

Chair
Cabinet

ADDRESSING ERRORS WITH THE WINTER ENERGY PAYMENT LEGISLATION: APPROVAL FOR INTRODUCTION

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Proposal

- 1 I seek Cabinet approval for the introduction of the *Social Security (Winter Energy Payment) Amendment Bill* (the Bill) on 4 March 2019. The Bill amends the Social Security Act 2018 (the Act).
- 2 This Bill is required to address errors with the Winter Energy Payment (WEP) legislation before the next winter period commences on 1 May 2019. The amendments ensure the Ministry of Social Development (MSD) has the correct legal authority to pay WEP to all groups intended to be eligible. The amendments are technical and remedial in nature, and are required to give effect to the policy intent. As such, I also seek confirmation of the policy as included in the Bill.
- 3 The Bill also includes provisions to validate decisions made by MSD in the 2018 winter period to pay WEP to all groups intended to be eligible.
- 4 s 9(2)(f)(iv)

Executive summary

- 5 Following enactment of the Families Package legislation, MSD identified errors in the WEP legislation where it does not align with the original policy intent as agreed by Cabinet in late 2017.
- 6 These errors affect the eligibility of people to be paid WEP in two different scenarios:
 - 6.1 When people are absent from New Zealand for longer than four weeks at any one time during the winter period.
 - 6.2 When people receive government funding for long-term residential care or residential care services, but are not eligible for Residential Care Subsidy or Residential Support Subsidy.
- 7 Over the last winter period (1 July to 29 September 2018), payments in the two scenarios described above were made in accordance with the policy intent rather than the strict wording of the law. This means that WEP was paid without the correct legislative and financial authority.
- 8 I seek Cabinet agreement to amend the Act before the next winter period commences on 1 May 2019. This will ensure that people intended to be paid WEP (under the two scenarios) can be paid lawfully.

Background

- 9 The Families Package was introduced as part of the Government's 100 Day Plan at the end of 2017.¹ The Families Package provides targeted social assistance to improve incomes for low and middle income families with children, and to reduce child poverty. As part of this, WEP was introduced as a response to the difficulties older New Zealanders and those on low incomes face in paying for heating and the consequential health impacts [CAB-17-MIN-0516 refers].
- 10 WEP aims to help those receiving a main income support benefit², New Zealand Superannuation (NZS) or a Veteran's Pension (VP) to heat their homes over the winter months (defined as 22 weeks from 1 May). This is in recognition of the high costs of heating and the importance of warm, dry, healthy homes over winter. Eligible people receive \$450 a year if they are single or \$700 a year if they are a couple or single with dependants.
- 11 Around 1 million people benefit from WEP each year, which makes it the supplementary assistance with the largest eligibility population in the benefit system. On average, during the last winter period (1 July to 29 September 2018), 774,200 recipients per month received WEP.³

There are two errors in the WEP legislation that were identified after the legislation had been passed

- 12 Following enactment of the Families Package legislation, MSD identified two errors in the WEP legislation that did not align with the original policy intent as agreed by Cabinet in late 2017 [CAB-17-MIN-0516 refers]. MSD practice during 2018 was to pay WEP in these cases. I seek Cabinet approval to amend the legislation before 1 May 2019 (the next winter period) in order to give effect to the policy intent.
- 13 These errors affect the eligibility of people to be paid WEP in two different scenarios:
 - 13.1 When people are absent from New Zealand for longer than four weeks at any one time during the winter period.
 - 13.2 When people receive government funding for long-term residential care or residential care services, but are not eligible for Residential Care Subsidy or Residential Support Subsidy.

Scenario 1: Payment of WEP in the event of an absence from New Zealand

- 14 Clients can be absent from New Zealand and continue to receive WEP for the first four weeks (28 days) of any absence if the payment continues to be payable to the client and the absence does not affect the client's eligibility for WEP. A client must be receiving a main income support benefit, NZS or VP to receive WEP while absent from New Zealand.

¹ The Families Package (Income Tax and Benefits) Act 2017 was passed under urgency on 14 December 2017.

² Jobseeker Support, Sole Parent Support, a Supported Living Payment on the ground of restricted work capacity or total blindness, a supported living payment on the ground of caring for another person, a Youth Payment, a Young Parent Payment or an Emergency Benefit.

³ This figure does not include partners where the other partner is receiving the payment on behalf of the couple (as the payment is not apportioned). When you include partners, around 1 million people benefited from WEP in 2018.

- 15 However, as section 220 of the Act is currently worded, if a beneficiary is absent from New Zealand for more than four weeks at any one time during the winter period, then WEP is not payable to that beneficiary for the period of that absence at all.
- 16 This provision does not align with the policy intent, which is to pay WEP for up to four weeks even where the individual is absent from New Zealand for longer than four weeks at one time.
- 17 Clause 5 of the Bill (section 220(2)) clarifies that WEP is payable for up to four weeks of any 1 or more absence, regardless of how long the absence lasts for.

Scenario 2: Payment of WEP to individuals in long-term residential care or residential care services

- 18 WEP is unique in the benefit system in that eligibility is only based on people receiving a main benefit, NZS or VP. With a few exceptions, everyone receiving one of these benefits is eligible and automatically receives WEP. Two of these exceptions relate to people in residential care.
- 19 WEP is not intended to be paid to those who qualify for government funding for their long-term residential care in a hospital or rest home under the Residential Care and Disability Support Services Act 2018. This type of funding is referred to as Residential Care Subsidy (RCS).
- 20 WEP is also not intended to be paid to those who qualify for government-funded disability support services that are residential care services under the New Zealand Public Health and Disability Act 2000. This type of funding is referred to as Residential Support Services (RSS).
- 21 The reason why these groups are excluded from receiving WEP is because the cost of their care (including heating costs) is already being met by the state. MSD is aware of these people because it administers the financial means assessments and redirection of benefits.⁴ The current provisions in the Act align with this.

Some people were unintentionally captured by these exclusions

- 22 There are people in care (receiving a main benefit, NZS or VP) who do not qualify for RCS or RSS, but receive partial or full government funding for the cost of their care through the health system.⁵ MSD is not involved in the administration of this funding, as there is no requirement for these groups to be financially means tested. Receipt of government funding for their care is mainly based on the level of care needed rather than on their assets or income.
- 23 Section 72 of the Act is currently too broad and captures these people, meaning they are not eligible for WEP.
- 24 One of these groups comprises those who do not qualify for RCS and pay the maximum contribution towards the costs of their care. This group was unintentionally excluded and should receive WEP, in recognition of the significant personal contribution they are making to their care (around \$1,075 per week).
- 25 There are also some small groups of people that are currently excluded by section 72 and should in fact receive WEP. These groups have been identified as:

⁴ People receiving RCS and RSS are liable to contribute their benefit towards the cost of their care.

⁵ Funding for these groups could also come from other sources, such as from the Accident Compensation Corporation. People would still be eligible for WEP because they would not be receiving RCS or RSS.

- 25.1 those who are 50-64 years old and married or single with dependent children and receive full government funding for their residential care,
- 25.2 elderly victims of crime receiving full government funding for their residential care,
- 25.3 exempt people⁶ receiving full government funding for their residential care, and
- 25.4 people in palliative residential care who receive full government funding.

There is potential inconsistency if some of these groups receive WEP

- 26 The groups described in paragraph 25 above have the cost of their care (including heating costs) already covered by the state and there could be some potential inconsistency if these groups receive WEP.
- 27 However, there are significant administrative complexities associated with MSD identifying this small number of people. MSD is not involved in administering financial means assessments (as it is not required), and it continues to pay these people the full rate of their benefit.
- 28 To ensure WEP can be paid in a practical, efficient and lawful way, Clause 4 of the Bill tightens the wording for the groups that are not entitled to receive WEP due to receiving RCS or RSS.
- 29 Anyone who is not specifically disentitled under section 72(2) is entitled to receive WEP. People in the groups identified in paragraphs 24 and 25 would still need to be receiving a main benefit, NZS or VP to receive WEP, which aligns with the overarching policy intent of WEP receipt.
- 30 As such, all the groups identified above in paragraphs 24 and 25 will be eligible to receive WEP in line with intended policy and operational realities for people that fall under these scenarios.

I seek Cabinet approval to resolve these issues before the next winter period commences

- 31 Over the last winter period, payments in the two scenarios described above were made in accordance with the policy intent rather than the strict wording of the law. This means that WEP was paid without the correct legislative and financial authority.
- 32 From 1 July 2018 to 29 September 2018, MSD paid WEP:
 - 32.1 for up to four weeks where individuals were absent from New Zealand for longer than four weeks at one time, and
 - 32.2 when people receive government funding for long-term residential care or residential care services, but are not eligible for RCS or RSS .

⁶ Classes of exempt people are specified in the Residential Care and Disability Support Services Regulations 2018.

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

36 I seek Cabinet agreement to amend the Act before the next winter period commences on 1 May 2019. This will ensure that people intended to be paid WEP (under the two scenarios) can be paid lawfully.

The proposed amendments will have a retrospective effect on the Act

- 37 The Bill will retrospectively validate decisions made by MSD to pay purported WEP in the last winter period. If the amendments do not have a retrospective effect in this way, the previous decisions would still be unlawful and would be open to legal challenge (refer to Part 2 of the Bill, clauses 6 and 7).
- 38 Amending the Act in this way is in line with the Legislation Guidelines (2018), which state that retrospection is appropriate if it is intended to “validate matters generally understood and intended to be lawful, but that are, in fact, unlawful as a result of a technical error”.⁷ No one will be adversely affected by the retrospective provisions, as WEP was paid to the benefit of clients who were intended to be eligible for WEP.

I propose a truncated legislative process so the Act is amended in time

- 39 The Act must be amended as a matter of urgency, which is why I have decided to take this matter directly to Cabinet for approval and to propose a truncated legislative process.
- 40 There are not enough sitting days before 1 May 2019 for the Bill to pass under a normal legislative process. The proposed legislative stages, which would include a shortened Select Committee stage, are necessary in order for the amendments to be enacted before 1 May 2019.

⁷ Legislation Guidelines (2018), Chapter 12, Legislation Design and Advisory Committee.

- 41 The proposed amendments are technical and remedial in nature, and will not implement any new policy. The changes to the Act will give effect to the original policy intent.

Unappropriated expenditure is unlawful and must be remedied in an Appropriation Act

- 42 The scope of the WEP appropriation is:

This appropriation is limited to the Winter Energy Payment, paid to eligible people in accordance with the criteria set out in, or in delegated legislation made under, the Social Security Act 1964 or any legislation that replaces that Act.

- 43 In respect of the two scenarios, MSD has made payments to people who were not eligible to receive WEP pursuant to the Act. As such, those payments are outside the scope of the WEP appropriation and constitute unappropriated expenditure under the Public Finance Act 1989 (PFA). Unappropriated expenditure is unlawful and needs to be validated by Parliament in an Appropriation Act under section 26C of the PFA.
- 44 I will be providing the necessary inputs into the 26C process led by the Minister of Finance later this year in order to remedy unappropriated expenditure in the Benefits or Related Expenses, Winter Energy Payment appropriation for the year ending 30 June 2019.
- 45 The Office of the Auditor General (OAG) has informed MSD and the Treasury that it is not acceptable for the Crown to incur expenditure on actions for which it has no legal authority. Their position is that MSD should not make payments to clients in the two scenarios. The MSD Appointed Auditor (Audit New Zealand) is monitoring this situation to ensure that an appropriate remedy is in place before 1 May 2019.
- 46 There is no justification for recovering these payments under section 362 of the Act (MSD's duty to recover debts), because the error in paying WEP to these groups has occurred through no fault of their own.⁸

Clients would be adversely affected if the current law was implemented

Clients who are absent from New Zealand for more than four weeks (28 days)

- 47 Superannuitants and veterans are able to be absent from New Zealand for up to 26 weeks of the year and continue to receive their NZS or VP payments. There is no obligation as part of their eligibility to receive WEP to advise MSD when they leave New Zealand.
- 48 MSD identifies when people are out of New Zealand for more than 28 days using an information matching agreement with the New Zealand Customs Service. This information is not available until a match arises when people are out of the country and have not returned after 28 days.
- 49 Implementing the current law would mean that once a client is out of New Zealand for more than four weeks (during the winter period), MSD would need to create WEP debts. This would create negative impacts for clients as their income would be reduced while the debt is recovered. It would also generate a very negative reaction from clients who automatically received WEP and are now being asked to pay it back.
- 50 If superannuitants and veterans are receiving supplementary assistance such as Accommodation Supplement, Disability Allowance or Temporary Additional Support, these

⁸ Section 444 of the Social Security Act 2018 and Regulation 208, Social Security Regulations 2018.

payments stop after the client has been absent from New Zealand for more than 28 days. Giving effect to the current law would create inconsistencies with these other forms of assistance.

Clients in long-term residential care or residential care services who are not eligible for RCS or RSS

- 51 There would be practical difficulties for MSD to prevent the payment of WEP to main beneficiaries, NZS or VP clients who are in long-term residential care or receiving residential care services, but not receiving RCS or RSS. MSD does not hold information on these people because they are not financially means tested and MSD does not administer their funding. MSD is only able to hold information about a client that is relevant to their benefit and superannuation entitlements.
- 52 Obtaining this information would likely require an information sharing agreement between MSD and the Ministry of Health/District Health Boards, as well as system changes to deal with the data once it has been matched. All this could not happen in time for the next winter period commencing 1 May 2019.

Compliance

- 53 The Bill complies with each of the following:
- 53.1 The principles of the Treaty of Waitangi.
 - 53.2 The rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.
 - 53.3 The disclosure statement requirements (a disclosure statement has been prepared and is attached to the paper).
 - 53.4 The principles and guidelines set out in the Privacy Act 1993.
 - 53.5 Relevant international standards and obligations.
 - 53.6 The Legislation Guidelines (2018) published by the Legislation Design and Advisory Committee.
- 54 WEP was introduced as part of the Families Package legislation. The Ministry of Justice considered that the Families Package (Income Tax and Benefits) Act 2017 appeared to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990. It is expected this Bill will meet the same threshold.
- 55 Amendments in the Bill (clauses 6 and 7) retrospectively validate decisions by MSD to pay WEP made during the 2018 winter period. This is in line with the Legislation Guidelines, which state that retrospection is appropriate if it is intended to “validate matters generally understood and intended to be lawful, but that are, in fact, unlawful as a result of a technical error”.⁹

⁹ Legislation Guidelines (2018), Chapter 12, Legislation Design and Advisory Committee.

Consultation

- 56 The Ministry of Health, New Zealand Customs Service, the Accident Compensation Corporation and the Treasury were consulted on this paper and the Bill. The Department of the Prime Minister and Cabinet (Policy Advisory Group) was informed.

Binding on the Crown

- 57 The Social Security Act 2018 is binding on the Crown, and as such the amendments in the Bill will also be binding.

Creating new agencies or amending law relating to existing agencies

- 58 Not applicable.

Allocation of decision making powers

- 59 The Bill does not allocate decision making powers between the executive, the courts, or tribunals.

Associated regulations

- 60 The Bill does not include any provisions for regulations to be included in the Social Security Act 2018.

Other instruments

- 61 The Bill does not include any provision empowering the making of other instruments that are deemed to be legislative instruments or disallowable instruments (or both).

Definition of Minister/department

- 62 The Bill makes no changes to the definitions of Minister or department.

Financial implications

- 63 There are no financial implications for appropriations as a result of the proposed amendments to the Act. Payments of WEP to the groups covered by the Bill are in accordance with the agreed policy intent and have been included in forecasted expenditure.

Impact Analysis

- 64 The Treasury Regulatory Quality Team has determined that the decisions sought in this paper are exempt from the Regulatory Impact Analysis requirements on the basis that they will have no or only minor impacts on businesses, individuals and not-for-profit entities.

Certification by Parliamentary Counsel

- 65 The Bill has been drafted and certified by the Parliamentary Counsel Office in anticipation of Cabinet's approval.

Commencement of legislation

- 66 Part 1 of the Bill will come into force, or is taken to come into force, on 1 May 2019. The rest of the Bill will come into force on the day after the date of Royal assent.

Parliamentary stages

- 67 The Bill should be introduced on 4 March 2019 and enacted by 30 April 2019. I propose that the Bill is referred to the Social Services and Community Committee, which should report back to the House by 1 April 2019. This means that the Select Committee process will be shorter than normal, and as such I will need to include special instructions for the committee (Standing Orders 287 and 290 refer). This is necessary to ensure the Bill is enacted before 1 May 2019. I seek agreement to have delegation to make technical amendments to the Bill following the Select Committee process.

Proactive release


- 68 I propose to partially release this paper as per Cabinet Office circular CO(18) 4: Proactive Release of Cabinet Material – Updated Requirements.

Gender and disability implications

- 69 The proposed amendments are policy neutral and do not have any gender or disability implications.

Recommendations

- 70 It is recommended that Cabinet:

- 1 s 9(2)(f)(iv) 
- 2 **note** that the purpose of the Bill is to ensure the Social Security Act 2018 reflects the policy intent in order to ensure that Winter Energy Payments can be lawfully paid to all intended recipients;
- 3 **note** that the Bill will have a retrospective effect for Winter Energy Payments made unlawfully during the 2018 winter period and that this is in line with the Legislative Guidelines (2018);
- 4 **confirm** that the policy intent, as outlined in the *Social Security (Winter Energy Payment) Amendment Bill*, is that Winter Energy Payments are paid:
 - 4.1 for up to four weeks to eligible individuals who are absent from New Zealand for longer than four weeks at one time; and
 - 4.2 to people who receive government funding for long-term residential care or residential care services, but are not eligible for Residential Care Subsidy or Residential Support Subsidy;
- 5 **note** that the Parliamentary Counsel Office has drafted the *Social Security (Winter Energy Payment) Amendment Bill* in anticipation of Cabinet's approval;

- 6 **approve** the introduction of the *Social Security (Winter Energy Payment) Amendment Bill*, subject to the final approval of the government caucus;
- 7 **agree** that the *Social Security (Winter Energy Payment) Amendment Bill* be introduced on 4 March 2019;
- 8 **agree** that the government propose that the *Social Security (Winter Energy Payment) Amendment Bill* be:
 - 8.1 referred to the Social Services and Community Committee for consideration and report back by no later than 1 April 2019; and
 - 8.2 enacted by 30 April 2019.

Hon Carmel Sepuloni
Minister for Social Development

Approved for lodging