



Report

Date: 23 September 2016

Security Level: IN CONFIDENCE

To: Hon Anne Tolley, Minister for Social Development

Alignment Project: 2015/23 – Overseas travel for humanitarian reasons

Purpose of the report

- 1 As part of the government's welfare reforms introduced in 2013, the rules around paying benefits to clients who leave New Zealand were strengthened so that clients receiving a main benefit who did not notify the Ministry of Social Development (the Ministry) of their travel plans would have their benefit stopped the day after leaving New Zealand, as a result of a data match with the New Zealand Customs Service.
- 2 In very limited circumstances the Ministry has been backdating benefit payments on humanitarian grounds to clients who do not inform the Ministry of their travel until after they have returned to New Zealand, and this has created a misalignment between legislation and operational practice.
- 3 This report provides you with more detail about backdating of benefits on humanitarian grounds, in response to your previous comments on advice provided as part of the Social Security Act rewrite [REP/15/06/609]. It also presents the Ministry's recommended option for amending legislation to remove any doubt about the circumstances in which benefits can be backdated, while maintaining current practice in the interim.

Recommended actions

It is recommended that you:

- 1 **note** that the Ministry allows backdating of benefit payments in limited circumstances if a client notifies the Ministry after they have returned to New Zealand

Yes / No

- 2 **note** that the wording of section 77 (*Effect of absence of beneficiary from New Zealand*) of the Social Security Act 1964 (the Act) does not support this practice

Yes / No

- 3 **agree** that the Ministry provides you with a draft Cabinet paper in October 2016 recommending amendment to the Act to address this issue

Agree / Disagree

- 4 **agree** to amend the Act at the first available opportunity, probably through the Social Assistance (Remedial and Other Matters) Amendment Bill, which has a category 3 priority in the legislation programme (to be passed if possible in 2016)

Agree / Disagree

- 5 **note** that the risk of legal challenge to the Ministry will remain until either practice is changed or the proposed legislative amendments are made

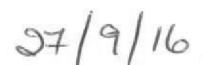
Yes / No

- 6 **agree** to send a copy of the report to the Associate Minister for Social Development.

Agree / Disagree



Ruth Bound
Deputy Chief Executive
Service Delivery



Date

Hon Anne Tolley
Minister for Social Development

Date

Background

- 4 In 2012, as part of the government's welfare reforms, Cabinet agreed that clients must inform the Ministry of any international travel plans and their reasons for travelling, otherwise their benefit would be automatically suspended when they left the country [CAB Min (12) 26/11.2 refers].¹ This change was brought into effect on 15 July 2013.
- 5 Initially this was implemented on the understanding that clients who contact the Ministry after they return to New Zealand could not have their benefit payments backdated in any circumstances, but that clients who informed the Ministry of their travel while they were away from New Zealand and met the following criteria, could have their benefit payments backdated:
- there was a humanitarian reason that justified their reason for travel and their failure to tell the Ministry before they left;
 - they contacted the Ministry as soon as was reasonably possible after they left (taking into account their circumstances); and
 - they met the criteria to continue to be paid their benefit while overseas.
- 6 Humanitarian reasons under section 77 of the Act are specified in regulation 8 of the Social Security (Effect of Absence of Beneficiary from New Zealand) Regulations 2013 (the regulations). Humanitarian reasons can be any of the following:
- a need or desire to provide aid or assistance to a family member immediately following a natural disaster or adverse event
 - a need or desire to be with a family member who is facing sudden imminent death or who has suddenly been taken seriously ill or injured, or
 - a need or desire to attend the sudden funeral (however called) of a family member.
- 7 Section 9(2)(h) Legal professional privilege
- 8 Ministry practice since this information was provided to staff in July 2013 has been to backdate benefit payments if a client has a humanitarian reason for travel and makes contact:
- while they are absent from New Zealand; or
 - when they return from overseas.
- 9 The strictest interpretation of section 77 of the Social Security Act 1964 (the Act) is that when "current absence" is read together with "after departing from New Zealand" the client must be outside New Zealand when advising the Ministry of that absence, rather than having already returned to New Zealand.
- 10 Section 9(2)(h) Legal professional privilege
- 11 Previous advice, provided to you in June 2015 as part of the Social Security Act rewrite [REP/15/06/609 refers], recommended that section 77(7) and 77(8) of the Act be amended to address this issue. At this time you did not agree to this recommendation but asked for more information on "humanitarian reasons".

¹ Recipients of New Zealand Superannuation and Veteran's Pension were excluded from these changes.

The policy intent was to emphasise a focus on work

- 12 The intent of the Absence from New Zealand policy changes introduced as part of welfare reform in 2013 was to take a strict approach to clients being able to receive benefit payments while outside New Zealand so as to emphasise a focus on work, while recognising there are some situations where clients should be able to continue receiving payments [SOC (12)74 refers]². As a result, there are detailed rules around when the Ministry needs to be informed of any travel, and in what circumstances clients can continue to be paid while overseas.
- 13 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 the Ministry before they left New Zealand.
- 14 Backdating payments when a client notifies the Ministry once they have returned to New Zealand, rather than while overseas, was not specifically considered during the development of this policy. However, it can be inferred that the policy intent was that payments would be backdated in these circumstances, as the critical factors are the reason for the travel, and that the client notified the Ministry as soon as could reasonably be expected.

Operational practice

- 15 Clients receiving a main benefit must advise the Ministry of their intention to leave New Zealand before they depart, otherwise they will not be eligible to keep receiving benefit payments for the period they are overseas.
- 16 If they do not advise the Ministry before they leave, their benefit payments will stop from the day after they leave New Zealand.
- 17 If a client contacts the Ministry after they leave New Zealand and their travel is allowed, their benefit will be resumed from the day they notified the Ministry of their absence.
- 18 The only exception to this practice (of resuming payments from the date of notification), is when a client:
 - has a humanitarian reason that justifies their travel and their failure to tell the Ministry before they left, and
 - contacted the Ministry as soon as they reasonably could.

In this situation a client can have their benefit backdated to the day after their departure date, providing they meet the usual criteria for travel.

- 19 If a client meets the criteria for backdating of benefit payments on humanitarian grounds, this currently applies:
 - when a client contacts the Ministry while they are still overseas; or
 - when a client contacts the Ministry after they have returned to New Zealand.
- 20 The Ministry's IT systems have been designed to ensure backdated payments are restricted to circumstances where the criteria have been met. To backdate a payment a case manager must first answer a set of specific questions that reflect the definition of humanitarian reasons outlined in regulations, to ensure benefit payments are only being backdated in these very limited circumstances.

The law

- 21 Clients have an explicit duty to notify the Ministry of overseas travel. If they do not notify the Ministry, they are not entitled to payment of benefit while overseas. This is

² *Welfare Reform Paper B: Design of the New Benefit Categories*, SOC (12) 74, 24 July 2012

irrespective of whether or not they would otherwise be entitled to benefit while overseas under the other absence rules.

22 Section 77(8) of the Act contains discretion to allow payment of benefit on or after a client's departure from New Zealand if a client fails to notify the Ministry before leaving New Zealand if:

- the absence from New Zealand, and the client's failure to notify the Ministry before they left are for humanitarian reasons, as defined in the regulations; and
- the client advised the Ministry of the current absence from New Zealand as soon as was practically reasonable in the circumstances.

23 Humanitarian reasons are set out in the regulations, as noted in paragraph 6.

Legal advice on risk of current practice

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

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Response

32 It is apparent that the Ministry's practice of backdating benefit payments on humanitarian grounds when a client informs the Ministry after returning from overseas is inconsistent with legislation. However, there are sound reasons for upholding current practice and seeking legislative change to support this.

33 No cases challenging this practice have been taken to the Social Security Appeals Authority to date.

Client impacts

- 34 From the data that has been analysed so far, it appears that the number of affected clients is small.³
- 35 Between 15 July 2013 and 30 July 2016, approximately 109,000 clients had their benefit suspended due to leaving New Zealand. Of these, approximately 6,000 clients who were suspended due to the reason "essential travel" (humanitarian reasons for travel are recorded under this category) had their benefit payments backdated to the same day they were suspended.
- 36 Of these 6,000 clients 5,775 of the travel notifications were made while the client was overseas, and only 212 were made after the client returned to New Zealand.

The Ministry has identified three options to address the issue

Option 1: Retain current practice and change legislation to support practice (recommended)

- 37 This option would mean continuing current practice and amending the legislation, probably using the Social Assistance (Remedial and Other Matters) Amendment Bill. This Bill has a category 3 priority in the legislation programme (to be passed if possible in 2016).

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

Option 2: Change practice now to align with legislation as a permanent solution, and do not seek legislative change

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

- 40 Clients are provided with information about the expectation to contact the Ministry before travelling overseas in a number of places including the Work and Income website, service centres and contact centres. This message has been consistently and

³ This is preliminary data and only includes primary clients; partners have not been included. Partners accounted for 23% of all Absence from New Zealand suspensions, so it can be inferred that the total numbers may increase by approximately this percentage.

comprehensively communicated to clients since changes were introduced in 2013, so clients are adequately informed of these obligations.

- 41 Clients receiving a benefit are required to comply with all associated obligations, which they are not fulfilling if they do not contact the Ministry before travelling overseas. Furthermore, as people who are working could be reasonably expected to inform their employer before they travelled overseas, it could follow that it is reasonable for clients receiving a main benefit to do the same.

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

Option 3: Change practice now to align with legislation as an interim solution, and seek legislative change to support current practice

- 43 The Ministry could change its practice now to align with current legislation, but with the intention that the legislation is amended to support current practice.
- 44 The benefit of this option is that it would align practice with legislation and, in the longer term, the policy intent would be reflected in legislation. However, in the interim it would create confusion for clients and staff. Practice would need to be changed now, and then changed back again once the legislation has been amended.
- 45 From an operational perspective, it is preferable not to make an interim practice change that will then be reversed. This is because the preferred option is to retain current practice and legislative change can be quickly sought (as there is a legislative avenue available to the Ministry to progress this change).

Retrospection is not recommended on this issue

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

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- 48 As reviewing these cases would not result in any benefit to the client or Ministry, and would be an unnecessary administrative task considering that any debt established as the result of an overpayment would probably be written off after considering the factors set out in section 86(9A) and (9B) of the Act, it is not recommended that any retrospection is undertaken.

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