



30 MAY 2019

Dear [REDACTED]

On 17 April 2019, you emailed the Ministry clarifying your request under the Official Information Act 1982, for the following information:

- *Key documents regarding the Winter Energy Payments error and the spending of public money outside the authority provided by Parliament.*
- *All communication between MSD staff, Ministers and their offices- in relation to this error.*
- *Please include, briefing papers to all relevant ministers/cabinet, briefing notes, any other briefings, memos, aide memoires, meeting notes, letters, emails, recommendations and reports.*

Please find enclosed the following key documents regarding the Winter Energy Payments error and the spending of public money outside the authority provided by Parliament.

- *Report: Winter Energy Payment: Implementation update and key decisions, dated 13 April 2018*
- *Report: Winter Energy Payment- Implementation Update, dated 21 June 2018*
- *Report: Addressing errors with the Winter Energy Payment legislation, dated 13 December 2018*
- *Aide-memoire Cabinet oral item: Addressing errors with the Winter Energy Payment legislation, dated 8 February 2019*
- *Aide-memoire Cabinet paper: Addressing errors with the Winter Energy Payment legislation: approval for introduction, dated 1 March 2019*

Within these documents, some information is withheld under section 9(2)(h) of the Act in order to maintain legal professional privilege. The greater public interest is in ensuring that government agencies can continue to negotiate without prejudice.

Some information is withheld under section 9(2)(g)(i) of the Act to protect the effective conduct of public affairs through the free and frank expression of opinions. I believe the greater public interest is in the ability of individuals to express opinions in the course of their duty.

Some information is withheld under section 9(2)(f)(iv) of the Act as it is under active consideration. The release of this information is likely to prejudice the ability of government to consider advice and the wider public interest of effective government would not be served.

You will note that the names of some individuals are withheld under section 9(2)(a) of the Act in order to protect the privacy of natural persons. The need to protect the privacy of these individuals outweighs any public interest in this information.

As mentioned in prior communication, your request for: *All communication between MSD staff, Ministers and their offices- in relation to this error, and briefing papers to all relevant ministers/cabinet, briefing notes, any other briefings, memos, aide memoires, meeting notes, letters, emails, recommendations and reports* has been refused under section 18(f) of the Act. This request is very broad and substantial manual collation would be required to locate and prepare all documents within scope of your request. The greater public interest is in the effective and efficient administration of the public service.

I have considered whether the Ministry would be able to respond to your request given extra time, or the ability to charge for the information requested. I have concluded that, in either case, the Ministry's ability to undertake its work would still be prejudiced.

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

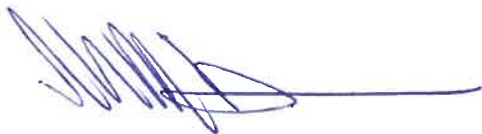
- to create greater openness and transparency about the plans, work and activities of the Government,
- to increase the ability of the public to participate in the making and administration of our laws and policies and
- to lead to greater accountability in the conduct of public affairs.

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 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](mailto:OIA_Requests@msd.govt.nz).

If you are not satisfied with this response, 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](http://www.ombudsman.parliament.nz) or 0800 802 602.

Yours sincerely



Alex McKenzie

**Acting General Manager, Seniors and International Policy**



# Report

**Date:** 13 April 2018

**Security Level:** SENSITIVE

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

*This report may include legal advice and be legally privileged. It should not be disclosed on an information request without further legal advice*

## Winter Energy Payment: Implementation update and key decisions

### Purpose of the report

- 1 This report:
  - 1.1 Updates you on implementation of the Winter Energy Payment (WEP)
  - 1.2 Advises you of some of the implications of aligning WEP with existing administration processes for Accommodation Supplement (AS) and Temporary Additional Support (TAS)
  - 1.3 Advises of an oversight when drafting the Families Package (Income Tax and Benefits) Act 2017, which means that WEP will be sanctioned slightly differently than AS and TAS in certain circumstances, and
  - 1.4 Provides you with options and recommendations to respond to these matters.

### Executive summary

- 2 Since the Families Package legislation passed in December 2017, the Ministry of Social Development (MSD) has been preparing to implement WEP. Key components of WEP design are that:
  - 2.1 It should fit within existing systems and processes (provided that such an approach would not negatively impact on WEP's intent), and
  - 2.2 Current practice for other supplementary assistance, particularly AS and TAS, were to be used as the starting point for developing the WEP detailed design [REP/17/1079 refers].
- 3 MSD is currently working through the details required to implement WEP and has identified that existing system settings have unusual consequences in relation to:
  - 3.1 The requirement to be not be out of New Zealand for more than 28 days to maintain eligibility to WEP (PART 1), and
  - 3.2 The way MSD pays supplementary assistance for couples receiving NZ Superannuation (NZS) or a Veteran's Pension (VP), or couples where both partners receive Supported Living Payment (SLP) in their own right<sup>1</sup> (PART 2).

<sup>1</sup> To be eligible for Supported Living Payment a client must be both permanently and severely restricted in their capacity for work because of a health condition, injury or disability or total

- 4 MSD has also identified a drafting oversight in the Families Package (Income Tax and Benefits) Act 2017 (Families Package legislation), which means that WEP will be sanctioned slightly differently than AS and TAS in certain circumstances (PART 3).
- 5 In considering each of these issues we have kept the impact on clients at the centre of our analysis. This impact is also considered in the context of the relevant legislative provisions, what can be achieved before 1 July 2018, and what changes could be sought to improve client experience for future years.

### PART 1: ABSENCE FROM NEW ZEALAND

*Current practice for administering absence from New Zealand provisions may not work well for all NZS/VP clients in recipient of WEP*

- 6 In order to maintain eligibility to AS, TAS, Disability Allowance (DA) and WEP a client must not be out of New Zealand for more than 28 days in a row.
- 7 MSD currently administers this requirement for AS, TAS and DA through an Information Matching Agreement (IMA) with NZ Customs. The IMA with NZ Customs must be administered in accordance with the Privacy Act 1993, which requires that, in most circumstances, clients are notified prior to an adverse action, including suspending payments. As a consequence, the current process for administering absence from New Zealand provisions for NZS/VP and non-beneficiary clients results in an overpayment of their supplementary assistance for up to 10 days (over the notice period).
- 8 The client experience for the current process is illustrated below:

Greg's experience with notice period



Greg leaves NZ for a 3 month holiday to see his daughter



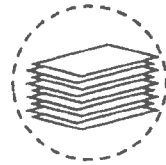
Greg has a great time on holiday



Greg explores London and Europe



Greg returns to NZ



Greg comes home to find letters at his home address saying that he has been away and now owes a \$30 debt and should contact MSD



Greg can't understand why MSD didn't stop his extra payments when they knew he was away and why they notified him at home if they knew wasn't there

- 9 The current process used for AS and TAS may not work well for WEP because a far broader group of NZS/VP clients will receive WEP and they are not used to engaging with MSD regularly. As WEP must continue to be paid during the notice period, the NZS/VP client will receive an overpayment of WEP which MSD must seek to recover under section 85 of the Social Security Act (SSA).

*MSD will take steps to limit potential negative consequences associated with WEP's provisions on absence from New Zealand*

- 10 MSD do not consider it appropriate to write-off the debt associated with overpayment of WEP, and instead will take practical steps to try and limit the amount of debt accumulated for the 2018 winter period. The steps will include encouraging, and making it easy for, NZS/VP clients to contact MSD prior to leaving the country for more than 28 days. This will enable WEP to be cancelled from their 29<sup>th</sup> day out of the country.
- 11 Due to the information match with NZ Customs, it is technically possible for MSD to stop the payment of the WEP at day 29 of an absence from New Zealand, and avoid

blindness; or caring for a person who requires full-time care and attention. This is a very small subgroup that is affected by the issue. Future references to "NZS/VP" on the apportionment issue, should be read to include this group too.

the debt creation, if there was a lawful exemption to the notification requirements under section 103 of the Privacy Act. This could be achieved through either;

11.1 The creation of an Approved Information Sharing Agreement (AISA) between MSD and NZ Customs (recommended), or

11.2 Through an amendment to the Privacy Act.

12 MSD recommends an AISA with NZ Customs is pursued as a priority, to be in effect for the winter period in 2019. This is because it:

12.1 Supports the broader objectives of the Office of the Privacy Commissioner to get government departments to transfer existing IMAs to AISAs

12.2 Will provide a robust framework for future information sharing with NZ Customs

12.3 Will go through a formal public consultation process with stakeholders on how NZ Customs and MSD share and use information, and

12.4 Will provide the legislative vehicle to enable us to prevent overpayment of entitlements to our clients when they are overseas.

13 However, there is currently an exception under section 103(1A) of the Privacy Act that enables MSD to suspend main benefits immediately based on a data match (i.e. without prior notification of an adverse action being taken). It appears to be a relatively straight-forward amendment to extend the exception to include the WEP (and, possibly, other forms of supplementary assistance).

14 The Office for the Privacy Commissioner have informally advised that they do not support exceptions under section 103(1A) of the Privacy Act as they are contrary to the principles of the Privacy Act. On this basis, MSD recommends pursuing the development of an AISA between MSD and NZ Customs.

15 This exemption would mean the clients would experience the following journey in future winter periods:

The Office of the Privacy Commissioner has not expressed a formal position on this, and so they are of the view that this comment reflects the Ministry of Social Development's interpretation of events.

Greg's experience without notice period



Greg leaves NZ for a 3 month holiday to see his daughter



Greg has a great time on holiday



Greg explores London and Europe



Greg returns to NZ

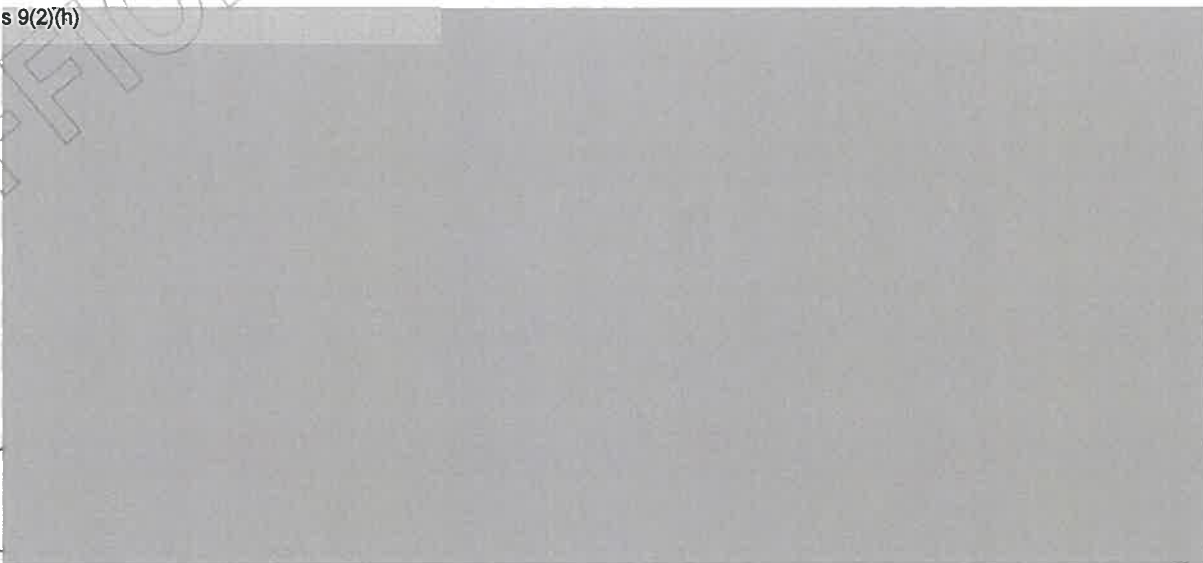


Greg finds a letter saying his Winter Energy Payment was stopped while he was out of the country and another saying his payment can be restarted on his return if he gives MSD a call



Greg gives MSD a call and requests his payment start again

s 9(2)(h)



## PART 2: PAYMENT OF WEP TO COUPLES

*AS and TAS for couples are currently paid differently for main beneficiaries and NZS/VP clients*

- 19 Currently, if AS and TAS<sup>2</sup> are paid to a couple they are apportioned (i.e. paid half each) between partners for most main benefit recipients<sup>3</sup> and all non-beneficiary recipients.
- 20 However, for NZS/VP clients who are couples and are receiving AS and TAS, those payments are not apportioned but paid in full to one member of the couple (the person who applies for the assistance).
- 21 This means that, if MSD implements WEP in accordance with existing system settings, WEP paid at the couple rate will be:
  - 21.1 Apportioned between partners for main beneficiaries (i.e. paid half each), and
  - 21.2 Paid in its entirety to one member of the couple for NZS/VP clients.
- 22 This issue only applies to supplementary assistance such as WEP, AS and TAS. NZS/VP payments are made to individuals in a couple. If they share a bank account, both payments will go into the same account. However, if they have separate bank accounts, their NZS or VP will go into these different accounts.
- 23 Of the nearly 1 million clients who will benefit from WEP this year, there are approximately 400,000 NZS/VP clients who are couples. Of those clients, approximately half are currently paid their NZS into the same account.

9(2)(h)



*MSD will implement WEP in accordance with existing system settings for 1 July 2018 and investigate system changes to enable apportionment for future winter periods.*

9(2)(g)(i) - Free and Frank



- 27 However, the apportionment of supplementary assistance is a core design element of the IT payment system and will be a significant change. MSD cannot make a change of this scale without significant delay in the delivery of WEP for all eligible clients well beyond 1 July 2018.

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<sup>2</sup> Disability Allowance is different as it is based solely on individual entitlement and is paid only to the eligible client.

<sup>3</sup> Excluding Supported Living Payment where the individuals qualify in their own right.



- 28 Given the importance of delivering WEP for all eligible clients from 1 July 2018, MSD proposes to:
- 28.1 Implement in accordance with existing system settings, i.e. not apportion WEP for NZS/VP clients who are couples, for 2018
  - 28.2 Ensure that it is possible for partners to switch who receives WEP, and
  - 28.3 Report back to you in with an update on the options to address this in August, and further advice on the expected cost and timing of the system fix by the end of 2018.
- 29 MSD has not been challenged on its failure to apportion supplementary assistance for NZS/VP clients to date. However, WEP will significantly expand the number of NZS/VP clients receiving supplementary assistance and, therefore, MSD cannot assume that this wider client group will not challenge the failure to apportion WEP.
- 30 If the proposed practice not to apportion the payment is questioned by a client, it is possible that clients will accept this practice if there is an undertaking to resolve it for future years.

### PART 3: SANCTIONS

*Drafting of the Families Package legislation means that sanctions will be applied to WEP differently in certain circumstances*

- 31 Clients can be sanctioned for failure to comply with obligations. The current sanctions regime provides three grades of sanctions, which differ depending on whether a client is in a relationship and/or has dependent children. For those in a relationship, the sanction only applies to the partner who does not meet their obligations.
- 32 Currently, for example, if clients are in a relationship and one partner has a sanction (such that they lose their main benefit and their half of the supplementary assistance) the other partner would keep their half of the supplementary assistance they were getting before.
- 33 A drafting omission means that this practice of stopping one partner's portion of supplementary assistance does not apply for WEP. For WEP, if one partner is not eligible for the WEP due to sanctions being imposed, their partner would qualify to get the full couple rate of WEP (i.e. 100 percent of the couple rate, rather than 50 percent).
- 34 This will only affect a small proportion of clients (around 500 per year), in particular circumstances.
- 35 Applying sanctions to the WEP differently from other assistance requires a manual processes to be undertaken, including the overriding of some automatic changes to the system. This increases the risk that they will not be implemented consistently.
- 36 Despite this operational risk, MSD recommends sanctions are applied to WEP in accordance with existing legislative provisions. This recommendation is made on the basis that the sanctions regime (including WEP) is expected to be considered through the overhaul of the welfare system. Furthermore, for clients in a relationship who receive a main benefit, WEP will be subject to fewer sanctions than other forms of supplementary assistance.

### **Recommended actions**

It is recommended that you:

- 1 **note** that preparation to implement the Winter Energy Payment (WEP) from 1 July is progressing well
- 2 **note** that Ministers agreed, on the advice of officials, that WEP be aligned with existing system settings to enable implementation from 1 July 2018

PART 1: Absence from New Zealand

- 3 **note**, due to provisions in the Privacy Act 1993, current practice for implementing absence from New Zealand requirements for Accommodation Supplement (AS) and Temporary Additional Support (TAS) results in an overpayment AS and TAS (during the required 10-day notification period) which becomes a debt on a client record that the Ministry of Social Development (MSD) must seek to recover<sup>4</sup>
- 4 **note** that, for NZS/VP clients, MSD must implement the WEP absence from New Zealand provisions consistently with AS and TAS, meaning that a significant number of client debts will be created
- 5 **note** MSD will take steps to limit potential debt creation associated with the implementation of the WEP's absence from New Zealand provisions by encouraging clients to contact us prior to their departure from New Zealand
- 6 **note** MSD do not consider an overpayment of WEP for up to 10 days (if a client is absent from New Zealand for more than 28 days) meets any of the exceptions to the duty to recover debt provided in the SSA
- 7 **agree**, EITHER:
- 7.1 to follow normal debt accrual and recovery processes for clients who are overpaid WEP as a consequence of being out of New Zealand for more than 28 days (recommended)
- OR
- 7.2 to pursue a debt write-off for clients who are overpaid WEP as a consequence of being out of New Zealand for more than 28 days (not recommended)
- 8 **note** it is possible to create an exception to the relevant Privacy Act 1993 requirements which mean client debts of up to 10 days of WEP are created, either through:
- 8.1 amendment to the Privacy Act 1993, or
- 8.2 creating of an Approved Information Sharing Agreement (AISA) between NZ Customs and MSD
- 9 **note** that, whilst a Privacy Amendment Bill is currently in the House, the Office of the Privacy Commissioner would likely oppose the changes required to remove the 10-day overpayment of WEP
- 10 **note** that the Office of the Privacy Commissioner are supportive of the creation of AISAs, and that departments will likely be obligated to create them within two years following the passing of the current Privacy Amendment Bill

AGREE / DISAGREE

AGREE / DISAGREE

The Office of the Privacy Commissioner queries the accuracy of the comment under recommendation 10. We are unaware of any discussion, policy or requirement that AISAs will likely need to be in place within two years of the passing of the Privacy Bill.

The Office of the Privacy Commissioner has not expressed a formal position on this, and so they are of the view that this comment reflects the Ministry of Social Development's interpretation of events.

<sup>4</sup> Social Security Act 1964, section 85.



11 **agree** that MSD undertake work for future years to stop the WEP payment at day 29 of an absence from New Zealand and avoid overpayment, EITHER by:

11.1 scoping the creation of an AISA between NZ Customs and MSD  
(recommended)

AGREE / DISAGREE

OR

11.2 seeking an amendment to the Privacy Act 1993 (not recommended)

AGREE / DISAGREE

12 **direct** MSD to report back to you in the middle of 2018 with a proposed plan to complete an AISA between NZ Customs and MSD

YES / NO

9(2)(h)

9(2)(f)(iv) - Active Consideration

AGREE / DISAGREE

#### PART 2: PAYMENT OF WEP TO COUPLES

16 **note** that AS and TAS are currently paid differently for main beneficiaries and NZS/VP clients who are couples

9(2)(h)

18 **note** that the way supplementary assistance is apportioned in the payment system is a central component of the system

19 **note** MSD cannot make a change of this scale without a significant delay to the delivery of WEP for all eligible clients well beyond 1 July 2018

20 **note** that WEP will significantly increase the number of NZS/VP clients impacted by the failure to apportion supplementary assistance

21 **note** MSD will implement WEP in accordance with existing system settings for 1 July 2018

22 **agree** that MSD investigates system changes to enable apportionment of WEP for couples for future winter periods

AGREE / DISAGREE

23 **agree** that MSD reports to you in August 2018 with an update on the options to address this issue, and provides further advice on the expected cost and timing of the system fix by the end of 2018

AGREE /  DISAGREE

PART 3: SANCTIONS

9(2)(h)

25 **note** this drafting oversight will only affect a small proportion of clients (around 500 per year) in particular circumstances.

26 **note** WEP could be sanctioned consistently with other supplementary assistance if there is an amendment to the Social Security Act, but MSD considers it a better use of resources to include consideration of the sanctioning of WEP in any future work on sanctions through the overhaul of the welfare system

27 **note** that MSD will apply sanctions to WEP consistent with the Families Package Legislation for the 2018 winter period

28 **agree** that officials include information on WEP as part of any future advice to Welfare Expert Advisory Group on the sanctions regime

AGREE /  DISAGREE


29 **note** that this report is on the agenda for MSD's agency meeting with you on Monday 16 April

30 **agree** to forward a copy of this report to the Minister of Finance for his information, and

AGREE /  DISAGREE

31 **agree** to forward a copy of this report to the Minister for Seniors for her information.

AGREE /  DISAGREE

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

13/04/2018

Date

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

15/04/2018

Date

## Ministers agreed the WEP should be administered consistently with existing supplementary assistance

- 37 WEP is a new payment, introduced through the Families Package legislation, which assists main beneficiaries and older New Zealanders to heat their homes over winter by providing additional financial assistance over the winter months. It is scheduled to be from 1 July to 30 September in 2018, and from 1 May to 2 October in future years.
- 38 A key component of WEP design was that it should fit with existing systems and processes (provided that such an approach would not negatively impact on WEP's intent), and that AS and TAS were to be used as the starting point for developing the WEP detailed design [REP/17/1079 refers].
- 39 Work to implement WEP for 1 July 2018 is progressing well. MSD is currently working through the details required to implement WEP and has identified that existing system settings have unusual consequences in relation to:
- 39.1 The requirement to be not be out of New Zealand for more than 28 days to maintain eligibility to WEP (PART 1), and
- 39.2 The way MSD pays supplementary assistance for couples receiving NZ Superannuation (NZS) or a Veteran's Pension (VP), or couples where both partners receive Supported Living Payment (SLP) in their own right<sup>5</sup> (PART 2).
- 40 MSD has also identified a drafting oversight in the Families Package (Income Tax and Benefits) Act 2017 (Families Package legislation), which means that WEP will be sanctioned slightly differently than AS and TAS in certain circumstances (PART 3).
- 41 In considering each of these issues, and our recommended course of action, MSD has kept the impact on clients at the centre of our analysis. This impact is then considered in the context of the relevant legislative provisions, what can be achieved before 1 July 2018, and what changes could be sought to improve client experience for future years.

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<sup>5</sup> To be eligible for Supported Living Payment a client must be both permanently and severely restricted in their capacity for work because of a health condition, injury or disability or total blindness; or caring for a person who requires full-time care and attention. This is a very small subgroup that is affected by the issue. Future references to "NZS/VP" on the apportionment issue, should be read to include this group too.

## PART 1: ABSENCE FROM NEW ZEALAND

### Current practice for administering absence from New Zealand requirements may not work well for all recipients of WEP

- 42 MSD relies on clients advising of overseas absence to ensure their benefit is paid correctly. NZS/VP clients currently only need to notify MSD if they receive supplementary assistance or are overseas for more than 26 weeks. The rules around how long assistance may be paid after a client leaves the country are different depending on the type of assistance. Most supplementary assistance such as DA, AS and TAS can only be paid for a maximum of 4 weeks (28 days).
- 43 MSD has an Information Matching Agreement (IMA) with NZ Customs which helps MSD to administer certain provisions under the SSA. It means that if clients do not tell us about their overseas travel, MSD can identify any clients who leave the country and when they return. The IMA with NZ Customs must be administered in accordance with the Privacy Act 1993, which requires that, in most circumstances, clients have to be given notice prior to an adverse action being taken as a consequence of an IMA. Adverse action includes MSD suspending payments.
- 44 There is an exception under section 103(1A) of the Privacy Act which enables MSD to suspend main benefits immediately (i.e. without prior notification of an adverse action being taken). There is no such exemption for supplementary assistance (which includes WEP).
- 45 This means that if NZS/VP clients, who are receiving supplementary assistance such as DA, AS or TAS, do not contact MSD when they leave the country, MSD will notify those clients at the end of the 4-week period and then allow 10 days before suspending payments. MSD will then establish a debt for those overpayments.

#### Paul's experience with current practice

Paul is a retired Hospital orderly. He lives in rental accommodation and receives a single rate of Superannuation which does not meet all of his living costs, so he also receives Accommodation Supplement. His daughter has paid for him to visit so that he can attend her wedding in London. In the excitement, Paul forgot to advise MSD of his plans to travel...



Paul leaves NZ for a 2 month holiday to be at his daughter's wedding



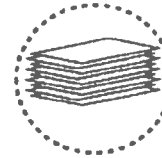
Paul has a great time on holiday



Paul explores London and Europe



Paul returns to NZ



Paul finds letters saying his AS was cancelled while he was out of New Zealand, that he now owes a debt and should contact MSD



Paul gives MSD a call to discuss repayment of the debt and to reapply for AS

- 46 Our current practice is to encourage NZS/VP clients who are receiving DA, AS or TAS to let us know if they are out of the country for more than 28 days so we can stop their DA, AS and TAS from the correct date and therefore avoid overpayment and resulting debt (MSD can do this because we are using information gained directly from the client). In practice this doesn't currently affect many NZS/VP clients because only a smaller subset of these clients receive DA, AS and TAS<sup>6</sup>.
- 47 However, the introduction of WEP will mean that approximately 750,000 NZS/VP clients will be eligible to receive WEP.

<sup>6</sup> Approximately:

40,000 NZS/VP clients receive AS  
129,000 NZS/VP clients receive DA  
6,000 NZS/VP clients receive TAS

## Applying current practice to WEP will potentially significantly increase the number of debts established for superannuitants

- 48 The introduction of WEP will significantly increase the number of NZS/VP clients receiving supplementary assistance, and many of these additional clients will not be used to engaging with MSD about their travel plans. The Office of the Privacy Commissioner have confirmed that, if MSD is using a data match to identify which WEP recipients are out New Zealand for more than 28 days, MSD must give recipients of WEP 10 days' notice prior to cancelling their payments.
- 49 MSD modelling suggests that approximately 20,000 NZS/VP clients will be outside of New Zealand for more than 28 days each winter period. All of these clients will need to be notified prior to "adverse action", notified when action is taken, and then contacted to arrange repayment of the debt.

### For NZS/VP clients only

#### Greg's experience with notice period



Greg leaves NZ for a 3 month holiday to see his daughter



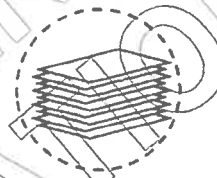
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Greg comes home to find letters at his home address saying that he has been away and now owes a \$30 debt and should contact MSD



Greg can't understand why MSD didn't stop his extra payments when they knew he was away and why they notified him at home if they knew wasn't there

9(2)(h)



### **Instead of writing-off the debt, we recommend MSD take practical steps to prevent overpayment**

- 53 This class of debt is not particularly unique. In fact, MSD currently accrues AS, TAS and DA debts for NZS/VP and non-beneficiary clients due to the exactly the same inaction by clients (i.e. not advising MSD of their travel out of New Zealand).
- 54 It would be unclear from a policy perspective why it would be appropriate to write-off this debt, given the clients who would benefit from such treatment are the higher-income NZS/VP clients who have the means to pay for extended periods overseas. There is a risk that the creation of the 'class of debt' in this scenario may raise expectations that Ministers might use section 86(1A)(d) of the SSA to write off similar debts in the future. On this basis, MSD does not recommend using section 86(1A)(d) to establish a class of debt to be written off for public finance purposes.
- 55 Instead, MSD will take steps to try and limit the number of debts incurred by NZS/VP clients. For example, MSD will make it clear in WEP communications that all clients should tell us about any travel out of New Zealand for more than 28 days to avoid any overpayment of WEP. MSD will also ensure it is easy for clients to tell us if they are going overseas for longer than 28 days via an online form and 0800 numbers.

### **There are options to improve administration of the "absence from New Zealand" provisions in the future**

- 56 As set out above, MSD expects approximately 20,000 clients to be at risk of receiving an overpayment of WEP each winter. These clients are likely to become confused and frustrated with the current process because:
- 56.1 MSD has reliable information which shows the client is no longer eligible for the WEP
- 56.2 MSD serves notice regarding the data-match, to an address it knows the client is unlikely to be at, to advise the client to take action or their WEP will stop
- 56.3 MSD then keeps paying WEP (despite knowing they are out of the country)
- 56.4 10 days later, MSD serves another notice to an address the person is away from, to advise the WEP has been cancelled and that there is now a debt on their record, and
- 56.5 Most NZS/VP clients will only need to notify us of their absence over the winter period (as they do not receive any supplementary support from us outside of the winter months).

- 57 Below is an example of what automatically stopping WEP for NZS/VP clients who are outside of New Zealand for more than 28 days, at day 29, would look like.

Greg's experience without notice period



Greg leaves NZ for a 3 month holiday to see his daughter



Greg has a great time on holiday



Greg explores London and Europe



Greg returns to NZ



Greg finds a letter saying his Winter Energy Payment was stopped while he was out of the country and another saying his payment can be restarted on his return if he gives MSD a call.



Greg gives MSD a call and requests his payment start again

- 58 Automatically stopping WEP for clients who are outside of New Zealand for more than 28 days will also have real administrative benefits for MSD which will likely reduce the ongoing implementation costs associated with WEP. This is because all of the steps outlined the process above require a manual intervention by MSD staff.

- 59 It is possible for MSD to stop the payment of the WEP at day 29 of an absence from New Zealand, and avoid the creation of a debt on a client record, if there is a lawful exemption to the notification requirements under section 103 of the Privacy Act. This could be achieved through either:

- 59.1 The creation of an Approved Information Sharing Agreement (AISA) between MSD and NZ Customs, or
- 59.2 Through an amendment to the Privacy Act.

*Officials recommend you support the creation of an AISA between NZ Customs and MSD to enable payment of WEP to stop at day 29 of an absence from New Zealand*

- 60 An AISA is an enabling tool that allows government agencies to provide efficient and effective public services. An AISA can do this by allowing agencies to collaborate and share information without intruding on individuals' rights or exposing agencies to legal risk.
- 61 An AISA would allow MSD to stop paying WEP when a person has been overseas for more than 28 days because the AISA is able to override specific provisions in the Privacy Act. An AISA would be approved by Order of Council and included in schedule 2A of the Privacy Act.
- 62 MSD recommends an AISA with NZ Customs is pursued as a priority, to be in effect for the winter period in 2019. This is because it:
- 62.1 Supports the broader objectives of the Office of the Privacy Commissioner to get government departments to sign up to AISAs
  - 62.2 Will provide a robust framework for future information sharing with NZ Customs
  - 62.3 Will go through a formal public consultation process with stakeholders on how NZ Customs and MSD share and utilise information, and
  - 62.4 Will provide the legislative vehicle to enable us to prevent overpayment of entitlements to our clients when they are overseas.
- 63 An AISA was first proposed with NZ Customs in 2016 and it was agreed to pursue this as a project led by MSD. Initial work on the AISA was completed, but was halted in first few months of 2017 due a number of competing priorities at both MSD and NZ Customs. If you agree, MSD hopes to leverage the initial work to reduce the time it takes to deliver an AISA between MSD and NZ Customs.
- 64 If you wish to avoid the creation of any client debt in the administration of WEP's absence from New Zealand requirements through the creation of an AISA, we will

report back to you in mid-2018 on with an update on the expected scope and timing of this work.

*You may wish instead to seek a legislative amendment to extend the existing exception to the notification requirements under the Privacy Act*

65 There is currently an exception under section 103(1A) of the Privacy Act that enables MSD to suspend main benefits immediately based on a data match (i.e. without prior notification of an adverse action being taken). It appears to be a relatively straight-forward amendment to extend the exception to include the WEP (and, possibly, other forms of supplementary assistance).

66 However, the Office for the Privacy Commissioner (OPC) have informally advised that they do not support exceptions under section 103(1A) of the Privacy Act as they are contrary to the principles of the Privacy Act. While MSD consider there are strong, client-centred arguments for extending the existing Privacy Act exception to include WEP (and possibly other forms of supplementary assistance), pursuing the exception through an AISA is better aligned with OPC's objectives and the Privacy Amendment Bill.

67 If you wanted to pursue the amendment, you could seek to include WEP in the current exception under section 103(1A) through the current Privacy Amendment Bill. The Privacy Amendment Bill had its first reading on 11 April 2018, and may not pass before 1 May 2019.

68 Alternatively, it may be possible to achieve amendment to the Privacy Act in time for 1 July 2018 if it was passed under urgency. However, this would require the Minister of Justice to agree to the amendment to the Privacy Act (as the responsible Minister) and the Leader of the House would need to support the motion to seek to pass legislation under urgency. MSD considers this will likely be difficult to achieve when there is already a Privacy Amendment Bill in the House. Furthermore, as MSD is currently finalising its' business process for WEP, there may not be enough time to fully implement any associated practice changes regarding the notification of adverse action before 1 July 2018.

9(2)(h)

The Office of the Privacy Commissioner has not expressed a formal position on this, and so they are of the view that this comment reflects the Ministry of Social Development's interpretation of events.

## PART 2: PAYMENT OF WEP TO COUPLES

### AS and TAS are currently paid differently for main beneficiaries and NZS/VP clients who are couples

- 73 Currently, if AS and TAS<sup>10</sup> are paid to a couple they are apportioned (i.e. paid half each) between partners for most main benefit recipients<sup>11</sup> and all non-beneficiary recipients.
- 74 However, for NZS/VP clients who are couples and are receiving AS and TAS, those payments are not apportioned but paid in full to one member of the couple (the person who applies for the assistance).
- 75 This means that, if MSD implements WEP in accordance with existing system settings, WEP paid at the couple rate will be:
- 75.1 Apportioned between partners for main beneficiaries (i.e. paid half each), and
  - 75.2 Paid in its entirety to one member of the couple for NZS/VP clients.
- 76 This issue only applies to supplementary assistance such as WEP, AS and TAS. NZS/VP payments are made to individuals in a couple. If they share a bank account, both payments will go into the same account. However, if they have separate bank accounts, their NZS or VP will go into these different accounts.
- 77 Of the nearly 1 million clients who will benefit from WEP this year, there are approximately 400,000 NZS/VP clients who are couples. Of those clients, approximately half are currently paid their NZS into the same account.

9(2)(h)



<sup>10</sup> Disability Allowance is different as it is based solely on individual entitlement and is paid only to the eligible client.

<sup>11</sup> Excluding Supported Living Payment where the individuals qualify in their own right.

*The way supplementary assistance is apportioned in our payment system is a central component of that system and would be extremely complex to change*

83 The payment system has never apportioned supplementary payments for NZS/VP clients and there has never been a previous request for it to operate in this way. The apportionment of supplementary assistance is a core design element of the IT payment system and will be a significant change. MSD cannot make a change of this scale without significant delay in the delivery of WEP for all of the eligible clients well beyond 1 July 2018.

84 As an alternative, MSD has also investigated whether it is possible to apportion WEP (and other supplementary) if the affected clients requested it (on an ad hoc basis) by using manual interventions. MSD could not identify an appropriate or reliable way to achieve this.

*Due to time constraints, and the importance of MSD implementing WEP for the entire population from 1 July 2018, MSD will implement WEP in accordance with existing system settings ...*

85 For 1 July 2018, MSD will pay WEP in accordance with existing system settings as this is the only way to reliably deliver for our clients from 1 July 2018.

9(2)(g)(i) - Free and Frank



*...and investigate a payment system change to enable apportionment for future winter periods.*

87 MSD considers that having a firm commitment to investigate the IT system issue which currently prevents apportionment of supplementary assistance for NZS/VP clients<sup>12</sup> will enable us to provide a clear message to clients that we intend to remedy this issue for future years.

88 As the payment system changes required to appropriately apportion supplementary payments are extensive, MSD must undertake full scoping and design to develop an accurate cost and timeframe for work. Given the overlap with the business process and IT system work underway to deliver WEP, MSD will undertake the scoping work following delivery of WEP on 1 July. On this basis, we intend to update you on the options to address the apportionment issue in August, and will provide further advice on the expected cost and timing of the system fix by the end of 2018.

89 MSD has not been challenged on its' failure to apportion supplementary assistance for NZS/VP clients to date. However, WEP will significantly expand the number of NZS/VP clients receiving supplementary assistance and, therefore, MSD cannot assume that this wider client group will not challenge the failure to apportion WEP.

90 If our failure to apportion WEP is questioned, it is possible that clients will accept this practice if there is an active investigation into how this could be resolved for future years. MSD will prepare communications material to ensure staff and clients have an accurate understanding of this issue.



9(2)(h)

### **PART 3: SANCTIONS**

#### **Current practice is to apply the sanction to supplementary assistance, even if it is paid at a couple rate**

- 94 Clients can be sanctioned for failure to comply with obligations. The current sanctions regime provides three grades of sanctions, which differ depending on whether a client is in a relationship and/or has dependent children. Only grade two and three sanctions affect supplementary assistance. For those in a relationship, the sanction only applies to the partner who does not meet their obligations.
- 95 Ministers agreed that WEP would be designed to fit within the current sanction processes to keep the settings consistent for clients and staff, and link in with the wider sanctions policy.
- 96 Currently, for example, if clients are in a relationship and one partner has a sanction (such that they lose their main benefit and their half of the supplementary assistance) the other partner would keep their half of the supplementary assistance they were getting before.

9(2)(h)

## **WEP could be sanctioned consistently with other supplementary assistance if there is an amendment to the Social Security Act**

- 101 Given that the original Ministerial decision was to apply sanctions to the WEP consistently with existing system settings, you may wish to seek an amendment to the SSA to enable this to be achieved. A legislative amendment would provide greater consistency and clarity in the application of sanctions to supplementary assistance.
- 102 However, given your intention for the sanctions regime to be considered through the overhaul of the welfare system, MSD considers it is likely a better use of resources to consider how sanctions will apply to WEP as part of this broader work. This is supported by the fact that, for clients in a relationship, WEP will be subject to fewer sanctions than other forms supplementary assistance.
- 103 MSD recommends sanctions are applied to WEP in accordance with existing legislative provisions, and that the application of sanctions to WEP is considered as part of any work on the sanctions regime through the overhaul of the welfare system.

### **Next steps**

- 104 MSD will continue to work to implement WEP from 1 July 2018. A further implementation report will be provided prior to the commencement of WEP to ensure you are fully informed of how clients will experience WEP this year.

#### **32 If you agree:**

- 32.1 MSD will report to you in mid-2018 with a proposed plan to establish an AISA between NZ Customs and MSD
- 32.2 MSD will report to you in August 2018 with an update on the options to address the apportionment issue, and will provide advice on the expected cost and timing of the system fix by the end of 2018, and
- 32.3 MSD will include information on WEP as part of any future advice to the Welfare Expert Advisory Group on the sanctions regime.

File ref: REP/18/4/554

Author: 9(2)(a) Senior Policy Analyst, Employment and Income Support Policy

Responsible manager: 9(2)(a) Policy Manager, Income Support Policy



# Report

**Date:** 21 June 2018

**Security Level:** IN CONFIDENCE

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

*This report contains legal advice and may be legally privileged. It should not be disclosed on an information request without further legal advice.*

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## Winter Energy Payment - Implementation Update

### Purpose of the report

- 1 This report updates you on the implementation of the Winter Energy Payment (WEP) ahead of its launch on 1 July 2018.
- 2 This report also advises you of three matters which may require your consideration in the future:
  - WEP eligibility for clients who are paying the legally required maximum for their long-term care, but still receive some "top-up" funding from District Health Boards
  - WEP's interaction with the Rates Rebate Scheme
  - WEP's interaction with the Social Rehabilitation Assistance programme.

### Executive summary

- 3 The Ministry of Social Development (MSD) is on track to implement WEP from 1 July 2018. There is a robust communications strategy in place to ensure clients understand WEP and how it will work for them.
- 4 However, MSD has recently identified one legislative issue and two interactions that you may wish to receive further advice on in the future. MSD has developed a pathway forward for 1 July 2018 for each of these issues.

#### *Long-term residential care and WEP*

- 5 During the process of developing the Families Package, Cabinet considered how each category of older people in long-term residential care should be treated for the purposes of WEP eligibility. This was followed by the drafting and passing of the Families Package (Income Tax and Benefits) Act 2017. The policy intent and legislative provisions are summarised on the next page.

	Policy intent as agreed by Cabinet	Legislative provisions	Comment
Person qualifies for Residential Care Subsidy (RCS)	Not eligible to receive WEP	Not eligible to receive WEP	Policy intent and legislative provisions align. Recipients of RCS will not receive WEP.
Person whose total residential care costs are entirely privately funded	Eligible to receive WEP	Eligible to receive WEP	Policy intent and legislative provisions align. Clients whose long-term residential care is entirely privately funded will receive WEP.
Person (not eligible for RCS) pays the "maximum contribution" for their residential care and receives top-up government funding	Eligible to receive WEP	Not eligible to receive WEP	Policy intent and legislative provisions do not align. See discussion below for intended action

6 MSD intends to pay WEP to those clients who pay the "maximum contribution" to the cost of their long-term residential care (up to \$1,100 per week in some regions) and do not qualify for Residential Care Subsidy (RCS) because:

- it would not be operationally feasible to identify these clients in order to stop WEP from being paid
- this approach is in line with the policy intent as agreed by Cabinet
- paying WEP to these clients will make people better-off

7 However, MSD recommends you pursue a legislative amendment at the next available opportunity to provide the legislative authority for WEP to be paid to clients who are in long-term residential care and do not qualify for RCS.

#### *Rates Rebate Scheme and WEP*

8 The Rates Rebate Scheme provides a subsidy to low income home-owners and ratepayers on the cost of their local authority rates. The Minister for Local Government is responsible for the Rates Rebate Scheme and it is administered by local authorities.

9 WEP has not been excluded as income for assessing applicants' entitlements under the Rates Rebate Scheme. This may result in a reduction of Rates Rebates Scheme entitlements by approximately \$85 per year for some clients, but these clients will be better-off overall because of the WEP they will receive (\$450 per year for single people and \$700 per year for couples). This possible impact on entitlement to a rates rebate will not be realised until after April 2019, as the income assessment is based on the income from the previous tax year.

10 If you wish to investigate interactions of the WEP with the Rates Rebate Scheme, officials recommend you write to the Minister for Local Government to raise this issue with her.

#### *Social Rehabilitation Assistance and WEP*

11 The Social Rehabilitation Assistance Welfare Programme was established in 2003 as an interim measure to meet the cost of MSD's clients participating in residential social

rehabilitation programmes. Currently, approximately 150 people receive this assistance at any time.

- 12 Officials have had insufficient time to complete the detailed analysis required to determine the best way for WEP and Social Rehabilitation Assistance to interact. Clients who receive Social Rehabilitation Assistance are particularly vulnerable and any decision affecting them should not be rushed.
- 13 Furthermore, the Social Rehabilitation Assistance Welfare Programme was established as an interim measure in 2003. The subsequent development of programmes such as emergency and transitional housing, which also respond to the needs of similar client groups, means that detailed analysis of this area may result in broader recommendations rather than just the interaction with WEP.
- 14 As current legislative settings mean clients in receipt of Social Rehabilitation Assistance are eligible to receive WEP, officials recommend that (for clients in receipt of Social Rehabilitation Assistance) WEP is implemented in accordance with existing legislative settings for 2018.
- 15 MSD will undertake further work on the Social Rehabilitation Assistance Programme (including how it interacts with WEP) in the future, to enable fulsome analysis of the best way for these two programmes to interact.

### Recommended actions

It is recommended that you:

- 1 **note** we have previously reported to you on the WEP implementation and undertook to provide an update before 1 July [REP/18/4/554 refers]
- 2 **note** MSD are prepared to implement WEP from 1 July 2018, with IT systems complete and a robust communications strategy in place
- 3 **note** in the final stages of preparing to implement WEP, MSD has become aware of three issues you should be aware of prior to 1 July when WEP is implemented

#### *WEP and long-term residential care*

- 4 **note** that Cabinet agreed that older clients who made significant contributions to the cost of their long-term residential care would be eligible to receive WEP [CAB-17-MIN-0516 refers]
- 5 **note** Cabinet's agreement, described at recommendation 4 above, was intended to include older people who pay the "maximum contribution" to the cost of their residential care and have their care costs "topped-up" by government funding, but the Families Package legislation does not reflect this intent
- 6 **note** MSD intends to pay WEP to those people who make significant contributions to the cost of their long-term residential care because:
  - 6.1 it would not be operationally feasible to identify these clients in order to stop WEP from being paid
  - 6.2 paying WEP to these clients will make people better-off
  - 6.3 this approach is in line with the policy intent as agreed by Cabinet
- 7 **agree** to pursue a legislative amendment at the next available opportunity to provide clear legislative authority for WEP to be paid to older clients who do not qualify for RCS and who make significant contributions to the cost of the long-term residential care, provided that they meet the other WEP eligibility criteria

**AGREE / DISAGREE**

#### *WEP and the Rates Rebates Scheme*

- 8 **note** the Rates Rebate Scheme provides a subsidy to low income home-owners and ratepayers on the cost of their local authority rates



- 9 **note** WEP has not been excluded as income for assessing applicants' entitlements under the Rates Rebate Scheme, but this will not have an impact until the 2019/20 financial year
- 10 **agree** to write to the Minister for Local Government to raise the interaction of WEP with the Rates Rebate Scheme with her

**AGREE / DISAGREE**

- 11 **note** that officials will work with your office to prepare a draft letter to the Minister for Local Government, should you agree to recommendation 10 above

*WEP and Social Rehabilitation Assistance*

- 12 **note** the Social Rehabilitation Assistance Welfare Programme was established in 2003 as an interim measure to meet the cost of MSD's clients participating in residential social rehabilitation programmes and currently approximately 150 people receive this assistance at any time
- 13 **note** that existing legislative settings mean that WEP is payable to those in receipt of this assistance.
- 14 **note** MSD will implement WEP for clients in receipt of Social Rehabilitation Assistance in accordance with existing legislative provisions
- 15 **note** MSD will consider the interaction between WEP and the Social Rehabilitation Assistance programme in the future, and that this may result in MSD considering, more broadly, how Social Rehabilitation Assistance fits with other existing programmes
- 16 **agree** to forward a copy of this report to the Minister of Finance for his information.

**AGREE / DISAGREE**



Fiona Carter-Giddings  
General Manager  
Employment and Income Support Policy

21/06/2018

Date



Hon Carmel Sepuloni  
Minister for Social Development

30/6/18

Date

## Background

- 16 Since the Families Package (Income Tax and Benefits) Act 2017 was passed in December 2017, MSD has been preparing to implement WEP which will benefit approximately one million New Zealanders each winter.
- 17 MSD reported to you in April 2018 to advise you of some difficulties associated with implementation of WEP for 1 July 2018 and a proposed pathway forward [REP/18/4/554 refers]. The April report advised that another update would be provided to you prior to 1 July, to ensure you were fully informed of how clients will experience WEP this year.
- 18 In May 2018, MSD provided a report to ensure you had an accurate understanding of how WEP will interact with overseas state pensions [REP/18/5/690 refers].

## MSD is on track to implement WEP from 1 July 2018

- 19 MSD has now completed all IT systems, communications material, operational policy and business processes required to implement WEP from 1 July. MSD is currently conducting training for front-line staff. Work and Income has contacted New Zealand Superannuitants (NZS), Veteran's Pensioners (VP), and working age clients we have an email address for about WEP to ensure they understand that:
  - WEP will commence from 1 July 2018
  - they don't have to do anything to access it
  - it will stop from 30 September (final day of eligibility is 29 September)
  - for Seniors, if they intend to travel outside of New Zealand for more than 28 days in a row they should contact Work and Income to ensure they are not overpaid their WEP entitlements.
- 20 All clients will be contacted again when WEP has been granted to advise how much they will receive and key terms and conditions associated with the payment. Letters to NZS and VP clients also inform clients they should advise MSD if they travel out of New Zealand for more than 28 days to avoid an overpayment of WEP.
- 21 Information is also being provided to stakeholders so they can keep their members informed:
  - Each edition of the SuperSeniors newsletter includes information about WEP.
  - An update was sent to stakeholders in early June about WEP and other 1 July changes. A further update will be sent in late June.
  - Winter Energy Brochures have been distributed through Citizens Advice, Grey Power and MSD service centres and regional offices.

### *Clients will receive WEP alongside their ordinary payments from July 2018*

- 22 WEP will be paid to all clients in receipt of either a main benefit or NZS/VP alongside their regular benefit or pension payments. This means weekly payments for those receiving a benefit, or fortnightly payments for people receiving NZS /VP.
- 23 The first WEP payments for 2018 will be:
  - week beginning 2 July, covering 1 day of WEP (Sunday, 1 July) for main benefits (paid weekly on one of Tuesday, Wednesday or Thursday)
  - payment made on 10 July covering 10 days of WEP for NZS/VP (paid fortnightly arrears payments on Tuesdays).

### *Clients will be reminded prior to the end of the winter period that WEP will be stopping soon*

- 24 Work and Income will write to clients in late August to remind them that WEP will be stopping from 30 September and to invite clients to contact Work and Income if they have concerns or questions.

- 25 Work and Income will also write to clients once WEP stops and again, invite clients to contact us if they are concerned about meeting their costs or have any questions.

*While MSD is on track for 1 July, there are three interactions you should be aware of*

- 26 MSD has recently exposed one legislative issue and has also identified two interactions that you should be aware of ahead of 1 July 2018. MSD has identified a pathway forward for 1 July 2018 for each of these issues, but there may be additional work you wish to be undertaken ahead of future winter periods.

### **WEP legislation and long-term residential care**

*Cabinet made decisions on how WEP and long-term residential care should interact and legislation has been enacted*

- 27 There are three main categories of older people in long-term residential care:
- People who qualify for subsidised care through the Residential Care Subsidy (RCS)
  - People whose long-term residential care is entirely privately funded
  - People who pay the 'maximum contribution' amount for their care (this is a very high amount - around \$1,100 a week in some regions) and a 'funder'/District Health Board is meeting some additional care costs over and above that maximum, as per section 140 of the Social Security Act 1964.
- 28 During the process of developing the Families Package, Cabinet considered how each category of people in long-term residential care should be treated for the purposes of WEP eligibility. This was followed by the drafting and passing of the Families Package (Income Tax and Benefits) Act 2017. The policy intent and legislative provisions are summarised below.

	<b>Policy intent as agreed by Cabinet</b>	<b>Legislative provisions</b>	<b>Comment</b>
	[CAB-17-MIN-0516 refers]		
<b>Person qualifies for RCS</b>	Not eligible to receive WEP <i>because the cost of their care is already being met by the state.</i>	Not eligible to receive WEP	Policy intent and legislative provisions align. Recipients of RCS <b>will not receive WEP.</b>
<b>Person whose total residential care costs are privately funded</b>	Eligible to receive WEP <i>because they are personally meeting the cost of their care, and residing in residential care should not remove their eligibility for WEP</i>	Eligible to receive WEP	Policy intent and legislative provisions align. Clients whose long-term residential care is all privately funded <b>will receive WEP.</b>
<b>Person (not eligible for RCS) pays the "maximum contribution" for their residential care and receives top-up government funding</b>	Eligible to receive WEP <i>because they are personally paying a significant amount towards the cost of their care, saving the state significant amounts of money.</i>	Not eligible to receive WEP	Policy intent and legislative provisions do not align.  <b>Please refer to discussion below.</b>

*Clients who pay the maximum contribution for their residential care, but receive a top-up of government funding were intended to receive WEP*

- 29 There is a category of people (numbering approximately 10,000, who generally have an age-related condition) who do not qualify for RCS and pay the 'maximum contribution' amount for their care (this is a very high amount – set at around \$1,100 a week in some regions). A 'funder'/District Health Board may be meeting some additional care costs over and above that maximum, as per section 140 of the Social Security Act 1964. The policy intent was that if people were making such a significant contribution to their own care (and do not qualify for RCS) they should still be able to receive WEP [para 33, REP/17/11/1079 refers].
- 30 Furthermore, MSD does not think it is operationally feasible to exclude this group from receiving WEP, as MSD would not be able to identify who they are.

s 9(2)(h)



#### *Implications of legal advice*

- 33 MSD intends to implement the long-term residential care provisions in the Families Package (Income Tax and Benefits) Act 2017 in accordance with their policy intent. This will mean that clients:
- in receipt of RCS will not receive WEP
  - who contribute the maximum contribution to the cost of their care, but may benefit from a "top-up" of funding under the Health and Disability Act 2000, will receive WEP.
- 34 In relation to the approach set out above, the policy intent was that these people would be able to receive WEP as they are making a significant contribution to the costs of their care, saving the state significant amounts of money. Furthermore, it is not possible to identify these clients to prevent payment and paying WEP to these clients is unlikely to be challenged. It is on this basis that MSD intends to pay WEP to all clients who are in long-term residential care and do not qualify for RCS.

*MSD recommends you pursue a legislative amendment to correct this drafting error*

- 35 MSD recommends you pursue a legislative amendment at the next available opportunity to clarify that WEP is payable to older clients who are in long-term residential care and do not qualify for RCS (and pay the "maximum contribution" amount for their care). Officials are scheduled to report to you on a possible vehicle for amendments to the Social Security Act in the coming month.

#### **Rates Rebate Scheme**

- 36 The Rates Rebate Scheme provides a subsidy to low income home-owners and ratepayers on the cost of their local authority rates. The Rates Rebate Scheme has a broad definition of what should be considered as income when assessing eligibility for a rates rebate, and exceptions must be clearly identified in the Rates Rebate Act 1973. The Minister for Local Government is responsible for the Rates Rebate Scheme and it is administered by local authorities.

*WEP may result in the reduction of Rates Rebate Scheme entitlements for some people*

- 37 In designing WEP, Ministers have been careful to ensure that receiving WEP would not result in a reduction of other types of financial assistance provided by MSD. This was achieved by excluding WEP from being considered as income for Income Related Rent, Accommodation Supplement, Childcare Assistance and Temporary Additional Support. This has been done to ensure that WEP genuinely increases incomes over the winter period, to support people to heat their homes over winter.
- 38 The Rates Rebate Act 1973 defines what should be treated as income for calculating entitlements to a rates rebate. Most payments provided under the Social Security Act 1964 are treated as income, with a few specific exceptions.
- 39 WEP has not been excluded as income for assessing applicants' entitlements under the Rates Rebate Scheme. This may result in a reduction of Rates Rebates Scheme entitlements by approximately \$85 per year for some clients, but these clients will be better-off overall because of the WEP they will receive (\$450 per year for single people and \$700 per year for couples). This possible impact on entitlement to a rates rebate will not be realised until after April 2019, as the income assessment is based on the income from the previous tax year.

*You may wish to investigate the interaction between the Rates Rebate Scheme and WEP and the Families Package further*

- 40 You may wish for the interaction between the Rates Rebate Scheme and WEP to be investigated further. However, it is important to note that the Rates Rebate Scheme is administered by local authorities and is the responsibility of the Minister for Local Government. Furthermore, the Local Government Regulatory Systems Bill [CAB-16-MIN-0338 refers] is intended to make some minor amendments to the Rates Rebate Act 1973 and is currently in the House.
- 41 If you wish to investigate the interaction of WEP with the Rates Rebate Scheme, officials recommend you write to the Minister for Local Government to raise this issue with her.

## **WEP and Social Rehabilitation Assistance**

*Social Rehabilitation Assistance meets the costs of residential social rehabilitation programmes*

- 42 Social Rehabilitation Assistance is a Ministerial Welfare Programme which provides financial assistance to meet the costs of individuals being resident in social rehabilitation programmes. Social rehabilitation programmes provide emergency and longer-term accommodation and wrap-around services such as budgetary advice, anger management, drug and alcohol support, court and prison follow-up services and training in domestic skills.
- 43 Clients who access Social Rehabilitation Assistance may require extra support due to a mental health condition, drug or alcohol dependency, or due to interactions with the criminal justice system.
- 44 The Social Rehabilitation Assistance Ministerial Welfare Programme requires that clients forgo payment of Accommodation Supplement and Disability Allowance in exchange for a Social Rehabilitation Assistance payment that is redirected to a social rehabilitation provider (which is equivalent to the Accommodation Supplement and Disability Allowance maxima plus \$20). A significant majority of a client's benefit is

also redirected to the social rehabilitation provider to meet the cost of board, leaving the client with the remainder of their benefit payments to be used as an allowance<sup>1</sup>.

*Social Rehabilitation Assistance was established in 2003 as an interim measure*

- 45 The Social Rehabilitation Assistance Ministerial Welfare Programme was established in 2003, in order to respond to a gap in funding between the Ministry of Health and the Department of Social Welfare. This gap was created due to the replacement of Special Benefit with Temporary Additional Support (which reduced the amount of discretion available) and the earlier transferral of certain services and funding from the Department of Social Welfare to the Ministry of Health in 1995. The Social Rehabilitation Assistance Welfare Programme was established as an interim measure to provide legislative authority for an existing funding arrangement which was not supported by legislation at the time [SDC Min (03) 14/2 refers].

*You have not made decisions to date on how WEP should interact with Social Rehabilitation Assistance*

- 46 Social Rehabilitation Assistance is a relatively small Welfare Programme, with approximately 150 clients receiving Social Rehabilitation Assistance at any point in time, and it has not been updated since its establishment in 2003. For these reasons it was not identified as a programme that required consideration in the development of WEP until recently and, accordingly, you have never had the opportunity to consider this issue.
- 47 Officials have had insufficient time to complete the detailed analysis required to expose the best way for WEP and Social Rehabilitation Assistance to interact. Clients who receive Social Rehabilitation Assistance are particularly vulnerable and any decision affecting them should not be rushed.
- 48 Furthermore, the Social Rehabilitation Assistance Welfare Programme was established as an interim measure in 2003 and has not been subject to significant review since then. The subsequent development of programmes such as emergency and transitional housing, which also respond to the needs of similar client groups, means that detailed analysis of this area may expose broader recommendations rather than just the interaction with WEP.

*Current legislative settings mean clients in receipt of Social Rehabilitation Assistance will receive WEP*

- 49 The current legislative provisions mean that clients in receipt of Social Rehabilitation Assistance will be eligible to receive WEP, because they are eligible for and receiving a main benefit.
- 50 WEP eligibility criteria is set in primary legislation and Social Rehabilitation Assistance is set out in a Ministerial Welfare Programme, therefore any change to the current legislative provisions will require careful consideration and drafting to change.

*Officials recommend WEP is implemented in 2018 in accordance with existing legislative settings, for clients who receive Social Rehabilitation Assistance*

- 51 Given the potential complexity involved in any detailed analysis of the Social Rehabilitation Assistance Welfare Programme, and the fact that the current legislative settings allow clients receiving Social Rehabilitation Assistance to get WEP, officials recommend WEP is implemented in 2018 in accordance with existing legislative settings for clients who receive Social Rehabilitation Assistance.
- 52 MSD intends to advise social rehabilitation providers that clients in receipt of Social Rehabilitation Assistance will receive WEP, so that providers can respond

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<sup>1</sup> This is currently \$97.37 per week for clients residing in Epsom Lodge but may vary between residencies

appropriately given the support those clients may already be receiving (e.g. gambling, or drug and alcohol addiction services or budgeting advice).

- 53 MSD will undertake further work on the Social Rehabilitation Assistance Programme (including how it interacts with WEP) in the future, to enable fulsome analysis of the best way for these two programmes to interact. This analysis may result in MSD considering how Social Rehabilitation Assistance fits with other existing programmes which support similar clients (e.g. those with a mental health condition, addiction issues or contact with the criminal justice system).

REP/18/6/882

Author: s 9(2)(a), Senior Policy Analyst, Income Support Policy

Responsible manager: s 9(2)(a), Policy Manager, Income Support Policy





# Report

**Date:** 13 December 2018

**Security Level:** IN CONFIDENCE

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

*This report contains legal advice and may be legally privileged. It should not be disclosed on an information request without further legal advice*

## Addressing errors with the Winter Energy Payment legislation

### Purpose of the report

- 1 To provide you with options for addressing two errors with the legislation governing the payment of the Winter Energy Payment (WEP).

### Recommended actions

It is recommended that you:

- 1 **note** that prior to commencing payment of WEP on 1 July 2018, the Ministry of Social Development (MSD) advised you that WEP would be paid in line with the policy intent for two scenarios not covered by the legislation:
  - for the first four weeks where an eligible individual is absent from New Zealand for more than four weeks [REP/18/4/554 refers]
  - where a person in residential care pays privately for the cost of their care up to the 'maximum contribution', but receives top-up funding from the government [REP/18/6/882 refers]
- 2 **note** that to ensure MSD can give effect to the policy intent, the Social Security Act 2018 (SSA) needs to be amended to correct these errors
- 3 **note** that post 1 July 2018, MSD received further advice from The Treasury and Audit New Zealand that payments made to clients as noted under recommendation 1 above was unappropriated expenditure under the Public Finance Act 1989 (PFA), as the spending was not in accordance with the criteria set out in the SSA and deemed to be outside the scope of the WEP appropriation
- 4 **note** that the Office of the Auditor General (OAG) is expecting MSD to remedy the unlawful and unappropriated expenditure before the next WEP eligibility period (starting 1 May 2019), and will be monitoring progress made by MSD to address this
- 5 **note** that the Auditor General and the Treasury have the power to stop further payments of WEP being made if the errors in the legislation are not corrected

6 **agree to:**

6.1 progress a legislative amendment Bill to address errors with the WEP legislation under urgency, to ensure the legislation is passed before the next winter period commences on 1 May 2019 (**recommended by MSD and the Treasury**)

Agree / Disagree

OR

6.2 change operational policy, practice and systems to prevent WEP being paid in the two scenarios, until such time as the legislative can be fixed (allowing time to progress the legislation without using urgency)

~~Agree / Disagree~~

- 7 **note** that changing the operational policy, practice and systems as described in paragraph 6.2 would be very difficult to achieve and have negative client outcomes
- 8 **note** that MSD will prepare the required information on your behalf by September 2019 to feed into the process led by the Minister of Finance for validating legislation for the unappropriated expenditure already incurred between 1 July 2018 and 29 September 2018, as required under section 26C of the PFA
- 9 **note** that MSD has drafted a letter to the Minister of Finance on your behalf outlining the breach of appropriation that has occurred in the 2018/2019 financial year in respect of WEP, and the plan to use section 26C of the PFA to validate the expenditure
- 10 **agree** to forward a copy of the report to the Minister of Finance, as well as the attached letter.

Agree / Disagree

s 9(2)(a)

  
Policy Manager  
Employment and Income Support Policy

13/12/2018  
Date

  
Hon Carmel Sepuloni  
Minister for Social Development

16/12/18  
Date

## **The Winter Energy Payment has been paid in two scenarios without the correct legislative and financial authority**

- 2 On 27 November 2017 Cabinet agreed to legislate for elements of the Government's Families Package in order to provide targeted social assistance to improve incomes for low and middle income families with children, and to reduce child poverty. This included the creation of a new payment known as the Winter Energy Payment (WEP) [CAB-17-MIN-0516 refers]. The Families Package (Income Tax and Benefits) Act 2017 was passed under urgency on 14 December 2017.
- 3 As part of regular updates you received on implementation of the Families Package, including WEP, the Ministry of Social (MSD) advised you of some issues with the legislation, and the intention to pay WEP in line with the policy intent rather than the strict wording of the law [REP/18/4/554 and REP/18/6/882 refer].
- 4 As such, from 1 July 2018 – 29 September 2018, MSD paid WEP in the following two scenarios in line with the policy intent:
  - for the first four weeks of absence from New Zealand when an eligible individual is absent from New Zealand for more than four weeks
  - where a person in residential care pays privately for the cost of their care up to the 'maximum contribution', but receives top-up funding from the government.
- 5 MSD's focus was ensuring that client's received WEP as intended. The decision to pay WEP in these situations was considered unlikely to result in legal challenge because MSD's practice was beneficial to clients and delivered the intended policy.
- 6 Subsequent to the decision to pay WEP in these scenarios, MSD received further advice from The Treasury and Audit New Zealand that these payments are outside the scope of the WEP appropriation and constitute unappropriated expenditure under the Public Finance Act 1989 (PFA). This is a technical breach of the PFA as a result of the law being drafted in error, in a way that doesn't fully reflect the policy intent.

s 9(2)(h)



## What MSD can do to ensure payment of WEP in 2019 is lawful

*Option 1 – Amend the legislation to remedy the WEP errors before the next WEP eligibility period (recommended by MSD and the Treasury)*

- 10 Amending the SSA to remedy the two WEP errors before the next winter period commences on 1 May 2019 would only be achievable if legislation was passed under urgency, or a significantly truncated Select Committee report-back was used.
- 11 s 9(2)(f)(iv)
- 12 To truncate the Select Committee report-back to less than four months requires the question to be debated in the House.<sup>2</sup> s (9)(2)(g)(i)  
s (9)(2)(g)(i)
- 13 Urgency would allow the House to discuss several stages of the Bill consecutively and could potentially allow the WEP Remedial Matters Bill to be passed in one sitting, taking all debates on the same day and bypassing the Select Committee stage altogether.<sup>5</sup> s (9)(2)(g)(i)  
s (9)(2)(g)(i)
- 14 Urgency could be justified on the basis that these amendments are remedial, and no new policy would be included in the Bill. s (9)(2)(g)(i)  
s (9)(2)(g)(i)
- 15 s (9)(2)(g)(i)
- 16 MSD have consulted the Parliamentary Counsel Office about the drafting for the legislative fixes, and they have confirmed that the previous Cabinet decisions do not provide sufficient authority to draft the required amendments to the SSA given that the package of Budget proposals (the Families Package) have now been enacted.
- 17 All necessary approvals would be sought from Cabinet to ensure the Bill can be ready for introduction in March 2019. Subject to House time, this will allow for the Bill to be passed ahead of the next winter period.

*Option 2 – Change operational practice to ensure WEP is not paid in the two scenarios where the law does not support making payments (not recommended)*

- 18 Another option is to amend operational policy, practice and systems to align with the legislation as enacted, meaning WEP would not be paid in the two scenarios. This would allow the legislation to be amended using the planned Social Assistance Legislation Amendment Bill, which is running to a longer timeframe.
- 19 However, aligning with the legislation would frustrate the policy intent and disadvantage clients. There are also significant challenges to implementing these changes. Specific concerns in respect of the two scenarios are discussed below.

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<sup>1</sup> s 9(2)(f)(iv)

<sup>2</sup> Standing Order 290.

## **Clients would be adversely affected if the current law was implemented**

### Clients who are absent from New Zealand during the WEP eligibility period

- 20 MSD identifies when people are out of New Zealand for more 28 days using an information sharing agreement with the New Zealand Customs Service (NZ Customs). This information is not available until a match arises when people are out of the country and haven't returned after 28 days.
- 21 Implementing the current law would mean that once a client reaches 29 days out of New Zealand (during the winter period) MSD would need to retrospectively create 28 days' worth of debt. Understandably, this approach would attract a very negative reaction from clients who are being asked to pay WEP back. Clients would, however, be encouraged to tell us of their absence plans to avoid the creation of debt.
- 22 In addition there would be inconsistencies with other forms of supplementary assistance already in the social welfare system. For example, Accommodation Supplement is payable for up to four weeks, in a 52-week period where the person is overseas.
- 23 MSD is in the process of developing an Approved Information Sharing Agreement (AISA) with NZ Customs to enable WEP to be stopped at day 29 of a client appearing in a data match with Customs as being out of the country (without having to meet the requirement in the Privacy Act 1993 to give notice before adverse action is taken – 10 day notification period).
- 24 The AISA is being put in place to reduce debt being created for clients.<sup>3</sup> On 28 November 2018, the Social Wellbeing Cabinet Committee agreed to release the draft AISA and the associated discussion document and the Privacy Impact Assessment for public consultation, commencing 4 December 2018 [SWC-18-MIN-0173 refers].

### Clients in residential care who receive a top-up subsidy

- 25 Older clients who have been assessed as requiring long-term residential care due to an illness or a disability may be eligible for:
  - a residential care subsidy (RSC) (or residential care loan)
  - a top-up subsidy.
- 26 If a client in age-related care has been declined or chooses not to apply for the residential care subsidy through a financial means assessment, the service user is then required to pay the lesser of either the cost of contracted care services or the 'maximum contribution' set by the facility's territorial local authority.<sup>4</sup> If the actual cost of the contracted care services is more than the 'maximum contribution' (for example where a client requires more expensive care such as hospital or dementia-level care), the client is eligible for a top-up subsidy through the funding District Health Board (DHB).
- 27 WEP is intended to be payable to people living in long-term residential care and paying for their care privately (up to the 'maximum contribution'), recognising that they are making a significant contribution to the cost of their care. Those receiving a RCS are not eligible for WEP.

### *MSD cannot easily identify this group of clients*

- 28 There would be practical difficulties in preventing WEP being paid to those clients in residential care who receive a top-up subsidy from the DHB. MSD does not currently identify whether a person is in residential care, unless they are receiving RCS. MSD is

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<sup>3</sup> In the period from 1 July to 30 September approximately 7,000 clients had debt established as a result of MSD complying with the notification requirements under the Privacy Act 1993 (resulting in WEP being overpaid by 10 days).

<sup>4</sup> Ranging from \$1033.55 - \$1124.41 per week depending on the region (as at 1 July 2018).

only able to hold information about a client that is relevant to their benefit and superannuation entitlements.

- 29 To obtain this information would require some form of information sharing agreement with the Ministry of Health/DHBs – which in itself is a significant undertaking. There would need to be a common identifier in order to be able to match these clients with information recorded in MSD’s systems (such as an IRD number). If the top-up subsidy is paid direct to the supplier by the DHB, it is unlikely that they will use such an identifier. Information matching between two organisations is very complex, particularly when there is not a common identifier.
- 30 Data matches that MSD currently utilise are supported by IT systems and personnel. It could be very costly and time consuming to obtain this information, and then enable the information to be recorded and matched in our system. Where a positive match was identified, the system would also need to be able to prevent the payment of WEP, which would require additional IT support.
- 31 Because MSD does not hold information on this group, it is unclear how many clients would be affected by this error. There are approximately 33,000 people living in residential care and 19,000 receiving RCS. This would leave some portion of the remaining 14,000 potentially receiving a top-up subsidy. MSD would need to work with the Ministry of Health on quantifying this group further.

**MSD does not recommend Option 2 due to the complexity of the changes required and the negative impacts it would have on clients**

- 32 To implement the law as currently enacted would divert resources from other work and involve costly systems changes. MSD has not had the time to fully investigate this option, and it is unclear if these changes would be able to be made in time for the next payment period (1 May 2019) due to the complexity in obtaining information on this client group and making necessary system changes.
- 33 This option would also create confusion and uncertainty for clients as there would be no continuity in payments received. That is, they were paid WEP in the first winter period, would not receive WEP in the second winter period (2019) and (if the law can be amended in time) would again be entitled to receive WEP in 2020 as intended.
- 34 MSD does not recommend Option 2 because of the complexity of the operational and system changes required to prevent the payments being made in these scenarios, and the negative client outcomes from doing so. Given this would be a temporary solution until the law can be amended, it would be a very inefficient use of MSD’s resources as well as government funds.

s 9(2)(f)(iv)

35 s 9(2)(f)(iv)

36 Including the WEP remedial amendments in the s 9(2)(f)(iv) s 9(2)(f)(iv) would be efficient for Ministers, MSD, submitters, the Select Committee, and the House in addressing all the amendments in one Bill.

37 However using this vehicle would mean that the legislation would not be changed before the 2019 winter period commences on 1 May 2019 s 9(2)(f)(iv) s 9(2)(f)(iv). As such, MSD would incur further unappropriated expenditure during this period. It is expected that the errors would be fixed by the 2020 winter period if this legislation is used.



The timing of the s 9(2)(f)(iv) raises concerns for government stakeholders

- 38 The proposed timing to fix the errors with the WEP legislation s 9(2)(f)(iv) has raised particular concerns with Treasury, Audit New Zealand and Office of the Auditor General (OAG).
- 39 OAG has advised MSD that it is not acceptable for the Crown to knowingly incur expenditure on actions (paying WEP in the two situations described in paragraph 4), where there is no legal authority. OAG has made it clear that MSD must not make payments to clients in these two situations when the WEP eligibility period resumes in May 2019, unless the legislation has been changed to accommodate these situations.
- 40 The Auditor-General, through the Controller function, provides independent assurance to Parliament that the expenses and capital expenditure of government departments and officers of Parliament are lawful and in the scope, amount and period of the appropriation or other authority.
- 41 The main features of the Controller function are:
- The Treasury must supply monthly statements to the Auditor-General to examine whether expenses and capital expenditure have been incurred in keeping with appropriations or other authority.
  - The Auditor-General can direct a Minister to report to the House of Representatives if the Auditor-General believes that any expenditure incurred is unlawful or applied for a purpose that is not in the scope, amount, or period of an appropriation or other statutory authority.<sup>5</sup>
  - The Auditor-General can stop payments from a Crown bank account or a departmental bank account to prevent money from being used for a purpose that is unlawful or inconsistent with any appropriation or other statutory authority.<sup>6</sup>
- 42 The Auditor-General also has the power to inquire in detail into issues of concern regarding a public entity's use of its resources.<sup>7</sup>
- 43 OAG is closely monitoring MSD's response to these issues to ensure there is no recurrence of unlawful payments when the eligibility period resumes in May 2019. As such, MSD does not consider it would be viable to use the s 9(2)(f)(iv) as this would result in MSD incurring further unappropriated expenditure and may well lead to the Auditor General taking action of the kind described above.

### Process to address the unappropriated expenditure

- 44 Unappropriated expenditure occurs when expenditure against an individual appropriation exceeds the maximum level set in the Appropriation Act for that financial year, or is outside the scope of an appropriation.
- 45 The WEP appropriation scope statement is:
- "This appropriation is limited to the WEP, paid to eligible people in accordance with criteria set out in, or in delegated legislation made under, the Social Security Act 1964 or any legislation that replaces that Act."*
- 46 The expenditure in respect of the two scenarios discussed in this paper has not been paid in accordance with the criteria set out in the SSA, and is therefore outside of the appropriation scope and requires validation by Parliament to be lawful. This is done

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<sup>5</sup> Section 65Z Public Finance Act 1989.

<sup>6</sup> Section 65ZA Public Finance Act 1989.

<sup>7</sup> Section 18 Public Audit Act 2001.



under section 26C of the PFA, using an Appropriation Bill which is led by the Minister of Finance.

- 47 MSD will prepare the required material for the section 26C process on your behalf, for tabling in the House. This needs to include an explanation from the responsible Minister about how the unappropriated expenditure has occurred - being a technical breach related to deficiencies in the legislation in respect of these two scenarios. You will need to feed into process by September 2019.
- 48 A statement relating to the breach of appropriation will be included in MSD's 2018/2019 annual report and in the Government's annual financial statements in accordance with section 45B of the PFA.

### **Next steps**

- 49 If you agree to Option 1, all necessary approvals will be sought from Cabinet to ensure the Bill is ready for introduction in March 2019. Subject to House time, and potentially the use of urgency, this will allow for the Bill to be passed ahead of the next winter period commencing 1 May 2019.
- 50 MSD will work with your office on the timing for submitting papers to Cabinet accordingly.
- 51 MSD recommends you send a copy of this report to the Minister of Finance for his information. A letter has been also been drafted to the Minister of Finance outlining the breach of appropriation that has occurred in the 2018/2019 financial year in respect of WEP, and the plan to use section 26C of the PFA to validate the expenditure.

File ref: REP/18/12/1650

Author: s 9(2)(a), Senior Policy Analyst, Employment and Income Support Policy

Responsible manager: s 9(2)(a), Policy Manager, Employment and Income Support Policy.

# Aide-mémoire



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

## Cabinet oral item

**Date:** 8 February 2019


**Security Level:** Cabinet Sensitive

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

**File Reference:** REP/19/2/057

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## Addressing errors with the Winter Energy Payment legislation

<b>Cabinet Committee</b>	Cabinet
<b>Date of meeting</b>	11 February 2019
<b>Minister</b>	Hon Carmel Sepuloni, Minister for Social Development
<b>Proposal</b>	You are presenting an oral item to Cabinet on the errors identified with the Winter Energy Payment legislation and your intention to progress amendments to the Social Security Act 2018 to address these errors.
<b>Talking points</b>	<ul style="list-style-type: none"><li>• I will be seeking Cabinet approval in early March to introduce an amendment Bill to fix two technical errors identified with the Winter Energy Payment legislation.</li><li>• The amendments are technical and remedial in nature, and will ensure the legislation gives effect to the policy intent.</li><li>• During the last winter period, MSD paid Winter Energy Payments in two scenarios according to the policy intent rather than the strict wording of the law. Implementing the current law would have adversely affected clients.</li><li>• The WEP payments made by MSD were unlawful and constitute unappropriated expenditure. This situation must be remedied before the next eligibility period for Winter Energy Payments commences on 1 May 2019.</li><li>• s (9)(2)(g)(i) </li><li>• The timeframes for the legislative process are tight, but they still allow for the amendments to be passed before 1 May 2019.</li></ul>

## Background

### **The WEP was introduced as part of the Families Package**

On 27 November 2017 Cabinet agreed to legislate for elements of the Government's Families Package in order to provide targeted social assistance to improve incomes for low and middle income families with children, and to reduce child poverty. This included the creation of a new payment known as Winter Energy Payment (WEP).

The Families Package (Income Tax and Benefits) Act 2017 was passed under urgency on 14 December 2017.

The WEP supports those in receipt of a main benefit, New Zealand Superannuation or a Veteran's Pension to heat their homes in winter by increasing the amount of money available over the winter months.

On average, during the last winter period (1 July to 29 September 2018), 774,200 recipients per month received WEP. When you include partners, around one million people benefited from WEP in 2018. This means it is the supplementary assistance with the largest eligible population in the benefit system.

### **There are two scenarios where the WEP legislation does not align with the policy intent**

The WEP legislation does not align with the policy intent due to two technical errors identified after the legislation was enacted.

It was intended that WEP would be paid:

- for the first four weeks (28 days) of absence from New Zealand when an eligible individual is absent from New Zealand for more than four weeks
- to a person who pays privately for the cost of their long-term residential care up to the maximum amount, but receive top-up funding from the government (Annex 1 provides further information on this scenario).

However, the legislation is drafted in a way that people in these two scenarios are ineligible to receive WEP.

### **WEP was paid without the correct legislative and financial authority in these two scenarios**

During the last winter period (1 July to 29 September 2018), the Ministry of Social Development (MSD) paid WEP according to the original policy intent rather than the strict wording of the law.

s 9(2)(h)



In total, it is estimated that around 25,300 were paid WEP unlawfully. This constitutes around 3.2% of last year's WEP recipients.<sup>1</sup>

**Implementing the current law would adversely affect clients**

Clients who are absent from New Zealand for more than four weeks

Implementing the current law would generate debt for eligible clients who are absent from New Zealand for more than four weeks (28 days) during the winter period.

Once a client reaches 29 days out of New Zealand during this time, MSD would need to retrospectively create debt for the WEP paid while they were out of the country (28 days of WEP). This would generate a very negative reaction from clients who automatically received WEP, and are now being asked to pay it back.

Clients in residential care who receive top-up funding

Implementing the current law would mean that clients who are already significantly contributing to the cost of their care would miss out on an entitlement they fairly and reasonably should receive.

There would also be practical difficulties for MSD to prevent the payment of WEP to these clients. MSD does not hold information on people receiving top-up funding from the government to cover the costs of their long-term residential care.

**You will be taking a paper to Cabinet in March 2019 to seek agreement to introduce an amendment Bill**

MSD is preparing a paper for you to take to Cabinet in early March 2019. The paper will seek Cabinet approval to introduce an amendment Bill to fix the relevant WEP provisions in the Social Security Act 2018 before 1 May 2019.

The Auditor-General and the Treasury have the power to stop further payments of WEP if the legislation is not remedied by 1 May 2019.

The amendments will be technical and remedial in nature, and will ensure MSD has the correct legal authority to pay WEP to all

<sup>1</sup> Approximately 20,000 people went overseas for over four weeks and were unlawfully paid WEP. Around 9,500 of these clients did not notify MSD they were going overseas.

A total of 6,560 people paid their residential care up to the maximum amount and received a top-up from the government. Approximately 5,300 of these people are single and so were paid WEP unlawfully.

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groups intended to be eligible.

**The legislative process will be truncated in order to pass the legislation before 1 May 2019**

s (9)(2)(g)(i)

The proposed timeframes are attached in Annex 2. These timeframes are necessary in order to enact these amendments in time to prevent any further unlawful and unappropriated expenditure.

s (9)(2)(g)(i)

**A separate process will address the unappropriated expenditure**

Unauthorised expenditure already accrued by MSD requires subsequent validation by Parliament in an Appropriation Act under section 26C of the Public Finance Act 1989.

MSD is in close contact with the Office of the Auditor-General and Audit New Zealand to ensure that an appropriate remedy is in place before 1 May 2019.

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Author: s 9(2)(a), Senior Policy Analyst, Employment and Income Support Policy

Responsible manager: s 9(2)(a), Policy Manager, Employment and Income Support Policy

## Annex 1: Policy and legislation alignment regarding people in long-term residential care

	Policy intent	Legislative provisions	Alignment
<b>Person qualifies for Residential Care Subsidy (RCS)</b>	Not eligible to receive WEP	Not eligible to receive WEP	Policy intent and legislative provisions align. Recipients of RCS <b>do not receive WEP.</b>
<b>Person whose total residential care costs are entirely privately funded</b>	Eligible to receive WEP	Eligible to receive WEP	Policy intent and legislative provisions align. Clients whose long-term residential care is entirely privately funded <b>do receive WEP.</b>
<b>Person (not eligible for RCS) pays the "maximum contribution" for their residential care and receives top-up government funding</b>	Eligible to receive WEP	Not eligible to receive WEP	Policy intent and legislative provisions do not align.

## Annex 2: Timeframes for the legislative process

Stage	Timeframe
Cabinet paper and Bill considered at Cabinet to confirm the policy contained in the Bill and to approve introduction of the Bill	4 March
Bill introduced	4 March
First Reading	7 March
Select Committee	11-29 March
Select Committee report back	1 April
Second Reading	4 April
Committee of the whole House	9 April
Third Reading and passing	11 April
Royal assent	Any time from 12 April and before 30 April



# Aide-mémoire



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

## Cabinet paper

**Date:** 1 March 2019

**Security Level:** Cabinet Sensitive

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

**File Reference:** REP/19/2/144

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### **Cabinet paper – Addressing errors with the Winter Energy Payment legislation: approval for introduction**

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<b>Cabinet Committee</b>	Cabinet
<b>Date of meeting</b>	4 March 2019
<b>Minister</b>	Hon Carmel Sepuloni, Minister for Social Development
<b>Purpose</b>	This aide-mémoire provides you with talking points and information to support you in the presentation of your paper at Cabinet on 4 March 2019.
<b>Talking points</b>	<ul style="list-style-type: none"><li>• I seek Cabinet approval to introduce the Social Security (Winter Energy Payment) Amendment Bill on 4 March 2019.</li><li>• The amendments in the Bill are technical and remedial in nature, and will ensure that people in two specific scenarios are able to be paid Winter Energy Payment as intended.</li><li>• During the last winter period, MSD paid Winter Energy Payments in two scenarios according to the policy intent rather than the strict wording of the law. This is because implementing the current law would have adversely affected clients.</li><li>• The Bill will also retrospectively validate decisions made by MSD last year to pay Winter Energy Payments to these people.</li><li>• The Bill must be passed before 1 May 2019, which is why a truncated legislative process is needed.</li></ul>

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## Background

The Winter Energy Payment (WEP) was a new payment introduced as part of the Families Package at the end of 2017.

WEP supports those in receipt of a main benefit, New Zealand Superannuation or a Veteran's Pension to heat their homes in winter by increasing the amount of money available over the winter months.

On average, during the last winter period (1 July to 29 September 2018), 774,200 recipients per month received WEP. When you include partners, around one million people benefited from WEP in 2018. This means it is the supplementary assistance with the largest eligible population in the benefit system.

Everyone receiving a main benefit, New Zealand Superannuation or Veteran's Pension is eligible for and automatically receives WEP. With a few exceptions, everyone receiving these benefits should receive WEP.

### What does the Bill do?

The current WEP legislation does not align with the policy intent in two instances:

- When people are absent from New Zealand for longer than four weeks at any one time during the winter period (Section 220 of the Act).
- When people receive government funding for long-term residential care or residential care services, but are not eligible for Residential Care Subsidy or Residential Support Subsidy (Section 72 of the Act).

It was intended that people in these two scenarios would be eligible to receive WEP.

However, the way the legislation is currently drafted means people in these situations are not eligible for WEP.

The Bill ensures that people in these two scenarios are able to be eligible for WEP.

### *Amendments*

The amendments to section 220 of the Act ensure people who leave New Zealand for longer than four weeks are eligible to receive WEP for the first 28 (or four weeks) of any one or more absence, regardless of how long the absence lasts for. This aligns with other forms of supplementary assistance.

The amendments to section 72 of the Act ensure that people receiving government funding for long-term residential care or residential care services (and not receiving Residential Care Subsidy or Residential Support Subsidy) are not excluded from receiving WEP.

Only people who receive Residential Care Subsidy and Residential Support Subsidy are captured by the amended exclusions in section 72.

### *Retrospection*

From 1 July to 29 September 2018, MSD paid WEP to people in the two scenarios according to the policy intent rather than the

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strict wording of the law. The Bill validates these decisions.

Unauthorised expenditure already accrued by MSD requires subsequent validation by Parliament in an Appropriation Act under section 26C of the Public Finance Act 1989.

MSD is in close contact with the Office of the Auditor-General and Audit New Zealand to ensure that an appropriate remedy is in place before 1 May 2019.

**How many people were affected by these errors? How much money was spent without authorisation?**

Of the 774,200 recipients who received WEP per month in the last winter period (1 July to 29 September 2018), approximately 25,758 people were captured by the legislative errors. Only 3.3 per cent of WEP recipients were paid unlawfully.

Of the \$265 million paid out in total, \$3.4 million was paid to the people captured by the legislative errors. This is approximately 1.3 per cent of the total WEP spending.

Annex 1 outlines how many people were affected and the estimated unappropriated expenditure.

**Why does the legislative process need to be truncated?**

The WEP payments made by MSD last year were unlawful and constitute unappropriated expenditure.

The Bill must be enacted before the next winter period commences on 1 May 2019 to ensure MSD has the correct legal authority to pay WEP to everyone who should receive WEP.

s (9)(2)(g)(i)

These timeframes are necessary in order to enact these amendments in time to prevent any further unlawful and unappropriated expenditure.

s (9)(2)(g)(i)

**Why was WEP paid unlawfully?**

Implementing the current law would have adversely affected clients. A practical decision was made to ensure everyone who was intended to be eligible for WEP received it.

*Clients who are absent from New Zealand for more than four weeks*

Implementing the current law would mean that once a client is out of New Zealand for more than four weeks (during the winter period), MSD would need to create WEP debts from the day the

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client left New Zealand.

This would create negative impacts for clients as their income would be reduced while the debt is recovered. It would also generate a very negative reaction from clients who automatically received WEP and are now being asked to pay it back.

*Clients in long-term residential care or residential care services who are not eligible for RCS or RSS*

There would be practical difficulties for MSD to prevent the payment of WEP to main beneficiaries, New Zealand Superannuation or Veteran's Pension clients who are in long-term residential care or receiving residential care services, but are not receiving Residential Care Subsidy or Residential Support Subsidy.

Although MSD continues to pay the full rate of these people's benefits, it does not hold information on these people because they are not financially means tested and MSD does not administer their funding. MSD is only able to hold information about a client that is relevant to their benefit and superannuation entitlements.

Obtaining this information would likely require an information sharing agreement between MSD and the Ministry of Health/District Health Boards, as well as system changes to deal with the data once it has been matched. All this could not happen in time for the next winter period commencing 1 May 2019.

s 9(2)(f)(iv)

[Redacted text block]

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Author: s 9(2)(a) [Redacted], Senior Policy Analyst, Employment and Income Support Policy

Responsible manager: s 9(2)(a) [Redacted], Policy Manager, Employment and Income Support Policy

## Annex 1: Number of people affected by the errors and estimated unappropriated expenditure

Legal provision (Social Security Act 2018)	Scenario	Approximate number of people	Estimated unauthorised spending
Section 220	People who went overseas for more than four weeks	20,000	\$2 million
Section 72	People who are not eligible for Residential Care Subsidy, pay the maximum contribution towards the cost of their care and receive a top-up from the government	5,300	\$1.305 million
	People in long-term residential care or short-term residential care (e.g. palliative care) receiving full government funding for the cost of their care, but who are not eligible for Residential Care Subsidy or Residential Support Subsidy	460 <sup>1</sup>	\$134,670
<b>Total</b>		<b>25,760</b>	<b>\$3.440 million</b>

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<sup>1</sup> These numbers include people recovering from surgery. The data is not easily separated, so the estimates for this group are likely to be higher than what they should be.

## Annex 2: Proposed legislative timeframes

Bill Introduced	4 March 2019
First Reading	7 March 2019
Select Committee	11-29 March 2019
Select Committee report back	1 April 2019
Second Reading	4 April 2019
Committee of the whole House	9 April 2019
Third Reading and passing	11 April 2019
Royal assent	Any time from 12 April and before 30 April 2019

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