

Aide-mémoire



**MINISTRY OF SOCIAL
DEVELOPMENT**
TE MANATŪ WHAKAHIATO ORA

Cabinet paper

Date: 19 June 2017 **Security Level:** Cabinet Sensitive

For: Hon Anne Tolley, Minister for Social Development

File Reference: REP/17/6/673

Treatment of Special Benefit clients who may be better off on Temporary Additional Support and other technical matters requiring changes to social security legislation

Cabinet Committee Social Policy

Date of meeting 21 June 2017

Minister Hon Anne Tolley, Minister for Social Development

Proposal

You are seeking agreement from Cabinet Social Policy Committee to:

- the approach to correct entitlements for Special Benefit clients who may be better off on Temporary Additional Support, including the required decisions to address the unappropriated expenditure
- a number of changes to the Social Security Act 1964 (the Act), including regulations under the Act to ensure that agreed Government policy and current operational practice are supported by the legislation.

Key issues:

- This paper cover the approach to correct entitlements for a group of grand-parented Special Benefit clients who could have received a higher level of financial support on Temporary Additional Support (since Temporary Additional Support was first introduced in April 2006) (Issue 1)
- These people were not given the opportunity to apply for Temporary Additional Support, as the Ministry of Social Development (MSD) understood the law prevented a person from cancelling their Special Benefit and applying for Temporary Additional Support.
- At 28 April 2017, there were 7,148 existing and former clients affected by this issue, with the total estimated at a maximum of \$9.5 million in Crown benefit costs. This paper seeks Cabinet agreement to validate the unappropriated expenditure.
- To ensure the payment of arrears (back-dated Temporary Additional Support)

does not effect a clients' eligibility to certain forms of financial assistance under the Act (that are income and/or cash assets tested), Cabinet agreement it sought to amend social security regulations to exempt back-dated Temporary Additional Support.

- Cabinet agreement is also sought to amend the Act and/or social security regulations in respect of Issues 2-7 to ensure that existing practice can continue lawfully.

Background to this paper

- In December 2015, you asked MSD to undertake a stock-take of issues where there was potential misalignment between legislation, policy and operational practice.
- This initial stock-take identified 36 issues. MSD has determined an approach to address each of these issues, with a number involving changes to MSD's operational practices which have been completed or are underway.
- This paper addresses seven issues that require change to the Act and/or to social security regulations.
- Of the seven issues, the most significant issue relates to correcting entitlements for Special Benefit clients who may be better off on Temporary Additional Support (Issue 1).

Correcting entitlements to Temporary Additional Support (Issue 1)

- When Temporary Additional Support was introduced in April 2006, to replace Special Benefit, the Government agreed to grand-parent all existing Special Benefit clients so no-one would receive a reduced level of assistance.
- MSD understood that the Act prohibited a Special Benefit client from electing to move to Temporary Additional Support and as such did not provide information to clients receiving Special Benefit that they may apply for temporary Additional Support and in some cases, may be better off. This understanding has since been found to be incorrect.

Section 9(2)(f)(iv) Active Consideration

-
- It important that MSD takes appropriate steps to correct entitlements for clients who could have received a higher level of financial support on Temporary Additional Support (potentially back to 1 April 2006), to retain trust and confidence in the social welfare system.
- MSD intends to proactively engage with existing and former clients affected by this issue and provide them the opportunity to have their entitlements corrected by paying back-dated Temporary Additional Support. Section 80AA of the Act provides a mechanism to do this (the 'Correction Power').
- Modelling undertaken by MSD has shown that as at 28 April 2017, 7,148 existing and former Special Benefit clients were at some point since 1 April 2006 better off on Temporary Additional Support.
- Failure to take a proactive approach could lead to a proliferation of individual reviews being sought particularly given the National Beneficiary Advocacy Consultancy Groups' interest in this matter. This would create significant reputational damage for MSD, as well as a huge workload (and operational cost) to individually consider each review.

-
- Cabinet's agreement to amend social security regulations to exempt back-dated Temporary Additional Support when assessing clients' eligibility to certain forms of financial assistance under the Act (that are income and/or cash assets tested). This exemption, specifically targeted to those affected Special Benefit clients, will last for a period of 12 months following the provision of the lump sum back-payment.
 - At 28 April 2017, the total cost of addressing this issue is estimated at a maximum of \$9.5 million in Crown benefit costs.
 - Validation will be sought by Parliament under section 26C of the Public Finance Act 1989 for any expenditure incurred in excess of the Benefits or Related Expenses, Hardship Assistance appropriation.
 - The approach to correcting entitlements to all clients affected since 1 April 2006 and exempting the back-dated payments is consistent with the approach taken to remedy the Accommodation Supplement payment error issue in 2016 [CAB-16-MIN-0460.01 refers].
-

Package of other technical changes to social security legislation (Issues 2-7)

- The paper also seeks agreement to a small number of technical changes to amend the Act, including changes to social security regulations under the Act, to ensure the legislation, policy and operational practice align.
 - The proposed changes ensure that the legislation fully supports current operational practice to make sure there is continuity and consistent treatment of clients under the social security legislation.
-

Timing of amendments

- Approval for the changes to regulations proposed in the paper will be sought from the Cabinet Legislation Committee in early August 2017.
 - Without these amendments, MSD cannot pay back-dated Temporary Additional Support without it potentially impacting on a person's eligibility or entitlement to some forms of financial assistance under the Act (which are cash asset and/or income tested), which would be unfair.
 - Where changes to the Act are needed, the timing will depend on a legislative vehicle being available. The proposals are in scope of the Social Assistance (Electronic, Remedial and Other Matters) Amendment Bill which is on the 2017 Legislative Programme. There is not sufficient time to draft and introduce this Bill prior to the election.¹
-

Additional supporting material

- The appended Question and Answers try to anticipate specific questions your colleagues might have and cover off the matters that have arisen during agency and Ministerial consultation.

¹ The week of 14 August will be the last week of normal Cabinet and committee meetings before the election.

APPENDIX: POSSIBLE QUESTIONS AND ANSWERS

GENERAL

Why are errors in the administration of social security legislation occurring?

- Ideally legislation, policy and practice should be clear and aligned. However, the combination of a complex welfare system, changing social and economic settings, and continual litigation and re-interpretation of legislation has led to a number of alignment issues, and these will continue to arise over time.

What steps is MSD taking to respond to future issues?

[Feedback from the Treasury]

- MSD is implementing a new process to manage potential issues where the legislation, policy and operational practices do not align. This will ensure there is visibility and accountability when issues are raised, alongside robust prioritisation, escalation, analysis, and decision making processes. By centralising the management of these issues, MSD will develop a better understanding of why these issues occur, and how MSD can mitigate the risks.
- The rewrite of the Act² aims to provide greater clarity and coherence, ensure greater consistency, modernise language, and re-enact existing policies in a more accessible and understandable form. When enacted this will make the Act easier to read and use for all interested parties, be clearer in its intent, and therefore less open to interpretation and challenge.
- Greater use of automation when processing client applications and maintenance activities provides MSD with better quality data and data in an electronic format. This allows for integration with other systems seamlessly and will significantly reduce the likelihood of data capture error.
- MSD is reviewing the Service Delivery quality framework to ensure that it includes robust processes for identifying errors and trends, and for informing staff training.

Are there other options for advancing the amendments to the Social Security Act covered in this paper?

- The Social Security Legislation Rewrite Bill 2016 is currently awaiting Second Reading and depending on the timing, could provide a mechanism to progress these amendments (as the amendments are minor and technical).
- However, as the Bill has already been through a Select Committee process, this would involve a Supplementary Order Paper to the Bill.

² Social Security Legislation Rewrite Bill 2016 is currently awaiting Second Reading.

ISSUE 1- CORRECTING ENTITLEMENTS FOR SPECIAL BENEFIT CLIENTS WHO MAY BE BETTER OFF ON TEMPORARY ADDITIONAL SUPPORT

What is the scale of the Special Benefit/Temporary Additional Support issue?

- As at 28 April 2017, there are approximately 7,148 clients who receive or have received Special Benefit since 1 April 2006 affected by this issue (modelling has been used to estimate Temporary Additional Support for these clients over time).
- The 7,148 clients are made up of three groups:
 - Existing Special Benefit clients potentially better off on Temporary Additional Support (369)
 - Former Special Benefit clients who were better off on Temporary Additional Support and still receiving financial assistance from MSD (3,811)
 - Former Special Benefit clients who were better off on Temporary Additional Support who are no longer receiving financial assistance from MSD (2,968).

How much will people receive in arrears payments?

- In making any back-payments, MSD would determine the 'net' amount of the Temporary Additional Support a client would receive by deducting Special Benefit paid for the same period. Most clients (5,265 clients) would receive under \$1,000 in 'net' back-payments, however:
 - the highest payment would be \$31,037, and the second highest \$30,664
 - a further 186 clients could receive back-payments of between \$10,000 and \$29,884
 - 3,716 would receive less than \$300, 2,043 clients would receive less than \$100, 30 clients less than one dollar, and the lowest payment is \$0.11.

Is it expected that all existing clients (Group 1) will choose to move to Temporary Additional Support?

- In order for the Correction Power to be exercised, each client will need to advise MSD of their decision to move from Special Benefit to Temporary Additional Support, and make an application for Temporary Additional Support.
- A decision to move to Temporary Additional Support cannot be undone (as in there is no ability to re-grant Special Benefit).
- Temporary Additional Support has more onerous reassessment requirements (every 13 weeks as opposed to every 26 weeks for Special Benefit) and the allowable costs are more tightly defined, with no discretion to pay an amount above the formula.
- For these reasons, it is expected that some clients will make a conscious decision to remain on Special Benefit, despite the potential for an arrears payment and a slightly higher weekly payment (at a point in time).

What support will be available to people with cognitive disabilities in making the decision to move to Temporary Additional Support?

[Feedback from Ministry of Health]

- As with any interview process, clients are able to bring a support person with them or where required MSD can assist in arranging for specialist support to be made available.
- In addition, MSD is working with beneficiary advocates in the development of the implementation processes and has built in additional steps to ensure that a client has the opportunity to access independent advice prior to making the decision to move to Temporary Additional Support.

Is it possible to limit who is entitled to back-dated Temporary Additional Support?

- | |
|--|
| Section 9(2)(h) Legal professional privilege |
|--|
- Doing so could also lead to the proliferation of individual requests being made for review (that is, the decision to re-grant Special Benefit, without advising of the client's ability to move to Temporary Additional Support or that the client may be better off on Temporary Additional Support), and each would then need to be individually considered by MSD.

Why should the arrears payments be exempted from income and/or cash assets testing under the Act?

[Feedback from the Minister of Finance]

- If no income or cash asset exemption is provided for, clients' entitlements to financial assistance under the Act may be reduced due to receipt of the lump sum payment (this could lead to a situation where the person is worse off than they are now).
- While core benefits are not cash asset tested, certain supplementary benefits are, for example:
 - there is no entitlement to Accommodation Supplement if cash assets are over \$8,100 (for a single person); and
 - Special Benefit and Temporary Additional Support has a cash asset threshold for a single person of \$1,062.51.
- As the lump sum payments are being paid as a result of an MSD error, it would be unfair to penalise clients for receiving their lump sum back-payment of back-dated Temporary Additional Support by then reducing financial assistance entitlements due to income or cash asset tests.
- For this reason, Cabinet agreement is sought so that all back-payments, and income derived from them, are exempt from all forms of cash asset and income testing under the Act and related regulations for 12 months. The 12 months exemption period is consistent with other similar cash asset and income exemptions currently applied in the welfare system.

- As a general principle, the social security legislation exempts payments for groups of clients that were not the fault of the client, or it would be inequitable not to do so. For example:
 - ex-gratia and compensation payments made by the Crown in recognition of harm experience by the client
 - back-payments made with the Accommodation Supplement historical issue in 2016.

**If a higher rate of Temporary Additional Support had been paid at the time, would clients have been entitled to less support in other ways?
[Feedback from the Minister of Finance]**

- No. Temporary Additional Support is calculated once all available forms of assistance have been granted.

Can the arrears payments be used to pay back debt to MSD?

- No, under the current Act it would not be possible for the lump sum payments of back-dated Temporary Additional Support to be used to automatically offset client debt to MSD (and potentially debts owed across government), as it requires individual considerations to be taken into account.
- However, when MSD writes to clients to advise of the lump-sum back-payment of Temporary Additional Support, it proposes to remind clients about the debt they have with MSD, encourage them to take up the opportunity to use this lump sum to pay off their MSD debt and detailed information about how to do this.

How will MSD locate former Special Benefit clients who no longer receive any financial assistance from MSD?

- MSD does not have up-to-date contact information for former clients who no longer receive financial assistance from MSD (2,968 people). All reasonable efforts will be made to make contact this group – but the reality is that some will have left the benefit system due to death, moving overseas, imprisonment etc. which means making contact will be very difficult.
- MSD will draw on its experience from the Accommodation Supplement payment in reaching this group, including adapting the online portal.

INTERFACE WITH OTHER LEGISLATION

**Do the proposals in this paper have any implications for the tax system?
[Feedback from Inland Revenue]**

- Inland Revenue assessed the potential tax implications of the proposals in this paper, specifically, the proposals to exempt certain payments (Issue 1, 5 and 6) from income and cash assets tests for assistance under the Act.
- Inland Revenue has confirmed that the proposed payments described in Issues 1 and 5 do not count as family scheme income for the calculation of Working for Families Tax Credits; in taxable income for the purposes of the Child Support Act 1991; or in adjusted net income for the purposes of the

Student Loan Scheme Act 2011 (so will not affect these Inland Revenue payments).

- In respect of Issue 6, Funded Family Care payments do not count as income of the disabled person, but wages paid to family or whānau carers are treated as income (consistent with the Social Security Act 1964). However, Inland Revenue has not yet concluded a view on the appropriate treatment of payments to Enabling Good Lives participants. This work is underway.

Do the proposals in this paper have any implications for social housing and the calculation of Income-related rent?

- The amendments proposed in Issue 5 & 6 would exempt the payments from asset and income tests for benefit purposes (under the Social Security Act) in line with current practice and this would have the effect of exempting them as cash assets, but not as income, for social housing purposes.
- Regulations could be made under the Housing Restructuring and Tenancy Matters Act 1992 (HRTMA) to specifically exclude these payments as income (and/or a cash asset) for social housing (Income-Related Rent calculation) purposes.
- However, these are not the only differences in the treatment of income (in particular income exemptions) between the respective legislation. Aligning the treatment of income and cash assets under these two regimes would require some broader policy thinking given that the Social Security Act 1964 and HRTMA have different purposes.