



# Report

**Date:** 23 November 2016

**Security Level:** IN CONFIDENCE

**To:** Hon Anne Tolley, Minister for Social Development

*This document may contain legal advice and be legally privileged. It should not be disclosed on an information request, without further legal advice.*

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## Alignment Project: Treatment of Special Benefit clients who may be better off on Temporary Additional Support

### Purpose of the report

- 1 This report informs you of a current practice of not giving Special Benefit (SPB) clients, who may have been better off on Temporary Additional Support (TAS), the opportunity to cancel their SPB and apply for TAS instead.
- 2 This practice has been in place since April 2006. Section 9(2)(h)  
Section 9(2)(h) Legal professional privilege  
Section 9(2)(h) This report sets out options for addressing this.
- 3 This paper also seeks key decisions from you, to inform a paper to the Social Policy Committee (SOC).

### Executive Summary

- 4 When TAS was introduced in 2006, to replace SPB, the Government agreed to grand-parent all existing SPB clients so no-one would receive a reduced level of assistance. It has never been the Ministry of Social Development's (MSD) practice to assess whether a SPB client would be financially better off on TAS, as it was understood that the legislation prohibited a SPB client from electing to move to TAS and clients would generally receive more on SPB.
- 5 MSD was aware that a small number of clients may have been better off on TAS (around 2,000 of the over 55,000 grand-parented SPB clients), but most of them (1,326 SPB clients) would have been better off by less than \$10.00 per week.
- 6 In April 2014, a case taken to a Benefits Review Committee showed that some clients would be entitled to more assistance on TAS than they would on SPB. Section 9(2)(h)  
Section 9(2)(h) Legal professional privilege
- 7 Of the 55,000 SPB clients grand-parented in April 2006, there are 6,268 affected by this practice<sup>1</sup>, comprising:
  - 423 current SPB clients who are likely to be better off on TAS now

<sup>1</sup> Data as at 30 September 2016.

- 140 current SPB clients who are currently better off on SPB but are likely to have been better off on TAS in the past; and
- 5,705 former SPB clients who had SPB cancelled at some time since 1 April 2006 who are likely to have been better off on TAS in the past (4,346 of these are still receiving some type of financial assistance from MSD, 1,359 are no longer clients of MSD).

*MSD is proposing to change its practice for current SPB clients*

- 8 There are 3,144 clients currently receiving SPB, of whom:
  - 423 are likely to be better off on a higher rate of TAS now than SPB
  - 2,721 are better off remaining on Special Benefit (140 of these are likely to have been better off on TAS at some point in the past).
- 9 For those SPB clients who continue to receive it, MSD propose to make a practice change so that they receive a regular TAS assessment at each review date and those who would be better off on TAS in the future will have the opportunity to consider cancelling their SPB and applying for TAS instead.
- 10 For the current 423 SPB clients that are likely to be better off on a higher rate of TAS now, MSD has two options for offering them the opportunity to apply for TAS; either contacting them immediately or at their next regular review of SPB. The latter option will mean a delay in any back-payment they could be due if a decision is taken to make back-payments.
- 11 We have worked with a sub-group of the National Beneficiaries Advocates Consultative Group (NBACG) to develop appropriate information for clients on cancelling SPB and applying for TAS. The sub-group do not consider that a move to TAS is beneficial for all clients (considering the discretionary rate, reapplication regularity, capped allowable costs for TAS, that fluctuating circumstances can mean a client is only temporarily better off on TAS, and that once a client is granted TAS, they cannot revert back to SPB).

*MSD seeks your direction about taking a proactive response to correcting this error retrospectively*

- 12 Your direction is required on whether to retrospectively review and back-pay TAS to the 6,268 clients affected provided they submit a backdated application for TAS. Specifically, MSD seeks your decision on:
  - consenting to back-payments through the Correction Power available under s80AA of the Social Security Act 1964
  - taking a proactive approach to engage current and former SPB clients to correct this error back to 1 April 2006

**and**

  - if you agree to both of the above, which retrospective approach to take to make back-payments.
- 13 The group of 6,268 is comprised of 563 current (423 better off now and 140 better off at some point) and 5,705 former<sup>2</sup> SPB clients who are likely to have been better off on TAS from an earlier date but who have not, or did not have, a chance to choose to apply for TAS then.

14 Section 9(2)(h) Legal professional privilege

<sup>2</sup> 'Former SPB clients' means clients who have cancelled their SPB but may or may not be getting other financial assistance from MSD now

- 15 MSD recommends taking a proactive approach, and where possible, to engage clients to retrospectively apply this practice as it is consistent with the approach taken with other alignment issues, such as the Accommodation Supplement issue. Failure to be proactive could lead to the proliferation of individual reviews being sought (such as was seen with the commencement date issue).
- 16 If you agree to back-paying affected clients, this paper seeks your direction on which approach to take to address this error and provides three options for doing this.
- 17 MSD recommend making back-payments to all affected clients back to 'the most financially beneficial point' since April 2006 (**Option 1** in this paper) – at a total cost of \$9.284 million. This paper also provides you alternative options of only back-paying clients with arrears that are either \$300 or over, at a cost \$8.220 million (**Option 2**) or \$100 or over, at a cost of \$8.913 million (**Option 3**).
- 18 In all options provided, the estimated cost of back-payments exceeds \$0.500 million, and would therefore also need joint approval with the Minister of Finance to make the benefit expenditure. MSD will work through the best way to address financial implications with Treasury.
- 19 In making any back-payments, we would determine the 'net' of the TAS payment a client would receive (calculated back to 'the most financially beneficial point'<sup>3</sup> for them to have moved to TAS since 1 April 2006), less the SPB paid for the same period. Consistent with section 86(9A) of the Act, the client would have the opportunity to identify whether it would be inequitable for MSD to recover the SPB paid. MSD's view is that such circumstances will be very rare.
- 20 If you agree that MSD should take a proactive approach to ensure client's back-payments, we will prepare a joint paper, in accordance with your decisions on who to retrospectively review, to yourself and the Minister of Finance seeking approval to use the Correction Power to make back-payments to this class of clients.
- 21 Additionally, if you agree that MSD should make back-payments, we recommend MSD exempt any lump sum TAS back-payments, including income derived from these payments, from income and cash asset testing when assessing clients' on-going eligibility to financial and benefit assistance for 12 months from the date of payment.

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

<sup>3</sup> Back-payments could be from either: the most recent date at that TAS provided a higher rate: or 'the most financially beneficial point' for the client to have moved to TAS. As there is not a considerable difference in the total under each option, MSD propose to calculate any back-payments to 'the most financially beneficial point' to maximise a client's payment.

## Recommended actions

It is recommended that you:

1. **Note** that the Ministry of Social Development has never assessed whether a Special Benefit client would be financially better off on Temporary Additional Support as it was understood that legislation prohibited them from moving to Temporary Additional Support and that clients would generally receive more assistance on Special Benefit

**Yes / No**

2. Section 9(2)(h) Legal professional privilege

**Yes / No**

*MSD intends to change its practice for current Special Benefit clients*

3. **Note** that there are currently 3,144 clients receiving Special Benefit, of whom:
  - 423 clients are likely to be financially better off if they move to Temporary Additional Support now
  - 2,721 clients are better off remaining on Special Benefit (140 of these are likely to have been better off on Temporary Additional Support in the past)

**Yes / No**

4. **Agree** that the Ministry:

- Option 1: contact the current 423 Special Benefit clients who are likely to be better off on Temporary Additional Support now, to review their situation and offer them an opportunity to apply for Temporary Additional Support now (recommended)

**Agree/disagree**

**or**

- Option 2: offer the current 423 Special Benefit clients who are likely to be better off on Temporary Additional Support now to apply at their next regular review

**Agree/disagree**

5. **Note** that the Ministry intends to make a practice change so that all current Special Benefit clients receive a Temporary Additional Support assessment at their 26 week Special Benefit review, or at an earlier change in circumstances, and advise any clients who may be better off on Temporary Additional Support, at that time, of their options

**Yes / No**

*Issue 1: MSD seeks your in principle direction about the exercise of the Correction Power*

6. **Note** that there are 6,268 current and former Special Benefit clients who are likely to have been better off on Temporary Additional Support from an earlier date but who have not, or did not have, a chance to choose to apply for Temporary Additional Support then

**Yes / No**

7. Section 9(2)(h) Legal professional privilege

8. **Agree** in principle to:

- Option 1: consent to back-payments through the Correction Power available under s80AA of the Social Security Act 1964, subject to approval from you and the Minister of Finance (recommended)

**Agree / Disagree**

**or**

- Option 2: Decline to consent to back-payments through the Correction Power available under s80AA of the Social Security Act 1964

**Agree / Disagree**

*Issue 2: MSD seeks your in principle direction about taking a proactive response for historical cases*

9. **Note** if a proactive approach is not taken, then the Ministry anticipates that:

- it would not have the ability to tightly manage the process and control administration costs
- there is a risk that many former Special Benefit clients (up to 55,000 grand-parented clients) could contact the Ministry to apply for Temporary Additional Support

**Yes / No**

10. Section 9(2)(h) Legal professional privilege

**Yes / No**

11. **Agree** in principle to:

- Option One: taking a proactive approach to engage current and former SPB clients to correct this error back to 1 April 2006 (recommended)

**Agree / Disagree**

**or**

- Option Two: taking no proactive steps to retrospectively review current and former SPB client records.

**Agree/Disagree**

*Issue 3: MSD seeks your in principle direction about the nature of the retrospective action*

12. **Indicate**, if you agree to proactively consider the exercise of the Correction Power under s 80AA, which retrospective approach to take to make back-payments to:

- Option 1: for all 6,268 clients, at a maximum cost of \$9.284 million (Preferred option)

**Agree / Disagree**

- Option 2: for 2,914 clients where back-payments are \$300 or over at a maximum cost of \$8.220 million

**Agree / Disagree**

- Option 3: for 4,399 clients where back-payments are \$100 or over at a maximum cost of \$8.913 million

**Agree / Disagree**

13. Section 9(2)(h) Legal professional privilege

**Yes / No**

*There are a number of consequential issues to consider*

14. **Note** that, in making back-payments, MSD would:

- determine the 'net' of the TAS payment a client would have received less the SPB paid during that time but, consistent with section 86(9A) of the Act, the client would have the opportunity to identify whether it would be inequitable for MSD to recover the SPB paid
- use 'the most financially beneficial point' for the client

**Yes / No**

15. **Note** that the Ministry will prepare a joint paper to the Minister of Finance, seeking agreement to authorise use of the Correction Power to make back-payments

**Yes / No**

16. **Agree** that, if you agree to any of the options above, that any lump sum back-payments, and the income derived from them, should be exempt from income and cash asset tests used to assess clients' ongoing eligibility to financial and benefit assistance, for a period of 12 months from the date of payment

**Agree / Disagree**

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

18.

19.

20. **Agree** to send a copy of the report to the Associate Minister for Social Development

**Agree / Disagree**

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Ruth Bound  
Deputy Chief Executive  
Service Delivery

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Date

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Hon Anne Tolley  
Minister for Social Development

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Date

## Background

- 23 The current practice of MSD not giving SPB clients, who may have been better off on TAS, the chance to cancel their SPB and apply for TAS is one of the 36 Alignment Project issues MSD has been working through and reporting to you on progress.
- 24 This issue is one of the more complex errors and differs from others such as the Accommodation Supplement and 'commencement date' issues as this issue arises because of the Ministry's inaction (in that it failed to provide an opportunity for SPB clients to choose to apply for a higher rate of TAS) rather than a simple administration error (as with the Accommodation Supplement issue).

*MSD has never assessed whether a client would be financially better off on TAS - or offered to move SPB clients to TAS*

- 25 TAS was introduced to replace the SPB on 1 April 2006. As part of the Working for Families package in 2004, Cabinet agreed:
- that SPB be replaced by TAS from 1 April 2006
  - to grand-parent existing SPB entitlements and criteria to ensure that no recipient receives a reduction in their benefit as a result of the introduction of TAS
  - that the grand-parenting arrangements be reviewed, by relevant Ministers, in early 2008 (CAB Min (04) 13/4 refers).
- 26 The purpose of TAS is to provide temporary financial assistance to alleviate financial hardship of people whose essential costs cannot be met from their income and other resources. People seeking or granted TAS are required to take reasonable steps to reduce their costs or increase their chargeable income.
- 27 The intent of the grand-parenting provisions was to ensure that SPB clients were able to retain their SPB under the existing rules - as it was expected that TAS would be less financially generous than SPB, and more onerous for clients.
- 28 Table 1 below sets out the differences between SPB and TAS, the primary difference being that SPB is a more discretionary tool than the formula-based TAS.

**Table 1: Significant differences between SPB and TAS**

Difference	SPB	TAS
<b>Payment calculations</b>	Payment assessed by formula, but with discretion to pay a higher rate	Payment assessed by a formula only. No discretion to pay a different rate
<b>Re-grant periods</b>	SPB is reviewed every 26 weeks, and a re-application is required	TAS is paid for a 13 week period, then a re-application is required
<b>'Allowable costs'</b>	SPB 'Allowable costs' are any regular essential expenses arising out of a client's special circumstances. There is discretion to include a cost if it meets the definition. Costs associated with AS and DA are included as allowable costs for SPB	TAS 'Allowable costs' must be ongoing and regular expenses. There is no discretion to include a cost not listed in the regulations. Some allowable costs are capped. There is a disability exception amount (set criteria applies)
<b>'Standard costs'</b> (proportion of living costs clients must meet by their own means)	For clients without children, standard costs (set by Ministerial Direction) increase annually by CPI rate. For clients with children, the standard cost is 70% of the unabated main benefit and 70% of unabated FTC	The standard costs for clients on a main benefit, is 70% of the unabated benefit. Plus for clients with dependent children, the standard cost is 70% of unabated FTC
<b>Future availability</b>	A client who cancels SPB cannot return to this assistance	A client who cancels TAS can re-apply at any future time

- 29 MSD was aware that a small number of clients may have been better off on TAS (around 2,000 of the over 55,000 grand-parented SPB clients), but most of them

(1,326 SPB clients)<sup>4</sup> would be better off by less than \$10.00 per week. Some consideration was given to seeking Ministers' agreement to further legislative change (so SPB clients could move to TAS). However, no change was progressed as:

- the legislative timeframes made that possibility very remote
- it was thought that, overall, clients were better protected with the discretion-based SPB
- a rapid attrition rate of SPB was expected (with little or no grand-parented SPB clients remaining after two years).

30 MSD's operational policy and practice has always been that clients cannot elect to cancel their SPB and get TAS instead. MSD has never assessed which form of assistance would provide more assistance for SPB clients, or considered offering clients an opportunity to move from SPB to TAS.

*MSD's understanding of law has changed over time*

31 TAS was introduced on 1 April 2006 through the *Social Security (Working for Families) Amendment Act 2004* (the 2004 Amendment Act) – which repealed the previous SPB provisions and inserted a new s61G providing for TAS<sup>5</sup>. SPB was grand-parented so that clients receiving SPB immediately before 1 April 2006 would continue to receive it until the person didn't qualify for SPB.<sup>6</sup>

32 Section 9(2)(h) Legal professional privilege

Section 9(2)(h) Legal professional privilege

33 In April 2014, a Benefits Review Committee considered a separate SPB issue, which highlighted that some SPB clients (including the litigant) would be entitled to more assistance on TAS. This case resulted in a benefit advocate writing to the Chief Executive on 24 November 2014, asking that s80AA be used to backdate TAS. MSD has not yet made a decision about whether to backdate TAS for this litigant.

34 Section 9(2)(h) Legal professional privilege

## **Current SPB clients who may be better off on TAS now will be given the opportunity to consider changing over to TAS**

35 As at September 2016, there are 3,144 clients currently receiving SPB. Of these:

- 423 (around 13% of current SPB clients) are likely to receive a higher rate on TAS than on SPB (higher by an estimated average of \$30 a week)
- 140 are still better off on SPB but are likely to have been better off on TAS in the past; and
- the remaining 2,581 clients are still better off on SPB, but if a client's financial circumstances change they may then become better off on TAS.

<sup>4</sup> These client impact numbers were thought to be overestimated, as the data model used did not account for SPB costs that would not be covered on TAS, and the new cost limits that would apply on TAS.

<sup>5</sup> The *Social Security (Temporary Additional Support) Regulations 2005* specify allowable costs, cash assets and other relevant matters.

<sup>6</sup> Or, if SPB was granted for a specific period, the end of that period (see section 23(1), *Social Security (Working for Families) Amendment Act 2004*).



- 36 MSD could contact the 423 SPB clients who are likely to be better off on TAS now to undertake a review and give them an opportunity to consider a move to TAS immediately or at their next regular 26 week review (this latter option could mean a delay in any back-payment they could be due if a decision is taken to make back-payments).
- 37 The 423 SPB clients will be managed at frontline by case managers, as part of usual business, at no additional cost. The additional benefit cost of having these 423 clients on TAS, if they elect to move, is estimated to be around \$13,500 per week (roughly \$0.700 million increase in benefit expenditure per year).
- 38 MSD also intends to make a practice change so that all current SPB clients receive a TAS assessment at their 26 week SPB review, or at an earlier change in circumstances, and any clients who may be better off on TAS are advised, at that time, that:
- they can cancel their SPB and apply for TAS
  - they could be better off later on SPB if their circumstances change
  - if they move to TAS they cannot return to SPB.
- 39 This ongoing practice change, regular review of the remaining SPB clients, is estimated to cost \$0.284 million per annum in operational costs. This change will also require MSD to update all operational policy guidelines and make appropriate communications to staff.

*Beneficiary advocates support the proposed approach*

- 40 MSD have consulted with a sub-group of the NBACG in regard to this issue, as they have particular views on the impact of a change from SPB to TAS.
- The sub-group are concerned that a move from SPB to TAS is not a beneficial move for everyone. If a client's financial circumstances change, it can result in periods where they are better off on TAS and then subsequently better off on SPB – so any change to TAS needs to be the client's decision. Once granted TAS, a client will not be able to revert back to SPB.
  - The sub-group consider that SPB offers more protection for some clients - considering the discretionary rate, reapplication regularity (13 weeks versus 26 weeks for SPB), the capped allowable costs for TAS, and the fact that fluctuating client circumstances can mean a client is only temporarily better off on TAS.
- 41 We worked with the sub-group to develop the communications for these clients who may be better off on TAS, and what they should take into account in making a decision. The sub-group appear to be comfortable with this agreed approach.

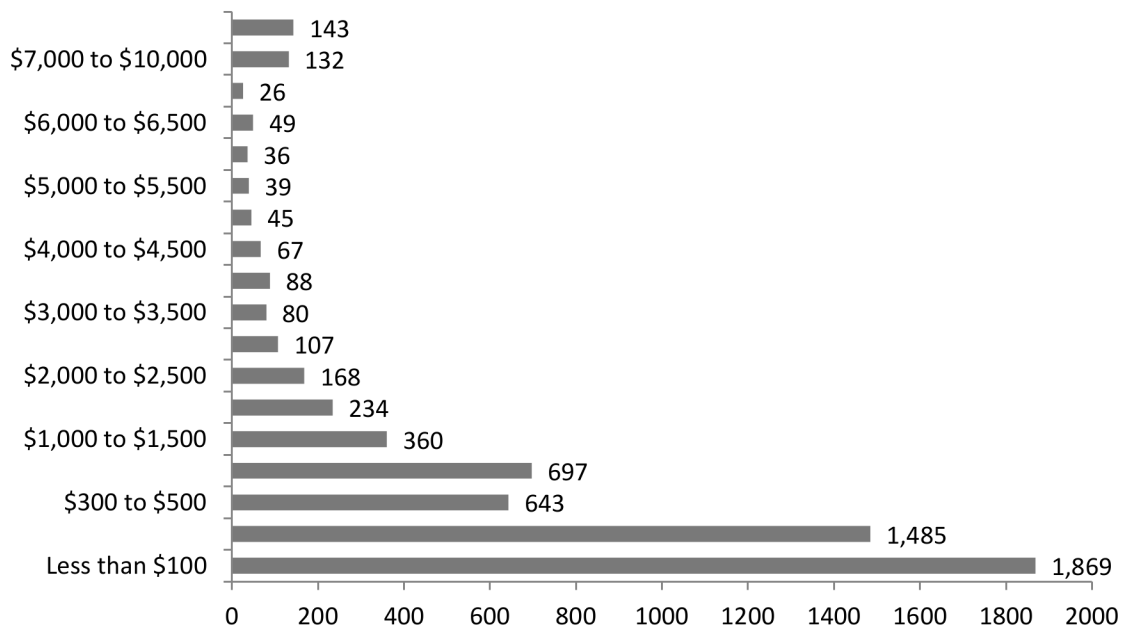
**Issue 1: MSD seeks your direction about whether we will backdate payments using the Correction Power**

*Current and former SPB clients who could have been better off on TAS in the past*

- 42 Of the 55,000 SPB clients grand-parented in April 2006, as at 30 September 2016, there are 6,268 affected by this alignment issue, comprising:
- 423 current SPB clients who are likely to be better off on TAS now
  - 140 current SPB clients who are currently better off on SPB but are likely to have been better off on TAS in the past; and
  - 5,705 former SPB clients who had SPB cancelled at some time since 1 April 2006 who are likely to have been better off on TAS in the past (4,346 of these are still receiving some type of financial assistance from MSD, 1,359 are no longer clients of MSD).

- 43 The graph below shows the distribution of these clients by estimated potential 'net' back-payments, in the event you consent to the exercise of the Correction Power in relation to them.

**Graph: Back-payment distribution for 6,268 clients affected since 1 April 2006**



- 44 While most clients (4,694 clients) would receive under \$1,000 in 'net' back-payments:
- the highest payment would be \$30,664, and the second highest \$29,306
  - a further 140 clients could receive back-payments of between \$10,000 and \$29,242
  - 3,354 would receive less than \$300, 1,869 clients would receive less than \$100 (nine clients less than one dollar, the lowest payment is \$0.13).
- 45 MSD consider it essential to correct entitlements in an equitable manner that is administratively efficient and reduces costs to the Crown. As a result, it is investigating options to increase automation of the calculation and provision of any lump sum back-payment, with particular reference to the tools being developed to correct Accommodation Supplement entitlements.

*The Correction Power can be used to make backpayments*

- 46 Usually back-paying is straightforward, as the payment is due to an underpayment of a client's benefit rate. However, in this situation, any back-payment would be for a benefit that was not applied for (that is, TAS). Section 80AA of the Act (the 'Correction Power') provides a mechanism to do this.
- Section 80AA provides you with a discretionary power to commence a benefit at an earlier time than when the application was made.
  - Section 80AA(2) provides you must not give consent unless satisfied that an applicant or group of applicants could not reasonably have been expected to apply earlier because of an error or inaction on MSD's part, or tried to apply or applied incompletely, and did not proceed because of an error or inaction on MSD's part.
- 47 While you hold this power as specified in s80AA, the power has been sub-delegated, since the inception of the Correction Power, by the previous Minister for Social Development to the Chief Executive, though that sub-delegation is limited to an amount of \$500,000 per financial year for any one purpose.

*Can the Correction Power be exercised here?*

48 Section 9(2)(h) Legal professional privilege

49 Given that MSD cannot unilaterally cancel a client's SPB and move them to TAS, in order for the Correction Power to be exercised in relation to a client, the client would need to advise MSD of their decision to move from SPB to TAS, and make a backdated application for TAS.

50 Section 9(2)(h) Legal professional privilege

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56 MSD recommends you consent in principle to the use of Correction Power for clients who would be or would have been better off on TAS.

## **Issue 2: MSD seeks your direction about taking a proactive response to correcting this error retrospectively**

*Option 1: You could choose to take a proactive approach to correct this error*

- 57 You could choose to take a proactive approach to engage current and former SPB clients to correct this error that has been in place since 1 April 2006.
- 58 MSD recommends taking a proactive approach to engage current and former SPB clients to correct this error as it is consistent with the approach taken with other alignment issues, such as the Accommodation Supplement issue.

*Option 2: You could choose not to take a proactive approach to correct this error*

- 59 You could choose not to take a proactive approach to correct this error. Failure to be proactive could lead to the proliferation of individual reviews being sought particularly given NBACG's interest in this matter. There is a risk that benefit advocates may initiate a campaign to encourage clients to lodge reviews (as with the 'commencement date' issue) that would create significant reputational damage for MSD.
- 60 Furthermore, if a proactive approach is not taken, then MSD anticipates that:
- it would not have the ability to tightly manage the process and control administration costs
  - there is the risk that every past SPB client (over 55,000 grand-parented clients) could contact us to apply for TAS.
- 61 Operational and benefit costs would be incurred if affected clients individually applied for a review to be granted TAS and seek a TAS back-payment.

62 Section 9(2)(h) Legal professional privilege

## **Issue 3: Options for making back-payments to all affected clients since 2006**

- 63 Three approaches could be taken to exercising the Correction Power. You could consent to back-payments in relation to the following potential categories that include both current and former clients:
- Option 1: all 6,268 clients, at a maximum cost of \$9.284 million
  - Option 2: 2,914 clients, where back-payments are \$300 or over at a maximum cost of \$8.220 million
  - Option 3: 4,399 clients, where back-payments are \$100 or over at a maximum cost of \$8.913 million.
- 64 All of these options require your consent under s80AA. Given the estimated cost of back-payments exceeds \$0.500 million for all options, the approval of the Minister of Finance would also be required to make the benefit expenditure.

### **Option 1 – Retrospectively review all clients (MSD recommended)**

- 65 You could consent to back-dating in respect of all 6,268 clients affected since the introduction of TAS in 2006. MSD would then engage with these clients to offer them an opportunity to apply for backdated TAS and, when granted, their entitlement would be reviewed using the 'most financially beneficial point' since 1 April 2006. MSD would take a 'net' approach, which would involve recovering any SPB paid for the same period from their TAS back-payment.

- 66 This could incur total costs of up to \$9.284 million, comprising:
  - operational costs of around \$1.410 million
  - Crown benefit costs of around \$7.874 million.
- 67 Of the 6,628 affected clients 1,359 of this group are no longer MSD clients so we may not have any recent information on their whereabouts with which to make contact.
- 68 

Section 9(2)(h) Legal professional privilege

**Options 2 and 3 – Only back-pay clients with payments over \$300 or over \$100**

- 69 You could consent to back-dating in relation to only some affected clients:
  - Option 2 - \$300 or over (2,914 clients) at a total cost of \$8.220 million (\$0.702 million in operational costs, and \$7.518 million in benefit costs)
  - Option 3 - \$100 or over (4,399 clients) at a total cost of \$8.913 million (\$1.135 million in operational costs, and \$7.778 million in benefit costs).
- 70 MSD would then engage these clients, invite them to apply for backdated TAS, and review their entitlement on the same basis as for Option 1.
- 71 Options 2 and 3 attempt to balance the administrative burden of manually reviewing and assessing cases against the benefit that could accrue to the client. This approach focuses MSD’s remedial action on clients due a high level of back-payment.
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Section 9(2)(h) Legal professional privilege

**Other options considered but not progressed**

- 73 MSD considered another option of only backdating to where Crown Law provided their advice (16 July 2015) but this was not progressed.
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Section 9(2)(h) Legal professional privilege

## **In exercising the Correction Power, MSD will take a 'net' approach, subject to representations from the client**

- 75 In calculating any back-payments due, MSD has considered whether to use:
- the 'most recent date' at which TAS provided a higher rate than SPB, or
  - the 'most financially beneficial point' for the client to have moved to TAS.
- 76 There is not a considerable difference in the total cost of back-payments under each of the options. For this reason, and because MSD is unable to determine when a client may have chosen to move from SPB to TAS if they had been offered the opportunity, MSD would calculate any back-payments to 'the most financially beneficial point'. This maximises the client's payment and takes account of MSD's inaction in failing to advise clients of the option to move to TAS in the past.
- 77 In calculating any TAS back-payments due to the client, MSD will generally take a 'net' approach, but provide the opportunity for clients to identify if circumstances exists which would make it inequitable (under section 86(9A) of the Act) for MSD not to deduct SPB paid to the client during the same period from the TAS back-payment.
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Section 9(2)(h) Legal professional privilege
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- 79 MSD's view is that there will be very few clients who will identify circumstances in which it would be inequitable to deduct the SPB paid to the client, as the fact the deduction will be made from the client's (larger) back-payment of TAS means it will not impose a financial burden on the client going forward. MSD will consider clients' individual circumstances, including the extent to which individual clients have been adversely affected by the loss of the use of the additional money that they would have received if they had moved to TAS earlier.

### **MSD advice**

#### *MSD's recommendation*

- 80 We recommend that MSD make full TAS back-payments to all affected clients, a total cost of \$9.284 million. That is, to any of the:
- 423 current SPB clients who choose to move to TAS now and seek backdating
  - 140 current SPB clients who are currently better off on SPB, but are likely to have been better off on TAS in the past, who make a backdated application for TAS; and
  - 5,705 former SPB clients who make a backdated application for TAS.
- 81 It is important to note that the TAS issue is different from the Accommodation Supplement issue, in that the TAS issue arises because of a lack of an opportunity to apply for TAS (in place of SPB) – rather than a simple administrative error (as with the Accommodation Supplement issue). As noted above, lump sum back-payments can only be provided if the affected client submits a backdated application for TAS.
- 82 The recommended approach presents the least risk for MSD in regard to our current practice which is mitigated by the position and action being taken by MSD. That is, MSD is remedying the fact that all affected current and former SPB clients should have had the opportunity to consider a move to TAS, right back to the introduction of TAS in 2006.
- 83 This option would also be likely to be the most favourable to the NBACG. It is consistent with the practice going forward, that all affected current SPB clients have an opportunity to consider a move to TAS now.

- 84 MSD will work with Treasury to prepare a joint paper to yourself and the Minister of Finance, seeking approval to use the Correction Power for this class of persons.
- 85 Clients owed back-payments would be paid a lump sum. MSD will encourage clients to use any lump sum back-payments to repay any debts which may be owed to MSD, consistent with the approach proposed for the Accommodation Supplement remedial project.
- 86 These TAS back-payments, and any income derived from them, may affect eligibility or entitlement to some forms of financial assistance as they are treated as cash assets and income.
- 87 MSD recommends that all TAS back-payments are made exempt from all forms of asset and income testing under the Social Security Act 1964 and related regulations for 12 months.<sup>7</sup> MSD considers that the alternative, not exempting the payments, would not be equitable as they correct an administrative error outside of the client's control.

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

Alignment ref: 2015/22  
Rep ref: REP/16/11/1517  
EDRMS ref: A9290676

<sup>7</sup> The 12 month exemption period is consistent with other similar cash asset and income exemptions currently applied in the welfare system.

<sup>8</sup> Amendments to would flow through to any cash asset and income tests for social housing. The exemptions would also cover Special Needs Grants, Advances and Recoverable Assistance Payments.