

In confidence

Office of the Minister for Social Development and Employment
Chair, Cabinet Legislation Committee

SOCIAL SECURITY (INCOME AND CASH ASSETS EXEMPTION) AMENDMENT REGULATIONS 2021 AND RESIDENTIAL CARE AND DISABILITY SUPPORT SERVICES (INCOME AND CASH ASSETS EXEMPTION) AMENDMENT REGULATIONS 2021

Proposal

- 1 This paper seeks authorisation for submission to the Executive Council of the following Amendment regulations:
 - the Social Security (Income and Cash Assets Exemption) Amendment Regulations 2021; and
 - the Residential Care and Disability Support Services (Income and Cash Assets Exemption) Amendment Regulations 2021.

Policy

After a Court of Appeal decision, the Ministry of Social Development implemented an updated process for the means assessment for the Residential Care Subsidy

- 2 On 31 May 2019, the Court of Appeal¹ found that some aspects of the Ministry of Social Development's (MSD) process for undertaking Financial Means Assessments (FMA) to determine eligibility for Residential Care Subsidy (RCS) was inconsistent with legislation. This was specifically in relation to the assessment of deprivation.²
- 3 RCS policy and funding are the portfolio responsibility of the Minister of Health. RCS is paid directly by District Health Boards (DHBs) to the hospital or rest home, and funded from general population-based funding under Vote Health. MSD undertakes FMAs to determine how much a person will have to pay towards their residential care and what (if any) support will be paid towards the cost of their care, which is met by DHBs.
- 4 MSD has implemented the Court of Appeal decision for new and existing clients going forward. It must implement the decision for clients and their estates retrospectively.

¹ CA423/2017 [2019] NZCA 201 refers.

² During the FMA, MSD may identify historic or current acts where the applicant has 'deprived' themselves of assets or income, and may incorporate these into a means assessment as well.

Cabinet has confirmed a strategy for implementing the Court of Appeal decision retrospectively and reviewing and refunding clients and their estates where necessary

- 5 On 12 April 2021, Cabinet confirmed a strategy for MSD to implement the Court of Appeal decision retrospectively and to process refunds to clients/estates directly [CAB-21-MIN-0108 and SWC-21-MIN-0035 refer].
- 6 MSD will contact approximately 2,100 clients and estates of deceased clients whose FMAs may be affected by the Court's decision and offer them a retrospective review. There may be also be additional requests for retrospective reviews.

Unless specifically exempted, refunds may affect clients' and their partners' eligibility to the Residential Care Subsidy and some social security assistance

- 7 Where reviews find that clients have paid more towards their care than they should have, refunds of RCS will need to be paid. In some cases, the retrospective payments and the income derived from them could be significant. Retrospective payments could affect clients' and their partners' eligibility for RCS and certain forms of social security assistance.
- 8 The Amendment Regulations will exempt retrospective back-payments arising from these reviews from asset and income tests for the RCS and social security assistance for a 12-month period from the date of payment [CAB-21-MIN-0108 and SWC-21-MIN-0035 refer]. This is consistent with comparable recent precedents where MSD has paid lump sum retrospective payments.
- 9 Repayments of social security assistance will be exempt under the generic income and cash asset exemption for the first 12 months after payment. This exemption is provided for under Schedule 8 of the Social Security Regulations 2018.

Timing and 28-day rule

- 10 It is proposed that the Regulations come into force on 9 June 2021. A waiver of the 28-day rule is sought on the grounds that the Regulations only confer benefits to people who receive a retrospective payment of RCS.

Compliance

- 11 The Amendment Regulations comply with each of the following:
 - 11.1 the principles of the Treaty of Waitangi;
 - 11.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 11.3 the principles and guidelines set out in the Privacy Act 2020 (if the regulations raise privacy issues, indicate whether the Privacy Commissioner agrees that they comply with all relevant principles);

- 11.4 relevant international standards and obligations;
- 11.5 the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Regulations Review Committee

- 12 There are no grounds for the Regulations Review Committee to draw the disallowable instrument or regulations to the attention of the House of Representatives under Standing Order 319.

Certification by Parliamentary Counsel

- 13 The draft Amendment Regulations were certified by the Parliamentary Counsel Office (PCO) as being in order for submission to Cabinet.

Impact Analysis

- 14 The Regulatory Quality Team at the Treasury has determined that the regulatory proposals in this paper are exempt from the requirement to provide a Regulatory Impact Statement on the basis that they have no or minor impacts on businesses, individuals or not for profit entities. This regulatory proposal will only be in effect for 12 months to reflect the implementation period of a Court of Appeal decision.

Publicity

- 15 A media holding statement will be prepared, and Ministers' offices will be kept informed at all stages.

Proactive release

- 16 I intend to proactively release this Cabinet paper, with redactions as appropriate in relation to legally privileged information, within standard timeframes.

Consultation

- 17 The Treasury, the Ministry of Health, and the Department of the Prime Minister and Cabinet (Policy Advice Group) were consulted on this paper and the Amendment Regulations.

Recommendations

I recommend that the Cabinet Legislation Committee:

- 1 **note** that on 7 April 2021, the Cabinet Social Wellbeing Committee confirmed a strategy to respond to a Court of Appeal decision that found that some aspects of the Ministry of Social Development's (MSD) approach to the financial means assessment (FMA) to determine a client's eligibility

for the Residential Care Subsidy (RCS) was inconsistent with legislation [CAB-21-MIN-0108 and SWC-21-MIN-0035 refer];

- 2 **note** that as part of the strategy referred to in paragraph 1 above:
 - 2.1 MSD will contact affected clients or estates of deceased clients whose past FMAs may have been affected by the Court of Appeal decision and offer them retrospective reviews of their RCS entitlements;
 - 2.2 following some reviews, lump sum RCS refunds will need to be paid where clients have paid more towards their care than they should have; and
 - 2.3 this may affect clients' and/or their partners' receipt of income- and asset-tested assistance, including the RCS and certain social security assistance;
- 3 **note** that on 7 April 2021, the Cabinet Social Wellbeing Committee agreed to amend the Social Security Regulations 2018 and the Residential Care and Disability Support Services Regulations 2018 to exempt retrospective back-payments arising from reviews from asset and income tests for the RCS and social security assistance for 12 months from the date of payment [CAB-21-MIN-0108 and SWC-21-MIN-0035 refer];
- 4 **note** that the Social Security (Income and Cash Assets Exemption) Amendment Regulations 2021 and the Residential Care and Disability Support Services (Income and Cash Assets Exemption) Amendment Regulations 2021 will give effect to the decision referred to in paragraph 3 above;
- 5 **authorise** the submission to the Executive Council of the following Amendment Regulations:
 - 5.1 Social Security (Income and Cash Assets Exemption) Amendment Regulations 2021; and
 - 5.2 Residential Care and Disability Support Services (Income and Cash Assets Exemption) Amendment Regulations 2021;
- 6 **note** that a waiver of the 28-day rule is sought on the grounds that the Amendment Regulations confer only benefits to those affected by them;

- 7 **agree** to waive the 28-day rule so that the regulations can come into force on 9 June 2021.

Authorised for lodgement

Hon Carmel Sepuloni

Minister for Social Development and Employment