

Report



**MINISTRY OF SOCIAL
DEVELOPMENT**
TE MANATŪ WHAKAHIATO ORA

Date: 14 November 2025 **Security Level:** Sensitive

To: Hon Louise Upston, Minister for Social Development and
Employment

File Reference: REP/25/11/904

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Responding to the High Court decision regarding backdated ACC payments

Purpose of the report

- 1 This report provides you with advice on responding to recent decisions made by the High Court and Social Security Appeal Authority regarding backdated Accident Compensation Corporation (ACC) payments.
- 2 It seeks your agreement to pursue legislative change to give effect to the longstanding policy intent relating to the treatment of backdated ACC payments and for the Ministry of Social Development's (MSD) income charging practice more broadly.

Key points

- 3 On 14 October 2025, the High Court found that MSD is not operating in accordance with current legislative provisions relating to charging backdated ACC payments against past periods.
- 4 This changes the way MSD must apply the law. MSD is undertaking immediate steps to respond to this decision, including reassessing entitlements for the clients the High Court decision relates to and the 36 current cases progressing through the Social Security Appeal Authority.
- 5 The High Court's decision does not align with the policy intent for charging backdated ACC payments against past periods. It also creates a significant inequity between clients who receive ACC compensation payments at the

time they earn it compared to clients who receive backdated ACC payments earned for a past period.

- 6 If legislation is not amended retrospectively to align with the policy intent, the High Court’s decisions may have significant financial and operational impacts relating to:
- writing-off debt that has been established, currently estimated to be \$63 million for cases established between 1998 and October 2025 though we note this estimate may be understated
 - needing to reassess at least 37,470 past and current clients who may fall in scope of the High Court’s decision, this is currently estimated to require 200 new FTE (with an associated cost of \$68 million) if completed within two years
 - changing practice and systems in line with the High Court’s decision (which would take a minimum of six months to scope before we could begin work on implementation).
- 7 This would also require reviewing MSD’s broader practice regarding charging all income against past periods, which may have far greater financial and operational impacts compared to ACC-only cases.

8 s (9)(2)(g)(i) [Redacted]

9 s (9)(2)(g)(i) [Redacted]

10 s (9)(2)(g)(i) [Redacted]

Recommended actions

It is recommended that you:

- 1 **note** that the Social Security Appeals Authority and the High Court have found that MSD is not operating in accordance with current legislative provisions relating to charging backdated ACC payments against past periods
- 2 **note** that the decision detailed in recommendation 1 does not align with the policy intent for the treatment of backdated ACC payments or for MSD’s income charging practice more broadly

3 **note** that MSD is working to identify all areas of practice that will need to be changed in response to the decisions detailed in recommendation 1

4 **note** that the decisions of the Appeal Authority and High Court have significant impacts (prospectively and retrospectively) for MSD, including operational and financial impacts relating to:

4.1 aligning current practice with the decisions

4.2 responding to cases that are currently under review and appeal which relate to the practice

4.3 potentially reassessing previous clients who have been subject to the practice.

5 **note** that there are impacts relating to fiscal liability that are covered in paragraphs 32-33

6 **agree** to seek Cabinet agreement to amend the Social Security Act 2018 to give effect to the policy intent set out in paragraphs 37-47 with either:

10.1 **Option one:** a prospective and retrospective effect, with a savings provision for some clients (recommended)

AGREE / DISAGREE

10.2 **Option two:** a prospective effect only (not recommended)

AGREE / DISAGREE

7 **note** there are choices for the scope and timing of a savings provision (where the law as found by the Appeal Authority and the High Court would continue to apply to a cohort of cases)

8 **indicate**, subject to your agreement to option one, your preference for the scope of the savings provision

8.1 a narrower savings provision (for example, restricting the scope to cases that are lodged with the Appeal Authority or the High Court, and/or limiting to cases lodged prior to Bill introduction)

PREFERRED / NOT PREFERRED

8.2 a broader savings provision (for example, including additional cases that are lodged via a review of decision with MSD and those before the Benefit Review Committee, and/or cases lodged up until the Bill commences)

PREFERRED / NOT PREFERRED

9 **note** that further advice on a savings provision can be provided as part of the Cabinet Legislation Committee process

10 **indicate** your preferred vehicle for progressing these amendments:

10.1 through a new standalone legislative vehicle under urgency

PREFERRED / NOT PREFERRED

10.2 s 9(2)(f)(iv)

PREFERRED / NOT PREFERRED

11 s 9(2)(f)(iv)

Samuel Willis
Policy Manager
Income Support Policy

Date

Hon Louise Upston
Minister for Social Development and
Employment

Date

Background

- 11 On 14 October 2025, the High Court upheld the Social Security Appeal Authority's (the Appeal Authority) decision (which was decided in late 2024) that MSD was operating outside of the existing legislative authority (section 252 of the ACC Act) in its treatment of backdated ACC payments.
- 12 We provided you an Aide Memoire on 7 November 2025 to inform you of the decisions and impacts at a high level [REP/25/11/889 refers].

MSD's current practice for charging backdated ACC payments has been successfully challenged

- 13 Most people, when eligible for ACC weekly compensation, will receive their compensation at the time they are injured. However, some people will wait a long period of time for ACC to make a final determination and will rely on MSD assistance during this waiting period. When ACC eventually approves a person's case, ACC will generally pay this person a backdated payment of weekly compensation. The backdated payment will cover the period they are entitled to weekly compensation which may overlap with periods of benefit receipt.
- 14 When this happens, MSD will generally:
 - seek a refund of any amount of main benefit¹ MSD paid the person, that has since been covered by their ACC payment
 - retrospectively review the person's past entitlement to supplementary assistance and determine whether any overpayments should be made for the period the ACC payment related to.
- 15 If MSD determines that a person's backdated ACC payment would have reduced their main benefit rate to zero, MSD will retrospectively consider this person a 'non-beneficiary.' MSD will then charge the backdated ACC payment as income against past supplementary assistance according to non-beneficiary rules.
- 16 The Appeal Authority found that:
 - MSD failed to take into account all relevant considerations (including any inequities that would be created) when deciding whether to exercise discretion to charge the backdated ACC as income against past entitlement for supplementary assistance

¹ This is defined as 'specified benefits' in the ACC Act and includes main benefits, Orphan's and Unsupported Child's Benefit and abated Veteran's Pension.

- while section 252 of the ACC Act enables MSD to recover main benefit payments directly from ACC, this provision does not affect the client's status as a beneficiary for the period reimbursed. Therefore, MSD cannot treat them as a non-beneficiary when undertaking a retrospective review of the supplementary assistance received in the same period.

17 s 9(2)(h)

These decisions have significant impacts for MSD

- 18 Both the High Court and Appeal Authority's rulings change the way that MSD must apply the law. The High Court's ruling was a statement of the law as it is now, and as it has always been.
- 19 While the decision of the Appeal Authority is not binding on future Appeal Authority decisions in the same way a High Court ruling is, in this case MSD has accepted the Appeal Authority's view of the law as correct.
- 20 This means that, in accordance with the law, MSD is required to:
- properly exercise its discretion when deciding whether or not to attribute backdated ACC payments of weekly compensation to a past period²
 - cease the practice of treating clients as non-beneficiaries where they entire amount of main benefit they received in the past has been recovered from their backdated ACC payment.
- 21 MSD is working to:
- reassess entitlement for the client the High Court decision related to, along with the two other clients who have cases being considered by the High Court, based on the High Court and Appeal Authority's rulings. This could potentially result in MSD writing off debts or refunding repayments that have previously been made.
 - reassess entitlement for the 36 current cases progressing through the Social Security Appeal Authority. This could also result in MSD writing off debts or refunding repayments that have previously been made.

² Properly exercising discretion can, for example, include considering the impacts or inequities placed on clients.

- put on hold consideration of decisions relating to supplementary assistance for cases of backdated ACC payments:
 - under review with the Benefits Review Committee
 - under a Review of Decision processes
 - lodged as new cases.
 - consider what this might mean for operational policy and practice.
- 22 MSD is legally required to take these immediate steps.
- 23 The implications of the decisions are expected to involve significant work and costs associated with:
- the operating cost of changing how we currently charge income and, where applicable, establish debt
 - potentially retrospectively assessing previous decisions made by MSD related to the treatment of backdated ACC payments that have since been found to be incorrect (and if necessary, reimbursing impacted clients)
 - prospectively changing current practice and systems to align with the decisions.
- 24 These impacts are canvassed in more detail below.

Retrospective impact

- 25 Without a retrospective amendment to legislation (to validate all past decisions made by MSD), MSD will need to consider its obligations in respect of historic decisions. MSD may need to:
- write off existing debts that were established based on practice that has since been found to be incorrect
 - refund any repayments already made by clients to MSD under this incorrect practice.
- 26 This would require substantial manual effort from MSD staff, with significant costs set out below.
- 27 MSD has looked at relevant legislative provisions and considers the scope of these decisions may affect past benefit assessments back to the late 1990's (if not further). Backdated ACC payments tend to be relatively large (as they often span several years).
- 28 MSD has undertaken an initial high-level estimate of potential costs if we needed to review past practice in respect of charging backdated ACC payments. For the period of 1998 to October 2025 there are at least 37,470 clients who could be in scope of review relating to these decisions. These clients have an approximate debt of \$63 million. Given the level of complexity

associated with reassessing and processing backdated ACC reviews, MSD estimates approximately 200 new FTE would be required to assess these cases in a 2-year period. Rough costs associated with this number of FTE are approximately \$68 million over two years.

- 29 As this data only relates to a portion of clients in scope, MSD expects the impacts could be greater once more fulsome modelling is undertaken.
- 30 In addition, the scope of the Appeal Authority's decisions also relates to all decisions made by MSD under clause 13 of schedule 3 (charging income against a past period). People can receive income relating to a different time period for many reasons. For example, wages paid at the end of a pay period (not the beginning), periodic interest payments made for the previous investments, holiday pay or paid out sick leave. MSD regularly considers the time period in which income relates, so that it can accurately be charged against a person's entitlement.
- 31 Given that this is a core part of the way income is treated in the welfare system, MSD expects the cohort that fall in scope of the broader Appeal Authority's decision to be substantial, However it is not currently possible to quantify how many people this may impact. We will consider the implications of these broader decisions as part of the next steps for responding to the High Court decision.

Fiscal liability impacts

- 32 MSD will be required to report an unquantifiable contingent liability to the Treasury as part of the 2025 Half-year economic fiscal Update. When there is a more reliable measure of the fiscal impact from this ruling MSD will recognise a liability and corresponding expense with flow through into the Crown accounts.
- 33 MSD considers the risk of unappropriated expenditure from expenditure exceeding budget levels is low due to it being early in the 2025/26 financial year, and having the opportunity to update relevant appropriations with forecast changes in the 2026 Budget Economic and Fiscal Update.

Prospective impact

- 34 Going forward, we expect there to be substantial impacts associated with changing practice and systems in line with the decisions. Changing our current practice and systems to align with the decisions in respect of backdated ACC payments would require time to:
 - work through flow-on impacts (both policy and operational flow-ons)
 - update our operational policy and processes
 - potentially change IT systems.

- 35 Due to the complexity of the above factors, we estimate the time to size, scope and plan this work (i.e. estimating the scale of work required to then begin work on implementation) could require six months of work at a minimum.
- 36 However, changing our income charging practice more broadly (in accordance with the Appeal Authority's broader decision) would have substantial impacts on the way MSD manages income declarations. It could result in significant resourcing implications if manual processing of income declarations is required.

These decisions do not align with the policy intent for the treatment of backdated ACC payments or for MSD's income charging practice

- 37 While we accept the High Court decisions in respect of the interpretation of law, we consider that they do not align with the policy intent for charging income against, and reassessing people in respect of, past periods.

Exercising discretion to charge income against past periods

- 38 Having consideration for the period in which to charge income has been a longstanding policy in the welfare system. When the current legislative provision was introduced in 2002, the discretionary component to the provision was included to allow MSD to have the discretion to choose when to charge income that did not relate to any particular time period (e.g. amounts regularly gifted to a person for no particular purpose).³ This allowed MSD to make a discretionary judgement as to whether it was more appropriate to charge income over the period the person:
- received it
 - became entitled to it, or
 - earned it.
- 39 The discretionary component was therefore intended to be limited to a certain set of considerations. While we accept the current wording of the law does not restrict the discretionary clause in this way, we consider this was the intended extent of the discretionary component. It was not intended for MSD to have broader considerations when exercising this discretion, including any inequities created by the retrospective recovery of assistance.

³ Provisions relating to periods in which to charge income have been in the Social Security Act (in various forms) since its enactment in 1964.

40 We therefore recommend you confirm this long-standing policy intent by seeking Cabinet agreement to amend the Social Security Act 2018 so that when calculating a person’s weekly income, MSD is limited in its exercise of discretion and must only have regard to:

- the extent to which the income was earned in the period, or
- the extent to which any other entitlement to it arose in, or in respect of, that period or those periods; or
- the period or periods for which it was otherwise received, acquired, paid, provided, or supplied.

Reassessing a person as a non-beneficiary when their backdated ACC payment meant they retrospectively exceed the income threshold

41 In addition, the longstanding policy intent and practice is to generally consider a person to be a non-beneficiary when their income results in their benefit abating to zero. Undertaking this income test is critical for MSD to determine whether a person is entitled to beneficiary or non-beneficiary assistance. Being determined a beneficiary or non-beneficiary has a material impact for clients, as detailed in Table 1 below.

Table 1: Examples for how entitlement to supplementary assistance is impacted by a person’s status as a ‘beneficiary’ or ‘non-beneficiary’

	Rules for a beneficiary	Rules for a non-beneficiary
Winter Energy Payment (WEP)	A beneficiary <u>is eligible</u> for WEP.	A non-beneficiary <u>is not eligible</u> for WEP.
Accommodation Supplement (AS)	A beneficiary <u>is not subject</u> to income abatement for AS.	A non-beneficiary <u>is subject to income abatement</u> for AS: their rate of AS is reduced by 25 cents for every dollar of income over the income threshold.

42 In line with the principles of a targeted welfare system, MSD will treat people differently according to how much income they receive. If a client has income over a certain amount (in this instance, the main benefit cut-out point), they are likely to receive less than someone with income under that amount. A way of determining whether someone’s income means they require additional assistance is by considering whether a person is a beneficiary (with very low income) or a non-beneficiary (likely low-medium income).

43 The High Court’s decision does not reflect this principle. It has found that MSD must continue to consider a person a beneficiary for a past period (and in most cases, allow the person to receive a higher amount as a beneficiary),

this would happen even if their backdated ACC payment abated their benefit amount to zero (and, in the standard treatment of income, would have otherwise made them a non-beneficiary).

- 44 The design of the main benefit abatement regime intends to, in part, accurately determine whether a person is a beneficiary or a non-beneficiary for the purpose of receiving additional assistance from MSD. However, we accept the decision of the High Court that the relevant legislative provision (section 252 of the ACC Act) does not affect the client's status as a beneficiary (and MSD therefore cannot treat the client as anything other than a beneficiary for that period).
- 45 This decision also creates a considerable inequity between clients of similar circumstances. It effectively means that:
- clients whose ACC payment abates their benefit to zero in the present day will have their MSD payments abated according to non-beneficiary rules
 - clients whose ACC payment abates their benefit to zero in a past period will have their MSD payments abated according to beneficiary rules.
- 46 This disadvantages clients who are paid ACC compensation at the time they earn it. The High Court acknowledged the disadvantage created, but considered the disadvantage faced by the individual (both in having to wait for their ACC compensation to be paid out and then being required to repay their supplementary assistance) was greater.
- 47 We therefore recommend you confirm this long-standing policy intent by seeking Cabinet agreement to amend the Social Security Act 2018 so that on direct reimbursement of main benefit payments from ACC, MSD may then, for the period those payments cover, treat the client as a non-beneficiary.

There are two options for seeking legislative change

- 48 There are two broad approaches for amending the Social Security Act 2018 which would align legislation with the longstanding policy intent. These options are set out below and would be relatively simple to draft.
- 49 In each instance we would seek to address treatment of backdated ACC payments and also safeguard MSD's general approach to charging income against past periods.
- 50 It is also important to consider how any potential legislative amendments would interact with the immediate steps taken by MSD to respond to the relevant decisions.

Option one: Amend the law with both retrospective and prospective effect, with a savings provision for some clients (recommended)

51 This would involve:

- amending the law in line with the longstanding policy intent going forward
- retrospectively validating all previous decisions made by MSD that have now been found to be unlawful
- preserving the current law through a savings provision for some clients. Further analysis on the choices regarding the scope of the savings provision is included in paragraphs 58-65 below.

52 MSD recommends this option because it aligns with how we have understood the policy intent from the point it came into force (i.e. it validates our past practice) and it prevents the risk of significant financial and operational impacts outlined in paragraphs 18-36 above.

53 When considering retrospective legislation, it is important that this aligns with the Legislation Design and Advisory Committee (LDAC) guidelines. As a general principle, legislation should not have retrospective effect or interfere with accrued rights and duties. However, departure from this principle can be justified in certain situations, including when Parliament wishes to amend the law in light of a judgement given in court proceedings. MSD considers this situation is likely to be a justified departure.

54 s (9)(2)(g)(i)

55 However, this is balanced with the fact that MSD does not consider the decisions align with what the policy intended to achieve when it was introduced into law.

56 When considering retrospective legislation, it is also necessary to consider a savings provision. A savings provision preserves a law, right, privilege or an obligation that would otherwise be affected by a new law. This means that even when there are good reasons for a law to apply with retrospective effect (which MSD considers applies for this situation), the new law should generally not interfere with the judicial process in particular cases before the courts. The law also needs to be consistent with the right to natural justice.⁴⁵

⁴ Natural justice means the right to be treated fairly, and have decisions affecting your rights made using fair process.

⁵ This is the guidance of the Legislation Design and Advisory Committee.

57 For this case, a savings provision would uphold the law as found by the Appeal Authority and High Court for the cohort of clients in scope.

There are choices regarding the scope and timing of a savings provision

58 A narrower savings provision could, for example, restrict the savings provision to clients who lodge a case:

- at the Appeal Authority or a Court; and/or
- prior to Bill introduction.

59 s (9)(2)(g)(i) [Redacted]

60 s (9)(2)(g)(i) [Redacted]

61 s (9)(2)(g)(i) [Redacted]

62 A broader savings provision could, for example, include clients who:

- lodge a Review of Decision or seek consideration by the Benefit Review Committee (in addition to those lodged with the Appeal Authority or High Court); and/or
- lodge a case up until the Bill is in force.

63 s (9)(2)(g)(i) [Redacted]

64 s (9)(2)(g)(i) [Redacted]

65 We are seeking an indication of your preferred approach to the savings provision which would inform further advice and potential legislative drafting

approaches. We will provide more advice on the impacts of a savings provision as part of the Cabinet Legislation Committee process.

Option two: Amend the law with prospective effect only (not recommended)

66 This would amend the law in line with the longstanding policy intent going forward. This option ensures that clients who have been subject to current practice are treated in accordance with the decisions, while limiting the financial impacts for the Government going forward.

67 This option would not align with MSD’s consideration of what the policy intended retrospectively. It would also mean that MSD would need to work to implement all retrospective implications as stepped out in paragraphs 18-36 (with associated financial and operational implications). For these reasons, MSD does not recommend this option.

Subject to your agreement, there are choices for how to progress the amendment

68 Should you agree to amend the law with retrospective effect (option one), you have choices for the speed at which you progress the amendment. As the decisions are now public, there is an opportunity for people who may have been treated incorrectly to lodge a claim and seek reassessment (and potentially, reimbursement).

69 s (9)(2)(g)(i) [Redacted text]

Approach one: Urgent legislation as soon as possible

70 This approach would require Cabinet to approve a Bill for introduction and for the House of Representatives to agree for the Bill to be debated under urgency.

71 This would reduce the financial and operational impacts of both:

- MSD changing its practice to align with the decisions
- the potential increase in appeals (and subsequent financial impact for the Government should those appeals be successful) following the decision being made public.

Approach two: The next appropriate Bill

72 s 9(2)(f)(iv) [Redacted]

73 s 9(2)(f)(iv) [Redacted]

74 s 9(2)(f)(iv) [Redacted]

75 s (9)(2)(g)(i) [Redacted]

s (9)(2)(g)(i) [Redacted]

76 s (9)(2)(g)(i) [Redacted]

77 s (9)(2)(g)(i) [Redacted]

78 s (9)(2)(g)(i) [Redacted]

79 s 9(2)(h) [Redacted]

Interaction with upcoming advice on income charging

80 s 9(2)(f)(iv) [Redacted]

81 s 9(2)(f)(iv) [Redacted text block]

82 s 9(2)(f)(iv) [Redacted text block]

Next steps

- 83 While we await your decisions, MSD will work to the immediate steps outlined in paragraph 21.
- 84 Subject to your agreement, MSD will begin drafting a Cabinet paper to seek agreement to amend the law in line with the recommended option. We will also work on a timeline for amendment depending on which legislative vehicle you prefer.

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