



7 September 2023

Tēnā koe

On 7 July 2023, you emailed the Ministry of Social Development (the Ministry) requesting, under the Official Information Act 1982 (the Act), the following information:

*We request:*

1. *All documents concerning how breaches to the New Zealand Bill of Rights Act 1990 (BORA) should be addressed under its ADR processes, including the:*
  - a. *Individualised Claim Assessment process ("the ICA process");*  
*and*
  - b. *the RPF process.*
  
2. *The request above relates to the following periods:*
  - a. *From 2020 to 8 July 2022;*
  - b. *From 8 July 2022 to 30 September 2022; and*
  - c. *From 30 September 2022 to May 2023.*

On 7 August 2023, we extended your request as consultations necessary to make a decision on your request were such that a proper response to the request could not be reasonably be made in the original time limit.

Given the broad scope of the request, we have decided to grant your request by a way of summary under section 16(1)(e) of the Act, on the basis releasing documents in the format you have requested would impair efficient administration (section 16(2)(a) of the Act refers). This has been done to ensure sufficient information is provided to address any transparency and accountability reasons favouring the release of information. For the avoidance of doubt, the summary does not contain or disclose any privileged material.

During the period 2020-2022, the Ministry requested multiple pieces of legal advice from Crown Law to assist in both responding to individual claims as well

as to inform the Ministry's policy position going forward on how it would respond to claims with potential BORA breaches.

Having received this advice, the Historic Claims team initially began to develop a draft BORA payment matrix that would consider individual allegations that may be potential BORA breaches in claims. However, the Ministry's learnings from the development and implementation of the inappropriate detention framework reinforced the value of having a policy-based standardised framework that moves away from detailed consideration of individual allegations and is operationally straightforward to implement and apply so that impacted claims can be resolved in a timely way.

The policy development process pivoted to creating a BORA policy framework that is standardised across care settings on or after 25 September 1990 that are most likely to have breached a claimant's BORA rights. It was identified that residential placements with a secure unit and NGO-run bush programmes were the most common settings where potential BORA breaches may arise.

Operational testing was carried out on a sample of claims which contained likely BORA breaches. The purpose was to understand what total payments would look like if we added standardised BORA amounts (as well as any inappropriate detention top-up) to the endorsed baseline payment for the claim under the Historic Claims payment categories. The intention was to find amounts that would generally be sufficient to increase the total settlement payment for claims to a level that would effectively remedy any BORA breaches. It was through this testing process that the \$4,000 payment for residential placement concerns and \$8,000 payment for NGO placement concerns payments were formulated. A higher payment was proposed for concerns about NGO bush programmes given they generally have had more serious abuse allegations than residential programmes.

As part of this testing it was recognised that there may be the occasional claim where increasing the settlement payment by \$4,000 or \$8,000 would not bring the total payment to a level where it would provide an effective remedy. In these cases, a bespoke calculation will be necessary.

When formulating the amounts in the BORA framework, the Ministry did not specifically consider the inputs you have noted in para 17.11 of your letter except for 17.11.5 (comparative payments for BORA breaches as awarded by the courts).

We acknowledge that Aaron Martin, Deputy Solicitor General at Crown Law raised with the Ministry your Office's proposal that Dr Andrew Butler would peer review any advice from Crown Law. This proposal was raised at a time when the Ministry had already received and considered Crown Law advice and was in the process of obtaining final approvals for its' BORA policy framework. The Ministry felt it was important to begin making settlement offers to claimants that had their claims delayed while this work was being completed.

In the later stages of development, the Ministry was also mindful of the Royal Commission's redress report which had been critical of agency processes not considering human rights obligations and the impacts of delays on claimants while the Ministry was finalising its approach.

The Ministry's approach to BORA for individualised assessments was finalised in June 2022 and began being implemented in early July 2022. Full details of the approach can be found in the Historic Claims Business Process and Guidance, which, as you are aware, is publicly available.

Many aspects of this approach were incorporated into the Ministry's rapid payment option which began being implemented in late 2022. As noted in the report recently provided to Cooper Legal seeking approval from the Minister for Social Development and Employment for the Ministry's rapid payment approach, incorporating these aspects ensures consistency between the two assessment processes and helps ensure that the Ministry is meeting its public law obligations.<sup>1</sup>

The principles and purposes of the Official Information Act 1982 under which you made your request are:

- to create greater openness and transparency about the plans, work and activities of the Government,
- to increase the ability of the public to participate in the making and administration of our laws and policies and
- to lead to greater accountability in the conduct of public affairs.

This Ministry fully supports those principles and purposes. The Ministry therefore intends to make the information contained in this letter and any attached documents available to the wider public. The Ministry will do this by publishing this letter on the Ministry's website. Your personal details will be deleted, and the Ministry will not publish any information that would identify you as the person who requested the information.

If you wish to discuss this response with us, please feel free to contact [OIA\\_Requests@msd.govt.nz](mailto:OIA_Requests@msd.govt.nz).

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<sup>1</sup> Approval for the Ministry's Historic Claims Rapid Payment Approach (Report number REP-22-9-876), para 26. Letter dated to Cooper Legal 19 July 2023.

If you are not satisfied with this response regarding BORA, you have the right to seek an investigation and review by the Ombudsman. Information about how to make a complaint is available at [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz) or 0800 802 602.

Ngā mihi nui

A handwritten signature in black ink, appearing to read 'L. Hrstich-Meyer'.

Linda Hrstich-Meyer  
**General Manager**  
**Historic Claims**