



Report

Date: 9 December 2015

Security Level: IN CONFIDENCE

To: Hon Anne Tolley, Minister for Social Development

New programme of work to address legislation and practice misalignments in the benefit system

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

Recommended actions

It is recommended that you:

- 1 **note** that the welfare system operates in a difficult environment of frequent litigation and constantly changing social and economic settings which, along with an increasingly inconsistent and incoherent legislation, can lead to misalignments between legislation, policy and practice

Yes / No

- 2 **note** that the Rewrite of the Social Security Act 1964 will remove many inconsistencies, make it more coherent and accessible, and adjust the balance between primary and delegated legislation to allow for more flexible and timely changes in the future

Yes / No

- 3 **note** that you have received a number of papers seeking minor and technical decisions on inconsistencies as part of the Rewrite programme, but that there are still a number of outstanding misalignments that need to be assessed and addressed - and more are expected to come to light over time

Yes / No

- 4 **note** that the Ministry of Social Development has established a concentrated work programme to ensure:

- 4.1 you are quickly and fully informed about all current misalignment issues and how the Ministry is responding to these
- 4.2 processes are integrated into the Ministry's ongoing work programme so that, if any further misalignments are identified in the future:
 - 4.2.1 issues are promptly assessed and addressed
 - 4.2.2 you are notified promptly and kept fully informed

Yes / No

5 Section 9(2)(h) Legal professional privilege

Yes / No

6 **note** that early in the New Year you will receive the first of several reports advising you of, and/or seeking decisions on, current misalignments in the benefit system

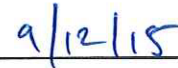
Yes / No

7 **note** that a legislative bid has been prepared for the 2016 programme to provide, if required, an opportunity to remedy remaining misalignments.

Yes / No



Nic Blakeley
Deputy Chief Executive
Social Policy



Date

Hon Anne Tolley
Minister for Social Development

Date

The welfare system is a complex system, operating in a difficult environment

- 1 Legislation, policy and practice should be clear and aligned. However, constantly changing social and economic settings, along with increasingly unclear, inconsistent and incoherent legislation, has led to a number of inconsistencies and misalignments between legislation, policy and practice. These misalignments can also result in, and from, litigation, which often produces varying interpretations of the Social Security Act 1964 (the Act).
- 2 Along with constantly changing environments and an extremely complex welfare system, it is expected that misalignments will continue to arise over time.
- 3 The diagram below provides a simplified overview of the varying parameters and dynamics of misalignments in the benefit system.

Diagram 1: Parameters and dynamics of misalignments in the welfare system

POLICY	LEGISLATION	PRACTICE
Clear Policy intent is clear on this issue	Clear Legislation is clear on this issue	Easily changed Practice can easily change to reflect legislation
Ambiguous Unclear or unconfirmed on this issue	Ambiguous Legislation is unclear on this issue	Required change unclear The policy and/or law is unclear
Unknown Policy intent on this issue is unknown	Unknown Legislation is silent on the issue	Hard to change Change would require funding or IT changes

- 4 It is rare that work on a misalignment issue results in a distinct policy intent, a clear legislative provision and an easily changed operational practice. More often there is a degree of complexity where:
 - the original policy intent may be unclear, unknown or no longer applicable
 - there is some level of ambiguity in, or varying interpretations of, the legislation
 - it is not easy, economical or feasible to quickly amend operational practice.
- 5 In addition, the suitable remedy for misalignments will vary, depending on:
 - the legal obligations of the Ministry of Social Development (the Ministry)
 - how many people are affected by the issue, and the size of that effect
 - the risks involved and likelihood and consequence of any actions.

Many inconsistencies in the Social Security Act 1964 will be addressed by the Rewrite programme

- 6 The scope of the Rewrite is to make the Act more coherent and accessible and address minor inconsistencies, without changing the majority of its substance.
- 7 Any more substantive or complex issues were excluded from the scope, to ensure development and drafting timeframes were feasible and reduce controversy and debate in the Select Committee and House stages [REP/13/03/206 refers].

- 8 However, the Rewrite provides an opportunity to adjust the balance between primary and delegated legislation, to allow for more flexible and timely changes in the future.
- 9 As part of the Rewrite programme, the Ministry identified a number of inconsistencies and misalignments with policy or practice.
- 10 You have received a number of papers seeking minor and technical decisions on some of these inconsistencies, for inclusion in the Rewrite Bill.
- 11 You have not received any specific or concentrated advice on the remaining misalignments. That is, those which are out of scope for the Rewrite and being progressed through the Ministry's regular work programme.
- 12 Proposals to address misalignment issues have, in the past, been progressed in a less systematic way than issues progressing through the Rewrite. For example:
- in November 2013 Cabinet considered three misalignment issues and legislative amendments were included in the *Social Security Amendment Bill (No 3)* enacted in April 2015
 - in March 2015 Cabinet considered a further three misalignment issues and included legislative amendments in the *Social Security (Extension of Young Persons Services and Remedial matters) Amendment Bill*, which is currently in the House.

13 Section 9(2)(h) Legal professional privilege

A new 'Alignment' work programme will ensure that you have visibility about current work on benefit system misalignments

14 Section 9(2)(h) Legal professional privilege

- 15 The below points summarise the design of the new Alignment work programme.
- A formal register of all misalignment issues has been established.
 - Each misalignment issue is being assessed and worked through in a systematic manner.
 - Advice on each of the current misalignment issues and options for consideration will be presented to you, in several tranches, over the next 6 months.
 - Each issue will be presented, in an advice template that clearly describe the specific facts, options and recommendations for that issue.

Some legislative corrections may be required

- 16 It is likely that legislative corrections will be required as a result of decisions made on some of the law/practice misalignment issues.
- 17 In a corresponding report on the 2016 legislative programme, you will note that a legislative bid has being prepared for remedial matters to the Act, the New Zealand Superannuation and Retirement Income Act, and the Veterans Support Act.

There are 32 items on the misalignment register

- 18 There are 32 known or potential practice/legislation inconsistencies on the current misalignment register -- ranging from minor technical issues to policy inconsistencies.
- 19 An initial analysis of the register shows that:
 - seven issues result from an authority decision such as the Social Security Appeal Authority, or High Court
 - three are already being addressed via amendments in the Youth Extension Bill
 - some of the misalignments will have a fiscal impact for the Crown
 - several of the misalignments have a clear positive or negative impact on clients.
- 20 Note that the above indications may change. The Ministry is still working to assess and prioritise issues on the register and, as noted earlier, most issues contain some degree of complexity and remedial options vary depending a variety of factors.

You will receive the Alignment Programme's first report early in the New Year

- 21 The first report, which you will receive early next year, will prioritise items that:
 - relate to Social Security Appeal Authority or High Court decisions
 - may have an adverse impact on Crown costs, or clients.
- 22 While the Ministry is still working through advice and options, five items have been identified as meeting the above criteria above and are likely to be included in the first report early next year.
 - The Appendix provides you with a summary of each of the five items.
 - All five items are cases in which the legislation and policy are relatively clear, but where there are challenges with an immediate practice change, in some cases.

Further Alignment Programme reports will follow

- 23 A second report, to be provided in March 2016, will prioritise cases where policy and legislation is less clear than those items in the first report.
- 24 It is likely that at least one more report will be provided in mid 2016, as part of this dedicated work programme.

A new systematic process for addressing future misalignment issues will ensuring they are managed systematically and you are promptly, and fully, informed

- 25 As part of the concentrated Alignment work programme, the processes that have been developed (to identify, prioritise and assess misalignments) will be integrated into the Ministry's ongoing processes and programme of change.
- 26 This will ensure that, on an ongoing basis, any emerging misalignment issues:
 - are identified, prioritised, assessed and addressed promptly
 - are brought to your attention individually.

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Appendix: Summary of misalignments issues likely to be included in Report One

Initial analysis - items likely to be included in the first Alignment programme report.

Brosnahan High Court decision - Terminal Benefit and Funeral Grant issue

- In October 2013 the High Court ruled, in *Brosnahan*, that Terminal Benefit should be paid directly to the surviving partner or dependent child, noting, with concern, that paying the Terminal Benefit to the deceased's estate subsequently led to the Funeral Grant application being declined.
- An amendment in the *Social Security (Extension of Young Persons Services and Remedial Matters) Amendment Bill*, currently before the House, clarifies the policy and process in relation to Terminal Benefit payments.
- How Terminal Benefit is assessed for Funeral Grant purposes still needs to be addressed. Defining Terminal Benefit as a non-assessable asset for Funeral Grant purposes, is estimated to cost around \$0.225 million per annum – and requires a minor amendment to the Social Security Act 1964. No element of retrospection is required.
- Officials are investigating funding alternatives (outside of the 2016 Budget process) and legislative options (such as a Supplementary Order Paper) should you wish to expedite the to make Terminal Benefit an non-assessable asset for Funeral Grant purposes.

Section 9(2)(h) SSAA decision – 12 month disregard for home sale proceeds

- The Ministry has an operational policy and practice of disregarding, for 12 months, the proceeds from the sale of a family home if there is an intention to purchase a new home. The Social Security Appeal Authority ruled, in the s 9(2)(h) decision of October 2012, that there is no legislative basis for this disregard.
- Operational policy and practice is being changed, to remove the disregard. No legislative changes are necessary.
- As the Government supports home ownership as a goal for low-income households, officials are considering options to formally establish the 12 month disregard.

Section 9(2)(h) SSAA decision - Review and Appeal Rights

- In March 2010 the SSAA ruled, in s 9(2)(h) that any "affected" applicant or beneficiary can review and appeal against any decision or determination made by the Ministry about another person's application or benefit, under the Act's review and appeal provisions (in s12J(1) of the Act).
- An amendment in the *Social Security (Extension of Young Persons Services and Remedial Matters) Amendment Bill*, currently before the House, clarifies that an applicant or beneficiary can only review and appeal in regard to their own application or benefit. No element of retrospection is included, or required.
- Practice changes are still being worked through, for the interim period.

Special Needs Grant income limits for New Zealand Superannuation and Veteran's Pension

- The Ministry treats New Zealand Superannuation and Veteran's Pension payments as income for Special Needs Grants. However, it has been discovered this practice does not align with the provisions set out in the Welfare Programme.
- Advice and options to address the situation going forward, and past decisions, are being developed. Any legislative change required, would be made by way of amending the Welfare Programme (which you can amend). It is too early to determine, if previous decisions were reviewed, how many people may have been affected, or the financial impact.

Resolving incorrect entitlements as a result of an Accommodation Supplement payment error

- An error was discovered where mismatched information could be entered into the Ministry's payment system resulting in the wrong rate of Accommodation Supplement (AS) being paid to some clients. The system has been amended so this error can no longer occur and all new AS clients are now being paid the correct rate.
- However, a number of current and previous AS clients receive, or have received, incorrect AS entitlements. The Ministry is working through advice and options on this issue. No legislative changes are necessary.