



# Report

**Date:** 27 August 2018

**Security Level:** SENSITIVE

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

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## Treatment of ex gratia and compensation payments as income and cash assets

### Purpose of the report

- 1 This paper seeks your agreement to begin work to seek Cabinet agreement to amend the Social Security (Income and Cash Assets Exemptions) Regulations 2011 (the Regulations) to extend the general exemption for ex gratia and compensation payments to include payments from non-Crown entities.

### Recommended actions

It is recommended that you:

- 1 **note** that the Crown makes ex gratia and compensation payments in recognition of harm, or to settle a claim of harm
- 2 **note** that these Crown payments are currently exempt from income and cash asset tests for social assistance paid under the Social Security Act 1964, for 12 months after the date of payment under the Social Security (Income and Cash Assets Exemptions) Regulations 2011 and the Social Security (Temporary Additional Support) Regulations 2005
- 3 **note** that ex gratia and compensation payments made by non-Crown entities are currently treated as income or cash assets under the Social Security Act
- 4 **note** that the Ministry of Social Development does not consider there is a good reason that ex gratia and compensation payments from Crown and non-Crown entities are treated differently when they are provided for essentially the same purpose
- 5 **agree** to seek to amend the Regulations to exclude the general exemption to include ex gratia and compensation payments from non-Crown entities from income and cash asset tests for social assistance paid under the Social Security Act

**Agree** / **Disagree**

- 6 **note** that there is a complaint before the Regulations Review Committee that asks for the exemption to be extended to cover ex gratia and compensation payments

received from non-Crown entities, and for those payments to be permanently exempt from income and cash asset tests

7 **note** that the Ministry's advice is to keep the status quo of a 12-month exemption period

8 **confirm** that the exemption period remains at 12 months

9 **note** that we will continue to ensure all clients are appropriately informed of the implications of the 12-month exemption period when they tell us they have received an ex gratia or compensation payment

Yes No  
? Still want to consider this

10 **note** that to give effect to the change in recommendation 5, Cabinet approval is needed to amend the Social Security (Income and Cash Assets Exemptions) Regulations 2011

11 **agree** that the Ministry of Social Development prepares a paper to seek Cabinet agreement to amend the Social Security (Income and Cash Assets Exemptions) Regulations 2011 in line with your decisions in recommendations 5 and 7.

8 ?

Agree / Disagree

s 9(2)(a)

  
\_\_\_\_\_  
Fiona Carter-Giddings  
General Manager  
Employment and Income Support Policy

27/8/18  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Hon Carmel Sepuloni  
Minister for Social Development

2/9/18  
\_\_\_\_\_  
Date

## Background

*Income and cash asset tests ensure clients use other resources to support themselves before seeking financial assistance*

- 2 Central to the benefit system is the principle that assistance is provided based on need, and that where people have additional resources, they should use this to help support themselves. This is reflected in the purposes of the Social Security Act 1964 (the Act), with Section 1A(c)(i) stating "that where appropriate [people] should use the resources available to them before seeking financial support under this Act." When people receive income from sources including wages, investments or interest payments, this reduces the financial assistance they receive.
- 3 Assistance is generally means-tested using income and cash assets tests. The benefit system has three tiers of assistance:
  - the first tier is the main benefits, providing a basic income for people who are not able to support themselves through paid work. Main benefits are only income tested (except for the Emergency Benefit and Jobseeker Support Student Hardship which are both income and cash asset tested).
  - the second tier is additional assistance paid to people in particular situations or with specific on-going costs. Low-income people may be eligible for this assistance whether or not they receive a main benefit. This tier of assistance is mostly subject to income testing and may be subject to cash asset testing, such as the Accommodation Supplement.
  - the third tier is tightly income and cash asset tested. It is generally provided to people in hardship (whether on benefit or not) as one-off grants such as Special Needs Grants or for assistance over a relatively short period of time. Such assistance includes the Temporary Additional Support.

*Exemptions to these tests exist where it would be unreasonable to have payments reduce social assistance*

- 4 There are numerous exemptions to income and cash asset tests. This report will focus on proposed changes to the existing exemption of ex gratia and compensation payments made by the Crown in recognition of harm experienced by individuals, or in settlement of a claim of harm. The definition of harm is outlined in Appendix One.
- 5 Ex gratia payments are payments for claims that are not actionable at law, but for which there exists a moral obligation.
- 6 Compensation payments are, for the purposes of this paper, considered to include payments where monies are paid:
  - 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.
- 7 In the period between 1 January 2004 and 30 June 2018, the Ministry of Social Development (MSD) made 1398 payments to individuals in response to historic abuse claims, totalling to \$26,584,184.
- 8 In September 2008, a general exemption was enacted in the Social Security (Income and Cash Assets Exemptions: Ex Gratia and Compensation Payments Made by the Crown) Regulations 2008. This was later replaced by the Social Security (Income and Cash Assets Exemptions) Regulations 2011 (the Regulations) to exclude ex gratia and compensation payments made by the Crown from being treated as income or cash assets under the Act, for a period of 12 months from the date of payment. The specific criteria for the compensation and ex gratia payments which are exempted are in Appendix One.

- 9 The Ministry considers that an exemption period of 12 months strikes a balance two factors. These are the need to give recipients adequate time to decide on the best way to use their payments and the need to, as consistent with the purpose of the Act, ensure they do not receive social assistance indefinitely despite having a payment they could potentially use to support themselves. A 12-month exemption is consistent with other exemption periods in the welfare system, and avoids creating significant administrative burden. This is discussed further in paragraphs 27-33.

### **We consider it appropriate to extend the general exemption to include payments from non-Crown entities**

- 10 While the majority of historic 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. Ex gratia and compensation payments can be made by these organisations to settle their claims and/or acknowledge the harm caused.
- 11 As it currently stands, the general exemption under the Regulations for ex gratia and compensation payments does not include any such payments made by non-Crown entities.
- 12 From the client's perspective, it is unreasonable that people who receive payments from non-Crown entities may end up receiving less, or losing entitlement altogether to, social assistance payments. These people had no choice as to who perpetrated the harm, so this disadvantage is through no fault of their own.
- 13 The broad rationale for exempting ex gratia and compensation payments for Crown payments in recognition of harm experienced by individuals or in settlement of a claim of harm can also be applied to non-Crown entities. That is, in both cases, clients will need sufficient time to consider how they will use the payment.
- 14 Non-Crown entities were not included in the general exemption because of the lack of direct responsibility the Crown has for these organisations. However, given the nature of the contractual relationships between the Crown and some non-Crown entities, it is possible that at least in some cases, the Crown is not completely removed from the activities of non-Crown entities.
- 15 In any case, independent of the level of direct responsibility the Crown has over non-Crown entities, this unintended consequence still exists. The only way to remedy this consequence is to extend the general exemption to include payments from non-Crown entities.
- 16 We recommend that you seek agreement to amend the Regulations to extend the current general exemption of Crown ex gratia and compensation payments to include ex gratia and compensation payments made by non-Crown entities. This would remove the risk that our clients would receive less income support from the Ministry as a result of receiving an ex gratia or compensation payment.

*We cannot predict the exact impact of extending the exemption to include non-Crown entities...*

- 17 The difficulty in extending the current exemption to include non-Crown entities lies in the fact that there is not an overarching authority/formalised system over the various different non-Crown entities that make ex gratia and compensation payments for harm (like there is with Crown payments). 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.
- 18 As there is no data available on how many of our clients have received ex gratia and compensation payments for harm from non-Crown entities, it is difficult to determine how much an extension to the exemption will cost. There are many unknown factors that could influence this. These include, but are not limited to:

- the number of payments our clients receive from non-Crown entities
  - the monetary value of these payments
  - the behaviour of our clients after receiving the payment – namely, how much of the payment they still have 12 months after receiving the payment.
- 19 We have no proxy for estimating client behaviour, as we do not currently track how ex gratia and compensation payments from the Crown are spent. In the case of the payments MSD makes for historic abuse claims, since these payments are made to acknowledge harm our clients came into while in MSD care, it would be inappropriate for MSD to monitor how the payments are spent.
- 20 Given that the financial implications are hard to quantify, MSD will work with Treasury to agree on an approach as the Cabinet paper is prepared.

*...but we consider that this risk is mitigated by applying the same limits that currently exist for Crown payments*

- 21 The criteria in Appendix One outlines what is included and excluded in the definition of ex gratia and compensation payments, and what is considered to be harm.
- 22 In amending the Regulations, the same limits that currently exist for Crown payments would also apply to payments from non-Crown entities, such as the exclusion of payments made in recognition of economic or employment related loss. This would help to limit the application of the exemption to cases where it would be unreasonable for an ex gratia or compensation payment to be considered in income and cash asset tests immediately after its receipt. In other words, it would make sure the Ministry is treating like with like.

## **Now is the right time to make this change**

*There is some scrutiny of the general exemption of ex gratia and compensation payments at the moment, and the Ministry knows that clients are being impacted*

- 23 The Regulations Review Committee (the Committee) received a complaint from Cooper Legal (a law firm representing complainants making allegations of abuse they suffered in state care as children), which was later clarified in a letter dated 19 June 2018. Cooper Legal is concerned about two features of the Regulations. Specifically, Cooper Legal want the Regulations to be amended to:
- include compensation paid by both Crown or non-Crown entities, and
  - remove the 12 month exemption period, so that ex gratia and compensation payments become permanently exempt from income and cash asset tests.
- 24 The Committee has yet to make a decision on this case.
- 25 On **s 9(2)(a)** you met with **s 9(2)(a)** to discuss this complaint. Before the meeting, MSD advised you and the Committee that we will provide advice to you on this issue in August 2018.
- 26 There is also currently a member's bill in the ballot that proposes to amend the Act "to correct a situation where ex gratia payments or compensation payments from the State must be spent within one year, or they will be counted as income and cash assets for the purpose of receiving a primary or supplementary benefit." This is essentially the same proposal as the second part of Cooper Legal's proposal.

## **We consider the 12 month exemption period to be an appropriate balance of conflicting factors**

- 27 Ex gratia and compensation payments can be appropriate resources available to people to support themselves, before seeking financial assistance. However, it seems inconsistent for the Crown to provide a payment to a person in recognition of harm

suffered, and then immediately reduce the amount of social assistance paid to the person because of that payment.

- 28 On this basis, MSD considers that recipients of ex gratia or compensation payments should be given sufficient time to decide how they will use their payment. However, there is also a need, consistent with the purpose of the Act, to ensure they do not receive social assistance indefinitely despite having a payment they could potentially use to support themselves.
- 29 MSD considers 12 months to be the appropriate exemption period to balance these two factors.

*Maintaining the 12-month exemption period avoids creating administrative difficulties and inconsistencies in the welfare system*

- 30 One complication with extending the current 12-month exemption is distinguishing the ex gratia or compensation payment from a client's own money, which is an issue that grows over time. Administratively, it would be difficult to 'ring-fence' the payment to ensure it is continually excluded from income and cash asset tests.
- 31 12 months is currently used as the exemption period from income and cash asset tests for other payments besides ex gratia and compensation payments. For example, the Accommodation Supplement and Temporary Additional Support arrears payments (required due to MSD error) both have a 12 month exemption period under the Regulations.
- 32 This would mean that extending the exemption permanent for ex gratia and compensation payments or making it permanent (as suggested in the Cooper Legal case) would make it inconsistent with other existing exemptions from income and cash asset tests.
- 33 Given how complex the welfare system already is, avoiding inconsistencies where possible is an important part of ensuring the welfare system is accessible and understandable to all New Zealanders.

*Clients should be appropriately informed of the 12-month exemption period*

- 34 When clients tell us that they have received ex gratia and compensation payments, MSD clearly informs them that in 12 months after the date of payment, the payment could have an effect on the amount of, or eligibility to, the MSD assistance they receive.
- 35 If the Regulations are amended so that the exemption applies to ex gratia and compensation payments from non-Crown entities, MSD will extend their current practice of communicating the implications of the exemption period to clients.

## **Next steps**

- 36 Subject to your agreement, we will begin work to amend the Regulations to extend the general exemption in Part 3 to include payments from non-Crown entities. This will involve the following steps:
  - A paper to Cabinet Social Wellbeing Committee for policy approval
  - Working with Parliamentary Counsel Office to draft the amended regulations
  - Taking the new regulations to Cabinet Legislation Committee for approval.
- 37 We will work with your Office to coordinate the timing of this work.
- 38 The amendment (if approved) will be carried forward into the regulations under the Social Security Legislation Rewrite Bill that will replace the Social Security (Income and Cash Assets Exemptions) Regulations 2011.

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## **Appendix One – Current definition of what ex gratia and compensation payments in recognition of harm experienced by individuals or in settlement of a claim of harm are exempt from income and cash asset tests**

On 3 November 2008, an exemption from treating ex gratia or compensation payments made to a client by the Crown as income or cash assets under the Act for a period of 12 months from the date of payment was made by the Social Security (Income and Cash Assets Exemptions: Ex Gratia and Compensation Payments Made by the Crown) Regulations 2008. It applies to any compensation or ex gratia payment that:

- has been made by or on behalf of the Crown
- has been made to an individual
- has been made in recognition of harm experienced by an individual or in settlement of a claim of harm
- has not been made in recognition of economic loss, or loss or reduction of property (including real and personal property, and other financial assets)
- has not been made in respect of or arising under an employment relationship
- has not been made in respect of a contract to provide goods or services

Harm is defined as: illness and/or injury, including physical harm, mental harm, humiliation, loss of dignity and injury to the feelings of the aggrieved person.

These regulations were replaced by the Social Security (Income and Cash Assets Exemptions Regulations 2011, with effect on 19 September 2011. The replacement regulations contain a definition of Crown that includes: all Ministers of the Crown, all departments of the Public Service, all Crown entities (for example, District Health Boards), and all other instruments of the Crown. All other exemption criteria remained identical.

