



# Report

**Date:** 22 November 2018

**Security Level:** IN-CONFIDENCE

**To:** Hon Carmel Sepuloni, Minister for Social Development

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## **Further information on the treatment of ex gratia and compensation payments as income and cash assets**

### **Purpose of the report**

- 1 This report provides further information in response to your feedback on a paper you received in August 2018 titled '*Treatment of ex gratia and compensation payments as income and cash assets*' [REP/18/8/1158 refers].

### **Executive Summary**

- 2 In August 2018, you received a report outlining two proposed changes to part 3 (the general 12-month exemption for ex gratia and compensation payments from the Crown) of the Social Security (Income and Cash Assets Exemptions) Regulations 2011 (the Regulations). This general exemption currently excludes specified ex gratia and compensation payments from the Crown in recognition of harm, or to settle a claim of harm, from the calculation of income and cash assets when determining eligibility for social assistance.
- 3 In response to this report you agreed to extend the general exemption to include ex gratia and compensation payments from non-Crown agencies (as well as Crown agencies), but you wanted more information before deciding on the second proposed change of making the 12-month general exemption into a permanent exemption from income and cash asset tests.
- 4 There is a significant distinction between the general ex gratia and compensation payments exemption and the other types of payments that are exempt under the Regulations. Namely, the recipients of ex gratia and compensation payments have undergone major physical, mental and/or emotional harm, which likely has had an ongoing impact for them. Limiting the exemption from income and cash asset tests to only 12 months (as it is currently) could cause further distress after this 12 month period passes.
- 5 MSD considers this distinction to be significant enough to justify making the exemption period for ex gratia and compensation payments permanent (while keeping the exemption period for other payments in the Regulations at 12 months).
- 6 There are risks to making the general exemption permanent, which MSD will mitigate appropriately should you agree to make this amendment.

## Recommended action

It is recommended that you:

- 1 **agree** to amend the Regulations to make the general 12-month ex gratia and compensation payments exemption into a permanent exemption from income and cash asset tests.

Agree / Disagree

s 9(2)(a)



Policy Manager  
Employment and Income Support Policy

22/11/2018  
Date

A handwritten signature in blue ink, appearing to read 'Carmel Sepuloni'.

Hon Carmel Sepuloni  
Minister for Social Development

25/11/2018  
Date

## **You asked for further advice on ex gratia and compensation payments**

- 7 On 27 August 2018, you received a report on the treatment of ex gratia and compensation payments as income and cash assets [REP/18/8/1558]. This report outlined potential changes to the current general exemption found in the Social Security (Income and Cash Assets Exemptions) Regulations 2011.<sup>1</sup> This general exemption excludes specified ex gratia and compensation payments in recognition of harm, or to settle a claim of harm, from the calculation of income and cash assets when determining eligibility for social assistance paid under the Social Security Act 1964.<sup>2</sup>
- 8 The previous report contained two key recommendations:
  - 8.1 to include payments from non-Crown entities in the 12-month exemption period from income and cash asset tests
  - 8.2 to keep the existing exemption period of 12 months.
- 9 You agreed to the first of these recommendations. The work to amend the Regulations to include payments from non-Crown entities has not started yet, as MSD will incorporate any changes you may make on the 12 month exemption into this process.
- 10 You requested more advice on the second recommendation before making your decision, including:
  - the range of amounts paid to individuals
  - the reasons for ex gratia and compensation payments
  - the range of agencies that administer Crown and non-Crown ex gratia and compensation payments
  - other reasons for exemptions to the income and cash asset tests
  - whether legislative change is required (other than the Regulations) if the existing exemption is extended beyond 12 months
  - whether extending the exemption beyond 12 months sets a precedent for benefits or other payments.

### *You received a letter from the Chairperson of the Regulations Review Committee on a complaint about the Regulations*

- 11 On 27 July 2018, you received a letter from the Chairperson of the Regulations Review Committee on a complaint about the Regulations. This is the same complaint discussed in the previous report on the treatment of ex gratia and compensation payments as income and cash assets [REP/18/8/1558 refers].
- 12 The Regulations Review Committee has determined that the complaint raises matters under two Standing Order grounds:
  - SO 319(2)(b) – the regulations trespass unduly on personal rights and liberties
  - SO 319(2)(c) – the regulations appear to make some unusual or unexpected use of the powers conferred by the enactment under which they are made.
- 13 The Regulations Review Committee does not have the authority to change regulations. However, it can draw the attention of the House to the regulations and recommend the rejection of the regulations under certain grounds. It would be prudent to respond to the Regulations Review Committee after you have considered

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<sup>1</sup> From 26 November 2018, this will be the Social Security Regulations 2018.

<sup>2</sup> The new Social Security Act 2018 commences on 26 November 2018.

the advice in this report. The Ministry of Social Development (MSD) can provide wording for this response.

- 14 The changes outlined in this paper may address the concerns that the Regulations Review Committee has.

### **There is a variety of types of ex gratia and compensation payments**

- 15 Ex gratia payments are payments for claims that are not actionable at law, but for which there exists a moral obligation.
- 16 Compensation payments are, for the purposes of this paper, considered to include payments:
- 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.
- 17 Ex gratia and compensation payments can be one-off for an individual, or due to class action (so part of a specified group).

### *Who gives ex gratia and compensation payments, and why these payments are made*

- 18 MSD is aware that the following Crown agencies have made ex gratia or compensation payments in the past:
- Ministry of Education – relating to allegations of abuse from former students' time at residential special schools.
  - Department of Corrections – for unlawful detention. Other reasons include improper use of force, unlawful searches and breaches of privacy obligations.
  - Ministry of Health – relating to alleged abuse while in state-run psychiatric care up to 1993 and payments for emotional harm to the families of children whose hearts were retained without consent at Greenlane hospital.
  - Oranga Tamariki – Ministry of Children – payments for privacy breaches and failure to follow processes that result in adverse outcomes for someone (for example, a caregiver).
  - MSD:
    - From 1 January 2004 to 30 June 2018, MSD made 1,398 payments to individuals with historic abuse claims.
    - Other parts of MSD make ex gratia payments for administrative errors, delays and incorrect decisions.
- 19 The following is a list of non-Crown organisations that have had, or currently have, claims against them. This list is not exhaustive, and not all claims will lead to ex gratia or compensation payments.
- the Catholic Church
  - Salvation Army
  - Baptist, Methodist, Anglican and Presbyterian churches
  - Barnardos New Zealand
  - Youth Horizons Trust
  - Youthlink Family Trust

- Odyssey House
  - Open Home Foundation
  - Dingwall Trust.
- 20 As a Crown agency, MSD does not have access to information on the reasons why non-Crown agencies have made ex gratia and compensation payments historically. However, we do know that some NGOs and churches have made, and will continue to make payments for the abuse of children in their care. There are likely to be other similarities for the reasons for payment between Crown and non-Crown agencies.

### *Amount paid*

- 21 MSD does not have access to the amounts of payments paid by other Crown agencies and non-Crown agencies, as this is sensitive information.
- 22 For the payments that MSD makes in response to historic abuse claims, the average payment was a little over \$19,000 for the period from 1 January 2006 to 30 September 2018. Payments ranged from \$1,150 to \$80,000 during this period.
- 23 Recent individual ex gratia payments made by other parts of MSD have ranged from \$200 to \$5000.

### *Reasons for payment as set out in the Regulations*

- 24 The possible reasons for an ex gratia or compensation payment are near endless. This is particularly true for ex gratia payments, as these are made out of a sense of 'moral duty' rather than a legal obligation. Therefore there is not a set framework for when these can be made.
- 25 Claims have been filed against the Crown alleging abuse and neglect while in the care of Crown institutions including child welfare homes, psychiatric hospitals and educational facilities. It is not possible to anticipate all of the different circumstances under which ex gratia and compensation payments may be made in the future. These could include payments to hospital patients, former veterans, victims of crime and prisoners.
- 26 As there is now a general exemption in place in the Regulations for ex gratia and compensation payments, there is no need to amend the Regulations each time another ex gratia or compensation payment for a particular circumstance comes to light.
- 27 The Regulations narrow the definition of what kinds of ex gratia and compensation payments can be exempt from income and cash asset tests for social assistance. These must be Crown payments that are made in recognition of harm experienced by individuals, or in settlement of a claim of harm.
- 28 Cabinet agreed on set criteria for payments that the general exemption could be applied to. This is because the exemption could capture a wide variety of potential payments for which there is not the same degree of policy justification. Payments that are excluded from the definition are ones for:
- economic loss
  - loss or reduction of property
  - loss of any benefit, whether or not of a monetary kind, that the aggrieved person might reasonably have been expected to obtain
  - loss of employment or office
  - payments related to an employment relationship or a contract to provide goods or services.



- 29 Therefore, while there are many different reasons why ex gratia and compensation payments are made, the payment must fit a more narrow definition to be exempted under the general exemption for ex gratia and compensation payments in the Regulations.

### **We now recommend changing the 12-month exemption for ex gratia and compensation payments to a permanent exemption**

*We have changed our advice on whether the 12-month exemption should be made permanent*

- 30 In the previous report you received in August 2018 [REP/18/8/1158 refers], MSD recommended to keep the exemption for ex gratia and compensation payments at 12 months.
- 31 The original policy rationale for setting an exemption period of 12 months was that 12 months was considered to strike the appropriate balance between two factors. These are:
- 31.1 the need to give recipients adequate time to decide on the best way to use their payments
  - 31.2 the need to ensure recipients do not receive social assistance indefinitely despite having a payment they could potentially use to support themselves (as consistent with the purpose of the Act).
- 32 While having a balance between these two factors is important, what is considered as an adequate amount of time will vary between different people. There are also several other factors to consider when deciding whether the 12-month exemption should be made permanent, as outlined in paragraphs 35-41.
- 33 MSD has done some further analysis on the differences between the general ex gratia and compensation payments exemption and other exemptions in the Regulations, and this provides the rationale for MSD changing their advice on this issue.
- 34 Additionally, MSD originally understood that the administrative implications of making the 12-month exemption permanent were significant, to the point where making the exemption permanent would be near impossible to implement. Further work has shown that there is a way to implement a permanent exemption, but not without some risks.

*There are key differences between the general ex gratia and compensation payments exemption and other exemptions in the Regulations*

- 35 The exemption for ex gratia and compensation payments is in the Regulations alongside several other exemptions for different payments. Appendix One contains a full list of the payments that are also currently exempt under the Regulations from income and cash asset tests for 12 months. There are several important differences between ex gratia and compensation payments and the other payments with exemptions under the Regulations.
- 36 While judgements of harm are inherently complicated, it could be argued that the harm experienced by those who receive these payments is more severe and/or long lasting in nature than that experienced by other groups who receive payments that are exempt under the Regulations. For example, the Regulations exempt payments of Accommodation Supplement (AS) error arrears payments for 12 months. Someone not receiving their full and correct entitlement of AS could have caused them harm - for example, the harm of having difficulties paying their rent. It is likely that this would be less harm than that suffered by those that receive ex gratia and compensation payments. Given this fact, a limited exemption period of 12 months could cause further distress to a client after this 12 month period passes.

- 37 Unlike most of the other payments exempted in the Regulations, the general ex gratia and compensation payment exemption is for payments for non-financial harm. While money can be repaid, there can be lasting impacts from physical, emotional and mental harm that a victim will carry for life.
- 38 Making the general exemption for ex gratia and compensation payments permanent would essentially draw a line between the harm experienced by recipients of these payments versus the harm experienced by the recipients of other payments exempted in the Regulations. This is not to say that every ex gratia and compensation payment recipient has suffered more than every recipient of another payment that is exempt under the Regulations. In reality, there is no definitive line for when harm is severe and when it is more minor. There could be some situations where someone who receives another payment exempted under the Regulations has suffered significantly more than an ex gratia or compensation payment recipient.
- 39 The rationale for giving ex gratia and compensation payments is to recognise the harm that people have experienced. Recipients of such payments are free to spend the money on whatever they please, and it is considered inappropriate for the entity that makes the payment to give the recipient any advice on how to spend the payment.
- 40 If an ex gratia or compensation payment is included in income and cash asset tests for social assistance, this could reduce the amount of assistance they receive to the point where they do not have enough money to pay for essential living costs such as accommodation and food leading a client to spend their ex gratia or compensation payment to meet these essential needs. This takes away from the freedom they are intended to have around how they will spend the payment.
- 41 As such, we consider that there is justification to change the 12 month exemption to a permanent exemption for ex gratia and compensation payments.

### **There are several risks and flow-on impacts to making the general 12-month exemption for ex gratia and compensation payments permanent**

#### *Making the general exemption permanent raises questions of fairness*

- 42 A permanent exemption will mean that some people with significant sums of money will be able to access financial assistance through the welfare system that is intended for people who do not have enough financial resources to support themselves with. This essentially creates an inequity between MSD clients who have and have not received ex gratia and/or compensation payments. It could be argued that the level of harm recipients of ex gratia and/or compensation payments have experienced justifies this inequity, but ultimately some may consider this unfair. Should you agree to make the exemption permanent, MSD will have to be prepared to accept this risk, including any adverse reactions from the public. Part of this preparation would be developing an appropriate communications plan.

#### *While it is possible to implement a permanent exemption, the process would be manual*

- 43 MSD relies on clients to tell us when they have a change of circumstances, including financial circumstances. This is because MSD has no way of knowing whether a client has received an ex gratia or compensation payment (especially if this payment is from a non-Crown agency). In saying this, if the payments are permanently exempt from income and cash asset tests, it is not strictly necessary for a client to tell us when they receive one, as it would not be included in income and cash asset tests anyway.

- 44 Currently, if a client tells us they have received an ex gratia or compensation payment for \$X amount, their case manager will put a 'client note' that will be associated with the client from that point forward. However, client notes are a general tool – there could be several different notes on different things, and a case manager may not always read every single client note for every single client they interact with.
- 45 Ideally, there would be a robust way of distinguishing the ex gratia or compensation payment from a client's own money, to ensure it is continually excluded from income and cash asset tests. This is particularly important as any interest earned from the ex gratia or compensation payment is generally also included in the exemption. Accurately 'ring-fencing' the payment may require MSD to revise the way we engage with clients for monitoring purposes.
- 46 This process could be assisted by a client keeping their ex gratia or compensation payment separate from the rest of their income and expenditure, but this could be seen as an unreasonable obligation to place on clients who have received this payment.
- 47 MSD will develop appropriate mitigations for these risks in an implementation plan.

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*Changes to the Social Security Regulations 2018 are required to make the general exemption permanent, and there could be flow-on effects to other legislation*

- 48 Changing the 12-month exemption period for the general ex gratia and compensation payments could be done through amending the Social Security Regulations 2018.
- 49 If you agree to make the 12-month exemption into a permanent exemption, then changes may need to be made to the Residential Care and Disability Support Services Regulations 2018 and the Housing Restructuring and Tenancy Matters (Prescribed Elements of Calculation Mechanism) Regulations 2018. MSD will consult with the relevant ministries before these changes are made.
- 50 The Regulations contain several exemptions for specific ex gratia payments, as outlined in Appendix One. These exemptions were added to the Regulations on an as needed basis before the general exemption for ex gratia and compensation payments was added. These are historic payments which have already been made at least several years ago, and consequently no changes to these exemptions are needed.

*Making the exemption permanent is unlikely to have significant financial implications*

- 51 As making the exemption permanent affects a relatively small group of MSD's clients, it is unlikely that there will be significant financial implications on MSD.
- 52 The Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions is submitting its findings and recommendations to the Governor-General in January 2023. There could be an increased number of ex gratia and/or compensation payments for harm made as a result of the Royal Commission's findings.
- 53 MSD will continue to track this issue and update you as needed. Should you agree to making the exemption permanent, any financial implications will be outlined in the cabinet paper.

## **Next steps**

- 54 Subject to your approval, we will include making the general exemption for ex gratia and compensation payments permanent in the same process as the one to



extend the general exemption to include payments from non-Crown entities (as agreed to in REP/18/8/1158).

55 This will involve the following steps:

Task	Estimated date
Paper to Cabinet Social Wellbeing Committee for policy approval	February – March 2019
Working with Parliamentary Counsel Office to draft the amended regulations	April 2019
Taking the new regulations to Cabinet Legislation Committee for approval	May 2019

56 We will work with your Office to coordinate the timing of this work.

57 The amendment (if you agree to it) will be carried forward into the regulations under the new Social Security Act 2018 that will replace the Social Security (Income and Cash Assets Exemptions) Regulations 2011.

File ref: REP/18/10/1365

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## Appendix One – Current exemptions in the Social Security (Income and Cash Assets Exemptions) Regulations 2011

Payment Group	Specific payment	Income exemption	Cash asset exemption
<b>Ex gratia and compensation payments related exemptions (these sections were added to the Regulations prior to the general ex gratia and compensation payment exemption in part 3, and would now fold into the general exemption)</b>	EVSA (Neville Wallace Memorial) Children's and Grandchildren's Trust payments	Yes - 12 months	Yes - 12 months
	Lake Alice compensation or ex gratia payments	Yes - 12 months	Yes - 12 months
	Personal injury from hepatitis C infection contracted through New Zealand blood supply	Yes - 12 months	Yes - 12 months
	Viet Nam veterans ex gratia payments	Permanent (no time limit)	Permanent (no time limit)
	Viet Nam Veterans and Their Families Trust payments	Yes - 12 months (but permanent exemption for income from trust)	Yes - 12 months
<b>Alignment- specific arrears payments due to MSD error</b>	Accommodation supplement arrears payments	Yes - 12 months	Yes - 12 months
	Temporary additional support arrears payments	Yes - 12 months	Yes - 12 months
	Best Start tax credit arrears payments	Yes - 12 months	Yes - 12 months
<b>Other Crown payments (excluding ex gratia or compensation payments)</b>	Health services and disability support services funded or provided by the Crown	Permanent (no time limit)	Permanent (no time limit)
	Payments to victims of crime	Yes - 12 months	Yes - 12 months
	Employment and Work Readiness Assistance Programme lump sum payments	Yes - 12 months	Yes - 12 months
	Operational allowances (made to some operational members of the New Zealand Defence Force or the police)	Yes - 12 months	N/A
<b>Miscellaneous payments</b>	Canterbury earthquake exemptions	Yes - 48 months	Yes - 48 months
	Payments of energy trust dividends	Yes - 12 months	N/A
	Home-based care	Permanent (no time limit)	N/A
	Superannuation schemes	Only while locked-in	Only while locked-in
	Payments under Sleepover Wages (Settlement) Act 2011	Permanent (no time limit)	Yes - 12 months