



**MINISTRY OF SOCIAL  
DEVELOPMENT**

TE MANATŪ WHAKAHIATO ORA

**18 JAN 2016**

Mr Simon Connell  
[fyi-request-3383-f9d28361@requests.fyi.org.nz](mailto:fyi-request-3383-f9d28361@requests.fyi.org.nz)

Dear Mr Connell

On 19 November 2015 you emailed the Ministry requesting, under the Official Information Act 1982, the following information:

- *Copies of internal estimates on the potential financial Crown costs of not correcting the error in the Social Security Act 1989, that has been provided to Cabinet.*

In May 2014, the Social Security Appeal Authority alerted the Ministry to an error in an amendment of section 80BA of the Act made on 3 June 1998 that meant a benefit should commence on the day that a stand down period ends (as opposed to the day after the stand down period ends).

In September 2015, Hon Anne Tolley, Minister for Social Development, directed Work and Income to change its practice so that it technically aligns with the letter of the law and last year's court decision, ahead of an upcoming law change which clarified the policy intent.

This saw all benefits granted after 29 September 2015, paid on the last day of their stand down period thus receiving an additional day of benefit. In May 2015, Cabinet agreed that the legislative error needed to be corrected with full retrospective effect to 3 June 1998.

The Government's policy intent has always been that a benefit commences on the day after the stand down period ends (e.g. for a 7 day stand down a benefit commences on day 8). The purpose is to encourage people to make provision for a short period without income before relying on state assistance. On 23 November 2015, the Bill to have the amendment corrected to align the legislation with the Government's policy received Royal Assent.

I have enclosed the following document relating to the financial estimates provided to Cabinet regarding the benefit commencement stand down period:

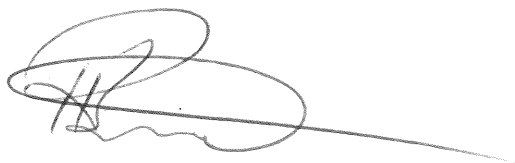
1. *Correcting the Social Security Act 1964 in relation to the benefit commencement date after a stand down period (Cabinet paper), dated 24 September 2015.*

You will note that some information is withheld from this paper 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 obtain confidential legal advice.

I hope you find this information about the estimates that were provided to Cabinet to correct the date a benefit commences following a stand down helpful. You have the right to seek an investigation and review of my response by the Ombudsman, whose address for contact purposes is:

The Ombudsman  
Office of the Ombudsman  
PO Box 10-152  
WELLINGTON 6143

Yours sincerely

A handwritten signature in black ink, appearing to be 'Ruth Bound', with a long horizontal line extending to the right.

Ruth Bound  
**Deputy Chief Executive, Service Delivery**

Chair  
Cabinet

## **CORRECTING THE SOCIAL SECURITY ACT 1964 IN RELATION TO THE BENEFIT COMMENCEMENT DATE AFTER A STAND DOWN PERIOD**

### **Proposal**

- 1 This paper seeks your agreement to expedite amendments to the Social Security Act 1964 (the Act) in relation to the benefit commencement dates after a stand down to align the legislation with Government policy intent and avoid unintended Crown costs.
- 2 I also seek your agreement that the legislation provide for a limited period in which people affected by the error in the period since it was discovered can seek recompense.

### **Executive Summary**

- 3 The Government's policy intent, and operational practice, is and has always been that a benefit commences on the day after the stand down period ends (e.g. for a 7 day stand down a benefit commences on day 8). The purpose is to encourage people to make provision for a short period without income before relying on state assistance.
- 4 In May 2014 the Social Security Appeal Authority alerted the Ministry to an error in an amendment of section 80BA of the Act made on 3 June 1998 that means a benefit should commence on the day that a stand down period ends (e.g. for a 7 day stand down period, on day 6). In May 2015 we agreed that the legislative error needs to be corrected with full retrospective effect to 3 June 1998 [CAB Min (15) 15/2 refers].
- 5 As the ongoing legal and financial risk to the Crown was perceived to be relatively low, Cabinet decided to progress the required amendments through the Social Security (Extension of Young Persons Services and Remedial Matters) Amendment Bill. This Bill is currently at the Social Services Select Committee.
- 6 However, I have received further legal advice and the financial risk is now increasing. A promotional campaign has begun, encouraging clients to seek a review of benefit in order to receive an additional day(s) benefit for any post stand down benefits granted since 1998. This could significantly increase the risk of unintended financial costs for the Crown and have operational impacts for the Ministry of Social Development (the Ministry).
- 7 It is therefore important to amend the Act with urgency. I seek to expedite the legislative change to ensure the Government's intended policy is properly enacted. I am proposing to make this change by way of a new bill, to be passed under urgency in early- to mid-October.
- 8 In the interim, I will direct officials to amend operational practice as of tomorrow, so that it reflects the current legislation and people subject to a stand down receive an additional day of benefit. This will incur additional expenditure of approximately \$0.6 million, assuming the legislative correction is enacted in 4 weeks.
- 9 To acknowledge that practice should have changed when the error was discovered, I also want to provide a limited opportunity for clients whose benefits were affected by the error from 20 May 2014 onwards to be able to seek recompense (via a provision to

accept and allow reviews of decisions for a period of 6 weeks after the legislative correction is made). I also propose that any applications for reviews in relation to the period back to 3 June 1998, which are lodged prior to the legislative amendment coming into effect, be protected from the effect of the retrospective validation. Assuming we agree to both these provisions, the back-dated payments are estimated to incur expenditure in the region of \$3.5 million.

- 10 Treasury officials have confirmed that all payments (ongoing and back-dated) can be made, without further adjustment or decision, from current appropriations.

### **There is an error in the legislation in relation to the day on which a benefit should commence after a stand down period**

- 11 I am seeking agreement to expedite an amendment to the Act to ensure the legislation reflects the policy intent in relation to a benefit commencement date after a stand down.

#### ***Government policy intent has always been clear and is reflected in operational practice***

- 12 To encourage people to make provision for a short period without income before relying on state assistance, a person eligible for a main social security benefit is generally subject to a 7 or 14 day stand down period during which they do not receive any benefit payment. For example, this policy means that a person granted a benefit, but subject to a stand down of 7 days from the day of entitlement,<sup>1</sup> will have their benefit commence on day 8 – that is, the day after the stand down period ends.
- 13 Operational practice is, and has always been, to commence benefit on the day after the stand down period ends (eg, for a 7 day stand down a benefit commences on day 8).

#### ***However, legislation does not reflect the policy intent and Cabinet has previously agreed to remedy this***

- 14 Section 80BA of the Act, which sets out the calculation of stand down periods, first came into effect on 1 April 1997. In reading the original explanatory note to the Bill, it is clear that a stand down period is to be considered in terms of a full calendar week, that is, a week stand down is 7 days with no benefit payment.
- 15 On 20 May 2014 the Social Security Appeal Authority alerted the Ministry a legislative amendment made on 3 June 1998 created an error in section 80BA of the Act. The change set the commencement date<sup>2</sup> of benefit after a stand down as the day the stand down period ends, instead of the day *after* the stand down ends. This wording entitles a person with a stand down to receive benefit a day earlier than intended, after 6 days with no benefit payment. The May 2014 decision of the Social Security Appeal Authority was not appealed by the Ministry, but accepted as correct after discussion with Crown Law.
- 16 In May 2015, Cabinet agreed the legislation needs to be corrected, with full retrospective effect to 3 June 1998 - with exceptions for two people who appealed their cases to the Social Security Appeal Authority [CAB Min (15) 15/2 refers].
- 17 In May, the ongoing legal and financial risk to the Crown was perceived to be relatively low. As such, Cabinet decided to progress the required amendments through the Social Security (Extension of Young Persons Services and Remedial Matters) Amendment Bill. This Bill is currently at the Social Services Select Committee.

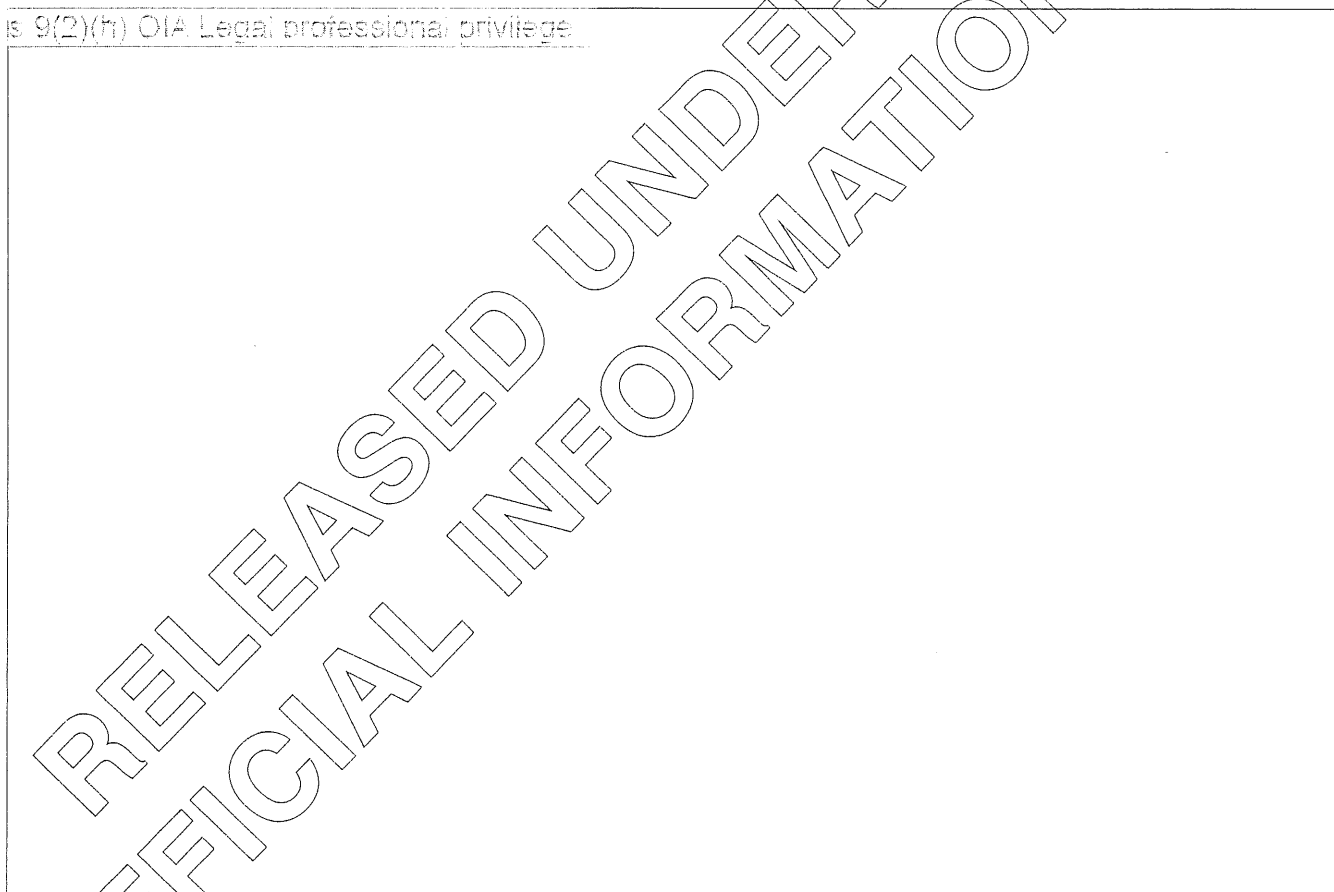
<sup>1</sup> The entitlement date is generally the date of the event that led the client to apply for a main benefit (e.g. the day after employment ceased, the date of arrival in New Zealand or the date of release from prison).

<sup>2</sup> That is, the date the benefit is backdated and paid from (benefits are paid in arrears).

***The level of risk associated with this error is now increasing***

- 18 I have received further legal advice on how the Ministry should be responding to this issue (see below), which has led me to reconsider our agreed response.
- 19 In addition, the financial risk is now increasing. In the past few weeks, a promotional campaign has begun, encouraging clients to seek a review of decision (about entitlements in relation to stand down periods) to receive an additional day(s) of benefit for any post-stand down benefit grants since the 1998 error.
- 20 This new activity could significantly increase the risk of unintended financial costs for the Crown and have operational impacts for the Ministry.
- 21 Initial data suggests that, since 3 June 1998, around 2,700,000 benefits were commenced after a stand down. Based the benefit rates paid in the 2014 calendar year, people who were subject to a stand down could receive an additional \$33.08 to \$41.40 per stand down that they were never intended to receive.

is 9(2)(f) OIA Legal professional privilege



***Refining the proposal to correct section 80BA of the Social Security Act 1964***

- 23 Cabinet agreed, in May 2015, to use the Social Security (Extension of Young Persons Services and Remedial Matters) Amendment Bill as the vehicle to:
  - amend the Act to correct the commencement date of a benefit so that a benefit commences on the day after a stand down period ends
  - make the amendment retrospective to 3 June 1998 (the date the error was made) to validate MSD's practice and decisions made relying on the current understanding of section 80BA since this period.
- 24 As noted earlier, I sought further legal advice and the financial risk is increasing. I am now proposing a quicker and more nuanced response.

- 25 First, although this Bill is currently with the Social Services Select Committee, I propose to expedite the amendments to ensure the intended policy is properly enacted, reduce litigation risks that would be heightened by a delay and avoid unintended Crown expenditure. I propose to do this by way of a new bill, to be passed under urgency in early- to mid-October.
- 26 Second, in the interim, I have directed officials to amend operational practice so that it reflects the current legislation and clients subject to a stand down period receive an additional day of benefit. This will incur additional benefit expenditure of approximately \$0.6 million assuming that the legislative correction is enacted in 4 weeks.
- 27 Third, to acknowledge that operational practice should have been amended when the error was found I want to provide a limited opportunity for clients whose benefits were commenced on or after 20 May 2014 to seek recompense. I propose to do this by way of a provision to allow applications for a review of decision to be lodged for a period of 6 weeks after the legislative correction is made. This timeframe balances the legal interests of clients compromised by the decision not to amend practice with the operational impact and financial cost of this provision.
- 28 Lastly, I propose any reviews relating to the period back to 3 June 1998, which are lodged prior to the legislative amendment coming into effect, should be allowed.
- 29 Both of these back-dated payments (for clients whose benefits were commenced on or after 20 May 2014 who lodge a review in the 6 week period after the legislative change and for those who lodge any review before the change) are estimated to incur expenditure in the region of \$3.5 million.
- 30 I have also written to the Ministry to instruct them to ensure that current beneficiaries receive the correct amount of benefit due to them under the current legislation and future beneficiaries are granted the correct amount of benefit, once the legislation is corrected.

### **Consultation**

- 31 The Treasury was consulted during the preparation of this paper. The Department of the Prime Minister and Cabinet has been informed.

### **Financial Implications**

- 32 Back-dated payments, potentially back to 3 June 1998 in some instances, require an increase to appropriations. Cabinet's agreement is sought to confirm my intended approach, and to adjust the affected Benefit or Related Expenses at the 2016 Budget and Economic Fiscal Update as part of that round of forecast adjustments.
- 33 Under the fiscal management approach the net impact of changes to forecasts will be counted against future operating allowances. The net impact will be determined once all between-budget economic and fiscal updates, baseline updates of forecasts of benefits, and all other expenses are finalised. There is a significant degree of uncertainty over the cost – not all clients will seek to lodge an application for a benefit review on the basis of this stand down issue. All figures shown in this paper are tentative estimates only.
- 34 Officials have estimated the total cost of back-dated payments to be in the region of \$3.5 million (for clients whose benefits commenced on or after 20 May 2014 who lodge a review in the 6 week period after the legislative change). I seek Cabinet's agreement to include a more accurate reflection of this cost in the 2016 Budget and Economic Fiscal Update.

35 Until legislative change takes effect, the Ministry will begin paying benefits consistent with current legislation. This will increase benefit expenditure. The effect of this change to current operating practice has been estimated at \$0.6 million. I seek Cabinet's agreement to adjust the affected Benefit or Related Expenses appropriation by the estimated amount, and that this adjustment be incorporated at the Budget Economic and Fiscal Update once the impacts are fully known.

### **Human Rights Implications**

36 The proposal in this paper is consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

### **Legislative Implications**

37 Amendment to the Social Security Act 1964 will be required to give effect to the policy proposals in this paper. Given that the issue of stand downs has received some media coverage, it is important that the Ministry's clients, past and present, are given clarity as to the rules applicable to stand down periods as quickly as possible. It is also important that the Crown's contingent liability for current and past benefit liability is clarified.

38 My officials have spoken with Parliamentary Counsel Office, who advise that a bill could be drafted within a few days of them receiving instructions. I propose to seek approval from Cabinet for the introduction of the Bill within two weeks. I will be looking to have the Bill passed as a matter of urgency.

39 I am seeking Cabinet's agreement to include a Social Security (Commencement of Benefits) Amendment Bill for the above purpose in the 2015 Legislation Programme with a priority of 2 (must be passed in 2015).

### **Regulatory Impact Analysis**

40 The proposals are necessary to amend the Act in order 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**

41 The amendments in this paper will not materially alter the gender implications associated with the current legislation.

### **Disability Implications**

42 The amendments in this paper do not have disability implications.

### **Publicity**

43 The Ministry will ensure clients have access to information about the review processes for commencement dates, and the additional one day payment that will apply until legislation is passed.

44 Role-specific training will be provided to contact centre, service centre and processing staff so that the Ministry can proactively advise clients, respond to questions and manage the interim payment and review processes. In addition, information will be

provided through the Work and Income website, and on digital signage and posters in service centres. Regional commissioners will engage with relevant stakeholders and the Ministry will work collaboratively with beneficiary advocates to share information.

- 45 The Ministry will work with my office on the wider communications approach including media.

## Recommendations

- 46 It is recommended that the Committee:

Legislation does not reflect policy intent

- 1 **note** that on 20 May 2014 the Social Security Appeal Authority alerted the Ministry that benefits should commence on the last day of a stand down period under section 80BA(4) of the Social Security Act 1964, contrary to longstanding Government policy and Ministry practice of commencing benefits the day after the stand down period ends;
- 2 **note** that on 11 May 2015 Cabinet agreed to confirm the existing policy and practice of commencing benefits the day after the stand down period ends and those decisions were given effect through the Social Security (Extension of Young Persons Services and Remedial Matters) Amendment Bill [CAB Min (15) 15/2 refers];
- 3 **note** that Cabinet also agreed to validate the Ministry practice retrospectively to 3 June 1998 (being the date the error occurred) and the Bill contains a validating provision to give effect to this decision;
- 4 **note** that the Minister for Social Development has given further consideration to this issue and proposes a quicker and more nuanced response;

Proposed legislative amendments

- 5 **confirm** the previous Cabinet decision to amend section 80BA of the Social Security Act 1964 to provide that a benefit commences on the day after a stand down period ends;
- 6 **vary** the previous Cabinet decision that the amendment have retrospective effect to 3 June 1998 so that it is subject to the exceptions in recommendations 7 to 10;
- 7 **agree** that until the date the amending legislation comes into force, benefits will commence on the last day of stand down and that the retrospective application will not apply to these decisions;
- 8 **agree** that decisions made about a commencement date following a stand down period after 3 June 1998 will not be affected by the retrospective application of the amendment if applications for review of those decisions are lodged prior to amending legislation coming into force;
- 9 **agree** that decisions made about a commencement date following a stand down period from 20 May 2014 onwards can be reviewed within a period of 6 weeks after the amending legislation comes into force and the retrospective application of the amendment not apply to those decisions;
- 10 **agree** that no application for review of decision unaffected by the retrospective application of the amendment shall be dismissed for being out of time;

Cost of change in operation practice (until legislative amendments are passed)



- 11 **note** that the estimated cost of changing current practice until legislative amendment takes effect is \$0.6 million;
- 12 **agree** to adjust the affected Benefit or Related Expenses appropriation to reflect recommendation 7 above, and that this will be incorporated at the Budget Economic and Fiscal Update once the impacts are fully known;

*Cost of back-dated payments*

- 13 **note** that the estimated cost of back-dated payments is in the region of \$3.5 million;
- 14 **agree** to adjust the affected Benefit or Related Expenses appropriation to reflect recommendations 8 and 9 above, and that this will be incorporated at the Budget Economic and Fiscal Update once the impacts are fully known;
- 15 **note** that under the fiscal management approach the net impact of changes to forecasts are counted against the next Budget's operating allowance - the net impact will be determined once between-budget economic and fiscal updates, baseline updates of forecasts of benefits, and all other expenses are finalised;

*Progressing the legislative amendments*

- 16 **agree** to include a Social Security (Commencement of Benefits) Amendment Bill in the 2015 Legislation Programme with a priority of 2 (must be passed in 2015);
- 17 **agree** that it is necessary to amend legislation to reflect the Government's policy intent as quickly as possible to clarify how the commencement date of benefit after a stand down will apply in the future for the Ministry's clients, how historic circumstances are to be managed and to manage the Crown's contingent liability;
- 18 **invite** the Minister for Social Development to issue drafting instructions to the Parliamentary Counsel Office to enable amendments to the Social Security Act 1964 to give effect to the policy decisions above;
- 19 **invite** the Minister for Social Development to seek approval to introduce the new amendment Bill within the next two weeks and discuss timing and priority for the Bill with the Leader of the House;
- 20 **authorise** the Minister for Social Development, in consultation with other Ministers as appropriate, to make any implementation, technical, policy, administrative and ancillary changes required to finalise the legislation.

Hon Anne Tolley  
**Minister for Social Development**

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