



**MINISTRY OF SOCIAL
DEVELOPMENT**

TE MANATŪ WHAKAHIATO ORA

[REDACTED]

Dear [REDACTED]

Thank you for your email of 12 February 2019 to the Ministry of Social Development (the Ministry) requesting, under the Official Information Act 1982, the Ministry's policy, procedures and processes for determining and calculating ex gratia and compensation payments, for Work and Income clients.

I understand that the Ministry's Service Delivery team has now completed its consideration of your case. Diane McDermott is best placed to answer any of your questions relating to this, or how the payment may be considered in relation to the financial assistance you receive.

I have been advised that you are aware of the information on the Ministry's online Manuals and Procedures, which sets out the information for clients to understand how ex gratia and compensation payments may impact on any assistance they may receive. This information is available at: www.workandincome.govt.nz/map/income-support/core-policy/income/types-of-income/ex-gratia-and-compensation-payments.html. I have also enclosed a copy of the information on the Ministry's intranet regarding these payments.

In your email, you have also asked for detail including timeframes and people/positions involved. This information is included in the enclosed document titled '*General guidance for considering ex gratia or settlement payments*'. This guidance acknowledges that cases can range from one issue with little complexity to cases that will require a lot more time due to their complexity. Some information such as job titles are no longer relevant as this document was developed in 2016 when the former Child, Youth and Family (now Oranga Tamariki, Ministry for Children) was part of the Ministry.

You also asked about any required stipulations as to the use of any money paid, and its use in asset calculations post payment. The Ministry does not stipulate how such a payment is to be used by a client. The information enclosed explains how these payments are exempt from the cash asset and income testing for a 12 month period when made by the Crown to the client in recognition of harm experienced or in settlement of a claim of harm.

The principles and purposes of the Official Information Act 1982 under which you made your request are:

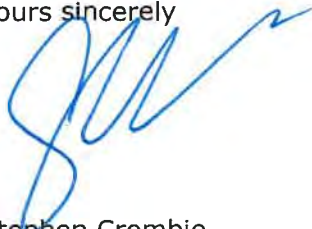
- to create greater openness and transparency about the plans, work and activities of the Government,
- to increase the ability of the public to participate in the making and administration of our laws and policies and
- to lead to greater accountability in the conduct of public affairs.

This Ministry fully supports those principles and purposes. The Ministry therefore intends to make the information contained in this letter and any attached documents available to the wider public shortly. The Ministry will do this by publishing this letter and attachments on the Ministry of Social Development's website. Your personal details will be deleted and the Ministry will not publish any information that would identify you as the person who requested the information.

If you wish to discuss this response with us, please feel free to contact OIA_Requests@msd.govt.nz.

If you are not satisfied with this response for documentation regarding policy, procedures and processes for determining and calculating ex gratia and compensation payments, for Work and Income clients, you have the right to seek an investigation and review by the Ombudsman. Information about how to make a complaint is available at www.ombudsman.parliament.nz or 0800 802 602.

Yours sincerely



Stephen Crombie
Deputy Chief Executive, Corporate Solutions

Ex Gratia and Compensation Payments

This page provides you with the information you will need to process ex gratia and compensation payments made to our clients.

On this Page:

What are ex gratia and compensation payments?

Ex gratia payments are made to a person without legal obligation or acceptance of liability by the Crown in recognition of harm experienced by the client.

Compensation payments are made in recognition that a person has experienced harm, or to settle a claim of harm.

The compensation payments can be made:

as the result of a Court order (otherwise known as damages) or award by a tribunal such as the Human Rights Tribunal to settle a claim that has been formally filed against the Crown or to settle a claim of harm where a claim has not been filed in Court

[MAP - Ex gratia and Compensation payments \[http://doogle/map/income-support/core-policy/income/types-of-income/ex-gratia-and-compensation-payments.html\]](http://doogle/map/income-support/core-policy/income/types-of-income/ex-gratia-and-compensation-payments.html)

Evidence required

Clients will need to provide evidence that they have received an ex gratia or compensation payment.

If it is unclear what the payment was made for, you should contact your regional solicitor. For example, if you are unclear whether the payment was made in recognition of harm or what portion of the payment was made for non-pecuniary damages.

Process for exempting ex gratia and compensation payments

When a client receives an ex gratia or compensation payment from the Crown you need to create a 'must view' note in UC VII. The note must state that:

the client has received an ex gratia or compensation payment that must not be considered as income or as a cash asset for 12 months

the date the client received the payment **and**

the date in 12 months that the financial assistance will need to be reassessed

If a client is currently receiving financial assistance, a bring up needs to be added via BRUPI in SWIFTT to reassess entitlement at the end of the 12 month exemption period.

A UC VII letter must be sent to the client when you add the 12 month exemption.

At the end of the 12 month period any remaining amount that a client has will be treated as a cash asset. Also any income derived from the cash asset will be treated as chargeable income for benefit purposes.

[MAP - Process for exempting ex gratia and compensation payments \[http://doogle/map/income-support/core-policy/income/types-of-income/lake-alice-psychiatric-hospital-compensation-payme-01.html\]](http://doogle/map/income-support/core-policy/income/types-of-income/lake-alice-psychiatric-hospital-compensation-payme-01.html)

Ex gratia payments from Veteran's Affairs New Zealand

When a client receives a payment you need to create a 'must view' note in UC VII. The note must state:

the client has received an ex gratia payment from Veterans' Affairs New Zealand

the date the client received the payment

the amount of the ex gratia payment

that the payment is **permanently exempt** from the cash asset test **and**

any income derived from the ex gratia payment is not treated as chargeable income for benefit purposes

A UC VII letter must be sent to the client to advise them that their payment is exempt.

[MAP - Ex gratia payments from Veterans' Affairs New Zealand \[http://doogle/map/income-support/core-policy/income/types-of-income/ex-gratia-payments-from-veterans-affairs-new-zeala-01.html\]](http://doogle/map/income-support/core-policy/income/types-of-income/ex-gratia-payments-from-veterans-affairs-new-zeala-01.html)

Vietnam Veterans and Their Families Trust payments

Lake Alice Psychiatric Hospital compensation payments and Hepatitis C ex gratia payments can also be retrospectively reviewed. However, any other payments can only be retrospectively reviewed for exemptions back to 3 November 2008; when the new Regulations came into effect.

Example one:

A client is receiving Job Seeker Support and supplementary assistance (Accommodation Supplement (AS) and Temporary Additional Support (TAS)).

On 1 September 2007 they received a payment for the Vietnam Veterans' and Their Families Trust for \$35,000.

At the time, the payment was added as a cash asset and because the cash asset exceeded the income limits the client's AS and TAS were cancelled.

The new Regulations introduced on 3 November 2008 allow the payment to be exempted for 12 months from the date of payment. The Regulations for payments from the 'Trust', are retrospective from 16 August 2007.

Due to these changes you must:

reassess the client's AS, exclude the asset for 12 months (from 1 September 2007 to 1 September 2008) and issue any arrears to the client.

not review TAS as this is not exempt for 12 months (Regulations allow TAS only to be exempt from 3 November 2008). Check with the client whether they still have the cash asset. If they have you should leave their record as it is - if they don't you should ask the client to reapply for supplementary assistance.

Example two:

A client was receiving a Sole Parent Support and supplementary assistance (AS and TAS).

The client received a payment of \$32,000 from the Vietnam Veterans' and Their Families Trust on 3 August 2008. The client did not advise Work and Income of this payment.

The new Regulations introduced on 3 November 2008 allow the payment to be exempted for 12 months from date of payment. The Regulations for payments from the Trust are retrospective from 16 August 2007.

This means that payment should have been exempted from cash asset and income testing from 3 August 2008 until 3 August 2009.

Work and Income were advised of the payment on 3 November 2008.

Due to these changes you must:

not review the AS, as this is exempt for 12 months (from 1 September 2007 to 1 September 2008).

review TAS between 3 August 2008 until 3 November 2008 (which is the date the Regulation allows TAS to be exempted), the client is not entitled to TAS during this period.

Example three:

A client was receiving Sole Parent Support and supplementary assistance (AS and TAS).

The client received a payment of \$24,000 from the Crown in a settlement of a claim of harm on 5 December 2007.

The payment was added as a cash asset, and the client's AS and TAS were cancelled because they exceeded the cash asset limit. The income earned from the cash assets were also charged against the benefit rate (thus reducing the rate payable).

The new Regulations introduced on 3 November 2008 meant that the payment should be exempted for 12 months from the date of payment. Payments from the Crown in a settlement of a claim of harm are not retrospective.

In these circumstances you must:

note that 12 months from date of payment is 5 December 2007 to 5 December 2008, however, the Regulations are only in affect from 3 November 2008. Therefore you must review the period from 3 November 2008 to today's date (or 5 December 2008 - whichever is the latest).

reassess (potentially grant) the client's AS, TAS and Sole Parent Support from 3 November 2008 to today's date (or 5 December 2008 - which ever is the latest).

Content owner: Work and Income Design and Improvement **Last updated:** 12 April 2015

Home » Business groups » » MSD Legal - how to get help » **General Guidance for Considering Ex Gratia Payments and Settlement Payments**

General Guidance for Considering Ex Gratia Payments and Settlement Payments

This new guidance outlines the factors to be considered when deciding if an ex gratia or settlement payment is appropriate. It also sets out the process for getting the payment approved.

Please contact Legal Services for advice early on if you are considering an ex gratia or settlement payment.

[General Guidance for Considering Ex Gratia Payments and Settlement Payments \(PDF 297.04KB\)](#)

[\[http://doogle/documents/business-groups/organisational-solutions/legal-services/practice-centre/general-guidance-for-considering-ex-gratia-payments-and-settlement-payments.pdf\]](http://doogle/documents/business-groups/organisational-solutions/legal-services/practice-centre/general-guidance-for-considering-ex-gratia-payments-and-settlement-payments.pdf)

Content owner: [Legal Services](#) **Last updated:** 05 September 2016

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**MINISTRY OF SOCIAL
DEVELOPMENT**
TE MANATŪ WHAKAHIATO ORA

General guidance for considering ex
gratia or settlement payments

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Overall approach

What principles should guide decision-making?

- 1 When considering whether to make an ex gratia or settlement payment, decision-makers should be guided by the following principles:
 - a) **Transparency** – Any payment must have a clear rationale
 - b) **Consistency** – While recognising that each case will turn on its own facts, to ensure fairness MSD should have a consistency of approach when considering similar circumstances
 - c) **Proportionality** – When payment is made in recognition of loss or harm, the payment must reflect MSD's level of responsibility for what has occurred and be proportionate
 - d) **Accountability** – In any case where we are making payment we must take responsibility for addressing any failures and having a clear plan in place to improve.
- 2 Expenditure of public funds is subject to the provisions of the Public Finance Act and Cabinet policy and procedural guidance. Any decision to commit public funds must be carefully considered, and all options explored.
- 3 In each case MSD needs to demonstrate to the Chief Executive what it has learned from the situation and how, when necessary, practices and/or processes have improved as a result.
- 4 To establish governance oversight, the Chief Legal Advisor monitors these payments, and reports them to the Corporate Capability Governance Committee annually (following financial year end), providing advice on any patterns or issues emerging.

Ex Gratia Payments

What is an ex gratia payment?

- 5 As identified in Cabinet Office Circular CO (15) 4, ex gratia payments are made out of goodwill or a sense of moral obligation. Payments are made without the giver recognising any liability or legal obligation.
- 6 Whether an ex gratia payment should be made and how much should be paid will depend on the level of service received and the extent of the loss or harm suffered by the individual.

How are ex gratia payments made?

- 7 Cabinet Office Circular CO (15) 4 sets the external parameters for making ex gratia payments. Departmental Chief Executives are authorised to pay up to \$30,000 (GST included where applicable) by way of ex gratia payment, with responsible Ministers having authority to spend up to \$75,000 (GST included where applicable).
- 8 Ex gratia payments are made from the responsible Deputy Chief Executive's budget and not from Crown Expenditure. They are not budgeted for and therefore their cost is met from the Deputy Chief Executive's budget where the incident took place.
- 9 The internal parameters for making ex gratia payments are found in MSD's Financial Delegation document. This provides that payments must be certified by the Chief Legal Advisor before being forwarded to the Chief Executive for approval unless they relate to payments made, mainly to caregivers, for deliberate damage to property by a person in CYF care, in which case:

- the CYF GM Operations may approve such costs to a level of \$10,000, subject to Chief Legal Advisor certification

- The CYF Executive Manager-Regional Operations may approve such costs up to a level of \$5,000, not subject to Chief Legal Advisor certification
- 10 MSD or the Minister cannot be compelled to make an ex gratia payment, though the Social Security Appeal Authority, Student Allowance Appeal Authority, or Ombudsman may recommend it. The Child, Youth and Family Complaints Panel may also recommend to the Chief Executive that an ex gratia payment is made following its consideration of a complaint.
 - 11 A payment made to settle a legally meritorious claim, such as a valid claim about a breach of the Privacy Act, is not an ex gratia payment. This is because it is a payment made in settlement of a claim (eg the claimant could take the case to the Human Rights Review Tribunal, who in turn, could award damages against MSD). The principles and process for considering a settlement payment is set out in the latter part of this Guide.
 - 12 An award of "damages" or compensation by the High Court or Human Rights Review Tribunal is also not an ex gratia payment. While payment for damages or compensation is made from operating budgets, MSD is legally required to make the payment.

Consider all other alternatives first

- 13 All other avenues for addressing the client's claim should be considered before a decision is made to seek approval for an ex gratia payment.
- 14 It is important to deal with any situation where you may be considering an ex gratia payment as quickly as possible. Delay dealing with a complaint can exacerbate the problem, whereas it may sometimes be possible to avoid the need for an ex gratia payment if a matter is dealt with quickly by alternative means.

Service Delivery

15 Check specific questions such as:

- (a) Is there any unpaid benefit entitlement or assistance available to the client that can be accessed? Would the client qualify for an SNG or lump sum special benefit payment?
- (b) Can the client's loss be remedied by writing the debt off under section 86(9A) of the Social Security Act 1964, or by choosing not to establish a debt under regulation 45 of the Student Allowances Regulations 1998?
- (c) Can the client's claim be better satisfied through a non-monetary solution? For example, by way of a letter of apology or change of case manager?

16 Note that section 11D of the Social Security Act makes it clear that the date a client first contacts us to request financial assistance is their date of first contact, and an entitlement to benefit can arise from that date. A client may contact MSD at any time, through various methods eg at reception at a service centre, via telephone through one of the contact centres, or in writing. For first contact prior to 24 September 2007 the *Taylor* judgment can be applied, meaning where evidence that an application has been made verbally is accepted, we will be able to consider payment of benefit from the date of the verbal application.

17 In addition section 80AA of the Social Security Act allows the commencement of a benefit to an individual from an earlier date than the application date where there has been some erroneous action or inaction by MSD. MSD requires the Minister's consent to use the power. The Minister has delegated the power to give consent to the Chief Executive, subject to financial limitations.

Child, Youth and Family

18 Other avenues should be considered before an ex gratia is recommended. There may be other options to address the concerns such as:

- (a) Payment for appropriate services through a Family Group Conference plan
- (b) Payment for appropriate services through a services or support order (sections 86 and 91 of the Children, Young Persons, and Their Families Act 1989)
- (c) Financial assistance to children or young people who have left care through section 389 of the Children, Young Persons, and Their Families Act 1989.

CYF Deliberate Damage Policy

19 Child, Youth and family expects that caregivers should be insured for those risks which are generally insurable and that they avoid damage where damage is avoidable.

20 Section 394 of the Children, Young Persons and their Families Act 1989 provides that the Chief Executive has no tortious liability for the damage caused by children or young people in his custody.

21 Despite the lack of legal liability, Child, Youth and Family established the Caregiver Claims for Deliberate Damage scheme on 1 July 2005 to address deliberate damage caused by a child in the custody of the Chief Executive to recognise the special relationship between CYF and its approved caregivers. The policy has the underlying principles that:

- (a) Child, Youth and Family understands that caregivers face risk of uninsurable property damage as a result of some deliberate acts committed by children and young persons placed with them;
- (b) Child, Youth and Family believes that the public interest and the interests of these children and young persons is best served by caregivers being given sufficient confidence that intentional damage caused by children in care which may be uninsurable will be the subject of a claims process operated by Child, Youth and Family according to specific business rules;
- (c) Child, Youth and Family also believes that it has the obligation to ensure that public funds are prudently managed.

22 Accordingly all ex gratia payments for deliberate damage caused by a child in the custody of the Chief Executive must be made pursuant to the Caregiver Claims for Deliberate Damage scheme.

When should an ex gratia payment be made?

23 Whether sufficient moral obligation exists will depend on the individual circumstances of each case. Any ex gratia payment involves the expenditure of taxpayer funds and needs to be carefully considered in terms of whether it is necessary and appropriate.

24 Staff will have different views on what they regard as sufficient. However MSD should endeavour to apply a consistent approach. Only through a thorough examination of all the circumstances can a fully considered decision be made.

25 In general an ex gratia payment may be appropriate where MSD's actions or omissions are deficient to a degree that a sufficient moral obligation arises to redress that through a payment to the client . The client will in such cases need to demonstrate that he or she has suffered harm as a result of MSD's actions, whether it be financial loss

(for example costs such as legal fees) or has suffered harm such as humiliation, distress or injury to feelings.

- 26 For example, it could be appropriate to make an ex gratia payment where MSD makes an incorrect decision and as a result the client incurs legal costs. Another example might be a payment for stress and inconvenience for unacceptably poor service.

What factors are relevant for determining how much the ex gratia should be?

- 27 Having established that an ex gratia payment is the appropriate way to respond to the client's grievance, consideration will need to be given to the amount of the payment. Legal Services must be consulted before any offer is made to a client.

- 28 Questions to consider include:

(a) What level of harm was suffered by the client as a result of the actions of MSD?

(b) The nature of the actions – was the situation complained of was an ongoing one, or a one-off error?

(c) Was there any bad faith or malice in MSD's actions – for example, whether sensitive information about the client was deliberately disclosed by MSD?

(d) Were any steps taken by MSD to mitigate the harm to the client – for example, assisting the client to relocate?

(e) What was the degree to which MSD's actions have contributed to the loss?

- (f) What actions were taken by the client that may have contributed to the harm suffered?
- (g) What is the level of ex gratia payments that have been made in other comparable cases? (if any)
- 29 When deciding how much a payment should be, consideration should also be given to whether the client is likely to need to pay tax on the ex gratia payment.
- 30 An ex gratia payment is not a substitute for an apology. MSD should always consider whether the client has received an appropriate apology, whether face to face or in writing.

Process for requesting approval for an ex gratia payment

- 31 There is no prescribed timeframe for progressing ex gratia payments. However, the general Ministry target is 90 working days from the time the possible ex gratia payment is identified.
- 32 When seeking approval from the Chief Executive, it is recommended that the following headings are used:
- Action required
 - Background, including information to satisfy the Chief Executive that other options have been explored and that the proposed ex gratia is an appropriate response
 - Why a sufficient moral obligation exists to make an ex gratia payment
 - Lessons learned, including individual practice or systemic process improvements which may have been made
 - Legal advice that no legal obligation exists to compensate the client
 - Recommendation

Roles and responsibilities

33 In making any decision to make an ex gratia payment out of a sense of moral obligation, the proposed authoriser will consider the advice of the business group and Legal Services as follows.

34 The business group proposing the payment is responsible for providing advice, supported by (and through) Legal Services that:

- (a) MSD has failed to provide an appropriate standard of service (ie consistently with policies, practice guidelines, service charters)
- (b) the nature of the action or inaction, such as whether it was one-off or ongoing, and the intent behind the action or inaction, such as whether there was any bad faith or malice in MSD's actions
- (c) loss or harm (physical, emotional, or financial) occurred because of this failure
- (d) any other possible steps have been taken or are on their own insufficient to bring appropriate closure, payment is now the appropriate step
- (e) the level of payment accurately reflects MSD's responsibility for the service failure and the consequent loss or harm
- (f) a plan is in place to:
 - address any failure by staff to provide quality service, act lawfully, and abide by the MSD and State Services Codes of Conduct
 - improve the service MSD provides to avoid similar failures from occurring in the future

- (g) notes whether payment, together with the service improvement steps, is likely to resolve the complaint for the complainant

35 Legal Services is responsible for providing advice that:

- (a) the payment is not a payment for legal liability or obligation
- (b) the payment is within the proposed authoriser's delegation
- (c) analyses to what extent to which the payment is proportionate to the failure and consistent with our approach in any previous similar circumstances.

36 The authoriser, on considering the advice, will make a decision about whether there is a moral obligation to address the failure by making an ex gratia payment.

37 Ex gratia payments made out of a sense of goodwill rather than moral obligation will be very rare, and should be discussed with Legal Services by the business group at an early stage.

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Settlement Payments

What is a settlement payment?

38 Settlement payments are made in respect of a claim that is actionable at law. For example:

- A breach of the Privacy Act, where the claimant could take the case to the Human Rights Review Tribunal, who in turn, could award damages against MSD;
- Employment disputes;
- Civil claims arising from negligence or breaches of the New Zealand Bill of Rights Act 1990.

How are settlement payments made?

39 Settlement payments are made from the responsible Deputy Chief Executive's budget and not from Crown Expenditure. They are not budgeted for and therefore their cost must be met from the Deputy Chief Executive's budget where the incident took place.

40 Cabinet Office Circular CO (15) 4 sets the external parameters for making settlement payments. Department Chief Executives are authorised to pay up to \$150,000 (GST included where applicable) by way of settlement payment, with responsible Ministers having authority to spend up to \$750,000 (GST included where applicable).

41 Expenses for compensation or damages for settlement of claims should be endorsed either by the Crown Law Office or a court judgement. Claims under \$75,000 need not be referred to the Crown Law Office, but must be certified by the Chief Legal Advisor before being forwarded to the Chief Executive for approval.

42 MSD or the Minister cannot be compelled to make a settlement payment.

When should a settlement payment be made?

43 There are a range of circumstances in which settlement payments may be made.

44 The proposed approach to settlement needs to be consistent with the Attorney-General's values for Crown civil litigation. MSD should act as a model litigant. MSD should endeavour to assess the merits of claims in a timely manner and consider making a settlement offer of part or all of the claim if there is a realistic prospect of liability.

45 The terms and conditions of each settlement will vary, but we should consider whether they should be confidential, "without admission of liability" and in "full and final" settlement. Where appropriate a signed formal Deed of Settlement should be executed.

What factors are relevant for determining how much the settlement payment should be?

46 The level of any settlement payment will depend upon the factual and legal merits of each case.

Process for requesting approval for settlement payment

47 There is no prescribed timeframe for progressing settlement payments. Content of the memo requesting approval for the payment will be case specific, but consider the following:

- Action required
- Background, including information to satisfy the Chief Executive that other options have been explored and that the proposed settlement payment is an appropriate response

- Lessons learned, including individual practice or systemic process improvements which may have been made
- Legal advice
- Recommendation

Roles and responsibilities

48 In making any decision to make a settlement payment, the proposed authoriser will consider the advice of Legal Services and the business group as follows.

49 Legal Services is responsible for providing advice that:

- (a) the proposed approach to settlement is consistent with the Attorney-General's values for Crown civil litigation
- (b) compensation or damages in settlement of the claim is appropriate
- (c) the payment is within the proposed authorisor's delegation
- (d) the proposed settlement payment is appropriate to settle the claim
- (e) the payment is being made in the way that best mitigates against further consequential risks to MSD and the Crown, including the extent to which the terms of settlement should be confidential, without admission of liability, and full and final.

50 Crown Law is responsible for providing endorsement of the proposed quantum if the proposed settlement is greater than \$75,000.

51 The business group proposing the payment is responsible for providing information, supported by (and through) Legal Services about:

(a) the nature of MSD's action or inaction, such as whether it was one-off or ongoing, and the intent behind the action or inaction, such as whether there was any bad faith or malice in MSD's actions

(b) the loss or harm (physical, emotional, or financial) which occurred

(c) a plan is in place to:

- address any failure by staff to provide quality service, act lawfully, and abide by the MSD and State Services Codes of Conduct
- improve the service MSD provides to avoid any similar failures from occurring in the future.

52 The authoriser, on considering the advice, will make a decision about whether to make a settlement payment.

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