

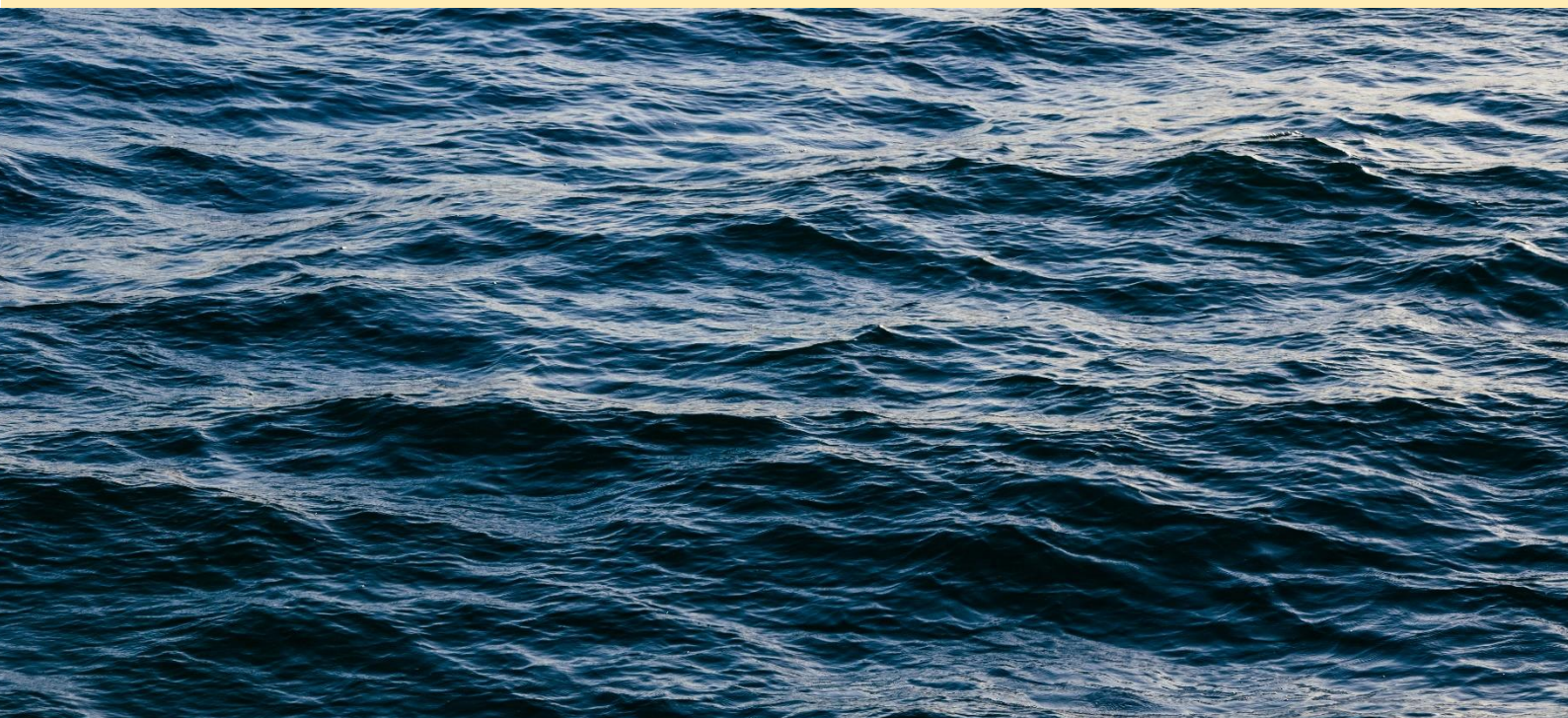


**Te Tari Ture  
o te Karauna**  
Crown Law

# ***Ex gratia Payments***

---

**He Aratohu mā ngā Rōia Kāwanatanga**  
A Guide for Government Lawyers







**Te Tari Ture  
o te Karauna**  
Crown Law

This advice has been prepared by Alison Todd (Senior Crown Counsel) and Jacqueline Perry (Assistant Crown Counsel).

In accordance with usual Crown Law policy, this advice was peer reviewed by Jenny Catran (Team Manager and Crown Counsel) and Austin Powell (Senior Crown Counsel).

Edition 1.0 November 2021

Proactively released May 2022

2022 © Crown Copyright This copyright work is licensed under the Creative Commons Attribution 4.0 International Public Licence. In essence, you are free to copy, distribute and adapt the work as long as you attribute the work to Crown Law and abide by the other licence terms. To view terms of the Creative Commons Attribution 4.0 International Public Licence, see:

- <http://creativecommons.org/licenses/by/4.0/>
- <http://creativecommons.org/licenses/by/4.0/legalcode>

Please note that neither the Crown Law nor New Zealand Government logos may be used in any way that infringes any provision of the Flags, Emblems, and Names Protection Act 1981 or would infringe such provision if the relevant use occurred within New Zealand. Attribution to Crown Law should be in written form and not by reproduction of either the Crown Law or New Zealand Government logos.



# Ngā Ihirangi

## Contents

Introduction .....	6
Structure of this guide .....	7
Authority for making <i>ex gratia</i> and settlement payments: an introduction .....	9
Departmental authority to incur expenses: the general position .....	10
Departmental authority to incur expenses in relation to <i>ex gratia</i> and settlement payments .....	10
The Circular excludes <i>ex gratia</i> payments and settlement payments from the general authorisation given to chief executives to incur expenses .....	11
The Circular distinguishes between <i>ex gratia</i> payments and settlement payments .....	11
This guide is about making payments not foregoing them .....	14
The purpose of <i>ex gratia</i> and settlement payments .....	15
The role of the government lawyer .....	16
Purpose of settlement payments .....	16
Purpose of <i>ex gratia</i> payments .....	17
The approval levels are consistent with these different purposes .....	18
Overview of when an <i>ex gratia</i> payment can be made .....	19
On the facts, can a legitimate legal claim for a monetary award be established? .....	20
The facts: what is the relevant factual assessment, and from whose perspective? .....	21
Assessing a legitimate legal claim for a monetary award: what does this mean? .....	22
Assessing whether there is a legitimate legal claim is a matter of judgement. You can draw on established legal tests .....	22
Situations where there may not be a legitimate legal claim .....	23
If an <i>ex gratia</i> payment is available, can the department identify a sense of moral obligation or goodwill reason to make a payment? .....	26
What is a sense of “moral obligation”? .....	27
What is “goodwill”? .....	27



What factors can be relevant to determining if there is a sense of moral obligation or goodwill reason to make a payment?	28
The nature of the relationship between your department and the individual .....	28
The nature of the department's actions or involvement in the situation .....	29
The degree and type of harm suffered .....	29
Te Tiriti/Treaty considerations .....	29
The individual's personal circumstances, and any contribution or mitigation on their part.....	29
Bring an appropriate cultural perspective to the analysis	30
Decision-makers must assess the existence of moral obligation or goodwill: this determines whether there is a basis for an <i>ex gratia</i> payment	30
<b>Should the department make an <i>ex gratia</i> payment? Consider the whole picture .....</b>	<b>31</b>
Judgement must be exercised as to whether to make an <i>ex gratia</i> payment	32
Why does a legitimate legal claim not arise? Would a payment undermine this policy or principle? .....	32
Consistency with international obligations (if any) .....	33
Strive for consistency with other circumstances in which <i>ex gratia</i> payments have been made .....	33
Availability and value of other remedial steps .....	34
Precedent effect of making an <i>ex gratia</i> payment .....	34
Economic considerations.....	34
Any other relevant matter .....	35
It is unlikely that natural justice applies when deciding whether to make an <i>ex gratia</i> payment	35
<b>How to assess quantum of payment? .....</b>	<b>36</b>
Assessing quantum is not an exact science	37
Identify the loss that the <i>ex gratia</i> payment acknowledges	37
The quantum should not usually be equivalent to what would be awarded if a legal claim did exist or a statutory scheme did apply.....	37
Link the size of the payment to the nature of the sense of moral obligation or goodwill	38
Relevance of other remedies or support that could be offered	38
Strive for consistency on quantum	38
Seeking the Solicitor-General's advice will assist with consistency on quantum .....	38
Legal costs should form part of the total quantum	39
Assessment of quantum will determine who has authority to approve payment	39



Tax implications flowing from an <i>ex gratia</i> payment	40
<b>Making an <i>ex gratia</i> payment: process, documentation and terms of a deed .</b>	<b>42</b>
Follow internal processes and put in place good practices	43
Your department should keep a clear record of the reasons for the <i>ex gratia</i> payment, and reasons for the sum chosen .....	43
Your department should also keep a clear record of the reasons for not making an <i>ex gratia</i> payment .....	44
How to record the position with the recipient, and what to include	44
A formal written record with the recipient will not always be needed .....	44
A formal written record, not legally binding, will usually be appropriate .....	45
In some cases, a legally-binding arrangement will be appropriate .....	45
Terms of a deed: assessing the need for confidentiality and finality	47
Confidentiality .....	47
Finality term.....	49
<b>Decisions on <i>ex gratia</i> payments: review mechanisms and scrutiny .....</b>	<b>52</b>
Declining an <i>ex gratia</i> payment: review mechanisms available to the individual	53
General accountability to Ministers and Parliament	54
<i>Ex gratia</i> payments may need to be disclosed in your department's financial statements	55
Auditors may see and review <i>ex gratia</i> payments	55
<b>Annexes .....</b>	<b>57</b>
<b>Annex 1: What you need to know about <i>ex gratia</i> payments .....</b>	<b>58</b>
<b>Annex 2: Correctly categorising payments made in the employment context.</b>	<b>61</b>
Severance payments .....	61
Return from parental leave .....	61
<b>Annex 3: Draft template for deed recording <i>ex gratia</i> payment.....</b>	<b>62</b>



# Kōrero whakataki

## Introduction

1. The Government can spend public money only in accordance with proper authority from Parliament.<sup>1</sup> Once that authority exists, the Government has significant discretion in its spending. *Ex gratia* payments are a form of discretionary spending, made by the Crown as an exercise of its prerogative powers.<sup>2</sup> They are defined in Cabinet Office Circular (18)2 (“the Circular”) as a payment made without the giver recognising any liability or legal obligation; the payment is made out of goodwill or a sense of moral obligation.
2. Put simply, *ex gratia* payments are made when there is a sense that it is the right thing to do. This is not a legal assessment. They can be made proactively or in response to a request for help or money. They are one step a department can make towards ‘putting things right’. ‘Settlement payments’ are made when there is a risk of legal liability, which the Government wishes to resolve by negotiating a settlement payment outside of court.
3. It is beyond the scope of the Circular to provide additional guidance as to what *ex gratia* payments are, how they should be approached, and how they differ from payments of compensation or damages in settlement of claims. So, this guide answers those fundamental questions. A correct and consistent understanding of the answers to these core (and other) questions is key to good decision-making and the fair distribution of Crown funds. This understanding will, in turn, ensure that decisions regarding discretionary expenditure of public funds are made by those Cabinet has mandated. The Circular provides different approval levels for settlement payments and *ex gratia* payments, with Ministers having to take certain decisions, so it is essential to understand what kind of payment is being made.
4. This guide is a companion to the Circular, aimed at government lawyers<sup>3</sup> who advise

---

<sup>1</sup> Public Finance Act 1989, ss 4 - 5.

<sup>2</sup> *Ex gratia* payments are generally regarded by New Zealand courts as an exercise of prerogative power. See, for example, *McLellan v Attorney-General* [2015] NZHC 3218, [2016] NZAR 859; *XY v Attorney-General* [2016] NZAR 875. The position is similar in the United Kingdom, see *Re McFarlane* [2004] UKHL 17 at [40]. Legislation may refer to the ability to make *ex gratia* payments (see for example the Earthquake Commission Act 1993, s 29(5)). Such sections appear to recognise the existence of a prerogative power to make *ex gratia* payments rather than creating a statutory power to do so.

<sup>3</sup> This guide has been written for lawyers in agencies who are part of the core Crown: agencies listed in schedule 2 of the Public Service Act 2020 and executive branch non-public service departments (NZ Police, NZ Defence Force and Parliamentary Counsel Office).



senior leaders and decision-makers. It is not prescriptive nor is it a checklist. Rather, the guide provides principles for you to apply in your unique operating context. It will help you to support decision makers to make good decisions which will stand or fall on their own particular merits.

5. *Ex gratia* payments can be made to an individual, whānau, iwi, group or even a company. The situations in which they may arise are wide-ranging. For ease, we have referred to “individuals” throughout this guide. Read these references broadly, and tailor the guide to the situation you have before you.

## Structure of this guide

6. *Ex gratia* payments involve expenditure. Both the [Public Finance Act 1989](#) and [Cabinet directions](#) must be understood and complied with. So, this guide starts with an introduction to the authority for making *ex gratia* and settlement payments.
7. Cabinet has distinguished between *ex gratia* payments and payments in settlement of legal claims. We therefore explain their different purposes in the next section. Having this clear at the outset helps you understand the remainder of the guide.
8. The guide then steps you through what you can do when your department has identified a situation where a payment may be appropriate or where you receive a request for a payment (no matter how it is framed); and explains when an *ex gratia* payment can be made. We begin with a one-page overview to introduce you to the concepts before dealing with each step in detail in the following sections.
9. The important first step is identifying whether the matter you have before you should be assessed using a legal or *ex gratia* framework. This will turn on whether the facts give rise to a legitimate legal claim for a monetary award. We explore what this means and how you should go about making this assessment. This first step ensures the right decision-maker is identified, and that they understand the basis on which they are considering and approving (or not approving) a payment. It also means the individual can understand why a payment is being made – because there is a potential legal liability or because of a sense of moral obligation or goodwill? Properly characterising the payment, and explaining this to the individual, may help with closure and go towards restoring the relationship between the Crown and the individual.
10. Following this, the guide will help you assess whether a sense of moral obligation or goodwill reason exists. This is the whole purpose of the payment, so identifying what it is about a situation that triggers this sense is important. We identify various factors that feed into the assessment, but there can be no exhaustive list given the unique and varied nature of situations that arise. Assessing moral obligation or goodwill does not involve legal standards.
11. The guide then moves to whether an *ex gratia* payment should actually be made,



which involves decision-makers standing back and exercising judgement as to whether the situation warrants it. A payment is not necessarily warranted in every situation where something has “gone wrong” or a mistake has been made. We identify some wider implications and matters that may be considered. Questions of quantum, and other steps your department may wish to take to help the individual, are then addressed.

12. Next the guide sets out matters that decision-makers will need to consider on the practical side of making a payment, such as how to record the payment, and what terms to use. This is a more legally-technical section, giving you the tools you need to help decision-makers on these legal matters.
13. To give a rounded picture of *ex gratia* payments, the final section outlines review mechanisms available to an individual, including review by the Ombudsman, and the way in which these payments can be scrutinised as part of a department’s financial statements.
14. We have prepared a three-page summary table to help you and decision-makers work through the steps set out in this guide, including working out whether or not making an *ex gratia* payment is an available option in the circumstances. This is [Annex 1](#).



# Authority for making *ex gratia* and settlement payments: an introduction

---

## In this section

- Departmental authority to incur expenses: the general position
- Departmental authority to incur expenses in relation to *ex gratia* and settlement payments
- This guide is about making payments not foregoing them

### Key points

- The Circular sets out those within Government who are authorised to incur expenses and in what circumstances.
- The Circular sets out specific provisions about authorising *ex gratia* payments and settlement payments. There are limits on the chief executive's authority to approval such payments. Ministers and Cabinet must approve them beyond certain monetary levels.
- The Circular defines an *ex gratia* payment as a payment made without the giver recognising any liability or legal obligation.
- “Recognising” liability involves asking whether the Crown “considers” there could be liability. It is not about admitting liability.
- There can only be a “liability” if a legitimate legal claim could be established on the facts.



## Departmental authority to incur expenses: the general position

15. The Public Finance Act 1989 provides that the Crown<sup>4</sup> or an Office of Parliament must not incur expenses except as expressly authorised by an appropriation or other authority by or under an Act.<sup>5</sup> So, there must be proper authority from Parliament for the Crown to incur expenses. Departments incur expenses as instruments of the Crown.
16. There is permanent legislative authority for public money to be spent for the purpose of meeting expenses in accordance with an appropriation (or other authority by or under an Act).<sup>6</sup> References to ‘incurring expenses’ and ‘spending money’ are thus interchangeable in this context.
17. Cabinet then stipulates, via the Circular, when a department has authority to incur expenses. In other words, the Circular sets out whom within Government is authorised to incur expenses and in what circumstances.<sup>7</sup> The Circular makes a distinction between a departmental chief executive’s authority to spend under departmental appropriations, and under non-departmental appropriations that they administer (which are, broadly, on-behalf-of the Crown appropriations).
18. The Circular contains the rules for spending under departmental appropriations. Spending under non-departmental appropriations must be in accordance with the terms of a delegation from the appropriation Minister.<sup>8</sup>

## Departmental authority to incur expenses in relation to *ex gratia* and settlement payments

19. Expenses in relation to *ex gratia* payments or settlement payments would ordinarily be incurred under a departmental output expense, as they would relate to something the department did or didn’t do (and so are a cost the department incurs in producing

---

<sup>4</sup> The Crown is defined to include all Ministers of the Crown and all Departments but does not include a Crown entity. See Public Finance Act 1989, s 2.

<sup>5</sup> Section 4.

<sup>6</sup> Public Finance Act 1989, s 6(a). When that spending occurs, expenses are charged against the relevant appropriation. This is because appropriations are on an accrual basis.

<sup>7</sup> The status of the Circular is that it is guidance from Cabinet, which departments are expected to comply with.

<sup>8</sup> CO Circular (18)2 at paragraphs 65 and 71.



its outputs). They could potentially be incurred under a departmental other expense appropriation, but this would be rare.<sup>9</sup>

20. Whereas if one of these payments (broadly) relate to something the Crown – in its wider or collective sense – did or didn't do, they would be met from a non-departmental other expense appropriation.
21. This guide focuses on the position when spending under a departmental appropriation that your department administers. However, the principles are equally applicable when considering a payment under an appropriation administered by another department, or under a non-departmental appropriation - which must occur under a specific Ministerial delegation.

### **The Circular excludes *ex gratia* payments and settlement payments from the general authorisation given to chief executives to incur expenses**

22. Cabinet has given a general authorisation to departmental chief executives and their delegates to incur expenses in relation to the operations of their departments under departmental output expenses or departmental other expenses in accordance with the Circular.<sup>10</sup>
23. *Ex gratia* payments and payments to settle legal claims are excluded from that general authorisation. Instead, they are governed by specific provisions in the Circular. There are limits on the chief executive's authority to approve these two types of expenditure, and Ministers and Cabinet must approve them in certain circumstances.
24. Apart from publicity expenses and capital expenditure, *ex gratia* payments and settlement payments are the only specified limits on incurring expenditure that still exist. The fact they have been called out in this way indicates that Government has a heightened interest in expenses of these kind and wishes to retain direct oversight and control over the circumstances in which some of these payments are made.

### **The Circular distinguishes between *ex gratia* payments and settlement payments**

25. The Circular distinguishes between *ex gratia* payments and payments in settlement of legal claims, and treats them differently. This arises through the definitions, the different approval thresholds for each, and the different requirements for legal assurance.

---

<sup>9</sup> [CO Circular \(18\)2](#) at footnote 32.

<sup>10</sup> [CO Circular \(18\)2](#) at paragraph 67.



## The Circular defines *ex gratia* payment

26. The definition of *ex gratia* payment in the Circular has two limbs: (i) a payment made without the giver recognising any liability or legal obligation; (ii) the payment is made out of goodwill or a sense of moral obligation.<sup>11</sup>
27. On the first limb, “recognising” is the same as asking whether the Crown “considers” there is or could be a liability or legal obligation. “Recognising” is different to “admitting”. This is a key point.
28. There can only be a “liability” or a “legal obligation” if the Crown considers a legitimate legal claim could be established on the facts. Guidance as to how to make this assessment can be found at [pages 22-25](#).
29. The Circular does not define payments in settlement of claims, presumably because such payments are well understood as following recognition of a legal claim or legal obligation (such as statutory compensation schemes).

## The Circular has different approval levels for the two types of payment

30. There are different approval thresholds for each type of payment:

Type of expense	Amount (GST excl.)	Approval required	Comment
Compensation or damages in settlement of claims*  <i>* The limitations do not apply to damages and costs ordered by a court. These can be expensed against any existing appropriation provided they are within the amount and scope</i>	\$150,000 or less	Chief executive (or his or her delegate)	Claims under \$75,000 should be certified by the department's Chief Legal Advisor as being in order, or should otherwise be endorsed by the Crown Law Office

---

<sup>11</sup> Other definitions of *ex gratia* payments may exist in specific contexts, for example the Social Security Regulations 2018, Schedule 8, part 5, reg 5 (*ex gratia* payment means a payment made without an acknowledgement of legal liability). Definitions such as this tend to focus on the first limb of the Circular definition, so do not provide assistance as to *when* an *ex gratia* payment is available. We consider this is governed by the Circular.



<i>of that appropriation.</i>	More than \$150,000 and up to \$750,000	Appropriation Minister	Expenses for compensation or damages in settlement of claims should be endorsed either by the Crown Law Office or a court judgement
	More than \$750,000	Cabinet	Cabinet considers advice from the Crown Law Office
<i>Ex gratia</i> expenses	\$30,000 or less	Chief executive (or his or her delegate)	An <i>ex gratia</i> payment is a payment made without the giver recognising any liability or legal obligation; the payment is made out of goodwill or a sense of moral obligation
	More than \$30,000 and up to \$75,000	Appropriation Minister	
	More than \$75,000	Cabinet	

31. The person or body (Cabinet) with authority to approve the *ex gratia* payment will be deciding whether to make it.

**The Circular has different requirements re legal involvement for the two types of payment**

32. The Circular sets out the circumstances in which your chief legal advisor or Te Tari Ture o te Karauna (the Crown Law Office) “should” certify and/or endorse payments in settlement of legal claims. We interpret the Circular as saying that your chief legal advisor must certify all payments up to \$75,000; and Te Tari Ture o te Karauna must endorse payments above this amount and up to \$750,000.<sup>12</sup> If the proposed payment is more than \$750,000 then Cabinet will consider advice from Te Tari Ture o te Karauna.

---

<sup>12</sup> Also, it is sufficient if a Court judgment endorses a payment of compensation or damages between \$150,000 and \$750,000.



33. However, with *ex gratia* payments there is no requirement for lawyers to be involved with at all. Despite this, our view is that lawyers should be involved at certain key stages, and we flag this at the relevant points below.

## **This guide is about making payments not foregoing them**

34. This guide deals with the payment of money to help resolve a situation; it does not apply to foregoing any payments which may otherwise be due (or potentially due), such as not seeking costs following successful litigation. Not seeking costs, or not enforcing a costs award, will not usually constitute an expense, and so the various provisions in the Circular covering the incurring of expenses will not apply.<sup>13</sup>

---

<sup>13</sup> In simple terms, seeking costs is a potential revenue stream. Not taking up that opportunity may mean the Crown foregoes revenue, but a loss of potential revenue is not recognised as a cost/expense.



# The purpose of *ex gratia* and settlement payments

---

## In this section

- The role of the government lawyer
- Purpose of settlement payments
- Purpose of *ex gratia* payments
- The approval levels are consistent with these different purposes

### Key points

- Cabinet has drawn a clear distinction between *ex gratia* payments and payments in settlement of legal claims.
- A payment of damages or compensation in settlement of a claim is a payment made, out of court, when there is a risk the Crown could be legally liable to make a monetary payment. The purpose is to deal with liability risk.
- An *ex gratia* payment is made when the Crown does not consider it could be legally liable to make a monetary payment. The purpose is to address the Crown's sense of moral obligation or goodwill.
- The relatively low authority levels in the circular for approving *ex gratia* payments operate as the necessary check on when payments should be made when there is no legal obligation to do so.



## The role of the government lawyer

35. As a government lawyer, you may be asked to advise on a wide variety of situations where things have ‘gone wrong’ and the Crown is involved in some way. In some situations, there will be an allegation of wrongdoing by the Crown, but in others there won’t be. The situation may give rise to a risk of a legal claim, or there may be no legal ‘flavour’ to the situation. If there is some risk of a legal claim, it may be one where a monetary award would be available, or it may be one involving a non-monetary remedy (like a judicial review or declaratory judgment claim). On top of that, the alleged facts of the situation may be accepted, accepted in part, or rejected by your department.
36. The task of a government lawyer is to chart a course through this web of variables when advising on the use of Crown funds to resolve a situation.
37. Cabinet has drawn a clear and deliberate distinction between *ex gratia* payments and payments in settlement of legal claims. They are, therefore, different things, with different purposes.

## Purpose of settlement payments

38. A payment of damages or compensation in settlement of a claim is a payment made, out of court, when there is a risk the Crown could be legally liable to make a monetary payment. Crucially, the risk could be great or small (we return to this shortly, starting at [page 22](#)). The purpose of the payment is to deal with that liability risk, albeit such payments can be made without any admission of liability.
39. This thinking is consistent with the approach that lawyers take to contingent liabilities. A contingent liability is defined in financial reporting standard IPSAS 19: Provisions, Contingent Liabilities and Contingent Assets to include a “possible obligation that arises from past events, and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity”.<sup>14</sup>
40. If there is a possible liability of the kind described, then the matter is recorded as a contingent liability.
41. A payment made to resolve a matter, out of court, amounts to settlement of a contingent liability. In other words, it is a payment to settle the risk of legal liability. The liability is ordinarily settled within the parameters of that contingency, by which

---

<sup>14</sup> <https://www.xrb.govt.nz/accounting-standards/public-sector/pbe-ipsas-19/>



we mean the maximum the person has claimed,<sup>15</sup> or the maximum you think they could be legally entitled to, plus their legal costs.

42. If there is a legitimate legal claim but damages are excluded (such as claims for damages for personal injury covered by accident compensation legislation) there will still be a contingent liability but only for the person's costs. This is because the person could still seek a declaratory remedy.

## Purpose of *ex gratia* payments

43. In comparison to a settlement payment, an *ex gratia* payment is a payment made when the Crown does not consider it could be legally liable or have any legal obligation to make a monetary payment. The purpose of the payment, as set out in the Circular, is to address the Crown's sense of moral obligation or goodwill.
44. This purpose has remained constant throughout the various iterations of the Circular.<sup>16</sup> It is consistent with dictionary definitions and with broad statements made within case law.<sup>17</sup>
45. As we discuss below, the situations in which *ex gratia* payments can be made are wide-ranging and are not limited to where your department has contributed to something going wrong.

---

<sup>15</sup> Sometimes the claimed amount does not fall within the range of reasonable or possible awards. If so, an "audited" amount is often taken as the genuine contingency, and settlement would usually be within that audited contingency.

<sup>16</sup> Earlier Cabinet Office Circulars defined *ex gratia* payments as those made in respect of claims that are not actionable at law, but for which there exists a moral obligation and payment should be made. Cabinet Office Circular (99) 07; CO (09) 06 (Guidelines for Changes to Baselines, 24 September 2009) and CO 11(6) (Guidelines for Proposals with Financial Implications, June 2011) can be requested from the Cabinet Office.

The definition changed in 2015, when an *ex gratia* payment was described in CO Circular (15)4 as a payment made without the giver recognising any liability or legal obligation; the payment is made out of goodwill or a sense of moral obligation. This formulation was carried over in 2018 into the current Circular.

<sup>17</sup> Leading law dictionaries define *ex gratia* payments as those made as a favour or gift, and not because of any legal duty or requirement or compulsion.

An *ex gratia* payment has been broadly described in caselaw as: synonymous with 'without admission of liability' (*Edwards v Skyways Ltd* [1964] 1 All ER 494 at 500, per Megaw J); presupposing there is no obligation to make it (*R v Secretary of State for the Home Department, ex parte Harrison* [1988] 3 All ER 86 (QB) at [30]); giving rise to no right to enforce payment via action in the courts (*R v Criminal Injuries Compensation Board ex parte Lain* [1967] 2 All ER 770 at [780]); being of a kind which the Crown may have no duty to undertake and to which the applicants may have no enforceable right (*XY v AG* [2016] NZAR 875 at [71]); one that is made as a matter of executive grace and favour (*Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR683, Ellis J at [4]).



## The approval levels are consistent with these different purposes

46. Before a payment is made to address a liability risk (i.e. compensation or damages in settlement of a claim), your chief legal advisor or Te Tari Ture o te Karauna must certify, endorse or advise on the payment as relevant. They can assess liability risk and appropriate quantum of payment by reference to established principles of law. In these circumstances, chief executives (or delegates) are conferred with authority to approve payments up to \$150,000. Payments above that amount must be approved by the Appropriation Minister or Cabinet, depending on the amount.
47. In contrast, the authority levels for approving *ex gratia* payments are significantly lower. Chief executives (or their delegates) are considered well placed to make payments of public funds to acknowledge moral obligations or goodwill, up to a point (\$30,000). Ministers are considered best placed to determine whether a sense of moral obligation or goodwill is so compelling that a higher payment should be made up to a value of \$75,000, having regard to community values and norms and the Crown's competing financial priorities. Beyond \$75,000, these decisions are reserved for Cabinet. These authority levels operate as the necessary check on when payments should be made when there is no legal obligation to do so.



# Overview of when an *ex gratia* payment can be made

---

48. We have identified that *ex gratia* payments are all about addressing moral obligations or acts of goodwill, whereas settlement payments are about dealing with liability risk. However, a situation can fall into the *ex gratia* category, the legal claim category, or potentially both. To work out the correct category and whether the situation justifies an *ex gratia* payment, you may wish to work through the following steps:
- 48.1. Based on the facts as the Crown sees them or considers could be proved, can a legitimate legal claim for a monetary award be established?<sup>18</sup>
    - 48.1.1. If yes, an *ex gratia* payment is not available. You will be advising your department about processing the matter as a legal claim instead.
    - 48.1.2. If no, an *ex gratia* payment is available. Consider the next question.
    - 48.1.3. If an *ex gratia* payment is available, can the department identify a sense of moral obligation or a goodwill reason for making a payment?
  - 48.2. If a sense of moral obligation or goodwill has been identified, should the department make an *ex gratia* payment considering all the circumstances?
    - 48.2.1. If yes, an *ex gratia* payment can be made.
    - 48.2.2. If no, an *ex gratia* payment should not be made.
  - 48.3. If your department has decided to make an *ex gratia* payment, what sum should be paid?
  - 48.4. If your department has decided to make an *ex gratia* payment, what practical steps should be taken in relation to records and, potentially, terms of payment.
49. This guide explores each of those questions in more detail in the next sections. Issues arising in the employment context are also briefly explored in Annex 2.

---

<sup>18</sup> Agencies wishing to settle judicial review or declaratory judgment proceedings do not generally settle them on the basis of a payment of money (as distinct from paying the individual's legal costs), as such relief would not be ordered by the courts. But we do not rule out exceptions to this approach in limited circumstances.

---



# On the facts, can a legitimate legal claim for a monetary award be established?

---

## In this section

- The facts: what is the relevant factual assessment, and from whose perspective?
- Assessing a legitimate legal claim for a monetary award: what does this mean?

### Key points

- The first step is to establish what the correct factual position is based on the available evidence.
- It is then necessary to determine whether a legitimate legal claim for a monetary award could be established. This is a matter of legal judgement. You should not apply a high a bar.
- There may be no legitimate legal claim where there is a statutory bar, an applicable defence or the individual is not eligible under a statutory scheme.
- If the facts give rise to a legitimate legal claim, then process it as a legal claim. If not, an *ex gratia* payment can be considered.



## The facts: what is the relevant factual assessment, and from whose perspective?

50. In cases where an individual has approached your department for help or for any form of monetary payment, they will likely present their version of what has happened. Your department may accept the facts presented, accept them in part, or dispute them – and some of these facts will be more relevant than others. Where your department has itself identified a situation that might warrant an *ex gratia* payment, the facts need to be established.
51. No matter how the situation comes to be considered by your department, the first step is to establish what the correct factual position is based on the available evidence.<sup>19</sup>
52. Establishing the facts means identifying the facts and circumstances surrounding what has occurred that are accepted by your department or are supported by the evidence, on the balance of probabilities. The decision-maker will need to take a position on any contentious factual matters. You should identify the nature and extent of your department's role in what has occurred and how (if at all) this contributed to any losses which have been suffered.
53. Isolate the losses that have been suffered and could be proved.
54. While the Circular does not require involvement of lawyers, in practice you will likely be involved at some or all of the stages of making an *ex gratia* payment. It is useful for lawyers to be involved at this factual assessment stage, and your department's internal policies may require this. You will have a good feel for when it is also appropriate to involve Te Tari Ture o te Karauna, and we recommend you do so if any of the following issues arise when undertaking the factual assessment:
  - 54.1. There is a reasonable suggestion of a breach of s 9 of the New Zealand Bill of Rights Act 1990.
  - 54.2. The circumstances are likely to give rise to issues of public or policy importance, or are otherwise particularly significant.
  - 54.3. There are indications an *ex gratia* payment might be made at the level where Cabinet is required to approve it – more than \$75,000. In this situation the Attorney-General may be asked for input and would be briefed by Te Tari Ture o te Karauna. Early engagement with Te Tari Ture o te Karauna will facilitate this process.

---

<sup>19</sup> Particular care may be needed where an individual alleges wrongdoing by an official, the official denies this, and an investigation into the facts could have employment consequences. Legal advice should be sought in these circumstances.



54.4. A court has determined that there is no legal liability, but the department is now considering making an *ex gratia* payment.

55. Throughout this factual-assessment process, you may need to seek and/or clarify information with the individual. We do not see this as ‘consultation’ but rather as engaging to obtain the best information available.

## Assessing a legitimate legal claim for a monetary award: what does this mean?

56. The ultimate question here is whether a legitimate legal claim for a monetary award could be established on the facts.<sup>20</sup> It does not matter whether a formal statement of claim (or similar) has been received. An assessment of this kind should generally be made by departments’ legal teams or otherwise reviewed by them.<sup>21</sup>
57. You need to assess whether the facts give rise to a particular kind of legal claim: one for which a monetary remedy may be available. This can be distinguished from other legal claims for which no monetary remedy may be available (for example, judicial review, or declaratory judgment proceedings).<sup>22</sup> We refer simply to ‘legal claims’ from this point forward, but in doing so, we mean legal claims where there is a possible monetary remedy.

### Assessing whether there is a legitimate legal claim is a matter of judgement. You can draw on established legal tests

58. Determining whether there is a legitimate legal claim is a matter of legal judgement. You should assess both the causes of action that may have been identified by the individual, and those that you identify as potentially available. You should not apply a high bar. A weak claim can still be a legitimate claim. You can draw on some established legal tests here. A claim is not legitimate where:<sup>23</sup>

---

<sup>20</sup> This includes claims for compensation under a statutory scheme, such as s 162A of the Biosecurity Act 1993.

<sup>21</sup> It is necessary to refer here to the [Compensation Guidelines for Wrongful Conviction and Imprisonment](#) (August 2020). This is a stand-alone scheme which recognises that deprivation of liberty consequent on a wrongful conviction is a particular loss that is worthy of a payment, which is most appropriately described as an *ex gratia* one. However, the guidelines apply in circumstances where a legitimate legal claim could potentially be established (e.g. for breach of the [Bill of Rights Act 1990](#) during the trial process, or for malicious prosecution). The scheme sets out its own rules and eligibility requirements, which is not typical of the situations we are seeking to cover in this guide. The Compensation Guidelines are unlikely to be helpful in other contexts, including the situations this guide seeks to cover.

<sup>22</sup> See [footnote 18](#) above.

<sup>23</sup> This approach is consistent with the earlier Cabinet Office Circulars. As set out in [footnote 16](#), they referred to payments made in respect of claims that are “not actionable at law”.



- 58.1. the causes of action are so clearly untenable that they cannot succeed.<sup>24</sup> This is the threshold for striking out a pleading on the basis it discloses no reasonably arguable causes of action, and is broadly the test for granting summary judgment for a defendant;
  - 58.2. the facts as asserted and relied upon to support the claim are plainly unsupportable and without foundation (if a cause of action would otherwise be available);
  - 58.3. there is simply no recognisable or reasonably possible cause of action that could be formulated to fit the facts; or
  - 58.4. in the case at hand, a court has determined that no liability lies.
59. Particular care will be required where there are factual disputes or uncertainties, or the applicability of a bar or limitation or immunity turns on an assessment of conduct (e.g. actions carried out in good faith).
60. In some situations, it will be clear and easy to establish whether or not there is a legitimate legal claim, and no real analysis will be required. Other situations will be more complex. Even so, analysing whether there is a legitimate legal claim does not always need to be a long and resource-intensive process. It must be principled, but use your judgement as to the extent of the analysis required for the situation you have before you.

## Situations where there may not be a legitimate legal claim

61. There are numerous reasons why a legitimate legal claim might not be established on the facts. When this is so, an *ex gratia* payment is available and you can move to the second question.
62. In addition to the situations which just have no legal flavour, we explore the more common reasons why there may not be a legal claim in the following paragraphs. The aim of this is to give you much of what you may need to make the assessment.

### Statutory bars

63. There may be a relevant and clearly applicable statutory bar to recovering damages and/or bringing proceedings and/or liability.<sup>25</sup> Bars of general or wide application include:

- 63.1. the bar on proceedings for damages arising directly or indirectly out of

---

<sup>24</sup> See decision of the Court of Appeal in *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 at 267; and the Supreme Court in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33], for a discussion of strike-out principles. See *Westpac Banking Corp v MM Kembla* [2001] 2 NZLR 298 (CA) at [64] for a discussion of summary judgment principles.

<sup>25</sup> As these bars exclude liability by operation of statute, they cannot be waived.



personal injury covered by the accident compensation regime (under s 317 of the Accident Compensation Act 2001);<sup>26</sup>

- 63.2. the bar on tortious proceedings against the Crown in respect of actions taken as part of the judicial process (s 6(5) of the Crown Proceedings Act);
  - 63.3. the bar on proceedings stemming from making information available under the Official Information Act in good faith (s 48 of that Act);
  - 63.4. the immunity from liability for chief executives and public service employees carrying out their responsibilities and duties in good faith (s 104 Public Service Act 2020).
64. Bars of more specific application may arise in any number of contexts, such as:
- 64.1. the (limited)<sup>27</sup> bar on tortious liability of the chief executive and other persons having care of a child or young person (under s 394 of the Oranga Tamariki Act 1989); and
  - 64.2. the immunity provision in s 163 of the Biosecurity Act 1993.

### **Applicable defence**

65. There may be a relevant and clearly applicable defence to the claim for damages.<sup>28</sup> The most obvious example is a limitation defence, and in particular the statutory defence to a money claim that is filed after the applicable period (s 11 of the Limitation Act 2010).
66. In compelling circumstances, the Crown may waive a limitation defence. When this is so, the matter should generally be handled as an *ex gratia* payment.<sup>29</sup> Limitation defeats a claim, so where the defence is clearly applicable, there is no liability risk to be addressed by a settlement payment. If the circumstances are such that a waiver would be considered appropriate, so that damages could otherwise be paid, then the situation may well be one where there is a moral obligation or goodwill reason to pay.

### **Common law precedent**

67. There may be a clear common law precedent that the claim cannot succeed. For example, a claim for damages for false imprisonment when a conviction is overturned, or a claim for public law/Baigent damages stemming from a judicial breach of the Bill

---

<sup>26</sup> See also s 52 of the Health and Disability Commissioner Act 1994, which repeats the bar on recovering damages for personal in certain proceedings in the Human Rights Review Tribunal.

<sup>27</sup> This bar only applies in respect of acts or omissions of a child or young person in care.

<sup>28</sup> A party can choose whether to raise the defence or not, so it can be 'waived'.

<sup>29</sup> Limitation issues can arise in a wide variety of situations and your approach to waiving limitation and any subsequent payments should be informed by the context.



of Rights Act.<sup>30</sup>

### **Non-eligibility under statutory scheme**

68. There may be a clear lack of eligibility to recover compensation or damages under a statutory scheme that covers the field. By way of example only, this includes schemes for:
  - 68.1. lump sum compensation for permanent impairment under the Accident Compensation Act 2001;
  - 68.2. compensation for loss caused by the eradication or management of an organism under s 162A of the Biosecurity Act 1993;
69. If the facts give rise to a legitimate legal claim, then process it as a legal claim. If not, an *ex gratia* payment can be considered. If the facts give rise to a legitimate legal claim, then process it as a legal claim. If it is appropriate to make payment, then treat any payment as compensation or damages in settlement of a claim.
70. If the facts do not give rise to a legitimate legal claim, then you are properly in the realm of considering an *ex gratia* payment.
71. If the factual matrix genuinely has two components – by which some facts give rise to a legal claim and some do not – then it may be necessary to split the factual situations and process them under separate heads. Departments can choose how best to progress each situation (in tandem or otherwise). In these circumstances there would need to be clear communication with the individual as to process and the purpose of any payments ultimately made.

---

<sup>30</sup> See *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.



# If an *ex gratia* payment is available, can the department identify a sense of moral obligation or goodwill reason to make a payment?

---

## In this section

- What is a sense of “moral obligation?”
- What is “goodwill”?
- What factors can be relevant to determining if there is a sense of moral obligation or goodwill reason to make a payment?
- Bring an appropriate cultural perspective to the analysis
- Decision-makers must assess the existence of moral obligation or goodwill: this determines whether there is a basis for an *ex gratia* payment

### Key points

- An *ex gratia* payment is made out of a sense of moral obligation or goodwill. This is not a legal assessment.
- A payment made out of a sense of moral obligation means it is the morally right thing to do. This can be triggered whether the Crown has been at fault or not.
- Goodwill is a lower threshold than moral obligation. This provides scope for a wider range of discretionary payments.
- The approach to moral obligation and goodwill may change over time and is influenced by changes in community and social values.
- Assessing moral obligation and goodwill requires decision-makers to consider and weigh various factors, which will be very case-specific.
- If a sense of moral obligation or goodwill cannot be identified, there is no basis for making *ex gratia* payments.



## What is a sense of “moral obligation”?

- 72. If a payment is made out of a sense of moral obligation, it must be the morally right thing to do. A moral obligation can potentially be triggered whether the Crown has been at fault or not.
- 73. The approach to moral obligations may change over time and is influenced by changes in community and social values and laws. The circumstances in which a moral obligation might arise, and why, are infinite. But not every case where harm or loss of some description has been suffered will lead to such moral obligation. The distinguishing features of a situation that give rise to the sense of moral obligation to pay should reflect current values.
- 74. The concept of moral obligation has been common to all iterations of the Cabinet Office Circular.

## What is “goodwill”?

- 75. The idea of making a payment out of goodwill, as an alternative to moral obligation, was added to the 2015 version of the Circular,<sup>31</sup> and carried over into the current Circular.
- 76. Goodwill is, in our view, a lower threshold than moral obligation. We do not seek to pin it down, but broadly we consider goodwill is about what is the good or proper thing to do. This provides scope for a wider range of discretionary payments that may not meet the threshold of a moral obligation. The idea of a payment being made out of goodwill is perhaps more closely aligned with the concepts of grace and favour that emerge in dictionary definitions.
- 77. Payments made out of goodwill will arise in a range of different circumstances and it is difficult to place parameters around when they might be appropriate. Generally, we consider payments made out of goodwill are more likely to be apt in circumstances where there is no fault on behalf of the Crown; there is an element of beneficence to the payment. As a result goodwill payments will generally involve smaller sums than where a moral obligation is engaged. As with moral obligations, community values and expectations of how a good government in the current climate might act are relevant.

---

<sup>31</sup> See CO Circular (15)4.



## What factors can be relevant to determining if there is a sense of moral obligation or goodwill reason to make a payment?

78. The Crown is not an insurer against all misfortunes in life, so your department must identify what it is about the specific matter that triggers a sense of moral obligation or goodwill reason for the Crown to make an *ex gratia* payment. This is the crux of the matter - the whole purpose of the payment – so it cannot be overlooked or overstated.
79. If your department works through and identifies what it is that triggers a desire to “put things right” by way of a payment, decision-makers will be better placed to distinguish between situations of ‘mere’ misfortune and situations raising moral obligation or goodwill.
80. Assessing moral obligation or goodwill is neither a legal assessment nor does it involve legal standards. It requires decision-makers to consider and weigh various factors, which will be very case-specific. We set out some factors below, but it is not an exhaustive list. The decision-maker you are advising must consider the particular situation they have before them, in its proper context. That context will include your department and/or government’s strategic direction and policy objectives, your department’s standards and expectations (and the community’s), any relevant statutory references<sup>32</sup> and the background to certain situations and relationships.

### The nature of the relationship between your department and the individual

81. The nature of the relationship between your department and the individual is important. Is it a close or special or dependent relationship; or are they at arms-length?<sup>33</sup> Will there be an ongoing relationship between your department and the individual? Your department may consider it has some responsibility for, or towards, the affected person, even though there is no legal relationship.

---

<sup>32</sup> Where there is a relevant statutory reference to the potential for making an *ex gratia* payment, such as [s179E](#) and [s 195](#) of the [Corrections Act 2004](#), this should be highlighted to the decision-maker as part of the relevant context.

<sup>33</sup> A short note on contractual relationships. A contract creates a legal relationship. When a contract is in place, check whether the situation is one that is governed by the contract and should be handled as a legal claim. Separately, a situation could arise where an *ex gratia* payment might be appropriate for a contract party where there is no legitimate claim for payment under the terms of the contract. The wider contractual context of the relationship may be relevant.



## **The nature of the department's actions or involvement in the situation**

- 82. You should assess the extent, if at all, to which the situation has arisen because of the department's actions or involvement. Your department may be directly or peripherally involved, or it may be responsible for the person who caused the wrong, or it may be responsible for the system in which the wrong occurred (e.g. the foster care system). The situation may simply be one that your department is particularly well-placed to remedy and feels that it should.
- 83. A moral responsibility or goodwill reason to pay can potentially be triggered when your department has an indirect connection with the situation and/or the everyday person would not consider your Department to be responsible or at fault.
- 84. There may be a number of people or actions that contributed to the loss or harm suffered by the individual. If so, assess the nature and extent of your department's contribution.

## **The degree and type of harm suffered**

- 85. There is no rule that only physical harm or significant economic loss can be acknowledged by an *ex gratia* payment. Any type of loss or harm qualifies. But the degree and type of harm is still relevant to moral obligation or goodwill. The graver the harm, and/or the absence of any prompt remedial steps by the department to decrease the severity of the harm, the greater the sense of moral obligation which may arise.

## **Te Tiriti/Treaty considerations**

- 86. An analysis of the facts may indicate that a Tiriti o Waitangi/Treaty of Waitangi issue is implicated. For example, the harm suffered may be a loss of cultural connection, and the situation may be such as to place a moral obligation on the Crown to provide some compensation.
- 87. Using your departmental expertise, you should take care to identify any Tiriti/Treaty dimension at an early stage to assess its relevance and significance. Te Tiriti/the Treaty might be relevant even if a breach of Treaty principles has not occurred.
- 88. You may need to seek advice from Te Tari Ture o te Karauna and/or Te Arawhiti if there is uncertainty as to whether Te Tiriti/the Treaty is relevant in light of the applicable facts, or if the issue is particularly contentious.

## **The individual's personal circumstances, and any contribution or mitigation on their part**

- 89. It is legitimate to look at the individual's personal circumstances. Is the person particularly vulnerable, or has the event had a particularly grave impact on them?



There may be applicable tikanga principles in play, such as the impact of a loss of mana.

90. Genuine impact should be taken into account. Some individuals may share the impact the event or harm has had on them (and in some cases, their whanau) willingly and without prompting. In other cases you might need to ask the individual about the impact on them. Use your judgement to determine whether additional enquiries are needed. Exercise care when undertaking these enquiries to ensure the individual is supported when sharing this with you, and that you receive the best information.
91. You should also consider whether the individual contributed to the situation or the harm that occurred. Further, if they could have reasonably controlled or mitigated the harm, did they make attempts to do so? A failure to do so may reduce or negate the existence of goodwill or moral obligation.
92. All of these factors need to be balanced. Having done so, is there a sense of needing to put things right?

## **Bring an appropriate cultural perspective to the analysis**

93. Be aware of the cultural background of the individual you are dealing with and endeavour to understand the cultural perspectives of that person. For example, where appropriate, a te ao Māori perspective should be brought to the assessment of moral obligation or goodwill.
94. To achieve this, it might be necessary to obtain guidance or advice from those with relevant cultural expertise.

## **Decision-makers must assess the existence of moral obligation or goodwill: this determines whether there is a basis for an *ex gratia* payment**

95. If the decision-maker determines there is a sense of moral obligation or sense of goodwill, there is a basis for making an *ex gratia* payment.
96. If a sense of moral obligation or goodwill has not been identified, there is simply no basis for making an *ex gratia* payment. There may be other steps your department might want to take, some of which are set out below in paragraph [109](#).



# Should the department make an *ex gratia* payment? Consider the whole picture

---

## In this section

- Judgement must be exercised as to whether to make an *ex gratia* payment
- It is unlikely that natural justice applies when deciding whether to make an *ex gratia* payment

### Key points

- Even if satisfied there is a sense of moral obligation or goodwill, the decision-maker still needs to exercise judgement as to whether the situation warrants an *ex gratia* payment.
- When judging whether to make an *ex gratia* payment, wider implications and matters may be considered.
- These include whether a payment might undermine policies, looking at consistency with other situations, the availability of other remedial steps and the precedent effect of a payment.



## Judgement must be exercised as to whether to make an *ex gratia* payment

97. If the decision-maker is satisfied there is a sense of moral obligation or goodwill reason to pay, that is not the end of the matter. They need to stand back and exercise judgement as to whether the situation warrants using public funds to make an *ex gratia* payment. Your department may have made a mistake or been at 'fault' in the loose sense of the word, but a payment does not necessarily have to follow.
98. When judging whether to make an *ex gratia* payment, wider implications and matters may be considered. These include, but are not limited to: the extent to which a payment might undermine policies or principles; consistency with other situations where *ex gratia* payments have been made; whether other remedial steps might be sufficient to address the situation; and the precedent effect of a payment. We address these in more detail in this section.

### Why does a legitimate legal claim not arise? Would a payment undermine this policy or principle?

99. The decision on an *ex gratia* payment should be an informed one. A key part of this involves understanding the policy or other basis for why a legitimate legal claim does not arise, and thinking about why a payment should nonetheless be made.
100. You should take steps to understand the policy rationale or principles behind any applicable bar, immunity, limitation, defence, common law precedent, prior Court determination, exclusion or cap under a statutory scheme. For example:
- 100.1. The immunity for actions undertaken by public servants in good faith reflects important public policy objectives: public servants serve the government of the day and perform a wide range of functions; they need to undertake them in a balanced way, without fear or favour; and government must be able to attract capable employees who are able to carry out the Crown's core functions without fear of liability for actions undertaken in good faith.<sup>34</sup>
- 100.2. The philosophy behind the accident compensation regime is to substitute an entitlement to claim compensation, capped as to amount, on a no-fault basis, for the right to bring a Court proceeding for damages for personal injury. This "social contract" provides a fair and sustainable scheme for managing personal injury.<sup>35</sup>

---

<sup>34</sup> See [https://www.publicservice.govt.nz/resources/legislation2013amendments?e891=action\\_viewall](https://www.publicservice.govt.nz/resources/legislation2013amendments?e891=action_viewall)

<sup>35</sup> See *Wilding v Attorney-General* [2003] 3 NZLR 787 (CA) at [11]; [Accident Compensation Act 2001, s 3](#).



- 100.3. The principles behind the common law precedent that damages are not payable for a judicial breach of the BORA are the desirability of finality in litigation, ensuring public confidence in judicial independence and the existence of other protections against judicial breach.<sup>36</sup>
- 100.4. Limitation provisions encourage reasonable diligence in litigation, protect defendants from stale claims when evidence is difficult or impossible to obtain, and give peace of mind to defendants after the lapse of a certain amount of time.<sup>37</sup>
101. With your assistance, decision-makers should consider whether making a payment out of goodwill or moral obligation would undermine the policy rationale behind a bar, immunity or established principles of law.
102. When thinking about whether a payment might undermine a statutory scheme, be aware that this could occur if a payment is a “top-up” to what is available under the scheme or the same as the total sum that would be granted if the scheme were available. Nevertheless, it may still be legitimate to distinguish between making a payment which would undermine the policy considerations behind the scheme, and making a payment where the scheme was intended to govern the position but intervening circumstances prevented it from doing so.
103. Also, making a payment when there is a genuine gap in the law may not undermine a statutory scheme, but it may indicate that legislative reform is required. In this case the department should consider reform rather than, or in addition to, using *ex gratia* payments to fill the gap.
104. The extent to which policy rationales or legal principles may be undermined can vary. The key point is that decision-makers should be aware of the position and any implications of making a payment in these circumstances.

### **Consistency with international obligations (if any)**

105. Depending on the context, it may also be relevant to ask whether a payment would be consistent with obligations at international law or recommendations of international bodies.

### **Strive for consistency with other circumstances in which *ex gratia* payments have been made**

106. Your department should treat like cases alike. But *ex gratia* payments are made in a multitude of circumstances, and turn on a variety of moral obligations or goodwill sentiments. Further, similar situations can have different impacts for different people.

---

<sup>36</sup> See *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

<sup>37</sup> See Todd on Torts at 26.5.1 and the cases cited therein.



So, identifying a ‘like’ case can be difficult, and may not always be possible. Still, you will need to turn your mind to identifying appropriate comparators. Where there is no immediately obvious factual comparator, you may need to look at situations that raised similar themes or involved similar losses. We suggest decision-makers should examine current community values and policies, social mores and expectations of good government, and look for situations raising comparable values or expectations—both within your department and more broadly across the Crown.

107. It is possible that the passage of time and changing social expectations mean that an *ex gratia* payment might be appropriate now, even though a payment was rejected in similar circumstances at an earlier point of time. The opposite may also be true.
108. Effective use of comparators, especially internal ones, is a matter that is likely to be looked at closely by the Ombudsman (in the event of a complaint and investigation). A genuine attempt to identify comparable situations will be needed.

### **Availability and value of other remedial steps**

109. The availability, and value, of other remedial steps should be factored into the overall judgement as to whether an *ex gratia* payment should be made. These may include, for example, an apology, public statement of some kind (including a public apology), or commitment to change policy or legislation (and potentially involve the individual in the process). The individual may have sought a particular resolution or outcome, which decision-makers should consider, or they could ask them what would help put matters right for them.
110. It is important to give careful thought to all available remedial steps and their value. They are all relevant to whether a payment of money is a meaningful way, or one of a suite of meaningful ways, of addressing the situation. What is needed to put matters right and, as appropriate, restore the relationship between your department and the individual, will be different in each case.

### **Precedent effect of making an *ex gratia* payment**

111. Decision-makers should consider the extent to which a payment will mean the Crown may be equally morally obliged to compensate others in the same or broadly comparable situations. This is the precedent effect of making a payment. Look at whether the circumstances are unique or might arise in other instances. Highlight any distinguishing features. Your department will need to think about any potential wider implications.

### **Economic considerations**

112. The Crown has an obligation to spend public funds responsibly and on a principled basis. If there is a basis for making an *ex gratia* payment, i.e. a sense of moral obligation or goodwill, decision-makers can consider the cost of making a payment versus the potential “cost” of not doing so (such as Ombudsman investigations,



Official Information Act or Privacy Act requests, and internal resourcing costs). That is a matter for their discretion.

### **Any other relevant matter**

113. The matters set out here are not exhaustive. Other factual matters can be relevant to the decision-maker's judgement. This could include any wider conduct by the individual.

## **It is unlikely that natural justice applies when deciding whether to make an *ex gratia* payment**

114. In light of the current authorities, we do not consider there is a basis to characterise these situations as ones where the legal right to natural justice is engaged. This is because there is no determination in respect of a person's rights or interests protected or recognised by law. *Ex gratia* payments are made when there is no legally-protected right or interest.
115. But this does not mean the department should not engage with the individual and/or update them as to progress, as appropriate. Good decision-making will often mean this is necessary.



# How to assess quantum of payment?

---

## In this section

- Assessing quantum is not an exact science
- Identify the loss that the *ex gratia* payment acknowledges
- Link the size of the payment to the nature of the sense of moral obligation or goodwill
- Relevance of other remedies or support that could be offered
- Strive for consistency on quantum
- Legal costs should form part of the total quantum
- Assessment of quantum will determine who has authority to approve payment
- Tax implications flowing from an *ex gratia* payment

### Key points

- Clarity about what loss or damage the *ex gratia* payment might acknowledge is important.
- Your department should treat like cases alike in terms of quantum.
- When determining where the payment falls in terms of approval levels, “all associated costs” must be included. A conservative approach to this should be taken.



## Assessing quantum is not an exact science

116. The assessment of quantum is not an exact science. It should be made independently of the approval thresholds in the Circular, which are not indicative of the sums that should be paid in any particular situation.

## Identify the loss that the *ex gratia* payment acknowledges

117. You should help decision-makers identify the loss or damage which an *ex gratia* payment might acknowledge. There are financial losses that are capable of being quantified, for example out-of-pocket expenses, specific legal costs, a particular sum equivalent to that which would be recovered under a statutory scheme. Then there are intangible losses or harms, such as general distress or upset, personal injury, loss of mana or lost opportunity. A payment can acknowledge one or both of these types of loss.
118. You will need to assess whether the loss has been, or is capable of being, verified. Some losses may be self-evident.
119. Clarity about what loss or damage the *ex gratia* payment might acknowledge is important. For example, in one case where payment under a statutory scheme could not be made, the Ombudsman recommended payment for administrative error and lost opportunity to claim under that scheme, rather than an equivalent to what would be paid under the scheme.<sup>38</sup>
120. The quantum will turn on the loss that the payment acknowledges. It is easier to determine a sum for specific financial loss (e.g. destroyed goods, or the cost of flights) than it is for a family member who has suffered distress and anxiety at losing a loved one. It is legitimate for decision-makers to assess certain types of losses as deserving of higher sums.

## The quantum should not usually be equivalent to what would be awarded if a legal claim did exist or a statutory scheme did apply

121. Ordinarily, the quantum should reflect the fact there is not a legal claim and should not be equivalent to what would be awarded if a legal claim were to exist. In certain circumstances, usually exceptional, it may be appropriate to pay what might be awarded if a relevant statutory scheme were to apply.

---

<sup>38</sup> Office of the Ombudsman “[Administrative error resulting in lost opportunity for ACC claim](http://www.ombudsman.parliament.nz)” (March 2018) <[www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz)>.



## Link the size of the payment to the nature of the sense of moral obligation or goodwill

122. The size of the payment ought to be related in some way to the nature of the moral responsibility or goodwill sentiment that is found to exist. The greater the moral wrong, the greater the sum of money. Equally, if your department's involvement was not substantial, there was no 'fault' by the department, or a payment is made simply out of goodwill, the sum would normally be lower.

## Relevance of other remedies or support that could be offered

123. When determining the sum, decision-makers can also consider what other remedies or support have been offered to the individual to address the situation most meaningfully. For example, an apology might be made or there could be provision for counselling or other services.

## Strive for consistency on quantum

124. Again, your department should treat like cases alike in terms of quantum. To find appropriate comparators you may need to look beyond the facts, and towards cases with similar themes and that sought to address similar losses (e.g. anxiety and distress). Some cases will be novel, and there will be no appropriate comparator. In such cases it is best to acknowledge this and make an assessment without trying to draw analogies and comparisons that are tenuous.
125. If comparable situations have been identified, a thorough analysis of the similarities and differences will help establish a quantum that is in keeping with past payments. The comparison should go beyond the superficial, and there can be an allowance for the impact of inflation.
126. Using appropriate comparators to ensure consistency seems to be an area of particular interest to the Ombudsman.

## Seeking the Solicitor-General's advice will assist with consistency on quantum

127. If your agency seeks the Solicitor-General's advice on a proposed *ex gratia* payment, as anticipated by [CO Circular \(16\)2](#), this will help to ensure consistency with other decisions and quantum across government. In practice this is achieved by seeking advice from Te Tari Ture o te Karauna, rather than the Solicitor-Generally personally.



## Legal costs should form part of the total quantum

128. If legal costs are to be paid as part of an *ex gratia* payment, they should form part of the total sum for the purposes of working out the correct approval level.

## Assessment of quantum will determine who has authority to approve payment

129. A recommendation on quantum will determine who has authority to approve the payment under the Circular. Depending on your internal delegations, this may be someone with delegated authority from the chief executive:
- 129.1. Payments up to \$30,000 must have the approval of the chief executive (or delegate).
  - 129.2. Payments between \$30,000 and \$75,000 must have the approval of the Appropriation Minister.
130. Payment over \$75,000 must have the approval of Cabinet. All associated costs and total amounts must be factored in when determining the approval level.
131. In determining whether the *ex gratia* expenses fall within the approval thresholds, the appropriation Minister or the departmental chief executive must ensure that all associated costs (e.g sub-contracts or multiple payments relating to one overall transaction) have been included.<sup>39</sup>
132. This means, for example, that a chief executive cannot authorise two separate payments of \$30,000 to one person in relation to the same matter. The overall amount would be \$60,000, and the Appropriation Minister's approval would be required.
133. A more difficult situation is where a sum under \$30,000 is to be paid individually to a large number of people for the same reason (i.e. there is a single situation and the proposal to deal with it involves numerous smaller payments). This may well fall within the notion of 'all associated costs' or 'one overall transaction', such that the total amount should be used to determine the approval threshold.
134. Specific advice will be required in the particular case, but as a general proposition, we recommend a conservative approach as to what constitutes "all associated costs" or "one overall transaction" when there is a significant cumulative effect on the Crown's

---

<sup>39</sup> [CO Circular \(18\)2](#), Paragraph 70.



financial resources. There is support for this conservative approach (of generally bringing matters to Cabinet’s attention when in doubt) in other sections of the Circular and the Cabinet Manual.<sup>40</sup>

## Tax implications flowing from an *ex gratia* payment

135. Whether *ex gratia* payments will constitute income (and thus be taxable in the hands of the recipient) will generally depend on the nature of the loss which the payment is intended to compensate for. The fact of it being an *ex gratia* payment does not in and of itself mean that the payment will not be subject to tax.<sup>41</sup> In general, whether the payment is in settlement of a legal dispute or made *ex gratia* in acknowledgement of a moral obligation or goodwill, if a payment compensates for a loss of income or profits it will likely form part of the recipient’s overall taxable income and be subject to income tax obligations.<sup>42</sup>
136. If an *ex gratia* payment is subject to income tax, it will be because the payment itself falls within the income provisions in Part C of the Income Tax Act 2007,<sup>43</sup> or because the *ex gratia* payment compensates for the loss of a payment which would have fallen within those provisions; including, for example, because it compensates for loss of income derived from a business, from a profit-making undertaking or scheme, in connection with employment, or otherwise constitutes income under ordinary concepts.<sup>44</sup>
137. It is the quality of the payment in the hands of the recipient, not the payer, which is

---

<sup>40</sup> Paragraph 9 of CO Circular (18)2 refers to paragraph 5.12 of the Cabinet Manual - Cabinet Office Cabinet Manual: 2017 (Department of Prime Minister and Cabinet, Wellington, 2017). This states that controversial matters, proposals that affect the government’s financial position, and important financial commitments are included amongst matters that must be submitted to Cabinet.

Paragraph 5.11 of the Cabinet Manual provides that where there is uncertainty about the type of consideration needed, departments should seek advice from the office of the portfolio Minister or from the Cabinet Office.

Paragraph 11 of the Circular provides that if there is any doubt as to whether a matter warrants Cabinet consideration, Ministers and officials should err on the side of caution and assume that it does.

<sup>41</sup> *G v Commissioner of Inland Revenue* [1961] NZLR 994. See also *Federal Commissioner of Taxation v Rowe* (1995) 131 ALR 622.

<sup>42</sup> See *Burmah Steam Ship Co v CIR* (1930) 16 TC 67 (IH (1 Div)); and *London and Thames Haven Oil Wharves Ltd v Attwooll (Inspector of Taxes)* [1967] 2 ALL ER 124 (CA).

<sup>43</sup> Part C of the Income Tax Act 2007 is extensive. The income types noted in this paragraph are by way of example only of some of the most common reasons why an amount would constitute income of a person. It is by no means an exhaustive list of the situations in which an *ex gratia* payment may be captured under the Income Tax Act 2007.

<sup>44</sup> Income under ordinary concepts is not defined in the Income Tax Act 2007, but principles have been established through a long history of case law. See *Krasniqi v Commissioner of Inland Revenue* [2018] NZHC 2075 for a summary of the principles.



determinative of its character as income or otherwise.<sup>45</sup> In some instances this may be obvious, whereas in other cases it may be a matter of fact and degree, having regard to the particular circumstances of the case.

138. If the loss or harm that the payment acknowledges is of a personal or private nature, such as distress and anxiety at losing a loved one, it is unlikely that the *ex gratia* payment will be subject to income tax in the hands of the recipient. In an employment context, and in circumstances where the payment is truly an *ex gratia* one, payments from an employer (or former employer) to an employee (or former employee), which are genuinely and entirely for compensation for humiliation, loss of dignity, or injury to feelings do not constitute income;<sup>46</sup> whereas payments from the employer that compensates for lost wages would, in general, be taxable.<sup>47</sup> Annex Two emphasises the need to properly categorise payments made in the employment context, so the comments in this section must be read in that light.
139. It is unlikely that any *ex gratia* payment would be subject to GST (even if the recipient were GST registered), as there would be no supply for which the payment was made.<sup>48</sup>
140. Depending on the circumstances, your decision-maker might want to know the position on tax. You should seek advice from Inland Revenue or (if the payment may have a bearing on benefits) the Ministry of Social Development.
141. It is, of course, important not to provide legal advice to the recipient or to advise in a way that may inadvertently bind another department in a manner inconsistent with their usual policy. Work and Income has some information on their website about benefits and *ex gratia* payments that you could provide to recipients.<sup>49</sup> If the recipient asks about the tax position, you should recommend they obtain their own tax advice. In acting on that recommendation, it will likely be of assistance to the recipients and their advisors if they have a full understanding of the purpose for which the payment was made to them, including the nature of the harm or loss which the payment is intended to acknowledge.

---

<sup>45</sup> See *Reid v Commissioner of Inland Revenue* [1986] 1 NZLR 129.

<sup>46</sup> See Inland Revenue Department “BR Pub 06/05: Assessability of payments under the Employment Relations Act for humiliation, loss of dignity, and injury to feelings” (30 June 2006) < [www.taxtechnical.ird.govt.nz](http://www.taxtechnical.ird.govt.nz) >.

<sup>47</sup> See for example *Cleland v CIR* [2001] NZLR 847.

<sup>48</sup> See Inland Revenue Department “GST treatment of court awards and out of court settlements” (1 September 2002) < [www.taxtechnical.ird.govt.nz](http://www.taxtechnical.ird.govt.nz) >.

<sup>49</sup> Work and Income “Ex gratia and compensation payments” <[www.workandincome.govt.nz](http://www.workandincome.govt.nz)>.



# Making an *ex gratia* payment: process, documentation and terms of a deed

---

## In this section

- Follow internal processes and put in place good practices
- How to record the position with the recipient, and what to include
- Terms of a deed: assessing the need for confidentiality and finality

### Key points

- Identify and record what gives rise to the sense of moral obligation or goodwill reason to pay, and why an *ex gratia* payment is appropriate (or not).
- The decision as to the necessity and nature of any formal written record with the recipient should be informed by legal advice.
- A formal written record ensures the position is all set out in one accessible document.
- A legally binding arrangement will be needed if terms are to be legally enforceable, but this will not be necessary in every case.
- The principles of open government, transparency and accountability lead to a general presumption against confidentiality terms in such arrangements. Sometimes they may be needed.
- Seeking a finality term before payment is a judgement call to be made by decision-makers.



## Follow internal processes and put in place good practices

142. During the consideration and decision-making stages, follow internal processes and policies.<sup>50</sup>
143. It is highly unlikely you will need to involve the department's insurer.<sup>51</sup> *Ex gratia* payments do not involve settling legal claims. Professional indemnity or insurance policies usually cover legal claims only and will not therefore cover the cost of an *ex gratia* payment. The steps that must be taken under those policies before settling a legal claim will usually not apply either.
144. In terms of general good practice in terms of engaging with the individual, we repeat in brief some points already made:
- 144.1. Seek and/or clarify information with the individual during the factual assessment stage (see paragraph [55]).
  - 144.2. Ask the individual what would help put matters right for them (paragraph [109]).
  - 144.3. Engage with the individual and keeping them informed as to process (paragraph [115]).
  - 144.4. and the sections below discuss the benefits of communicating decisions to individuals, and doing so in a way that helps them understand the decision and the nature of an *ex gratia* payment (see [146], [153], [157]).

### **Your department should keep a clear record of the reasons for the *ex gratia* payment, and reasons for the sum chosen**

145. If the decision is to make an extra gratia payment, clearly identify and record the distinguishing features of the situation that give rise to the sense of moral obligation or goodwill reason to pay, together with other reasons why payment is appropriate. The reasons for the sum chosen should also be recorded. This ensures that:
- 145.1. the Government does not set a broader precedent than intended and/or erect a set of justiciable expectations;

---

<sup>50</sup> We refer to 'making' a payment in this section but acknowledge that this could well be preceded by discussions and an 'offer' to make the payment. Where discussions or negotiations have occurred, departments will need to be careful about creating legitimate expectations as to process.

<sup>51</sup> We are however aware that certain departments ask their insurers to review and/or manage certain *ex gratia* payments that are made in accordance with specific *ex gratia* schemes.



- 145.2. a reasonably consistent approach can be taken to requests for *ex gratia* payments within the department and more broadly across the Crown. If the payment is a reasonably expected product of a set of current values, then it will be easier to achieve consistency in other cases; and
- 145.3. the resulting transparency will assist any other people, including auditors or a Select Committee, to assess the basis for the decision.

### **Your department should also keep a clear record of the reasons for not making an *ex gratia* payment**

146. If there is a decision not to make an *ex gratia* payment, your department should clearly record the reasons, whether or not the individual was aware of the potential for payment.<sup>52</sup> Where there has been engagement, the department should explain the position to the individual,<sup>53</sup> in such a way that it helps them to understand the outcome and gives enough information should the matter be reviewed internally or by the Ombudsman.

## **How to record the position with the recipient, and what to include**

147. There is nothing in the Circular that indicates that a written record with the recipient is needed when making an *ex gratia* payment. Nonetheless, decision-makers should decide whether a formal written record is desirable. This can be in a non-legally binding form, such as a letter or it can be in a legally-binding form, namely a deed. A deed will be necessary if there is a need for legally-binding terms. This will not always be the case. It is a matter for the decision-maker's discretion. We discuss the different options next.
148. The decision as to the necessity and nature of any formal written record should be informed by legal advice.

### **A formal written record with the recipient will not always be needed**

149. In some cases, it may be considered inappropriate to draw up a formal written record of the *ex gratia* payment with the recipient. This could be where it would be administratively burdensome and out of proportion to the sums involved, or where it would be jarring or insensitive. A formal record may be unnecessary where more informal records are in existence, such as email communications between your

---

<sup>52</sup> It would be unusual for an individual to be unaware of a potential *ex gratia* payment. But this may arise where, for example, an agency handles a widespread system issue by way of *ex gratia* payment, which does not necessitate individual notifications.

<sup>53</sup> Individuals also have a right of access, on request, to a statement of the reasons why an agency made a decision or recommendation ([Official Information Act 1982, s 23](#)).



department and the recipient or file notes of conversations. Still, we would recommend that those informal records contain confirmation with the recipient (in writing) that the payment has been made, and why.

150. Even where there is no formal record, internal documentation and financial records should clearly set out who the payment is being made to, why, and the amount of the payment.
151. We note that under s 23 of the Official Information Act 1982, individuals always have a right of access, on request, to a statement of the reasons why an agency made a decision or recommendation.

### **A formal written record, not legally binding, will usually be appropriate**

152. A formal written record, not legally binding, may be administratively helpful or desirable for policy reasons. This may be the case where it would help to acknowledge and draw a line under the matter, or be an opportunity to record an apology or other sentiments. More generally, a formal written record ensures that the position is all set out in one accessible document (for the department and the individual). If the recipient subsequently brings legal proceedings about the same events, the document can also be put before the court. Therefore, it will generally be good practice to put this in place.
153. A letter of this kind should outline the facts and record the payment by your department (or the date on which the money will be paid). It should state that your department does not consider there is any legal obligation to make a payment and that money is paid on an *ex gratia* basis. We suggest you take the time to explain what this means, not least as this may help to make the process more restorative.
154. Your department may wish to set out the position regarding confidentiality. We discuss below the principles regarding when confidentiality will be appropriate and how this should be approached. A confidentiality provision in a letter of this kind would probably not be legally binding, but would simply be a record of the parties' expectations.

### **In some cases, a legally-binding arrangement will be appropriate**

155. A legally binding arrangement will be needed if terms are to be legally enforceable. The usual terms that the Crown or the recipient might want to be legally enforceable are confidentiality or finality. Finality is where the recipient agrees they will not bring or continue legal proceedings relating to the matter that is the subject of the *ex gratia* payment. We explain confidentiality and finality in more detail below, followed by how to analyse whether one or both terms might be needed – and therefore whether a legally binding arrangement is needed. This involves assessments of risk, and the weighing of various factors.



156. The short point here is that a legally binding arrangement is not the starting point, and may or may not be necessary in any particular case. We acknowledge that an *ex gratia* payment can “settle” the matter in the individual’s mind, such that no further steps are needed. Your decision-maker has a discretion whether to pursue a legally binding arrangement.
157. Lawyers should be involved in the assessment of whether a legally binding arrangement is needed. If it is necessary, a deed will usually be the most appropriate tool to use. It ensures that all relevant matters are accurately recorded in one accessible place, and that the individual understands the binding nature of the commitments entered into. While deeds are legalistic documents, you can ‘offset’ this by writing in plain language.

### **What is a deed?**

158. A deed is a written instrument, signed and witnessed and delivered in the manner required by law, in which binding obligations are created.<sup>54</sup> A deed contains terms that bind one party or more than one party. It can contain whatever terms the parties wish. There is no need for consideration and a deed can therefore contain a series of binding obligations on two parties, none of which need to be consideration for the other.<sup>55</sup>

### **A deed should set out the facts and circumstances, and all binding terms**

159. The deed should set out the key facts and circumstances, so it is clear what the payment is for. The deed must clearly record that the department does not consider or accept that there is any legal obligation to make the payment; and the payment is being made on a purely *ex gratia* basis. It is not necessary to set out the *specific* nature of the sense of moral obligation or goodwill. But it *is* beneficial for the recipient to understand what an *ex gratia* payment means, which may be more appropriately set out in earlier correspondence or a covering letter.
160. If a deed is to be used, we suggest it should contain all terms that the parties wish to be binding. This will include how much the department is going to pay, and by when, in addition to confidentiality and/or finality. Exercise caution as to whether any other binding terms are needed. This ensures that all terms are accurately recorded, and will bind the department to making the *ex gratia* payment.
161. So that everyone is clear on enforceability, any deed should be called a deed, and meet the statutory formalities in s 9 of the Property Law Act 2007. It may be appropriate to use the following (or similar) term:

---

<sup>54</sup> *Re Wilsons' Settlements, Gibbs and Another v Anderson and Others* [1972] NZLR 13 and Property Law Act 2007, s 9. Section 9 sets out the formal requirements for a deed, which will need to be satisfied in each case.

<sup>55</sup> A deed can be contrasted to an agreement or contract, which requires consideration.



This is a legally binding deed. It may be pleaded as a bar and a complete and absolute defence to any proceedings or other action taken in breach of this deed, and this deed may be used as evidence for that purpose.

**The recipient should usually obtain independent legal advice before the deed is finalised**

162. Because the terms of a deed are legally enforceable, usually it would be appropriate to suggest to the recipient that they obtain independent legal advice. This (or the fact of obtaining advice) should generally be recorded in the deed itself. In some cases, this may only be achieved if your department pays for that advice, and that may be the right thing to do.
163. Such a contribution to the recipient's legal costs would need to be included within the total sum of the payment, for the purposes of working out the Circular approval thresholds.

**Template deed**

164. A draft template deed is contained in [Annex 3](#). This brings together the points discussed in this section and includes recommended wording for certain points and terms.

## Terms of a deed: assessing the need for confidentiality and finality

165. There may be situations where it is legitimate to consider and then rule out issues of confidentiality or finality quickly and easily. But other circumstances will require more careful consideration.
166. We explore confidentiality and finality each separately.

### Confidentiality<sup>56</sup>

**There is a presumption against confidentiality terms but confidentiality may be necessary in particular cases**

167. The principles of open government, transparency and accountability<sup>57</sup> lead to a general presumption against confidentiality terms in deeds recording *ex gratia* payments.<sup>58</sup> Further, information about *ex gratia* payments (either generally or

---

<sup>56</sup> The principles expressed in this section also apply to confidentiality when settling a legal claim.

<sup>57</sup> Open government is a public service principle, refer [Public Service Act 2020, s 12](#). Transparency and accountability are public service values, refer [s 16 of the Act](#).

<sup>58</sup> A similar sentiment is expressed in Te Kawa Mataaho's Model Standards, which state that there must be a genuine and legitimate reason to have a confidentiality or non-disclosure term in an employment exit settlement agreement. See Te Kawa Mataaho Public Service Commission "[Acting in the Spirit of Service Workforce Assurance](#)" (August 2020) <[www.publicservice.govt.nz/resources/workforce-assurance](http://www.publicservice.govt.nz/resources/workforce-assurance)>.



specifically) may be requested under the Official Information Act 1982 (the OIA), which contains the principle that information shall be made available unless there is good reason for withholding it. Information about *ex gratia* payments may also need to be disclosed in other ways, such as through parliamentary questions.

168. Confidentiality should be considered by reference to particular information, rather than by reference to the fact of the *ex gratia* payment as a whole or the contents of the deed as a whole.
169. Confidentiality of information may be necessary and appropriate in certain cases. There are a range of factors that decision-makers will need to think about when considering whether a confidentiality term is appropriate, and some will need to be balanced against the others. These include:
  - 169.1. the transparency required for the use of public funds;
  - 169.2. the public perception of keeping information of this nature confidential;
  - 169.3. the reasons underlying a desire for confidentiality, by one or both of the parties;
  - 169.4. whether there are statutory provisions that require information to be kept confidential, for example s 18 of the Tax Administration Act 1994;
  - 169.5. whether any of the withholding grounds in the OIA apply.<sup>59</sup>

#### **Frame the confidentiality term accurately**

170. Any confidentiality term should be framed to accurately cover the information that is justifiably confidential. This could extend to any information relating to the payment and/or set out in the deed, or only certain information such as the name and any identifying details of the recipient, or the quantum.
171. The department and recipient are not the final arbiters of whether information can be kept confidential, given the role of the Ombudsman and the Courts. So, any confidentiality term must contain the qualifier that information shall remain confidential to the parties, “to the extent permitted by law”.

---

<sup>59</sup> If there is a *conclusive* reason for withholding some or all of the information relating to the payment and/or contained in the deed, as set out in the OIA (s 6), then a confidentiality term that covers that information should be included in the deed. If there is only a *good* reason for withholding information relating to the payment or contained in the deed, decision-makers will need to consider whether the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make the information available (s 9). Your department will need to evaluate the public interest in the facts and issues in the matter, and consider the principles of open government, accountability and transparency in the use of public funds.



172. If, whether or not confidentiality has been agreed, it is anticipated that public or media requests will likely be made for information relating to the *ex gratia* payment or set out in the deed, it may be beneficial for your agency and the recipient to agree on a form of wording that could be used in any response.

### **The absence (or presence) of a confidentiality term is not conclusive**

173. The absence of a confidentiality term does not mean that the information or deed must be provided in full if it were to fall within the scope of a subsequent request. Such a request may come under the OIA, a discovery order, or something akin to that. The OIA should be applied in the normal way, with information withheld if the grounds in the Act are met. Usual discovery principles (or other relevant principles) should be applied.

## **Finality term**

### **What is a finality term and why is it desirable**

174. If the recipient of the *ex gratia* payment gives a legally binding promise that they will not continue or commence legal proceedings relating to the matter which has given rise to the payment, finality is achieved. This is what we mean by a ‘finality term’.
175. A finality term is desirable because the Crown then avoids the effort and costs of defending unmeritorious claims in circumstances where a payment (and potentially other steps) has already been made to right the wrong. If a claim were brought, it is anticipated that the Crown would successfully defend it. However the Crown would not fully recover its costs, as only scale costs are usually recoverable; and it may not recover any costs at all if the recipient lacked the means to pay or the Crown decided not to seek costs. So, finality means the public purse is not exposed to unnecessary expenditure.
176. A finality term is not really aimed at preventing double-dipping.<sup>60</sup> Given the assessment there is no legitimate legal claim, it is anticipated that a Court would not award a sum in damages in the event a claim were brought and permitted to proceed. Even if a claim were established, the Court would likely take account of any sum that had already been paid when fixing damages.

### **Weighing the pros and cons of seeking a finality term**

177. Good governments should address moral obligations when the circumstances demand it and ought not to be exposed to the cost of defending litigation from the same person about the same thing. As a general position, Te Tari Ture o te Karauna supports finality terms. However, seeking a finality term from the recipient of an *ex gratia* payment requires decision-makers to consider and balance various factors. Lawyers can assist with the consideration, but it is ultimately a call for the decision-maker taking into account all of the particular circumstances. We discuss below the

---

<sup>60</sup> But see [footnote 62](#) below.



sorts of matters that may be taken into account.

#### Consider the likelihood of legal proceedings being brought

178. You should consider the risk of the recipient bringing or continuing legal proceedings. The length and history of the matter, and nature of the relationship between your agency and recipient, are relevant here. Is there an indication that they may wish to pursue other avenues if they do not consider the payment is suitable? How did the *ex gratia* payment come about? If, for example, your department voluntarily offered to make the payment (without the recipient requesting it) the recipient may be unlikely to contemplate a legal claim and a finality term may not be required. However, if the matter first came to the department's attention framed as a legal claim, it will usually be prudent to seek a term addressing finality.
179. The department should assess the likelihood the payment (and if relevant, other remedies) will be seen by the recipient as sufficient to address and remedy what has happened. If confident in this assessment, a finality term may not be needed.
180. Consider also whether the recipient has always acknowledged, or it is well settled between the parties, that there is no legal avenue for them to pursue a claim (and that is why they are seeking an *ex gratia* payment). If this is the case, a finality term may not be required.

#### Think about the grace and favour nature of the payment

181. Your department ought to think about the extent to which a finality term might diminish the 'grace and favour' nature of the payment.<sup>61</sup>
182. Does a strict legal term of this kind diminish the idea behind making a payment because it is the morally right thing to do, such that the term shouldn't be used? Similarly, would it detract from what your department is trying to achieve through making the payment (and any other steps they have taken)? Seeking to include the term may also create distrust as the individual may think that there is a possible legal claim, that your department is trying to avoid. There may be cases where including this term would be inconsistent with the department's approach to the situation and may undermine what would otherwise be a positive experience for the recipient.

#### Consider whether there could be a perception of unfairness

183. You should also assess whether there is something about the situation or the vulnerability of the recipient which means it would be unfair to use a finality term. When the recipient has a lawyer, this mitigates against the notion of unfairness.

#### Does a Court finding reduce the need for a finality term

184. If a Court has already found the Crown is not and could not be legally liable in the situation, this may reduce the need for a finality term.

---

<sup>61</sup> This was referred to by Ellis J in *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683.



185. All of the above factors need to be carefully weighed. Whether or not to seek a finality term and/or to insist upon one before a payment is a policy/judgement issue, not a legal one. While it will often be in the public interest (in finality and closure) that no litigation arises from the matter,<sup>62</sup> this will not always be the case. We recommend that decision-makers are presented with the options and consequences, including the option of not making a payment in the absence of such a term.

### **Form of finality term**

186. As set out above, if a finality term is to be included, the recipient should ordinarily obtain independent legal advice. It may be appropriate for this to be funded by your department.
187. The wording of the term will turn on whether your agency wants to rule out all potential legal proceedings (for damages, for a declaration, for a declaration of inconsistency etc), or only proceedings for damages. If a finality term is needed, it could cover all possible types of proceeding (for damages, declaratory judgment, judicial review) and so fully achieve the aim of protecting public funds; or it could cover only proceedings for damages. We generally support the first option, but a decision will be needed as to which option is the more appropriate in the circumstances. The following is an example of a finality term:

The [party] agrees not to bring [any] OR [or insert type of] proceeding in any New Zealand court, tribunal, authority or arbitration against the Attorney-General, the [insert name of any other entity against whom action might lie] or any agent or employee or former agent or former employee of [insert name of entity] or any other person, which in any way arises from or in connection with the matters which are the subject of this *ex gratia* payment.

---

<sup>62</sup> Note that when a person receives compensation under the [Compensation Guidelines for Wrongful Conviction and Imprisonment](#), they must sign a deed which states they will discontinue any existing proceedings and will not bring any future proceedings in relation to the wrongful conviction. This does prevent double-dipping. As explained above, payments are made under the Guidelines in circumstances where there might be a legitimate legal claim. The person has nonetheless elected to use the compensation scheme. The finality term means there will be no double recovery.



# Decisions on *ex gratia* payments: review mechanisms and scrutiny

---

## In this section

- Declining an *ex gratia* payment: review mechanisms available to the individual
- General accountability to Ministers and Parliament
- *Ex gratia* payments may need to be disclosed in your department's financial statements
- Auditors may see and review *ex gratia* payments

### Key points

- Decision-makers should always take care to record their reasons for making or declining an *ex gratia* payment.
- If your department declines to make an *ex gratia* payment, the individual may seek to review the decision via an internal review, the Ombudsman or the Court. The justiciability of a decision will turn on the facts.
- An *ex gratia* payment may need to be disclosed in your department's financial statements.
- *Ex gratia* payments may be examined during the auditing process.



## Declining an *ex gratia* payment: review mechanisms available to the individual

188. If your department declines to make an *ex gratia* payment, or the amount offered is smaller than sought, the individual may seek to use any internal review policies that apply.
189. They can also ask the Ombudsman to investigate the matter. The Ombudsman can make recommendations, which are not binding. However, if the Ombudsman considers the agency's response is inadequate and inappropriate, the matter may be referred by the Ombudsman to the Prime Minister and thereafter reported by them to the House.<sup>63</sup> The Ombudsman has not shied away from making recommendations in this area, including on precise matters of quantum.
190. A recipient may seek a review of a refusal to make an *ex gratia* payment (or amount of that payment) by the Courts. Whether the decision can be justiciable will turn on whether there is a legal framework or yardstick, or a context akin to a framework of law, by which the legality of the decision can be assessed.<sup>64</sup> Prerogative powers, such as decisions on *ex gratia* payments, have been held to be justiciable in these circumstances. Keep this in mind when considering and providing advice on proposed policies within your department.
191. The following two cases show how issues of justiciability of *ex gratia* payments arise and are analysed by the Courts in practice.

### ***McLellan v Attorney-General***

Losses were suffered by various fishing companies due to mismanagement by fisheries officials in the 1990/91 fishing year. A Parliamentary Select Committee recommended *ex gratia* payments. Negotiations commenced, and offers were made but then lapsed.

The Minister of Fisheries and Cabinet decided not to renew negotiations or make any further offers to certain claimants, and these decisions were challenged on judicial review.

Kós J held that that there were no guidelines, statutory background or coherent policy statement, amounting to a legal framework, which might render the exercise of the

---

<sup>63</sup> Ombudsmen Act 1975, s 22(4) – (5).

<sup>64</sup> See *McLellan v AG*, above n2, at [57].



prerogative power to compensate or withhold compensation justiciable. The Government merely announced that it would enter into negotiations for *ex gratia* payments with the plaintiffs and other fishers. Cabinet set payment maxima. But the policy was no more detailed than that.<sup>65</sup>

### ***Pora v Attorney-General***

The payment of ‘*ex gratia* compensation’ for those who have been wrongly convicted and imprisoned is the subject of detailed Compensation Guidelines.<sup>66</sup> Mr Pora was offered compensation in line with the Guidelines. He sought a declaration that the Guidelines required inflation adjustment.

Ellis J held the decision was justiciable: it was governed by publicly available Guidelines, which constitute a yardstick against which the decision can be measured; the decision concerned the assessment of appropriate compensation for a person who has been wrongly convicted; and the Courts’ competence was not diminished by the fact the payment of compensation was a prerogative or *ex gratia*.<sup>67</sup>

## **General accountability to Ministers and Parliament**

192. A department is always accountable to Ministers and to Parliament and must be able to explain and justify all *ex gratia* payments.
193. Further, *ex gratia* payments may be visible within your department’s financial statements and/or examined during the auditing process. These accountability and scrutiny mechanisms reinforce the importance of decisions being made by those who are properly authorised, and who have a full understanding of the nature of the payment and why it is justified.

---

<sup>65</sup> See *McLellan v AG*, above n2, at [59].

<sup>66</sup> See the [Compensation Guidelines for Wrongful Conviction and Imprisonment](#), August 2020.

<sup>67</sup> See *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683.



## ***Ex gratia* payments may need to be disclosed in your department's financial statements**

194. There are no specific disclosure requirements in accounting standards, legislation or Treasury circulars (in terms of generally accepted accounting practice) that require a department to disclose *ex gratia* payments in their financial statements.<sup>68</sup> However, the principles and guidance in PBE IPSAS 1: Presentation of Financial Statements<sup>69</sup> - which prescribe the manner in which general purpose financial statements should be prepared and presented - note that entities must adopt a fair presentation in their financial statements to enable users to understand the impact of particular transactions and other events on a department's financial position and performance.
195. There is scope for an *ex gratia* payment to fit into this category, such that disclosure within your department's financial statements will occur. Your Chief Financial Officer is responsible for the preparation of financial statements and reporting requirements, and we recommend you consult with them on any large or potentially 'material' payment.
196. The financial statements form part of your department's annual report, which must be presented to the House of Representatives and thereafter published, together with any applicable audit report.<sup>70</sup>
197. If the existence and significance of an *ex gratia* payment does warrant disclosure in the financial statements, a summary of the transaction will need to be provided. A reference in the financial statements could also trigger a request for further information from your Minister, a Select Committee, Treasury or the public (via a request under the Official Information Act).

## **Auditors may see and review *ex gratia* payments**

198. During the annual audit process, the Office of the Auditor-General is likely to ask agencies if they have made any *ex gratia* payments. They will also have sight of payments that are referred to in the financial statements. Depending on the department, the sums involved and the scope of the audit, the auditor may review the payment. If they do so, they will consider whether the department has met public

---

<sup>68</sup> There are some specific disclosure requirements regarding severance and termination payments in the Crown Entities Act 2004, the Local Government Act 2002 and the Education and Training Act 2020. We mention these for completeness only.

<sup>69</sup> <https://www.xrb.govt.nz/accounting-standards/public-sector/pbe-ipsas-1/>.

<sup>70</sup> Public Finance Act 1989, s 44.



sector good practice expectations, by assessing:

- 198.1. whether the department has followed the correct approval process, including ensuring that approval is given by the right person within their delegated authority, the department has documented the process, and the department has taken legal advice (where appropriate);
  - 198.2. whether any required disclosures have been made; and
  - 198.3. whether there is a probity and waste issue i.e. a payment which appears to be excessive and wasteful of public money
199. The Office of the Auditor-General will not generally examine the reasons for, or appropriateness of, making the *ex gratia* payment. But if they identify a failure to comply with process or a probity and waste concern, they could make that the subject of adverse comment in the audit report or a report to management of the department. Audit reports must be published and, again, could trigger information requests from a variety of bodies.



# Annexes

---

Annex 1: What you need to know about *ex gratia* payments - summary for decision-makers.

Annex 2: Correctly categorising payments made in the employment context.

Annex 3: Draft template for deed recording *ex gratia* payment.



# What you need to know about *ex gratia* payments

## Summary for decision-makers


This document will help you with the steps to work through when deciding whether to make an *ex gratia* payment from a departmental appropriation. It also highlights the differences between an *ex gratia* payment and a payment in settlement of a legal claim.

An *ex gratia* payment is defined in [Cabinet Office Circular \(18\)2](#): a payment made without the giver recognising any liability or legal obligation; the payment is made out of goodwill or a sense of moral obligation.

 See [Cabinet Office Circular \(18\)2](#).

The purpose of an *ex gratia* payment is different from a payment to settle a legal claim.

Settlement of a claim	<i>Ex gratia</i> payment
A payment to <b>settle a legal claim</b> is made when there is a risk the department could be legally liable to make a payment. This risk could be great or small. The purpose of the payment is to deal with that liability risk.	An <b><i>ex gratia</i> payment</b> is made when the department does not consider it could be legally liable to make a payment. The purpose of the payment is to address the Department’s moral obligation or can be an act of goodwill.

**Steps to work through when considering whether to make an *ex gratia* payment**

### Step one: do the facts give rise to a legitimate legal claim?

This is not a high bar. A weak claim can still be a legitimate one. In some cases, it will be obvious that there is no legitimate legal claim. In others it may be more borderline and may turn on the application of a bar/immunity or a defence. It is only if a legal claim could not be established that you can consider an *ex gratia* payment.

Your legal team should help you determine this question.

If some facts give rise to a legal claim and some do not, they should be handled for what they are.

### Step two: identify whether there is a sense of moral obligation or goodwill reason to make a payment

You can make a payment out of a sense of moral obligation, or as an act of goodwill. This is not a legal assessment. Goodwill is a lower threshold than moral obligation, providing scope for a wider range of discretionary payments.

You must be able to articulate what you consider the goodwill reason or moral obligation to be.

Here are some considerations that will help you identify whether a moral obligation or goodwill reason exists. Each situation will turn on its particular facts, assessed in light of the relevant context:



- The nature of the relationship between your department and the individual.
- The extent to which the situation has arisen because of your department's actions or involvement. "Fault" is not a prerequisite.
- The degree and type of loss/harm suffered.
- Any Te Tiriti/ Treaty matters that may arise on the facts.
- The individual's personal circumstances, and any contribution the individual made to the situation.

### Step three: if a sense of moral obligation or goodwill reason has been identified, should a payment be offered?

Exercise your judgement. Consider the bigger picture. Here are some prompts:

- Why is there no legitimate legal claim in this case? Would an *ex gratia* payment undermine the underlying policy or principle?
- What else can you offer to help put matters right for the individual? You could ask the individual this question too.
- Would a payment be consistent with payments made in other situations raising comparable values or social expectations?
- What is the precedent effect of making a payment?

Not all mistakes by your department require (or would justify) an *ex gratia* payment.

### Step four: how much should be offered?

The amount of the *ex gratia* payment will depend on the loss/harm suffered and being acknowledged (specific financial losses, and intangible harm such as distress), and the nature of the moral obligation or goodwill sentiment. Comparators should be identified.



The tax implications will depend on the nature of the loss which the payment is intended to compensate for, assessed in the hands of the recipient. In general, if the loss is of a personal nature (such as stress and anxiety) it is unlikely the payment will be subject to income tax. If compensating for loss of income or profits, it will generally be subject to income tax obligations.

### Step five: what approval is needed?

Cabinet has set rules about who needs to approve *ex gratia* payments and payments to settle legal claims.



See *Cabinet Office Circular (18)2* at paragraph 70.

Settlement of a claim	<i>Ex gratia</i> payment
<ul style="list-style-type: none"> <li>• \$150,000 or less: CE or delegate</li> <li>• \$150,000–\$750,000: Appropriation Minister</li> <li>• More than \$750,000: Cabinet</li> </ul>	<ul style="list-style-type: none"> <li>• \$30,000 or less: CE or delegate</li> <li>• \$30,000–\$75,000: Appropriation Minister</li> <li>• More than \$75,000: Cabinet</li> </ul>

These amounts include “all associated costs” – for example, any legal costs you may offer to pay.

A proposal to settle a claim under \$75,000 should be certified by your Chief Legal Advisor. A proposal to settle a claim over \$75,000 should be endorsed by Te Tari Ture o te Karauna, the Crown Law Office.

The Circular does not require legal certification for *ex gratia* payments. But this may be required by your internal delegations or policies.



If the funds for the *ex gratia* payment are not coming from a departmental appropriation, different rules apply - see CO (18)2 at [65],[71].



Documenting the payment

Keep a clear record of the reasons for the *ex gratia* payment (or for not making a payment), and reasons for the sum chosen. The decision should be clearly communicated to the individual.

Departments should usually have a formal written record with the individual recording the relevant facts and nature of payment. Decision-makers have discretion on whether to use a legally-binding arrangement. Sometimes that will be prudent. There is no one size fits all approach.

Settlement of a claim	<i>Ex gratia</i> payment
<ul style="list-style-type: none"><li>• A legally binding arrangement signed by your department and the recipient is usually necessary.</li><li>• There is a presumption against confidentiality terms, but one can be used if appropriate.</li><li>• A “full and final” term will almost always be appropriate.</li></ul>	<ul style="list-style-type: none"><li>• A formal written record containing the facts and nature of payment will usually be desirable.</li><li>• A legally binding arrangement may be necessary if you want to include a confidentiality or “full and final” resolution term.</li><li>• There is a presumption against confidentiality terms, but they can be used if appropriate.</li><li>• It is a policy decision whether to seek a full and final resolution term.</li></ul>

If you decline to make an *ex gratia* payment: what can happen?

The individual can use internal complaints mechanisms or ask the Ombudsman to investigate a refusal to offer an *ex gratia* payment. If a department has made an offer, the individual can also complain about the *amount* offered. The Ombudsman can recommend that the department makes a payment (or increases its offer) but cannot order it to do so.

Decisions about *ex gratia* payments might be challenged in court. The courts are generally only willing to examine such payments if the department has guidelines or policies about *ex gratia* payments that amount to a legal framework.



# Correctly categorising payments made in the employment context

---

## Severance payments

*Ex gratia* payments can be made in any context, including the employment context. Employees are sometimes said to receive an *ex gratia* payment when they receive a severance payment. According to the Auditor-General's guidelines, a severance payment is a payment additional to what the individual is entitled to under their employment agreement, made as part of an arrangement to end the employment relationship. While a contractual entitlement might be paid at the same time as a severance payment (and is sometimes contained within a severance agreement) it does not actually form part of it.

An employment relationship can end for many reasons, including a disciplinary issue, claims of bullying or harassment or incompatibility issues. Where the issues that led to the employment relationship ending give rise to a legitimate legal claim, such as where a personal grievance is genuinely on the horizon, any severance payment to address this should be handled as compensation or damages in settlement of a claim. And, usually, it should all be contained in a s 149 settlement agreement.<sup>71</sup> These agreements have the advantages of flexibility in terms of content and of constituting a full and final settlement for both parties. It is only if there is no risk of a legitimate legal claim that the matter could be assessed and handled as an *ex gratia* payment.

Whatever situation arises, the Office of the Auditor General's comprehensive guidance on severance payments should be followed.<sup>72</sup>

## Return from parental leave

We understand that sometimes employees are also said to receive an *ex gratia* payment when they return from parental leave. Ordinarily, such payments are provided for in the employment contract, so the employee is contractually entitled to the payment if the prerequisites are met. Accordingly, we do not consider that return-to-work payments of this kind are *ex gratia* payments.

---

<sup>71</sup> Employment Relations Act 2000, s 149.

<sup>72</sup> <https://oag.parliament.nz/2019/severance-payments>.



# Draft template for deed recording *ex gratia* payment

---

[This template deed can be used where the parties want to record legally binding obligations. Note that a deed is not needed with every *ex gratia* payment.]

## DEED RECORDING *EX GRATIA* PAYMENT

**BETWEEN** [party one]

**AND** [party two]

### Background

1. [Set out here the key facts and circumstances that have given rise to the decision to make an *ex gratia* payment.]
2. The [Department/Ministry] does not consider, or accept, that the facts set out in paragraph(s) [1] give rise to any legal liability or obligation to make a payment. The [Department/Ministry] is making the payment at paragraph [3] on an *ex gratia* basis.

### Terms

3. The [Department/Ministry] will make an *ex gratia* payment to [party] of [amount in dollar figure and numerically] inclusive of GST (if any is payable). [If applicable: This includes a contribution to [the party's] legal costs.]
4. The total sum will be paid to [insert relevant party here e.g. the party or their lawyer] within [timeframe] of the deed being signed and delivered by both parties.

OR

The sum of [insert figure] will be paid to [party] within [timeframe] of the deed being signed and delivered by both parties; and the sum of [insert figure], comprising legal



costs, will be paid to [insert relevant party here e.g. lawyer, legal aid services] within [timeframe].

5. [Insert here any other terms specific to this matter, which are intended to be *legally binding*.] [Exercise caution as to what commitments you wish to be binding.]
6. [If applicable, insert provision relating to confidentiality.] The [insert information] shall remain confidential to [insert the limits of confidentiality, e.g. the parties and their legal advisors], to the extent permitted by law. [Consider what information is justifiably confidential – any/all information relating to the payment; name and details of individual; quantum only etc.]
7. [If applicable, insert provision relating to finality, to be adjusted if proceedings have already been filed.] [The party] agrees not to bring [any] OR [insert type of] proceeding in any New Zealand court, tribunal, authority or arbitration, against the Attorney-General, the [insert name of any other entity against whom action might lie] or any agent or employee or former agent or employee of [insert name of entity] or any other person, which in any way arises out of or is in connection with the matters which are or have been the subject of the situation described in paragraph(s) [1].

### Status and use of this deed

8. This is a legally-binding deed. [As appropriate] It may be pleaded as a bar and a complete and absolute defence to any proceedings or other action taken in breach of this deed, and this deed may be used as evidence for that purpose.

### Legal advice

9. [The party[acknowledge(s)] that they have had the opportunity to receive independent legal advice about the content and consequences of the deed before signing it. [This term is likely to be needed where you are including a finality term, per paragraph [7]. If the individual will not be prevented from pursuing legal proceedings this term may not be needed. If you do not require inclusion of a finality term, consider whether a deed is required at all].



## **Governing law**

10. This Deed is governed by the laws of New Zealand and the courts of New Zealand have exclusive jurisdiction in respect of its subject matter.

## **Execution**

11. This deed will be binding on a party when they sign the deed, their signature is witnessed, and it is delivered to the other party (either in hard copy or through email).

### **Executed as a deed for and on behalf**

**of [Dept or Ministry] by**

**[insert name]**

**[signature]**

Witness signature: [The witness must not be a party to the deed. There is no impediment to the witness being another Government employee.]

Name of witness:

City/town of residence: [It is sufficient to specify the city/town/locality where the witness resides. An address is not required and the use of home addresses is not recommended.]

Occupation:

Date:

### **Executed as a deed by**

**[insert party's name]**

**[signature]**

Witness signature:

Name of witness:

City/town of residence:

Occupation:

Date:





**Te Tari Ture  
o te Karauna**  
Crown Law