto relationship.

If income is involved, assessors should be in a position to determine whether or not a wife is being supported. If a wife is not being supported, there would initially be some doubt as to the existence of a defacto relationship. These cases will require thorough investigation before a "second wife" could receive a DSS payment.

In a case where the husband is on some form of DSS benefit/pension, the first wife (a legally married wife or the one in the longest relationship with the husband) can be claimed for wives pension/additional benefit. Recent departmental decisions have indicated that second "wives" in these circumstances can claim SPP. It would be more consistent to apply the models above in paying a half-married rate Special Benefit. The category of "traditional spouse" could not, of course, be used.

If we "recognise" traditional polygamous marriages, it does not mean that we are necessarily obliged to "recognise" polygamy for DSS purposes in other societies.

Neither would it be appropriate for non-Aboriginal polygamous wives to have equal entitlement to Widows Pension. This is particularly so if one wife is legally married and the other is a defacto spouse.

This arrangement would not unduly advantage or disadvantage second wives in either society and would eliminate the payment of SPP to non-Aboriginal polygamous wives.

Summary

Apart from the introduction of a separate Special Benefit category, aspects of Widows Pension entitlement and systems/manuals amendments, neither of the two suggested models involves making a separate legal provision for Aboriginal polygamy.

As specified, the models however do recognise Aboriginal polygamy and conform with the department's requirement that the Law Reform Commission recommendations are addressed.

They have the additional features of being relatively simple to administer, having minimal impact on clients and relate closely to existing practice.

They can also be applied to non-Aboriginal society giving consistency across client groups. Both models attempt to be fair to all men and women involved in polygamous unions.

Unless further research into polygamy suggests other alternatives, it is NADU's opinion that either of these two models should be accepted as DSS policy and promulgated accordingly.

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POLYGAMY IN TRANSITION

The nature of polygamy in remote areas of Australia
and its treatment by the Department of Social Security.

(To be read in conjunction with the NADU Response to the
Central Office Discussion Paper on
Polygamous Marriages)

by

Bill Pennington 

North Australia Development Unit

Darwin, February, 1990

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REFERENCES

1. INTRODUCTION

The treatment of polygamous marriages (meaning traditional Aboriginal polygamy) by the Department of Social Security has been the subject of discussion and analysis both within the Department and by external bodies and individuals.

These discussions and analyses have extended over a period of approximately 20 years and have taken many forms. Polygamy and DSS has at various times been a policy issue, a legal issue, an regional office administrative concern, the subject of Law Reform Commission recommendations and has even become part of an academic study.

At various times over this 20 year period, attempts have been made to resolve perceived problems with how the Department treats a group of clients in a polygamous situation. Solutions proposed in the past have either not met with universal acceptance by staff or have been seen as not satisfactory with respect to external factors.

Changes to income maintenance programs and Departmental policy over that 20 year period has further complicated matters. By mid 1989, there existed no real policy or administrative direction for Departmental staff to follow in dealing with Aboriginal polygamy.

Earlier in 1989, NADU field reports had indicated DSS staff had adopted local arrangements in regional offices where polygamy was common, and the suggestion was made that there existed a need for a nationally consistent set of instructions. NADU had agreed to include polygamy in its project plans along with other issues related to traditional Aboriginal culture and DSS.

In August 1989, Central Office Benefits Delivery Division issued a discussion paper on the DSS treatment of polygamous marriages. NADU was asked to co-ordinate a response from NT regional offices to the proposals in this paper. In August/September 1989 this was completed after consultation with all NT offices and the responses were compiled as a NADU Paper ('Response to the Central Office Discussion Paper on Polygamous Marriages'). It is recommended that this first paper be read in conjunction with this current one.

NADU stated in the context of releasing the first paper that, regional office opinion was fairly consistent as to how the Department should treat polygamy, with the NT offices and those contacted in WA agreeing on most points. A concern of NADU before the results were known was that there may be unforeseen problems if a policy was adopted that was different from current existing practice, that is, there may be negative repercussions on traditional Aboriginal people if DSS made wholesale or universal changes to payment policy.

As it was, the response from DSS staff suggests that current practice takes into account the needs and concerns of Aboriginal people, and has 'grown up' or adapted itself to the particular circumstances of polygamy. Be that as it may, NADU had agreed to undertake a short study of the nature of polygamy amongst Aboriginal people so that the effects, if any, of policy change could be estimated.

This paper sets out the details of that undertaking. Polygamy is analysed in the context of DSS programs and policies and its nature is only studied to the extent of gauging the possible effect on Aboriginal culture and living arrangements.

The methodology employed in the formulation of this paper was to use data obtained through NADU field visits to certain communities, the preliminary results of another NADU project on service delivery/policy for Aboriginal clients, interviews with DSS field staff, interviews with community workers, missionaries and the like as well as a review of literature on the topics covered in each chapter.

This is not an academic paper and no anthropological, sociological or economic analysis is attempted. References to other work are given where relevant. It presents a general overview that should be read with caution and no conclusions outside the direct reference to DSS policies should be drawn from content or comments.

Polygamy in 1990 is not of the same nature as it was in traditional society. It has been subject to the same pressures and outside influences as has Aboriginal traditional society as a whole. This does not mean that polygamy is 'dying out', nor is traditional Aboriginal society 'dying out'. The changes to Aboriginal society have been profound and far-reaching. In the last 20 years DSS has been a major factor in that process of change - it is arguable whether for the benefit of the members of that society or not.

The theme of this paper is 'Polygamy in Transition' - the greatest changes to Aboriginal society in remote northern Australia have taken place in those 20 years - and there is no doubt that even with all the changes, a distinctly Australian Aboriginal culture has been retained. Polygamy will remain part of that culture as long as it has the strength to survive.

The treatment of aspects of Aboriginal culture - such as polygamy - will be an indication of how the Department of Social Security can adapt to rapid change and how far the commitment to equity and social justice has come.

5. DSS AND POLYGAMY - OPTIONS

The 1986 Report of the Law Reform Commission 'The Recognition of Aboriginal Customary Laws' made recommendations to the Department of Social Security based on making the Social Security Act and related legislation recognise Aboriginal customary law for specific purposes. This functional recognition was seen to be the most suitable method of ensuring fairness and recognition within a legal context.

With reference to Social Security and polygyny, the Commission recommended:

"The Commission concludes that the continuation of polygyny is a matter for Aborigines themselves to decide. Functional recognition of traditional marriage should entail recognition of polygyny where it exists. Problems of competition between wives, or between wives and husbands, should be considered in context as they arise...." (1986 p185)

The Commission made further recommendations regarding the treatment of multiple marriages under DSS provisions. These were concerned with the equal treatment of all wives, the qualification for benefit and the arbitrary selection of the 'first wife'. For more details on these issues, refer to the first paper of this series.

Also considered of importance was the perceived 'Denial of the Most Appropriate Status to Persons in Need' where the Commission criticised the Department for its failure to use either discretionary or legal powers at its disposal to assist in categorising claimants. Similarly, the income testing provisions that applied in the main to monogamous couples could also be applied with discretion under current legislation to allow for polygamy.

Berndt expressed the opinion that, for Social Security purposes, there should be no difference in the treatment of wives in a polygamous marriage with those in a singular relationship. He noted:

"A polygynous marriage is no less legal than a monogamous marriage in traditionally-oriented Aboriginal Australia. Co-wives in a polygynous union are of equal status. A wife of a monogamous union and a wife of a polygynous union are for all intents and purposes legally equivalent. Co-wives in a polygynous union.....are in fact more legitimately and more unmistakably married than de facto wives...." (1971 f6-7)

As far as the administrative treatment of these arrangements by government departments was concerned, Berndt allowed himself to state:

"When a marriage is categorically established, I see no reason why a period should elapse before a Social Service payment is made: this can only lead to hardship, especially where older wives (deserted or widowed) are concerned."

"Certainly, deserted wives who have been married in a tribal sense, and whose marriages were socially sanctioned....should be considered to be entitled to Social Services allowances. Where a husband 'deserts' his wife - through divorce (or 'enforced desertion') or through being discarded for another (whether or not the marriage was monogamous or polygynous) - her marriage would have been 'tribal' and de jure."

"As already mentioned, however, I would query the assumption that this 'social legislation is (or should be) based on monogamy and cannot be circumvented'. The Department of Native Welfare should take a strong stand here because....the Department of Social Services has decided that tribal marriage between Aborigines should be accorded the same status as legally registered marriages in regard to the provisions of the Social Services Act. In other words, its concern is with tribal marriage, and (to repeat) tribal marriage covers both monogamous and polygynous unions. If the Department concerns itself solely with the former, it is tackling only half the problem." (1971 f6)

Bell and Ditton agree in principle with Berndt. In their analysis of the economic impact of DSS payments on Aboriginal women in particular, they say:

"It is little wonder women frequently mentioned welfare and social security payments in connection with the breakdown of their law....(d)ifferent aspects of the payment of benefits impinge on men and women, different values are threatened. Men and women have separate economic roles which cannot easily be subsumed by categories established by social security to deal with the problems facing nuclear families in white Australia."
(1984 p20)

Aboriginal people themselves are concerned about the Department and its treatment of certain cases that impact on the retention of their tradition. M, a traditional man from community X said:

"Polygamy within our Aboriginal cultural tradition must exist and be introduced to the Department to have this awareness and prevent any problem areas. It has been practised for generations and both ways of Aboriginal and balanda [term for European] society must cooperate in the best ways of mankind...."

Hart is of the opinion that each case involving a polygamous family throws up an entirely different set of circumstances. The personalities of the men involved, the ownership of cheques, the care of children will be variable and as such it is difficult to determine how these variables interact.

The research work of Bell and Ditton and Smith, Adams and Burgen points to this as the major consideration in any treatment of polygamy by the Department. Indeed, the Law Reform Commission noted this along with child payments and information, as being the central DSS issues in their hearings and community visits.

The first paper in this series contains DSS regional and field staff's views, which are in accord with those of the researchers. The current practice in most regional offices has emerged over the last ten years in direct response to the needs of clients, especially women. This unwritten policy is perhaps the most logical method by which Aboriginal polygamous marriages of today can be incorporated into current Department of Social Security categories and policies.

The policy model that emerged from the staff discussions in the first paper is included with this report as Appendix B.

What options are available to the Department?

In the preparation of this paper, nothing was found that contradicted the assumptions and analysis of the DSS staff survey contained in the first paper.

This is not surprising, given that that paper was the compilation of benefits and field staff views, these officers having to work with problems involving Aboriginal tradition, current lifestyle, remoteness and other factors as part of their daily routine. There is obviously a great deal of experience and knowledge within this group of people.

The obligations of the Department to the Law Reform Commission recommendations and other external considerations are acknowledged in this paper and in the first paper also.

Briefly, the Department can proceed in one of two directions; legislative provision for polygamy and other aspects of traditional culture or to adapt existing policy interpretation to achieve the same net effect for the client. Both of these avenues should be tempered by the two critical factors in this equation:

- . formal recognition has never been proposed by the Law Reform Commission - only functional recognition
- and
- . any legislation and policy needs to be flexible enough and practical enough to meet the diverse needs of clients whose individual situations vary widely

Paper number one went into detail as to how DSS can provide the appropriate benefit and pension categories to satisfy these considerations.

That paper included provision for second or third wives and 'recognition' of their status, widowhood, separation, child rearing and methods of payment. It also suggested ways in which the Department could resolve the thorny question of income testing under polygamous arrangements.

In more general terms, this paper has investigated how Aboriginal society has reacted, and reacts now to change. This gives a proper perspective in which to view any recommendations that may arise from the findings in the first paper.

In summary, this paper suggests the allowances to be made for polygamy in Aboriginal Australia should take into account:

- (a) Traditional marriage should be recognised as such, including the notion of polygamy;
- (b) Payments and payment obligations should generally be on an individual basis for men and women;
- (c) The notion of any woman being dependent on her husband should be avoided wherever possible;
- (d) A set of indicia based on community perception should be included in the Department's requirements for determining traditional marriage;
- (e) There should preferably be no distinction between wives for payment or eligibility purposes for any benefit;
- (f) There should be capacity in the policy to allow for situations involving movement between wives and location of wives;

and

- (g) Some consideration will need to be given to support and income distribution where there may be substantial income involved. These cases are expected to be rare, however.

Enough information exists in Departmental records and other sources for a start to be made on drafting appropriate legislative (if required) and policy change.