



# Memo

**To:** Policy and cross-Social Sector Committee

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**Security level:** IN CONFIDENCE

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## Social Security Act rewrite: Clarifying "resident" and "ordinarily resident"

### Purpose

The purpose of this paper is to seek agreement on a Ministry position on clarifying "resident" and "ordinarily resident" in the Social Security Act rewrite.

### Recommendations

It is recommended that the Policy and cross-Social Sector Committee:

1. **note** that the terms "resident" and "ordinarily resident" currently share the same definition in the Social Security Act, and do not reflect policy intent and current Ministry practice
2. **note** the current definitions of "resident" and "ordinarily resident" have resulted in litigation such as *Greenfield v Chief Executive of the Ministry of Social Development*
3. **note** that if the definitions are not clarified, there is a risk of further litigation and costs associated with changing Ministry guidelines
4. **note** that on 6 March 2014 Minister Bennett agreed that the terms "resident" and "ordinarily resident" were to be considered in the rewrite programme
5. **agree** that the Ministry's position is that –
  - a. **Resident means** a person who is making their home in New Zealand lawfully, on a permanent basis. Where a person has only recently arrived in New Zealand they must be able to prove that they intend to make their home in New Zealand for the foreseeable future.
  - a. **Ordinarily resident means** a person who, in addition to being resident, usually physically lives in New Zealand. They must intend to remain here for a settled purpose and any absences from New Zealand must be short term.

## **“Resident” and “ordinarily resident” are two of the criteria used to determine eligibility for most benefits administered by the Ministry**

- 2 The terms “resident” and “ordinarily resident” (“the two terms”) apply to many of the benefits administered by the Ministry.
- 3 The following examples demonstrate how the two terms are used to determine eligibility for benefits through the Social Security Act 1964 (SSA) and the New Zealand Superannuation and Retirement Income Act:
  - a. Section 74(1) of the SSA: This section allows the Chief Executive to use his discretion to refuse, terminate, or reduce a benefit where he is satisfied the applicant or the applicant’s spouse or partner (who may benefit from the benefit) is not ordinarily resident.
  - b. Section 74AA of the SSA: This section establishes the residential requirements for certain benefits. If an applicant does not satisfy the resident and ordinarily resident requirements they are not eligible for benefit.
    - a. New Zealand Superannuation (NZS): The legislation that governs NZS uses the definitions of the two terms in the SSA. This means that in order to receive NZS, a person must meet both the resident and ordinarily resident requirements. They must have a level of belonging to, and connection with, New Zealand.

## **The two terms should be clarified because they currently share the same definition in the SSA, and do not reflect policy intent and the Ministry’s established practice**

- 4 The definitions of the two terms in the SSA are both worded as, “does not include being unlawfully resident in New Zealand”<sup>1</sup>.
- 5 These definitions are very broad and do not give any guidance as to the nuances between the two concepts. In particular they do not provide any clarity as to the distinction between “resident” and “ordinarily resident” nor how a person is to be determined as being “ordinarily resident” in New Zealand.
- 6 The policy intent of the term “ordinarily resident” was originally, and still is, based on both historical fact and intention. Parliament intended that only those who have a requisite level of belonging to, and connection with, New Zealand will be deemed ordinarily resident in New Zealand. Ministry practice reflects Parliament’s intention.

## **The current definitions of the two terms have resulted in litigation such as the Greenfield case**

- 7 The ambiguous definitions mean that the Ministry’s decisions are open to challenge.
- 8 The case of *Greenfield v Chief Executive of the Ministry of Social Development* (Greenfield) has brought the inadequate definitions of the two terms to the forefront.
- 9 Mrs Greenfield is a missionary who has lived in Singapore since 1993. When she turned 65 she visited New Zealand and applied for New Zealand Superannuation. Mrs

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<sup>1</sup> Social Security Act 1964, s3(1)

Greenfield does not normally live in New Zealand but intends at some point in the future to retire here.

10 Although Mrs Greenfield generally met the other requirements for NZS her application was declined because she had been absent from New Zealand for 19 years and had no fixed date of return. On this basis, it was considered she was not ordinarily resident in New Zealand on the date of her application.

11 The Greenfield case has been heard in the Court of Appeal and will be heard by the Supreme Court on 20 August 2015. The Court of Appeal gave judgment on the factors that show whether an applicant is ordinarily resident in New Zealand or not. These factors aligned with Ministry practice and policy intent and will be used in the report to the Minister and drafting instructions to the Parliamentary Counsel Office (PCO). The advice to the Minister will reflect the submissions prepared on behalf of the Ministry for the Supreme Court.

**We recommend that the two terms be clarified through the SSA rewrite to reflect the policy intent and practice**

12 On 6 March 2014 Minister Bennett agreed that the terms "resident" and "ordinarily resident" were to be considered in the rewrite programme.

13 Defining the two terms in the rewrite will clarify how they should be interpreted for the purposes of NZS and other benefits in the SSA.

14 PCO will use established parliamentary intent that aligns with Ministry practice to draft appropriate definitions of the two terms in the rewrite of the SSA.

15 **PCO will receive instructions from the Ministry on how the definitions of the two terms should be framed to reflect the following elements:**

**Resident**

- a. A person is resident in New Zealand when they are making their home in New Zealand lawfully, on a permanent basis. Where a person has only recently arrived in New Zealand they must be able to prove that they intend to make their home in New Zealand for the foreseeable future.
- b. For most benefits under the SSA a person must have been resident in NZ for two years.

**Ordinarily resident**

- c. An applicant must establish on the date of their application that they usually physically live in New Zealand. They must intend to remain here for a settled purpose and any absences from New Zealand must be short term.
- d. A person cannot be ordinarily resident in two places at the same time.
- e. To support the close and clear connection, the Court of Appeal in Greenfield said the expression "ordinarily resident" should be interpreted to cover the following elements:
  - i. Physical presence here other than casually or as a traveller;
  - ii. Voluntary presence;
  - iii. Intention to remain in the country for a settled purpose;

- iv. Continuing residence despite any temporary absences.

**16 The framing of these definitions is in line with the practice and definitions of other agencies**

17 The two terms are used by other agencies such as Accident Compensation Corporation and Immigration New Zealand. The attached appendix provides a non-exhaustive table of the two terms used in other New Zealand legislation.

18 How the two terms are framed in other legislation and used in practice, aligns with our Ministry practice, parliamentary intent for benefit eligibility, and the proposed clarification of the terms in the rewrite of the SSA.

**19 The benefits of clarifying the terms include**

- a. providing clarity and specificity: At present, the definitions of "resident" and "ordinarily resident" in the SSA are broad and non-exclusive and lack the specificity required to provide clarity as to their meaning. By defining these terms we will ensure that the legislation is clear and adequately reflects the policy intent and current Ministry practice.
- b. avoiding further litigation: The court action taken demonstrates the uncertainty that the current SSA definitions create. Since Mrs Greenfield has challenged the Ministry's ruling other people in similar situations have come forward about their eligibility. Defining the terms may assist in reducing future litigation.
- c. bringing the SSA in line with policy intent: The Ministry's practice is consistent with the policy intent for both "resident" and "ordinarily resident". Redefining the terms through the rewrite will ensure that they reflect the policy intent.
- d. better reflecting current practice: The present definitions are not specific enough to reflect current practice. Redefining the terms through the rewrite will support current practice.

**20 The fiscal implications are not quantifiable**

- a. It is not possible to quantify the fiscal implications of leaving the two terms as they are. However, the recommended change would have a positive fiscal impact. Defining the terms more clearly within the SSA through the rewrite will mitigate the risk of further litigation and of people receiving payments where it was not intended.

**21 There are some risks with this option**

- a. *People may miss out that we do not intend to miss out:* The risk of people missing out because they do not meet the conditions of the two terms as a result of the rewrite has been assessed as low as the new definitions will reflect policy intent and current Ministry practice.
- b. *The Supreme Court may make a ruling that does not reflect the policy intent and Ministry's practice:* If the Supreme Court makes a decision that does not reflect the policy intent behind the two terms it will reinforce the need for clear definitions by way of the rewrite. There will be a small delay in the execution of the legislative changes in the rewrite; the Ministry would assess the implications for Service Delivery at that time.

**We considered and discounted a Ministerial Direction or waiting until the Supreme Court makes a decision as options**

22 A Ministerial Direction would mean that the legislation remains unclear and open to further litigation and therefore is not recommended.

23 Waiting until after the Supreme Court makes a decision would mean missing the opportunity to clarify the two terms through the rewrite. Relying on the outcome of the Supreme Court poses the risk of the Supreme Court not aligning with established policy intent and the Ministry's practice. Service Delivery changes would be required to bring them into line with the Supreme Court decision.

### **Next steps**

24 The Minister for Social Development has delegated authority from Cabinet (SOC Min (15) 12/1) to make technical and minor policy changes in the context of the rewrite.

25 If the Minister agrees with the Ministry's recommended option to amend the SSA through the rewrite by including definitions of "resident" and "ordinarily resident", we will instruct PCO through the rewrite of the SSA.

26 The rewrite of the Social Security Act Bill will be considered by the Cabinet Legislation Committee in November.

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**Appendix 1: Use of the two terms in other New Zealand legislation:**

New Zealand Legislation	Definition of resident	Definition of ordinarily resident
Immigration Act 2009	<p><b>S4:</b> Resident means the holder of a resident visa</p>	<p>Not defined in the Act, but there are policy guidelines for interpreting the term on the Immigration website:</p> <p><b>E4.10 Definition of 'ordinarily resident' in New Zealand</b></p> <p>a. For the purpose of sponsorship a person is considered to be 'ordinarily resident' in New Zealand where an immigration officer is satisfied that New Zealand is their primary place of established residence at the time specified in immigration instructions.</p> <p>b. Evidence that New Zealand is a person's primary place of established residence may include but is not limited to original or certified copies of:</p> <ul style="list-style-type: none"> <li>• correspondence addressed to the person;</li> <li>• employment records;</li> <li>• records of benefit payments from the Ministry of Social Development;</li> <li>• banking records;</li> <li>• rates demands;</li> <li>• Inland Revenue records;</li> <li>• mortgage documents;</li> <li>• tenancy and utility supply agreements;</li> <li>• documents showing that the person's household effects have been moved to New Zealand.</li> </ul> <p>The presence or absence of any of the documents listed above is not determinative. Each case will be decided on the basis of all the evidence provided.</p>
Overseas Investment Act 2005	Not defined in the Act.	<p><b>S6(2)(a)</b> holds a residence class visa granted under the Immigration Act 2009; and</p> <p>(b) is in one of the following categories:</p> <p>(i) is domiciled in New Zealand; or</p> <p>(ii) is residing in New Zealand with the intention of residing there indefinitely, and has done for the immediately preceding 12 months (see subsection (3)).</p>
Accident Compensation Scheme 2001	Not defined in the Act.	<p><b>S17(1)</b> A person is ordinarily resident in New Zealand if he or she—</p> <p>(a) has New Zealand as his or her permanent place of residence, whether or not he or she also has a place of residence outside New Zealand; and</p>

		<p>(b) is in one of the following categories:</p> <p>(i) a New Zealand citizen:</p> <p>(ii) a holder of a residence class visa granted under the Immigration Act 2009:</p> <p>(iii) a person who is a spouse or a partner, child, or other dependant of any person referred to in subparagraph (i) or (ii), and who generally accompanies the person referred to in the subparagraph.</p> <p>(2) A person does not have a permanent place of residence in New Zealand if he or she has been and remains absent from New Zealand for more than 6 months or intends to be absent from New Zealand for more than 6 months. This subsection overrides subsection (3) but is subject to subsection (4).</p> <p>(3) A person has a permanent place of residence in New Zealand if he or she, although absent from New Zealand, has been personally present in New Zealand for a period or periods exceeding in the aggregate 183 days in the 12-month period immediately before last becoming absent from New Zealand. (A person personally present in New Zealand for part of a day is treated as being personally present in New Zealand for the whole of that day.)</p> <p>(4) A person does not cease to have a permanent place of residence in New Zealand because he or she is absent from New Zealand primarily in connection with the duties of his or her employment, the remuneration for which is treated as income derived in New Zealand for New Zealand income tax purposes, or for 6 months following the completion of the period of employment outside New Zealand, so long as he or she intends to resume a place of residence in New Zealand.</p> <p>(5) A person is not ordinarily resident in New Zealand if he or she is in New Zealand unlawfully within the meaning of the Immigration Act 2009. Any period during which a person is in New Zealand unlawfully is not counted as time spent in New Zealand for the purposes of subsection (3).</p>
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