

Chair
Cabinet Social Wellbeing Committee

CHANGES TO THE EXEMPTION FOR EX GRATIA AND COMPENSATION PAYMENTS

Proposal

- 1 I seek Cabinet's approval to make changes to the cash asset and income exemption for ex gratia and compensation payments in Schedule 8 of the Social Security Regulations 2018, to:
 - extend the exemption beyond payments made by the Crown as it is currently to include payments made by non-Crown entities
 - remove the 12 month time limit to make the exemption permanent.
- 2 To make these changes I seek authorisation for submission of the attached Amendment Regulations to the Executive Council:
 - Social Security (Cash Assets and Income Exemptions – Ex Gratia and Compensation Payments) Amendment Regulations 2019
 - Residential Care and Disability Support Services (Exempt Assets – Ex Gratia and Compensation Payments) Amendment Regulations 2019.

Executive Summary

- 3 Social assistance is generally means-tested using cash asset and/or income tests. Main benefits are income tested, which means when people receive income from sources such as wages, investments or interest payments, this reduces the financial assistance they are entitled to. Additional support such as Accommodation Supplement and Temporary Additional Support are cash asset tested which means if their cash assets are over a certain threshold they may not qualify for any payment.
- 4 Cash asset and income exemptions are currently available for some payments. These exemptions are made when it would be unfair, unreasonable, or inequitable if the payment adversely affected a person's financial assistance.
- 5 One of these exemptions is for ex gratia and compensation payments that are made in recognition of harm (as specified in Appendix One), or to settle a claim of harm (such as historic abuse settlements made to people who were abused while in State care). There is an existing exemption for ex gratia and compensation payments made by the Crown for a period of 12 months.
- 6 In 2018, Cooper Legal, who are acting on behalf of a group of people making civil claims against the Crown and/or non-Crown entities, made a complaint to the Regulations Review Committee regarding the ex gratia and compensation payments exemption. Cooper Legal argued that the 12 month time limit should be removed to make a permanent exemption and that payments covered by the exemption should include those made by both Crown and non-Crown entities.
- 7 I received advice regarding these concerns. I consider that restricting the ex gratia and compensation payment exemption to payments made by the Crown means there is an

unnecessary disparity for potential claimants based solely on who makes the payment. I consider that all payments should be treated in the same way. I also consider the 12 month time limit unfair in the restrictions it places on how and when people can spend the ex gratia or compensation payment. People should be able to have flexibility in how they spend this money.

- 8 Therefore, I propose to extend the exemption beyond the payments made by the Crown as it is currently to include non-Crown entities and to remove the 12 month time limit to make the exemption permanent. I also propose to further define “non-Crown entities” for the purpose of this exemption to be clear which payments this exemption is intended to include.

Cash asset and income tests ensure clients use other resources to support themselves before seeking financial assistance

- 9 Central to the welfare system is the principle that assistance is provided based on need, and that where people have additional and available resources, they should use these where possible to help support themselves. Social assistance is generally means-tested using cash asset and/or income tests. Main benefits are income tested, which means when people receive income from sources such as wages, investments or interest payments, this reduces the financial assistance they are entitled to. Additional support such as Accommodation Supplement and Temporary Additional Support are cash asset tested which means they may not qualify for any payment if their cash assets are over a certain threshold.

Cash asset and income exemptions are made in regulations when it would be unfair, unreasonable or inequitable if the payment adversely affected a person’s financial assistance

- 10 Income and cash asset exemptions are made for particular payments¹ and generally have a 12 month time limit (though some Canterbury Earthquake payments can be exempt for up to 48 months and some have no time limit such as the ex gratia payments made to Viet Nam veterans). Exemptions allow people to continue to receive financial assistance at their existing level.

There is already a cash asset and income exemption for ex gratia and compensation payments

- 11 Schedule 8 of the Social Security Regulations 2018 includes an exemption for ex gratia and compensation payments made by the Crown in recognition of harm, or to settle a claim of harm (such as historic abuse settlements made to people who were abused while in the care of the State).
- 12 Ex gratia payments are payments for claims that are not actionable by law, but for which there exists a moral obligation. Compensation payments include settlement payments, and are defined in the Regulations:
 - as the result of a Court order (otherwise known as damages) or award by a tribunal such as the Human Rights Review Tribunal
 - in settlement of a claim formally filed against the Crown
 - in settlement of a claim that has not been filed in Court.

¹ There is one exemption that is a disregard of earning due to a person’s circumstances (that they are severely disabled) rather than a particular payment.

- 13 Ex gratia and compensation payments can be one-off for an individual or due to class action (that is as part of a specified group).

Following a complaint to the Regulations Review Committee I asked the Ministry of Social Development to review the existing exemption for ex gratia and compensation payments

- 14 Cooper Legal act for a large group of people making civil claims against the Crown and/or non-Crown entities for physical, sexual or psychological abuse while in the care of those entities as children. Cooper Legal wrote to the Regulations Review Committee (the Committee), raising concerns about the ex gratia and compensation exemption being:
- restricted to payments made by the Crown – they consider this unfairly disadvantaged people who receive an ex gratia or compensation payment from someone other than the Crown, even when they were a third-party entity contracted or engaged by the Crown
 - the 12 month time limit – they consider it encourages claimants to make poor financial decisions in order to keep their assistance, and reduces the meaningfulness of the compensation packages as claimants might see it as giving with one hand and taking with the other.
- 15 In May 2018, Ministry of Social Development (MSD) officials attended a hearing with Cooper Legal before the Committee. Cooper Legal then provided a letter to the Committee in June 2018 and MSD contacted Cooper Legal to discuss their complaint. The Committee then invited MSD to appear to further discuss the letter provided to them in July 2018, which MSD officials attended.
- 16 In December 2018, I wrote to the Chair of the Committee and advised him that I had received further advice and agreed that consideration needs to be given to amending the Regulations. MSD proposed amending the Regulations to make the existing 12 month exemption for ex gratia and compensation payments from cash asset and income tests permanent, and to extend it to cover non-Crown entities.
- 17 MSD representatives appeared before the Committee on 3 April 2019. The Chair of the Committee expressed concern about the progress of the complaint. I responded noting the importance of this work and that I would be amending the Regulations to resolve this matter. Based on that advice and discussion with the Committee, I propose to extend the ex gratia and compensation exemption to include payments made by non-Crown entities and remove the 12 month time limit.

The original intention was for the ex gratia and compensation payments exemption to be available for all payments made by the Crown, with non-Crown payments managed on a case-by-case basis

- 18 When the ex gratia and compensation exemption was introduced in 2008, Cabinet agreed to restrict it to the payments made by the Crown. Individuals who received compensation from non-Crown organisations would have their payments treated differently from individuals who receive payments from the Crown, unless the Crown chose to specifically exempt these payments [CAB Min (08) 24/6 refers].
- 19 Since then only one payment fitting within the ex gratia and compensation definition and made by a non-Crown entity has been made exempt from cash assets and income tests by having separate exemptions made. Payments made from the Sleepover Wages (Settlement) Act 2011 were exempted in 2012.

20 I have taken a considered approach in my proposal to extend the exemption to payments made by non-Crown entities – one that balances the need to ensure similar payments are treated the same, with the need to ensure only intended ex gratia and compensation payments are exempt.

Restricting the ex gratia and compensation payment exemption to payments made by the Crown means there is a disparity based solely on who makes the payment

21 Cooper Legal represents many clients with historic abuse claims. While the majority of historic abuse claims are against the Crown, several non-Crown entities have also had, or currently have, claims against them. This includes the Catholic Church and the Salvation Army, as well as several NGOs such as Youthlink, Barnardos and Youth Horizons Trust.

22 Under current settings a person who has suffered physical, sexual or psychological abuse as a child in a Social Welfare home and is compensated by the Crown will have their payment exempt from cash asset and income tests. A person in similar circumstances who is compensated by a non-Crown entity (for example the Catholic Church) and from the Crown (for example in recognition of poor supervision) will have only the Crown part of their compensation package exempted. A person in similar circumstances who is compensated by a non-Crown entity (for example Barnados) will not have their compensation exempt at all.

23 It should not matter who makes a payment as long as the payment is an ex gratia or compensation payment made in recognition of harm, or a claim of harm. While historic abuse claims are just one type of ex gratia and/or compensation payment for harm, this principle should apply across all similar payments.

I have taken care that the definition of non-Crown entities does not open the exemption up to payments it was not intended to exempt

24 I have considered how the fact that the Crown has no direct responsibility for payments made by other organisations, and is not involved in processes for determining how or to whom such payments are made should be balanced with the need to ensure similar payments are treated the same. To manage this, I propose to carefully define non-Crown entities so that it covers the majority of payments we want to exempt, but not be so broad that it exempts some payments unintentionally. For example, we would not want a person to be able to claim money they received from their employer as a compensation payment for harm rather than wages.

25 I propose to define non-Crown entities as:

- agencies engaged, funded, licensed, or registered by the Crown to provide services, for example the Salvation Army under contract to provide residential care
- faith-based institutions as defined in the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Order 2018 (as specified in Appendix Two)
- charitable trusts registered under the Charitable Trusts Act 1957 and charitable entities registered under the Charities Act 2005
- boards under the Charitable Trusts Act 1957
- incorporated societies as defined in the Incorporated Societies Act 1908.

- 26 I propose that agencies that were engaged, funded, licensed or registered by the Crown at the time of the circumstances that led to the payment be defined as non-Crown entities, regardless of whether they are engaged, funded, licensed or registered by the Crown at the time the payment is made.
- 27 The non-Crown definition has the effect of restricting the exemption to payments made by entities registered domestically. Any payments not captured by that definition could be made exempt from cash asset and income tests if Cabinet chooses to do so, on a case-by-case basis.

The original intention for setting a time limit of 12 months was to strike a balance between allowing people enough time to decide on the best way to use their payments and the principle that people should use their own resources when they have them

- 28 When the ex gratia and compensation exemption was introduced in 2008, Cabinet agreed to a time limit of 12 months.
- 29 Cooper Legal considers that the 12 month time limit encourages claimants to make poor financial decisions which are driven by the fear of losing some, or all, of their entitlements. They argue the limit reduces the meaningfulness of the compensation package as it is seen as giving with one hand and taking with the other.

The 12 month time limit places unfair time constraints on people to spend an ex gratia or compensation payment

- 30 There is one ex gratia payment exemption that pre-dates the ex gratia and compensation exemption introduced in 2008 that does not have a time limit. This exemption covers *Viet Nam veterans ex gratia payments*. There are several other early ex gratia and compensation payments that have a 12 month time limit, for example the *Personal injury from Hepatitis C infection contracted through New Zealand blood supply payments and income exemption*.
- 31 Some people who receive a compensation payment may have long-term effects from the harm they have suffered, and due to that they may receive a benefit or other financial support long-term. Some of the monies may be paid to acknowledge the impact on a person's ability to work while some may be used to assist with long-term health needs. The 12 month time limit does not allow people to have flexibility in how they spend the payment. I think it could perversely encourage them to spend funds that could be used for their future.
- 32 It is not fair that people who are paid a compensation payment lose assistance requiring their compensation package to be spent on essential living costs. I want to better recognise and acknowledge the harm people have suffered and may continue to suffer.
- 33 I propose to effectively ring-fence any ex gratia and/or compensation payments by removing the 12 month time limit from the ex gratia and compensation exemption, making the exemption permanent. This would be in the best interest of those affected and ensure the rationale for the compensation package is preserved.
- 34 I have also asked MSD to do a full review of cash asset and income exemptions, including the 12 month time limit for other exemptions to ensure they are fair and fit for purpose.
- 35 Removing the time limit from the exemption for harm means that a person's cash asset and income tested assistance, including targeted assistance such as Accommodation Supplement, Temporary Additional Support, Hardship Assistance and Public Housing will not

be stopped, reduced or refused based solely on the ex gratia or compensation payment they receive (though there might be other reasons assistance is not continued or granted).

- 36 I propose that the permanent exemption will apply to any ex gratia and compensation payments for harm, regardless of whether the claimant was receiving cash asset and income tested assistance at the time, from the date the amendment comes in to force on 21 June 2019. This means, for example, that a person who was given a compensation payment of \$50,000 five years ago and still has \$25,000 in the bank, will be able to ask MSD to exempt the \$25,000 they still have – and MSD can apply the exemption from the date of the change.
- 37 I also propose that anyone who already has an ex gratia and compensation exemption for harm on the date the amendment comes in to force will have the exemption applied permanently, without needing to apply for it.

MSD are unable to quantify the number of ex gratia and compensation payments that are made and therefore how many people might benefit from the proposals in this paper

- 38 There is not an overarching authority or formalised system that represents the various non-Crown entities that make ex gratia and compensation payments for harm and not all of the people who receive an ex gratia or compensation payment will be receiving cash asset or income tested assistance. This makes it difficult to predict not only the number and value of payments that come from non-Crown entities, but also the exact range of payments that can be made to clients.
- 39 Although MSD is aware that Crown agencies such as the Ministry of Education, Department of Corrections, and Oranga Tamariki have made ex gratia or compensation payments in the past, and are aware non-Crown organisations such as the Catholic Church, Salvation Army, and Barnardos New Zealand have had or currently have claims against them, there is no data available on how many MSD clients have received ex gratia and compensation payments from Crown and non-Crown entities. MSD also does not have access to information on the amounts of payments paid by other Crown agencies and non-Crown entities as this is sensitive information.

Administering the ex gratia and compensation payment exemption

- 40 MSD will implement the changes to the ex gratia and compensation payment exemption for harm using existing systems and processes. This will be done by excluding the amount of the payment from cash asset and income tests permanently.
- 41 MSD will continue to rely on the obligation beneficiaries have to notify changes in their circumstances, so that they tell MSD:
- when they receive an ex gratia and/or compensation payment that will be considered for an exemption
 - of any changes that may affect the exemption when granted, such as having spent all the money so the exemption is no longer required.

This can be a complicated process as many settlements include a non-disclosure clause. The requirement to notifying changes in circumstances is stipulated in section 113 of the Social Security Act 2018 and is a general obligation when receiving a benefit.

- 42 MSD aims to make the exemption process as open and comfortable for clients as possible given that some of the harm they have suffered may be of a sensitive nature.

- 43 MSD will rely on self-declaration with support from bank statements showing the source of the payment to identify a cash asset being compensation relating to harm. The current balance will be the cash asset to be exempted.

Consultation

- 44 The Ministry of Housing and Urban Development, Ministry of Health, Ministry of Justice, Ministry of Education, the Treasury, Inland Revenue and Department of Internal Affairs have been consulted. The Department of the Prime Minister and Cabinet has been informed.

Financial implications

- 45 The financial impact of this change will be minimal and will be absorbed within the existing demand driven based forecasts.

Human rights implications

- 46 This paper addresses a distinction based on whether the payment is received from the Crown or not. By removing the distinction we are removing a disparity based solely on who makes the ex gratia and/or compensation payment.

Legislative implications

- 47 Subject to Cabinet agreement, there will be changes to two sets of regulations. These are:
- Social Security Regulations 2018
 - Residential Care and Disability Support Services Regulations 2018.
- 48 I also intend to amend the Ministerial Direction in relation to Special Benefit to exempt ex gratia and/or compensation payments for harm using the power in section 7 of the Social Security Act 2018 to give MSD binding directions.
- 49 The exemption currently ensures payments made to people in need of Public Housing are exempt from the cash assets test, as the Social Security Act 2018 definition for cash assets (and subsequent exemptions) is also used to assess Public Housing eligibility. Existing operational discretion enables MSD to override the cash asset and income test for Public Housing and exclude ex gratia and compensation payments from income related rent calculations.
- 50 The Amendment Regulations have been drafted in line with other cash asset and income exemptions which are framed around a payment that has been made. Operationally the exemption will be in place until the client advises of a change to their assets.

Timing and the 28-day rule

- 51 The Amendment Regulations, if approved, will be submitted to the Executive Council for consideration on 17 June 2019, will be published in the New Zealand Gazette on 20 June 2019, and will come into force on 21 June 2019.
- 52 A waiver to the 28-day rule is sought on the grounds that the Amendment Regulations confer only benefits for those affected by them.

Compliance

- 53 The Amendment Regulations comply, where applicable, with 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 principles and guidelines set out in the Privacy Act 1993
 - 53.4 relevant international standards and obligations
 - 53.5 *Legislation Advisory Committee Guidelines; Guidelines on Process and Content of Legislation*, published by the Legislation Advisory Committee.

Regulation Review Committee

- 54 This change will address and remedy the two areas of concern raised by the Regulations Review Committee. There are otherwise no grounds for the Regulations Review Committee to draw the Amendment Regulations to the attention of the House under Standing Order 319.

Certification by Parliamentary Counsel

- 55 The Amendment Regulations have been certified by the Parliamentary Counsel Office as being in order for submission to Cabinet.

Regulatory impact and compliance cost statement

- 56 The Treasury Regulatory Quality Team has determined that the decisions sought in this paper are not subject to the Regulatory Impact Analysis requirements on the basis that they will have no or minor impacts on businesses, individuals or not-for-profits.

Gender implications

- 57 The proposals in this paper have no gender implications as the ex gratia and compensation payment exemption relate to a wide range of circumstances that do not inherently have a gender bias.

Disability perspective

- 58 The proposals in this paper support people who have suffered harm, including physical or mental harm. Ensuring that any ex gratia and/or compensation payments received does not impact on their financial assistance is to their benefit.

Publicity

- 59 As part of the legislative requirements, the Amendment Regulations will be notified in the New Zealand Gazette on 20 June 2019.

Proactive Release

60 I intend to proactively release this Cabinet paper within standard timeframes.

Recommendations

61 It is recommended that the Cabinet Social Wellbeing Committee:

There is an existing ex gratia and compensation payments exemption for harm

- 1 **note** there is an existing exemption for ex gratia and compensation payments in recognition of harm, or to settle a claim of harm in Schedule 8 of the Social Security Regulations 2018

Extending the exemption beyond the payments made by the Crown as it is currently, to include non-Crown entities

- 2 **note** that the exemption for ex gratia and compensation payments for harm is currently limited to payments made by the Crown and any payments from non-Crown entities are not exempt from cash asset and income tests
- 3 **agree** to extend the exemption for ex gratia and compensation payments for harm to New Zealand based non-Crown entities defined as:
 - engaged, funded, licensed, or registered by the Crown to provide services at the time of the circumstances that led to the payment regardless of whether they are engaged, funded, licensed, or registered by the Crown at the time the payment is made
 - faith-based institutions, as defined in the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Order 2018 (as specified in Appendix Two)
 - charitable trusts registered under the Charitable Trusts Act 1957 and charitable entities registered under the Charities Act 2005
 - boards under the Charitable Trusts Act 1957
 - incorporated societies, as defined in the Incorporated Societies Act 1908
- 4 **note** any payments from non-Crown entities outside of the definition in recommendation 3 could be made exempt from cash asset and income tests if Cabinet chooses to do so, on a case-by-case basis

Removing the 12 month time limit to make the exemption permanent

- 5 **note** that the exemption for ex gratia and compensation payments is currently limited to 12 months and any payments are included in income and cash asset tests after this time
- 6 **agree** to remove the current 12 month time limit from the ex gratia and compensation payments exemption to create a permanent exemption

Authorisation for submission of the attached Amendment Regulations to the Executive Council

- 7 **authorise** the submission of the following Amendment Regulations to the Executive Council to give effect to the decision referred to in recommendations 3 and 6 above:
 - 7.1 Social Security (Cash Assets and Income Exemptions – Ex Gratia and Compensation Payments) Amendment Regulations 2019
 - 7.2 Residential Care and Disability Support Services (Exempt Assets – Ex Gratia and Compensation Payments) Amendment Regulations 2019.

Policy settings

- 8 **note** that the changes to the ex gratia and compensation payments exemption will come into force on 21 June 2019
- 9 **agree** the changes made to this exemption will apply to any ex gratia and/or compensation payments made on or after the implementation date, and will apply to any clients that currently have an ex gratia and compensation payments exemption
- 10 **agree** that the exemption will apply to any funds remaining from any ex gratia and/or compensation payments made prior to the implementation date, with effect on or after the implementation date
- 11 **note** the financial impact for the recommendations above will be minimal and will be absorbed within the existing demand driven based forecasts
- 12 **note** that the Minister for Social Development intends to amend the Ministerial Direction in relation to Special Benefit to exempt ex gratia and compensation payments made by non-Crown entities in line with recommendation 3 and 6

Waiving the 28 day rule

- 13 **note** that a waiver of the 28-day rule is sought on the grounds that the Amendment Regulations confer only benefits for those affected by them
- 14 **agree** to waive the 28-day rule so that the Amendment Regulations can come into force on 21 June 2019.

Next steps

- 15 **note** that the Minister for Social Development will be considering further advice on a full review of cash asset and income exemptions.

Authorised for lodgement

Hon Carmel Sepuloni
Minister for Social Development

Appendix One

Part 10

Ex gratia and compensation payments made by the Crown

13 Interpretation

In this Part, unless the context otherwise requires,—

compensation—

(a) means a payment made—

- (i) in satisfaction of a judgment or an order of any court or an award of any tribunal, other than an award of costs; or
- (ii) in settlement of a claim against the Crown (whether or not that claim has been formally filed in a court or tribunal); and

(b) does not include a payment made under—

- (i) an employment relationship; or
- (ii) a contract to provide goods or services

economic loss means loss that is of a pecuniary nature, for example, lost wages

harm—

(a) means illness or injury, or both; and

(b) includes—

- (i) physical harm; and
- (ii) mental harm; and
- (iii) humiliation, loss of dignity, and injury to the feelings of the aggrieved person; but

(c) does not include—

- (i) economic loss; or
- (ii) loss or reduction of property; or
- (iii) loss of any benefit, whether or not of a monetary kind, that the aggrieved person might reasonably have been expected to obtain; or
- (iv) loss of employment or office

property has the meaning given to it by section 4 of the Property Law Act 2007.

14 Payments and income

This clause applies to—

(a) any compensation or *ex gratia* payment made—

- (i) by the Crown to a person; and
- (ii) in recognition of harm or in respect of a claim of harm; and

(b) any income derived by the person from a payment referred to in paragraph (a).

Appendix Two

Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Order 2018

Definitions

- 17.4 **In the care of faith-based institutions** means where a faith-based institution assumed responsibility for the care of an individual, including faith-based schools, and—
- (a) for the avoidance of doubt, care provided by faith-based institutions excludes fully private settings, except where the person was also in the care of a faith-based institution:
 - (b) for the avoidance of doubt, if faith-based institutions provided care on behalf of the State (as described in clause 17.3(b) above), this may be dealt with by the inquiry as part of its work on indirect State care:
 - (c) as provided in clause 17.3(d) above, care settings may be residential or non-residential and may provide voluntary or non-voluntary care. The inquiry may consider abuse that occurred in the context of care but outside a particular institution's premises:
 - (d) for the avoidance of doubt, the term 'faith-based institutions' is not limited to one particular faith, religion, or denomination. An institution or group may qualify as 'faith-based' if its purpose or activity is connected to a religious or spiritual belief system. The inquiry can consider abuse in faith-based institutions, whether they are formally incorporated or not and however they are described:
 - (e) for the avoidance of doubt, 'abuse in faith-based care' means abuse that occurred in New Zealand.