



Report

Date: 1 June 2017

Security Level: IN CONFIDENCE

To: Hon Anne Tolley, Minister for Social Development

Draft Cabinet paper for Ministerial Consultation ‘Treatment of Special Benefit clients who may be better off on Temporary Additional Support and other technical matters requiring changes to Social Security legislation’

Purpose of the report

- 1 This report provides a brief overview of the key points and issues in the attached draft Cabinet paper, as well as an update on the alignment project.

Recommended actions

It is recommended that you:

1. **note** that the attached draft Cabinet paper contains proposals to amend the Social Security Act 1964 including social security regulations, and reflects your previous decisions on these alignment issues

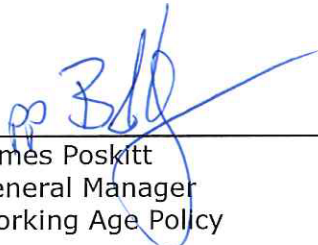
Yes / No
2. **indicate** if you would like to include the additional text discussing the alignment project more generally in the draft Cabinet paper (paragraph 26)

Yes / No
3. **agree** to circulate this draft Cabinet paper for Ministerial consultation, with feedback provided to MSD by 9 June 2017

Agree / Disagree

4. **note** that this paper also provides an update on the 36 alignment issues reported to you in December 2015.

Yes / No



James Poskitt
General Manager
Working Age Policy

1-6-2017

Date

Hon Anne Tolley
Minister for Social Development

Date

Background

- 2 In December 2015, you asked the Ministry of Social Development (MSD) to undertake a stock-take of issues where there was potential misalignment between legislation, policy, and operational practice. This initial stock-take identified 36 issues. Seven of these require legislative change.

The 7 issues that require legislative changes and are being progressed via the attached Cabinet paper

- 3 The proposals in this paper cover those alignment issues that require amendments to the Social Security Act 1994 (the Act) and social security regulations, and reflect your previous decisions on these matters. In summary, the proposals are to:
 - amend regulations to exempt back-dated payments associated with correcting entitlements to Temporary Additional Support from being considered as income or a cash asset under the Act for a period of 12 months after receipt [REP/17/2/115 refers]
 - clarify that clients are able to notify MSD as soon as is reasonably practicable of their overseas absence due to humanitarian grounds (and have their benefit paid from the date of departure), including after returning to New Zealand [REP/16/9/1169 refers]
 - clarify the exchange rate used to calculate the rate of overseas pension to be deducted from a New Zealand benefit, and the period for which it applies [REP/16/11/1529 refers]
 - clarify that reimbursement cannot be provided to an employer (and subsequently established as a debt to the client), where an evidential drug test was unnecessary due to a client waiving the need for the test [REP/16/8/999 refers]
 - exempt energy trust dividends from the income testing under the Act for 12 months after receipt [REP/16/8/1000 refers]
 - exempt health service and disability support service payments, including where there is an employment relationship between the person and the provider of the support service from the income and assets test under the Act for 12 months after receipt [REP/16/8/1001 refers]
 - clarify that advance payments of benefit do not include supplementary benefits [REP/17/1/032 refers].
- 4 This paper also deals with the approach to correct entitlements for grand-parented Special Benefit clients (existing and former) who were/may be better off on Temporary Additional Support, including the required decisions to address the unappropriated expenditure. This is consistent with the approach taken to correct entitlements to Accommodation Supplement due to a payment error dating back to 1993, as agreed by Cabinet in September 2016 [CAB-16-MIN-0460.01 refers].

Points to note in the attached Cabinet paper

Advice on exempting Crown payments for health services and disability support services that require a recipient to enter an employment relationship from cash assets test (Issue 6)

- 5 On 2 September 2016, you agreed that health and disability funding provided to a person to purchase support services where there is an employment relationship with a family carer, support worker etc¹, should be exempt from the income test as these payments cannot be used for income purposes such as paying ordinary living costs [REP/16/8/1001 refers].
- 6 In that report, MSD identified that funds from a client's health service and disability support service payments, which are set aside to cover employment-related costs, can accumulate in a client's bank account. You agreed that MSD provide you with further advice on whether these funds should be exempted from the cash assets test. We have now undertaken that work and formed a view below.

MSD recommends exempting these payments from cash assets test

- 7 Discussions with the agencies that administer these payments' have found that there are legitimate reasons why funds from these payments may accrue. For example, Funded Family Care clients are required to set some funds aside for employment costs (e.g. for leave provisions, ACC levies, and KiwiSaver contributions). These funds may remain unused if, for example, an employee opts-out of KiwiSaver, so the disabled person does not have to make the employer contribution.
- 8 There are also strong accountability mechanisms in place for ensuring the payments are being used for the intended purpose and for repaying unused funds.
- 9 MSD recommends exempting these payments from the cash assets test. The attached Cabinet paper has been drafted to reflect this.

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

¹ These payments include - Ministry of Health's Funded Family Care and Individualised Funding, MSD administered payments to Enabling Good Lives participants and Accident Compensation Corporation's support payments.

Financial Implications

- 14 Following discussions with The Treasury, it is proposed that MSD will provide for the costs of paying back-dated Temporary Additional Support potentially since 1 April 2006 in its 2016/17 Crown accounts once the final amounts are confirmed.
- 15 As the underpayments were identified in 2016/17, it needs to be recognised as an expense in that year and will have a negative impact of about \$9.5 million on the 2016/17 operating balance before gains and losses (OBEGAL). As it is not possible to appropriate these expenses before 30 June 2017, they will need to be validated in the Appropriation (2016/17 Confirmation and Validation) Bill.
- 16 Correcting the financial impact of the error, as proposed, will need to be reflected in the Vote: Social Development (Hardship Assistance) appropriation for which you hold responsibility for.
- 17 Approval under section 26C of the Public Finance Act 1989 will be sought to remedy any unappropriated expenditure in the Benefits or Related Expenses, Hardship Assistance for the year ended 30 June 2017 as a result of expenses in excess of the amount of the appropriation. This process requires relevant forms to be signed by you as the Minister for Social Development by 22 September 2017 and supported by a written authorisation which will be tabled in the House.
- 18 This is the same approach used for the expenditure required to correct the Accommodation Supplement payment error.

Regulatory Impact Statement

- 19 We are finalising the Regulatory Impact Statement for the legislative change required for Issue 1 and it will accompany the final paper for lodgement. Treasury have confirmed that in respect of Issues 2-7 the Regulatory Impact Analysis requirements do not apply (technical revisions exemption criteria).

Status of the 36 alignment issues

- 20 MSD has determined an approach to address each of the 36 issues. In some cases the solutions still require implementation, which is underway.
- 21 The outcome for 24 of these issues is as follows:
- 6 involved changes to legislation, including the Social Security Act 1994 (the Act), regulations or ministerial direction which have been completed
 - 11 were found not to be alignment issues and there is either no further action required or where action is required, these have been added to MSD's future work programme
 - 5 involved making changes to MSD's operational practices, which have been completed
 - 2 alignment issues are with other countries, for which the resolution is underway.
- 22 MSD is progressing the remaining 12 issues:
- 7 issues require legislative changes (and are included in the attached Cabinet paper)
 - 4 issues require changes to MSD's operational policies and practices
 - Section 9(2)(f)(iv) Active Consideration

Continuous improvement

- 23 The combination of a complex welfare system, changing social and economic settings, and continual litigation and re-interpretation of legislation means that legislation/policy/operational practice issues will continue to arise over time. MSD has clear business as usual processes for recording, prioritising, analysing and resolving issues; as well as escalating issues according to the level of risk.
- 24 Where significant decisions are required (e.g. legislative change, large system changes or sizable number of clients impacted), we will provide you with advice accordingly.
- 25 In response to consultation with relevant government agencies, Treasury noted that they want to understand how MSD is both responding to future alignment issues as they arise, as well as systematically identifying new issues, including mitigation where possible. Given both the fiscal and reputational risk from alignment issues, we consider this is something Ministers will have a strong interest in understanding.
- 26 We have drafted some text to proactively cover MSD's approach to alignment more generally, that could be included in the Cabinet paper with your agreement.

MSD is implementing a new process to manage potential issues where the legislation/policy/operational practice does not align. This will ensure there is visibility and accountability when issues are raised, alongside robust prioritisation, escalation, analysis, and decision making processes. By centralising the management of these issues, MSD will develop a better understanding of why these issues occur, and how MSD can mitigate the risks. The new process will be reviewed regularly to allow for continuous improvement.

Other key projects aimed at improving the interface between legislation, policy and practice and increasing the efficiency and effectiveness of service delivery, include:

- the rewrite of the Act² has the aim to provide greater clarity and coherence, ensure greater consistency, modernise language, and re-enact existing policies in a more accessible and understandable form. When enacted this will make the Act easier to read and use for all interested parties, be clearer in its intent, and therefore less open to interpretation and challenge
- straight through processing of applications and maintenance activities provides MSD with better quality data and data in an electronic format. This allows for integration with other systems seamlessly and will significantly reduce the likelihood of data capture error which has been responsible for some alignment issues
- reviewing the Service Delivery quality framework to ensure that it includes robust processes for identifying errors and trends, and for informing staff training.

Despite these improvements, the risk of future alignment issues arising remains. One example which is difficult to foresee is where the Courts take a different view of the legislation.

Next steps

27 The proposed timeline for this Cabinet paper is set out below:

Timeframe	Date
• Draft Cabinet paper for Ministerial consultation	1 June – 8 June 2017
• Final Cabinet paper and RIS to the Minister	14 June 2017
• Cabinet paper and RIS lodged by your Office	15 June 2017
• Cabinet paper considered by SOC	21 June 2017
• Cabinet paper considered by Cabinet	26 June 2017

28 Following Cabinet decisions, the regulations will need to be amended and could be progressed under the following proposed timeline:

Timeframe	Date
• Drafting of changes to regulations (PCO)	28 June – 21 July 2017
• Cabinet paper seeking to introduce changes to regulations considered by LEG	2 August 2017
• Cabinet paper seeking to introduce changes to regulations considered by Cabinet/ Executive Council	7 August 2017
• 28-day rule following gazetting of regulations	8 September

² Social Security Legislation Rewrite Bill 2016 is currently awaiting Second Reading.

Draft Cabinet paper for Ministerial Consultation 'Treatment of Special Benefit clients who may be better off on Temporary Additional Support and other technical matters requiring changes to Social Security legislation'

- 29 In order to ensure that back-dated Temporary Additional Support payments, and any income derived from them, do not affect a client's entitlement to other financial assistance under the Act, regulations must first be changed to exempt these payments. As MSD is now aware of this issue, it is important that entitlements to Temporary Additional Support for existing and former Special Benefit clients are corrected in an expedient manner.
- 30 Meeting this timeline is necessary to ensure there is time for the Parliamentary Counsel Office to draft the amendments and for you to seek approval to introduce the amended regulations to LEG/Cabinet prior to the last week of regular Cabinet and committee meeting in the week of 14 August 2017. The other changes in the Cabinet paper that require regulations to be amended will be progressed in the same timeframe.
- 31 As such, feedback from your colleagues is needed from your office by Friday 9 June 2017. A final copy of the paper will be provided to you by Wednesday 14 June 2017 incorporating any feedback from Ministerial consultation, alongside the completed RIS. We will provide you with an aide-mémoire by Monday 19 June 2017.
- 32 Where changes to the Act are needed, the timing of this will depend on a legislative vehicle being available. The proposals are in scope of the Social Assistance (Electronic, Remedial and Other Matters) Amendment Bill which is on the 2017 Legislative Programme. However, there is not enough time to draft and introduce the Bill prior to the election. As such, these amendments will be progressed after the election.

REP/17/5/609

File ref: A9672883

Chair
Cabinet Social Policy Committee

TREATMENT OF SPECIAL BENEFIT CLIENTS WHO MAY BE BETTER OFF ON TEMPORARY ADDITIONAL SUPPORT AND OTHER TECHNICAL ISSUES REQUIRING CHANGES TO SOCIAL SECURITY LEGISLATION

Proposal

- 1 This paper advises Cabinet of an issue affecting entitlements to certain supplementary benefits. Specifically, some clients receiving grand-parented Special Benefit could receive a higher level of support on Temporary Additional Support. I seek Cabinet's support to the proposed approach to correct entitlements, by giving clients the opportunity to apply for Temporary Additional Support, including paying arrears to clients since 1 April 2006.
- 2 I have also put together a package of other technical changes to amend the Social Security Act 1964 (the Act) including changes to Social Security regulations under the Act, to ensure the legislation, policy and operational practice align.

Executive summary

- 3 When Temporary Additional Support was introduced in 2006 to replace Special Benefit, Cabinet agreed to grand-parent all existing Special Benefit clients so no-one would receive a reduced level of assistance. It has never been the Ministry of Social Development's (MSD) practice to assess whether a Special Benefit client would be financially better off on Temporary Additional Support, as it was understood that the legislation prohibited a Special Benefit client from electing to move to Temporary Additional Support, and clients would generally receive more on Special Benefit.
- 4 Following more recent legal advice, it is now understood that some clients are (or would have been) better off on Temporary Additional Support and the Act does not prevent a person from cancelling their Special Benefit and moving to Temporary Additional Support. As at 28 April 2017, there were 7,148 existing and former clients affected by this issue.
- 5 To maintain the public's trust and confidence in the social welfare system, I consider it is essential that clients receive their full and correct entitlement to Temporary Additional Support in an equitable manner. I have instructed MSD to proactively engage with existing and former Special Benefit clients.
- 6 Where it is financially beneficial for a client to receive Temporary Additional Support (or have received Temporary Additional Support prior to cancellation), it is appropriate that those clients are given the opportunity to apply for Temporary Additional Support (including receiving back-dated Temporary Additional Support since 1 April 2006). In making any back-payments, MSD would determine the 'net' of the Temporary Additional Support payment a client would receive, less the Special Benefit paid for the same period.
- 7 The total fiscal cost to address this issue for affected existing and former Special Benefit clients is estimated to be no more than \$9.5 million. Of this total amount, approximately \$7.0 million relates to correcting entitlements for clients still receiving Special Benefit or other

financial assistance from MSD, and \$2.5 million relates to clients that are no longer receiving financial assistance from MSD. For the group no longer receiving financial assistance from MSD, it is unlikely the full \$2.5 million will be spent.

- 8 If all current Special Benefit clients assessed as better off on Temporary Additional Support elect to move, the on-going additional benefit expenditure is estimated at \$600,000 per annum. There are no overpayments (debts to MSD) arising from this issue.
- 9 MSD will provide for the above costs in its 2016/17 Crown accounts once the final amounts are confirmed. This will result in potential unappropriated expenditure under the Benefits or Related Expenses Hardship Assistance appropriation, for the year ended 30 June 2017 as the additional expenditure will exceed the final amount voted in the 2016/17 Supplementary Estimates. Validation by Parliament under section 26C of the Public Finance Act 1989 will be required for any expenditure incurred in excess of the appropriation.
- 10 The receipt of back-dated Temporary Additional Support (as a lump-sum) may affect the recipients' entitlement to financial assistance under the Act (income and/or cash assets test). I am of the view that the payment of arrears to correct entitlement to Temporary Additional Support should not impact on the financial circumstances of affected clients. Therefore,
- 11 Once the regulations to exempt the lump sum payments of back-dated Temporary Additional Support from the income and cash assets test are in effect, MSD will commence engagement with clients to review entitlements and make back-dated Temporary Additional Support payments.
- 12 This paper also seeks agreement to several technical amendments required to improve legislative clarity and to give effect to the recognised policy intent and longstanding administrative practice.

13 Section 9(2)(f)(iv) Active Consideration

Issue 1: Treatment of Special Benefit clients who may be better off on Temporary Additional Support

MSD has never assessed whether a client would be financially better off on Temporary Additional Support or offered to move Special Benefit clients to Temporary Additional Support

- 14 Temporary Additional Support¹ was introduced on 1 April 2006 to replace the highly discretionary Special Benefit. All recipients of Special Benefit at 31 March 2006 had their existing entitlements and criteria grand-parented until they no longer qualified to receive that support. The relevant transitional provision is section 23 of the Social Security (Working for Families) Amendment Act 2004 (the Amendment Act). At 1 April 2006 59,899 clients in receipt of Special Benefit were grand-parented.

¹ The purpose of Temporary Additional Support is to provide temporary financial assistance to alleviate financial hardship of people whose essential costs cannot be met from their income and other resources. It is a non-taxable supplementary benefit. People seeking or granted Temporary Additional Support are required to take reasonable steps to reduce their costs or increase their chargeable income.

- 15 Grand-parenting provisions were introduced to ensure that no person saw a reduction in their benefit because of the introduction of Temporary Additional Support, as it was thought that Special Benefit provided more financial assistance than Temporary Additional Support [CAB Min (04) 13/4 refers].
- 16 MSD's operational policy and practice has always been that clients cannot elect to cancel their Special Benefit and get Temporary Additional Support instead. MSD has never assessed which form of assistance would provide more assistance for Special Benefit clients, or considered offering clients an opportunity to move from Special Benefit to Temporary Additional Support.
- 17 In February 2014, a Benefits Review Committee decision highlighted that Special Benefit does not always provide more assistance than Temporary Additional Support.

Crown Law advice

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

19

Scale and impact of Special Benefit clients who are or have been better off on Temporary Additional Support

- 20 In assessing the scale of impact to this client group, MSD has developed a model to estimate the Temporary Additional Support entitlement compared to Special Benefit paid over the same period (since 1 April 2006), to determine if at some point the client would have been better off on Temporary Additional Support. The model assumes that all costs associated with Special Benefit are applicable to Temporary Additional Support costs,² and that if the client is eligible for Special Benefit they would have been eligible for Temporary Additional Support. This approach provides a reasonable estimate of costs and counts but due to unavailability of data this information should be treated with a certain level of caution.
- 21 This issue primarily affects former Special Benefit clients with retrospective entitlement to a higher level of financial assistance on Temporary Additional Support. Only a very small number of existing clients are likely to benefit from having the opportunity to apply for Temporary Additional Support based on their current circumstances. There are no overpayments (debts) arising from this issue.

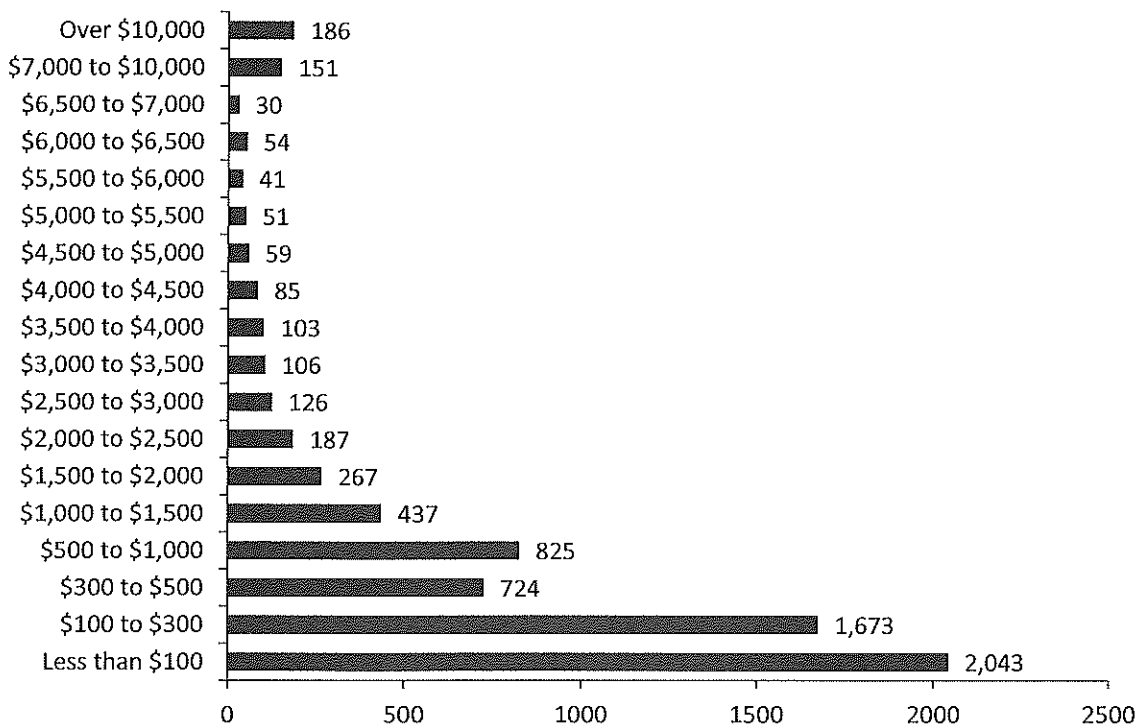
² This will overstate the numbers and arrears to a small extent.

22 As at 28 April 2017 there are 7,148 existing and former clients affected by this issue, which can be broken down into the following three groups:

Group	Number of clients impacted	% of clients with Arrears >\$100	% of clients with Arrears \$100-\$1000	% of clients with Arrears <\$1000	Maximum benefit expenditure (\$m)
1) Existing Special Benefit clients potentially better off on Temporary Additional Support	369	8%	24%	68%	\$2.1
2) Former Special Benefit clients who were better off on Temporary Additional Support and still receiving financial assistance from MSD	3,811	28%	45%	27%	\$4.9
3) Former Special Benefit clients who were better off on Temporary Additional Support who are no longer receiving financial assistance from MSD	2,968	32%	48%	20%	\$2.5
	7,148				\$9.5

23 The graph below shows the distribution of these clients by estimated potential 'net' back-dated Temporary Additional Support payments.

Graph: Back-dated Temporary Additional Support Payments clients affected since 1 April 2006



24 Of the current Special Benefit clients (Group 1), 54 per cent are receiving a working age benefit and 45 per cent are receiving New Zealand Superannuation or Veterans Pension. 83 per cent of Group 1 clients are also receiving a Disability Allowance.

25 Of those former Special benefit clients still in receipt of financial assistance from MSD (Group 2), 51 per cent are receiving a working age benefit and 39 per cent are receiving New Zealand Superannuation or Veterans Pension. 57 per cent of Group 2 clients are also receiving a Disability Allowance.

I have instructed MSD to take a proactive approach to correcting entitlements for current and former Special Benefit clients

26 To maintain the integrity of the social welfare system, I consider it is important MSD takes appropriate steps to correct entitlements for those clients who could have received a higher level of financial support on Temporary Additional Support during the same period. It is paramount that vulnerable families receive what they are legally entitled to.

27 As such, I have instructed MSD to proactively engage with existing and former clients affected by this issue since the introduction of Temporary Additional Support on 1 April 2006 (7,148 clients). This is consistent with the approach taken to remedy the Accommodation Supplement payment error issue [CAB-16-MIN-0460.01 refers].³

Correcting entitlements to Temporary Additional Support requires a different benefit to be granted

28 Benefits generally do not commence retrospectively. However, Section 80AA of the Act (referred to as the Correction Power) allows the Minister of Social Development to consent to a benefit to an individual, or group of individuals being back-dated in certain limited circumstances (i.e. to commence a benefit at a time earlier than the time an application was made).

29 A benefit may be backdated if the applicant could not reasonably have been expected to apply at an earlier time or tried to apply but did not proceed because of some erroneous action or inaction on the part of MSD. Examples include giving incorrect advice or failing to provide information or help.

Crown Law advice

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

31

I consent to the use of the correction power

32 I consent to Temporary Additional Support being back-dated for a class of applicants using the Correction Power in section 80AA; on the basis that it was an error not to provide information to clients that Temporary Additional Support would be more financially advantageous than Special Benefit (in certain circumstances).

³ To date MSD has paid 17,500 in phase 2 (current clients) and we have paid 3,317 of the 24,028 clients owed money in phase 3 (non-current clients).

Approach for existing clients

- 33 Current Special Benefit client assessed as being better off on Temporary Additional Support (Group 1) will need to make a deliberate decision to move to Temporary Additional Support. If they don't move, they will not be able to be paid arrears (back-dated Temporary Additional Support since 2006). However, the decision to transfer to Temporary Additional Support is not a straightforward one as once the client moves to Temporary Additional Support they cannot later apply for Special Benefit.
- 34 Temporary Additional Support is intended to be short-term and temporary, with reapplication required every 13 weeks. If a client's situation changes, such as an allowance cost increases, there is not the same flexibility under Temporary Additional Support (compared to Special Benefit) to adjust the payment accordingly. As such, there is a risk to individuals that they could receive a reduced amount of assistance in the future compared with what would have been available had they remained on Special Benefit.
- 35 MSD has been working with the Beneficiary advocates on the detail of the proposed approach, and in particular how MSD can best support current clients in deciding to move to Temporary Additional Support
- 36 If all existing clients in Group 1 elect to move, the additional benefit cost of having these clients on Temporary Additional Support is estimated to be around \$12,000 per week (a \$600,000 increase in benefit expenditure per year).
- 37 There are a further 2388 existing Special Benefit clients that are better off on Special Benefit, but if their circumstances change they may become better off on Temporary Additional Support in the future. MSD intends to make a practice change so that all existing Special Benefit clients will receive a Temporary Additional Support assessment at their 26-week Special Benefit review.

Approach for former clients

- 38 Addressing the impact of the error for clients that continue to receive other financial support from MSD (Group 2) will be administratively easier, as MSD already engages with and holds current details for individuals in this group. MSD will be using an automated calculation underpinned by a data tool to assess the difference if Temporary Additional Support was paid for the same period. To receive back-dated Temporary Additional Support using the Correction Power, clients will need to complete an application. MSD intend to use a much simpler application process than for a new application for benefit.
- 39 Of the 6,779 former Special Benefit clients assessed as having been better off on Temporary Additional Support at some point since 1 April 2006, around 44 per cent (2,968 clients) are no longer in receipt of financial assistance from MSD. As such, MSD does not have current contact details for these clients, and there are privacy risks associated with sending personal information to a last known address.
- 40 MSD will be using a range of communication channels to encourage as many affected former clients as possible to enquire into their entitlement to received back-dated Temporary Additional Support. This includes the online portal developed for the Accommodation Supplement Payment error (which can be adapted for use in this situation), as well as communication with key stakeholders, advocate groups and community groups.
- 41 MSD's experience with the Accommodation Supplement payment error has highlighted the difficulties in making contact with former clients who are no longer connected to the benefit

system, and MSD has only been able to pay arrears to a small proportion of this group.⁴ A proportion of these clients will never be able to be contacted (for example they may have died, left the country or be in prison).

Treatment of back-dated Temporary Additional Support payments

- 42 MSD will take a 'net' approach to the arrears payments; by offsetting the amount already received in Special Benefit for the same period Temporary Additional Support is being back-dated.(calculated back to 'the most financially beneficial point' for them to have moved to TAS since 1 April 2006).
- 43 Clients' owed back-payments would be paid a lump sum. These payments, and any income derived from them, may affect eligibility or entitlement to some forms of financial assistance under the Act as they are treated as cash assets and income.⁵
- 44 I seek agreement for all lump sum Temporary Additional Support back-payments, including income derived from these payments, to be exempt from all forms of asset and income testing under the Act and related regulations for 12 months. Not exempting the back-payments would be inequitable as they correct an error outside of the client's control.
- 45 This would require amendments to the:
- *Social Security (Income and Cash Assets Exemptions) Regulations 2011*⁶
 - *Social Security (Temporary Additional Support) Regulations 2005*
 - *Social Security (Long-term Residential Care) Regulations 2005*.
- 46 These changes will also require amendment to the Ministerial Direction in relation to Special Benefit to similarly exempt lump-sum back payments from the definitions of income and cash asset in the Ministerial Direction; I intend to make changes to the Ministerial Direction at the same time as the changes to regulations.
- 47 MSD will encourage clients to use any lump sum back-payments to repay any debts owed to MSD, consistent with the approach taken in the Accommodation Supplement payment error [Recommendation 11, CAB-16-MIN-0460.01 refers].
- 48 Section 9(2)(f)(iv) Active Consideration

⁴ Even with an online portal and a range of publicity as at 30 April 2017 only 12.5 per cent of former clients impacted by the Accommodation Supplement Payment error have been identified, assessed and paid

⁵ Income and asset tests ensure that financial assistance is targeted to those most in need, as taxpayer funds are scarce resources. They require, where appropriate, that clients use their own resources before seeking Government financial assistance.

⁶ Amendments will flow through to any cash assets and income tests for social housing. The exemptions would also cover Special Needs Grants, Advances and Recoverable Assistance Payments.

Issue 2: Overseas Absence – Timing of notification of absence due to humanitarian reasons

Background, issue, and legal advice

- 49 Welfare reform changes in 2013 tightened the rules for overseas absence while receiving a benefit. All beneficiaries are now required to inform MSD of their travel plans or their benefit will be stopped on departure [CAB Min (12) 26/11.2 refers].
- 50 Despite not telling MSD of a forthcoming absence, there is discretion for MSD to re-start a benefit (including back-dating the benefit to the date of departure) in limited circumstances. This includes where the client has a good and sufficient humanitarian reason that justifies their reason for travel and their failure to tell Work and Income before they left (Section 77(8) of the Act). For example, where a client travels overseas to attend the sudden funeral of a family member.⁷
- 51 The policy of backdating benefit payments on humanitarian grounds recognises that there may be sudden and unforeseen situations where a client meets all other criteria for approved travel, but could not be reasonably expected to inform MSD before they left New Zealand. The current practice allows for notification that occurs once the client has returned to New Zealand following an overseas absence.

Crown Law advice

- 52 Section 9(2)(h) Legal professional privilege

Changes to the Act proposed

- 53 I propose to change the Act to clarify that clients are able notify MSD of their overseas absence due to humanitarian reasons as soon as is reasonably practicable, including after returning to New Zealand and still have their benefit backdated.

Issue 3: Overseas pensions - notification of exchange rate for direct deductions

Background, issue, and legal advice

- 54 Section 70 of the Act provides that government-administered overseas pensions (including benefits, pensions, allowances etc) must be deducted from any New Zealand benefit or pension.
- 55 The mechanism for calculating the amount of overseas pension to deduct is specified in the Social Security (Overseas Pension Deduction) Regulations 2013. Part of that calculation involves the updating of overseas currency rates each month.

⁷ Humanitarian reasons are defined in the Social Security (Effect of Absence of Beneficiary from New Zealand) Regulations 2013, Regulation 8.

- 56 Issues have arisen due to delays in obtaining exchange rates and in updating currency exchange rates in MSD's computer system (where the newly notified exchange rate cannot be updated in the system until at least the 20th day of the month).

Crown Law advice

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

Changes to Regulations proposed

- 58 To ensure that the Regulations and MSD practice are consistent, I propose to change the Social Security (Overseas Pension Deduction) Regulations 2013 to clarify that:
- the exchange rates of one calculation period are to be applied to the instalments in the calendar month after the month in which that calculation period ends
 - the exchange rates are able to be notified after a calculation period has ended, but before the 20th day of that month (or the next working day if the 20th falls on a non-working day).

Issue 4: Reimbursing employers for the cost of unnecessary evidential drug tests

Background, issue, and legal advice

- 59 Drug-testing obligations were introduced in July 2013 as part of welfare reforms to ensure that pre-employment drug testing requirements would not preclude MSD from referring a person with work obligations to an otherwise suitable job.
- 60 Clients who fail to meet the drug testing requirements, or who fail to apply for jobs with pre-employment drug tests, without a good and sufficient reason, are subject to the same sanctions that apply to other work obligations.
- 61 There are two types of drug tests:
- a screening drug test⁸ indicates the presence of one or more controlled drugs
 - an evidential drug test confirms the type and quantity of drugs.

What happens if a client fails a screening drug test?

- 62 If a client fails a screening drug test, they will be asked if they:
- accept that the results are accurate and sign a confirmation form agreeing to the result (waive the need for a further evidential drug test); or
 - would like the sample to be sent for a further evidential drug test.

⁸ A screening drug test generally provides employers with enough information to make a decision about whether to hire a client, making the evidential drug test unnecessary.

- 63 Waiving the need for an evidential drug test equates to a failed evidential drug test (section 102B(4) of the Act), unless the client has a good and sufficient reason for failing the test.

Employers can claim reimbursement of the cost of drug testing

- 64 Employers can claim reimbursement from MSD for the actual and reasonable costs of a client's failed drug test (screening, evidential or both) under section 102C(3) of the Act. Once the cost of the failed drug test is reimbursed to the employer, it must be established as a debt to the client.

An incorrect process for reimbursement has emerged

- 65 MSD is aware that some employers send all failed drug screening samples to the lab for evidential testing – even if a client has waived the need for evidential drug testing. Likewise, the practice has been to reimburse employers for an evidential drug test undertaken. This has implications for clients as they are liable for the cost of the evidential drug test if it returns a failed result.

Crown Law advice

- 66 Section 9(2)(h) Legal professional privilege

Changes proposed

- 67 MSD intends to change its practice to ensure reimbursement will not be provided to employers for the cost of unnecessary evidential drug tests. To verify whether it is reasonable to reimburse for an evidential drug test, employers will be required to provide a copy of the waiver form (if any). If there is a waiver form, no reimbursement for the evidential drug test will be made.
- 68 In addition, and for the avoidance of doubt, I propose to amend the Act to clarify that reimbursement cannot be provided for an evidential test which was unnecessary due to the client waiving the need for evidential testing.

Issue 5: Impact of energy trust dividend payments on entitlement to financial assistance under the Act

Background, issue, and legal advice

- 69 In 2000, after the 1990's electricity industry reforms, several energy trusts were established and started paying their consumers dividends. Under section 3(1) of the Act dividends are defined as income and may affect eligibility or entitlement to some forms of financial assistance under the Act.
- 70 In 2001, the Debt Repayment (Energy Trusts) Programme (the Programme) was created to ensure clients receiving energy trust dividends would not have their benefit or New Zealand

Superannuation payments reduced [SEQ Min (01) 2/3 refers].⁹ Essentially, the Programme grants special assistance to clear any MSD debt that clients incur due to the dividends being treated as income.

- 71 The intent of the Programme was to ensure that clients receiving energy trust dividends could keep these one-off payments without any impact on their benefits. Given the ad hoc and unpredictable nature of these payments, it was considered unreasonable to expect beneficiaries to anticipate them and adjust their finances accordingly.

MSD's current policy and practice is to disregard all energy trust dividends when assessing a client's income for benefit purposes

- 72 The approach of charging income and then writing off any debt is administratively burdensome and MSD systems are not in place to operationalise the Programme correctly. For this reason, MSD practice is to disregard all energy trust dividends as income under the Act.

Crown Law advice

- 73 Section 9(2)(h) Legal professional privilege

Changes to Regulations proposed

- 74 I propose to amend the Social Security (Income and Cash Assets Exemption) Regulations 2011 to exempt energy trust dividends from the income test under the Act for 12 months after the payment is made.
- 75 The Programme would expire once the amended Regulations come into force. This automatic expiry is provided for under the Programme.

Issue 6: Impact of health services and disability support services payments where there is an employment relationship on entitlement to financial assistance under the Act

Background, issue, and legal advice

- 76 There are several Crown payments paid directly to injured or disabled people to purchase health and disability support services that require, or can require, a person to enter an employment relationship with a family carer, support worker etc. These payments include Funded Family Care and Individualised Funding administered by the Ministry of Health, Enabling Good Lives payments administered by MSD, and support payments paid by the Accident Compensation Corporation.

⁹ There are three specified energy trusts listed in a schedule to the Programme - Auckland Energy Consumer Trust, Mainenergy trust and Waipa Networks Trust.

- 77 These payments reflect a model for disability support that is focused on giving disabled people and their families more choice, control and flexibility over support and funding in their everyday lives.
- 78 MSD's practice is to disregard all health and disability support service payments from being considered income or a cash asset of the injured or disabled person.

Crown Law advice

79	Section 9(2)(h) Legal professional privilege
80	

Funds provided to clients to purchase health services and disability support services should not be treated as income or cash assets

- 81 MSD has also identified that Funded Family Care, Individualised Funding, and Enabling Good Lives payments may accrue in a client's bank account. For example, where an employee of the disabled person opts-out of KiwiSaver, so the disabled person does not have to make the employer contribution, or where a person underspends on their initial disability support plan. Under the legislation currently, these funds should be count towards a person's cash assets.
- 82 These payments should not impact on a person's eligibility or entitlements to financial assistance under the Act (through the income or cash assets test) for the following reasons:
- they cannot be exchanged for cash or other services
 - they must be used to purchase health or disability related services
 - they cannot be used to pay for the type of ordinary living costs for which benefit payments are provided
 - there are accountability mechanisms in place and processes to refund any unspent money.

Changes to Regulations proposed

- 83 I seek agreement to amend the Social Security (Income and Cash Assets Exemption) Regulations 2011 to exempt health services and disability support services payments where there is an employment relationship between the person and the provider of the support service from the income and cash assets test under the Act for 12 months after the payment is made.

¹⁰ Sections 70A(2)(a)(b), 70C and 70D(3)(a)(b)(c).

84 To clarify, these payments should only be counted as income or an asset for the family carer / support worker being paid by the client.

Issue 7: The maximum limit for advance payment of benefit should not include supplementary benefits

Background, issue, and legal advice

85 Clients can apply for an advance payment of their benefit if they have an immediate or essential need which cannot be met through other means.¹¹ Every client has a maximum available balance for an advance. The advance is recoverable, meaning it is a debt that the client must pay back to MSD.

MSD's practice has always been to use a client's main benefit to determine the maximum amount of advance payments of benefits

86 The maximum amount of any advance (including the total of all previous advances), must not exceed six weeks of benefit.¹² MSD has always used only the client's main benefit for that calculation, and does not include supplementary benefits (such as Accommodation Supplement, Temporary Additional Support, Disability Allowance) in the calculation.

87 MSD's IT systems only calculate advance balances based on a main benefit and were not designed to include supplementary benefits in the calculation.

88 Further, MSD's practice is to allow only a single grant of advance payments of benefit per client, rather than allowing clients to apply for multiple, simultaneous advances of each benefit.

Crown Law advice

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

90

91

Changing the practice to include supplementary benefits in the calculation of advance limits would be contrary to the policy and practice

92 The intent is that only a main benefit be used in the calculation of the maximum amount of advance payable. Supplementary benefits are temporary and vary from week to week and would add complexity and confusion to the calculation. In addition, including six weeks of

¹¹ Section 82(6) of the Act.

¹² Clause 4 of the Advance Payment of Benefits Ministerial Direction.

supplementary benefits in the calculation would increase the amount of unmanageable debt for clients, and impact on their ability to repay that debt.

Changes to the Act proposed

- 93 I seek agreement to amend to the Act to clarify that only a main benefit (or New Zealand Superannuation, Veterans Pension, Orphan's Benefit or Unsupported Child's Benefit) can be used to calculate a client's access to an advance payment of benefit (that is up to a maximum of 6 weeks of a client's main benefit entitlement).

Consultation

- 94 The following agencies have been consulted in the preparation of this paper: the Ministries of Health, Education, Justice, Business, Innovation and Employment; the Ministry for Women; the Treasury, Accident Compensation Corporation, Inland Revenue, Parliamentary Counsel Office, the Offices for Disability Issues and Seniors, Crown Law Office and the State Services Commission. Comments from these agencies have been incorporated into the paper. The Department of Prime Minister and Cabinet has been informed.
- 95 MSD has been working with a sub-group of beneficiary advocates on Issue 1, and in particular the approach for current Special Benefit clients who may be better off on Temporary Additional Support. MSD will continue to work with advocates on the client review process.

Financial implications

- 96 The costs of all changes required to MSD IT systems and support (to address Issues 1-7) such as websites, letters, forms, and client reviews will be met from within baseline.
- 97 At 28 April 2017, the total cost of addressing Issue 1 for all three groups is estimated at a maximum of \$9.5 million in Crown benefit costs. However, this figure is likely to be an overestimation for the following reasons:
- it is assumed that all Special Benefit costs are applicable to Temporary Additional Support, whereas Temporary Additional Support has a more limited set of allowable costs as prescribed in the legislation¹³
 - not all current clients will choose to move to Temporary Additional Support, particularly where their arrears payments will only be small. Given that there is no ability to return to Special Benefit, and the requirements for on-going receipt of Temporary Additional Support are more stringent this could also influence a client's decision to move to Temporary Additional Support
 - for former Special Benefit clients who are no longer receiving financial assistance from MSD, it is not straightforward to make contact and pay back-dated Temporary Additional Support as MSD does not have up to date contact information. Other channels will be used to contact this group but it will impact on the payment of arrears.
- 98 MSD will provide for the costs resulting from the error in its 2016/17 Crown accounts. This will result in unappropriated expenditure under the Benefits or Related Expenses, Hardship Assistance appropriation, for the year ended 30 June 2017 as the additional expenditure will exceed the final amount voted in the 2016/17 Supplementary Estimates. Validation by

¹³ Social Security (Temporary Additional Support) Regulations 2005.

Parliament under section 26C of the Public Finance Act 1989 will be required for any expenditure incurred in excess of the appropriation.

- 99 Section 26B of the Public Finance Act 1989 was considered, but it is likely the amount in excess of the appropriation will be greater than the two per cent permission in section 26B(2)(b) of the Act.
- 100 The increased uptake of Temporary Additional Support associated with the change in practice (following the new understanding of the law) to allow people to elect to move from Special Benefit to Temporary Additional Support will be treated as a technical forecast change to the appropriation (*'Changes to ensure administrative practice is aligned with legislation'*).
- 101 Proposals in respect of Issues 2-7 do not have any additional financial implications as they are necessary to ensure the agreed policy and practice is fully supported by social security legislation.

Human rights implications

- 102 This paper has no human rights implications.

Legislative implications

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

Regulatory impact and compliance cost statement

- 104 A regulatory impact statement (RIS) has been completed for the proposal to ensure that affected clients' eligibility or entitlement to financial assistance under the Act is not impacted by paying back-dated Temporary Additional Support to correct a failure to provide active assistance (Issue 1).
- 105 The proposals associated with Issues 2-7 are necessary to amend the Act to give effect to recognised policy intent and longstanding administrative practice. I consider that the proposed amendments are technical revisions that re-enact current law to improve legislative clarity and are therefore exempt from the Regulatory Impact Analysis requirements.

Gender implications

- 106 68.8 per cent of existing or former Special Benefit clients affected by Issue 1 are female. Supporting these changes ensures that this group of clients and their families receive the support they are entitled to receive.
- 107 The proposals in this paper in respect of Issues 2-7 are necessary to ensure that current practice is fully supported by legislation. Issue 7 has a higher impact on female clients. In the 2016 calendar year 65 per cent of advances were paid to women, which is reflective of the fact that a higher number of women receive benefits and pensions compared to men.

Disability perspective

- 108 Over half of the existing or former Special Benefit clients (58.9 per cent) affected by Issue 1 who are still receiving financial assistance from MSD receive a Disability Allowance. Supporting these changes ensures that this group of clients and their families receive the support they are entitled to receive.

Publicity

- 109 MSD has developed a communications strategy to outline how both potentially affected current and former clients will be advised that they may be entitled to a higher level of support on Temporary Additional Support, or able to access information to check whether they are impacted by error.

Recommendations

- 110 It is recommended that the Committee:

Treatment of Special Benefit clients who may be better off on Temporary Additional Support

1. **note** that Temporary Additional Support was introduced on 1 April 2006 to replace the highly discretionary Special Benefit, but all existing recipients had their existing entitlements grand-parented until they no longer qualified to receive that support;
2. **note** that the Ministry of Social Development has never assessed whether a Special Benefit client would be financially better off on Temporary Additional Support as it was understood that legislation prohibited them from moving to Temporary Additional Support (due to the grand-parenting provision) and that clients would generally receive more assistance on Special Benefit;
3.

Section 9(2)(f)(iv) Active Consideration
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4. **note** that there are approximately 7,148 existing and former Special Benefit clients affected by this issue (at 28 April 2017);
5. **note** that existing and former Special Benefit clients assessed as being better off on Temporary Additional Support will be given the opportunity to receive back-dated Temporary Additional Support as soon as the regulations are amended in accordance with recommendation 7;
6. **note** that the Minister of Social Development consents to using the correction power under section 80AA of the Social Security Act 1994 to allow Temporary Additional Support payments to be backdated to the most financially beneficial point since 1 April 2006 (less the amount already received by way of the Special Benefit), on the basis that applicants could not reasonably have been expected to apply for Temporary Additional Support at an earlier time because of the Ministry of Social Development's failure to fulfil the duty of active assistance;
7. **agree** to amend the Social Security (Income and Cash Assets Exemptions) Regulations 2011, the Social Security Temporary Additional Support) Regulations 2005, and the Social Security (Long-Term Residential Care) Regulations 2005 to exempt

back-payments correcting clients' entitlements to Temporary Additional Support (and any income derived from them in the 12-month period) from the income and cash assets test for financial assistance under the Social Security Act 1964;

8. **note** the Minister of Social Development intends to amend the Ministerial Direction on Special Benefit to exempt back-payments for correcting clients' entitlements to Temporary Additional Support and any income derived from them in the 12-month period from the cash assets and income test for assistance under the Social Security Act 1964;

Financial recommendations for correcting entitlements to Temporary Additional Support

9. **note** that the Ministry of Social Development's approach to address underpayment of Temporary Additional Support entitlements will have the following impact on the operating balance:

	\$m = increase/(decrease)			
	2016/17	2017/18	2018/19	2019/20 and outyears
Vote Social Development				
Operating Balance Impact	9.500			
Debt Impact	-	-	-	-
No Impact	-			
Total	9.500	-	-	-

10. **note** that in accordance with generally accepted accounting practice, \$9.5 million will be expensed in the financial statements of the government for the year ended 30 June 2017;
11. **agree** to the Ministry of Social Development incurring expenses of up to \$9.5 million in 2016/17 under the authority of imprest supply to address underpayment of Temporary Additional Support entitlements;
12. **note** that as the 2016/17 Supplementary Estimates have closed, the Vote Social Development Benefits or Related Expenses appropriation Hardship Assistance, cannot be increased for 2016/17 which means that expenses incurred in 2016/17 to correct entitlements to Temporary Additional Support that are in excess of the amount of this appropriation will become unappropriated expenditure at the close of 30 June 2017;
13. **agree** that any unappropriated expenses noted in recommendation 12 above be included in Appropriation (2016/17 Confirmation and Validation) Bill, for validation by Parliament;
14. **note** that the Public Finance Act 1989 requires the introduction of the Appropriation (2016/17 Confirmation and Validation) Bill to be accompanied by a report presented by the Minister of Finance containing the Minister for Social Development's explanation for any expenditure in excess of the appropriation;
15. **note** that on-going benefit expenditure for existing Special Benefit clients who elect to move to Temporary Additional Support is estimated to be \$600,000 per annum and is a technical forecasting change (*'Changes to ensure administrative practice is aligned with legislation'*);

16. **note** that the Ministry of Social Development will be absorbing within existing Vote Social Development department output expense appropriations the administrative costs of identifying and paying affected Special Benefit clients who were not given the opportunity to receive Temporary Additional Support over the same period;

Technical amendments required to improve legislative clarity and to give effect to the recognised policy intent and administrative practice

17. **agree** to amend the Social Security Act 1964 to allow backdating of benefit payments for an overseas absence because of a humanitarian reason, if MSD is not notified until the client is back in New Zealand, provided this is as soon as reasonably practicable in the circumstances;
18. **agree** to amend the *Social Security (Overseas Pension Deduction) Regulations 2013* to ensure that:
 - 13.1 the exchange rates of a calculation period apply to the instalments of the overseas pension received in the calendar month after the month in which that calculation period ends
 - 13.2 the exchange rates for the calculation period can be notified after the calculation period has ended, but by the 20th day of that month (or the next working day if the 20th falls on a non-working day);
19. **agree** to amend the Social Security Act 1964 to clarify that reimbursement cannot be made to an employer (and subsequently established as a debt to the client) where an evidential drug test was unnecessary, due to the client waiving the need for evidential testing;
20. **agree** to amend the Social Security (Income and Cash Assets Exemption) Regulations 2011 to exempt energy trust dividends from income testing under the Social Security Act 1964 for 12 months after the payment is made;
21. **agree** to amend the Social Security (Income and Cash Assets Exemption) Regulations 2011 to clarify that that Crown health and disability funding provided directly to a person to purchase support services is exempt from the income and assets test under the Social Security Act 1964, including where there is an employment relationship between the person and the provider of the support service;
22. **agree** that the Social Security (Income and Cash Assets Exemption) Regulations 2011 be amended to clarify that the payment received by the employed provider of the support services as described in Recommendation 21 should be treated as income;
23. **agree** to amend the Social Security Act 1964 to clarify that only a main benefit (or New Zealand Superannuation, Veterans Pension, Orphan's Benefit or Unsupported Child's Benefit) can be used to calculate a client's access to an advance payment of benefit;

Legislative implications

24. **invite** the Minister for Social Development to issue drafting instructions to the Parliamentary Counsel Office for amendments to the Social Security Act 1964 to be included in the Social Assistance (Electronic, Remedial and Other Matters) Amendment Bill and to the Regulations referred to above, to give effect to the above policy decisions.

Authorised for Lodgement

Hon Anne Tolley
Minister for Social Development

DRAFT