

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

## Summary for decision-makers

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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.<sup>1</sup>

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.

<sup>1</sup> Further guidance can be found in Crown Law's advice *Ex Gratia Payments: A Guide for Government Lawyers*.

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.

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

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

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