



26 January 2026

Tēnā koe

Official Information Act request

Thank you for your letter to the Ministry of Social Development (the Ministry), dated 3 December 2025.

You requested the following documents:

- The Crown Resolution Strategy and Principles – as identified in the Historic Claims 2nd claims policy.
- The Historic Claims Business and Process Guidance (the Handbook) – as identified in the Guidelines on Discretionary Payments in Historic Claims.

I have considered your request under the Official Information Act 1982 (the Act). Please see the requested documents enclosed with this letter.

I note some information on page 27-28 of the Crown Resolution Strategy and Principles has been redacted. I consider this information to be outside the scope of your request as it is not part of the Crown Resolution Strategy and Principles. Please contact the Ministry if you would like this information.

I will be publishing this decision letter, with your personal details deleted, on the Ministry's website in due course.

If you wish to discuss this response with us, please feel free to contact OIA_Requests@msd.govt.nz.

If you are not satisfied with my decision on your request, 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 or 0800 802 602.

Ngā mihi nui

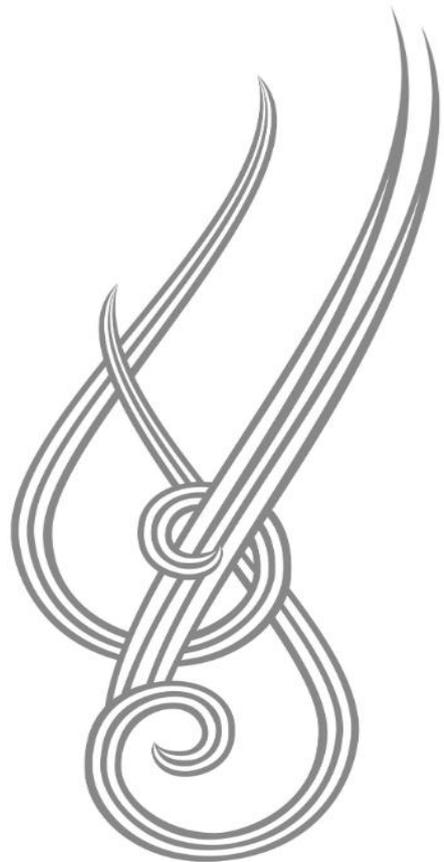
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Anna Graham
General Manager
Ministerial and Executive Services



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

MSD Historic Claims Business Process and Guidance (updated July 2025)



Owner	General Manager, Historic Claims
Version	3.2
Approval Date	4 July 2025

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Introduction

The MSD Historic Claims Handbook (the Handbook) replaces the version titled MSD Historic Claims Business Process and Guidance Version 2.5, July 2022.

This update reflects the introduction of rapid payments, with previous versions reflecting the introduction of new payment frameworks (inappropriate detention and potential breaches under the New Zealand Bill of Rights Act 1990, the Historic Claims Application database (the Application), and the development of any process and practice changes since the implementation of the new Historic Claims assessment framework in November 2019.

The MSD Historic Claims team are committed to continually reviewing how we assess and respond to claims to ensure we deliver a service that is consistent and fair, and is mana manaaki; a positive experience every time. As part of this commitment the processes, policies and guidance will be subject to review and amendment over time.

The following process provides guidance for responding to claims. Some claims may benefit from a more individualised approach, including in response to unanticipated issues.

Historic Claims Application (the Application)

Design work began in April 2019 for the development of an application database for Historic Claims to replace the manual system of recording and processing claims.

The Application is also a reporting tool and therefore relies on the input of accurate recording of claim details. It does not contain all information about the claim or claimant as this information is saved in the claimant file in Objective¹. However, there are links to relevant documents in the claimant file in Objective copied into the claimants record in the Application.

User Guides have been developed that provide step by step instructions for all points of the claims process where information is required to be entered into the Application.

Terminology

State care

For the purposes of this handbook State care refers to a child or young person who has been placed under the supervision, custody, guardianship or has come to the notice of Child, Youth and Family or its predecessors.

Claimant

For the purposes of this handbook, a claimant is a person who has been confirmed as eligible to make a claim as part of the Ministry's Historic Claims process.

¹ Objective is the Ministry's main document management system.

1. Intake

Claims may be made to the Ministry of Social Development (MSD) by a person directly or via their nominated agent or representative or via a legal representative. Once it has been confirmed that the person meets MSD's eligibility criteria, every claim received is recorded in the Historic Claims Application (the Application).

1.1 Direct claims

Direct claims are usually received by phone, email or mail. Claims may also be made, with the consent of the person, by a representative or agent. Claimant Support Specialists receive the claim and work with the person to establish if they meet MSD's eligibility criteria to make a claim.

Where a person is seeking to act on behalf of a claimant, confirmation giving them authority to act must also be provided to Historic Claims in writing.

Prior to any information being gathered (beyond any initial written contact), a Claimant Support Specialist will provide information to the person about how MSD uses their personal information including who MSD may share their information with and why. As part of these conversations the Claimant Support Specialist will also:

- ensure that Historic Claims has sufficient information to confirm whether or not a person is eligible to make a claim;
- provide information about the claims process, what to expect, and answer any questions the claimant may have;
- where possible, help claimants to access counselling support or other services.

1.2 Legally represented claims

A person may choose to progress their claim via a legal representative rather than directly with MSD. In these circumstances MSD is usually advised in writing of claims made via a legal representative. This may be by way of a completed Claim Registration Form, Statement of Claim, letter outlining a person's concerns and/or Letter of Offer². These will be processed and recorded in the Application after eligibility has been confirmed. The date the claim is registered is the date that the first of any of the above documents is received.

Legally represented claimants may access the same support as direct claimants during the claims process.

1.3 Confirming eligibility

Eligibility needs to be confirmed for all claims. This may require additional steps (such as requesting files) to determine eligibility. Checks may also need to be carried out to

² A letter outlining a person's concerns which also contains a settlement offer for which the person would be willing to settle the claim for.

determine whether the concerns raised have been previously considered by Oranga Tamariki.

Claimant Support Specialists are responsible for determining whether a claim meets the eligibility criteria. This decision is recorded in the Application. A person is advised of the decision by:

- a letter of acknowledgement confirming registration of their claim and providing information about the claims process and a copy of the Historic Claims Fact Sheet which includes information about how a claimant's information is treated;
- or a closure letter advising that they are not eligible to make a claim with MSD.

A person is eligible to make a claim to MSD if they:

- had been in the care, custody, guardianship, or came to the notice of the Child Welfare Division, the Department of Social Welfare, or Child, Youth and Family **before 1 April 2017, and**
- believe they were harmed as a result of abuse or neglect while in care³.

A person is **not eligible** to make a claim to MSD if they do not meet the above criteria.

In cases where a person is not eligible to make a claim to MSD it may be appropriate to provide contact details to the person making a claim of other organisations or services that may be able to assist (e.g. Ministry of Education, Ministry of Health, Faith-based organisations or Accident Compensation Corporation) or to assist them to connect with an agency by agreeing to pass on their contact information. Note: where personal information is being shared with an agency (such as contact information), it is important that a claimant's verbal consent is obtained and is clearly documented in Objective.

In some cases, a person will be eligible to make a claim to MSD but some allegations will be out of scope of MSD's claims process. Allegations that are not in scope of MSD's claims process include allegations relating to events that took place:

- at an educational placement including Residential Special Schools, schools attached to social welfare residences or other schools. For further information see *Historic Claims Policy on Ministry of Education Claims*;
- at a health institution such as a psychiatric hospital;
- at a non-government organisation (NGO) placement where the claimant was not in the care of or custody of the State at the time; and
- on or after 1 April 2017.

Claims cannot be lodged on behalf of people who are deceased (see *Policy and Practice Guidance on Deceased Claimants*).

³ 'Care' is defined for the purposes of eligibility as a person who has been in the care, custody, guardianship, or has come to the notice of the Child Welfare Division, the Department of Social Welfare, or Child, Youth and Family.

1.4 Second claims or revisited claims

MSD provides a claims process where the general expectation is that each claimant brings only one claim against MSD relating to their time in care and any resolution currently agreed upon is in full and final settlement.

However, there may be the occasional situation where it is appropriate to consider a request for a second claim to be registered or for MSD to revisit a claim where a payment has already been made.

For a second claim to be registered or for a claim to be revisited, the General Manager, Historic Claims must approve the request. For further information see *Requests to register second claims or revisit claims*.

1.5 Prioritisation of claims

Claims are allocated for assessment in the chronological order in which they are received in order to ensure fairness and equity across all claimants. However, claims can be prioritised in the following situations:

- where a request is made by a claimant or their representative or agent to have a claim prioritised it will be considered by the General Manager on a case-by-case basis at any stage in the claims process. Claims that may be considered by the General Manager for prioritisation include:
 - claimants who are at high risk of dying before their claim is assessed if prioritisation was not to occur. Supporting information from a claimant's medical practitioner may be required.
 - claimants who are at high risk of suicide before their claim is assessed if prioritisation was not to occur. Evidence from a claimant's clinician confirming this risk is required.
- where a claimant is 70 years or older, their claim will be automatically prioritised.⁴

Where there are multiple claims that have been prioritised, claims that have been prioritised due to health concerns are to be allocated first, before any claim that is prioritised for age.

2. Provision of personal information

A claimant or their representative or agent may request access to their personal information at any point during the claims process. Requests for personal information are allocated to an Information Coordinator in order of receipt, or by exception as outlined in section 1.5 Prioritisation of claims.

⁴ This does not apply to any claimant who has passed away prior to allocation of the claim for assessment

2.1 Acknowledgment of request and preparation for processing

The staff member completing the check:

- confirms that relevant paper records and relevant CYRAS⁵ records have been saved into Objective;
- sends an acknowledgement to the requestor (either the claimant or their representative or agent) confirming receipt of the request and advising that the request will be granted (if there are relevant files);
- where an initial search finds no related records, the staff member completing the check will contact the requestor for further information that may assist in searching and identifying relevant records.

If no records can be found the requestor will be advised, and the information request will be closed. The Manager Historic Claims will be informed and will be responsible for determining the next steps to be taken for the claim taking into account the guidance in section 7.9 Loss of claimants records (where applicable).

2.2 Personal information request allocated for redaction

Once the records are received and scanned, an Information Coordinator creates working copies of files and redacts information in accordance with the Privacy Act and any other relevant legislation.

The claimant or their representative or agent is contacted to confirm how they want to receive a release of their information. Release/pick-up letters are prepared, and the file is sent via CITRIX⁶ or signature courier to a secure place of business.

3. Sharing of information with other agencies relating to safety concerns

3.1 Sharing of information

Where a claimant raises concerns about the care or treatment provided to them that relates to a current Oranga Tamariki, NGO, or other government agency staff member or caregiver who works with children, this information may need to be shared with that agency if the concerns raise current safety concerns for children. This helps to keep children safe now and in the future.

See the Historic Claims Privacy Fact Sheet – *Your Information is Important* for more information.

⁵ CYRAS is Oranga Tamariki's case management system.

⁶ CITRIX is a secure "Sharefile" method of information sharing with external agencies and individuals electronically.

3.2 Safety Checking

A safety check is completed to identify any current safety risks to children, by identifying any staff members or caregivers referred to in a claim who may be currently employed by Oranga Tamariki, MSD, or an operating NGO.

The need for a safety check may be identified by:

- when a new claim is registered or a letter of offer is received from a claimant's lawyer;
- at interview or during discussions with the claimant; or
- during an assessment, if previously unknown information is found on the claimants file, or at any other point that details of alleged perpetrators are established.

Information that requires safety checking is referred to the Lead Claims Advisor (or nominee) to carry out the safety check. Staff who are conducting safety checks may need to make contact with Oranga Tamariki or operating NGOs to check whether staff members are employed by that agency.

The outcome of these safety checks may result in referrals to Oranga Tamariki, NGO's, other Government agencies or the Police. Safety checks will be referred to the Lead Claims Advisor for consideration and for any relevant referrals to be made, in consultation with MSD Legal where appropriate (e.g. filed claims).

3.3 Court orders prohibiting disclosures of information

Court Orders prohibit some disclosures of information contained in claims that are filed with the Court. Breach of these orders would likely constitute contempt of Court.

If the intention is to make a safety referral in relation to an allegation raised in a claim filed in Court, the Lead Claims Advisor, relevant Senior Claims Advisor or their manager will consult with MSD Legal prior to the referral being made. MSD Legal are available to provide legal advice as needed when making decisions in other cases.

3.4 Referring care and protection concerns

During the claims process other information may be gathered that raises concerns about the care and protection for a child or young person outside of the safety check process. Where a staff member has concerns about the safety of a child identified outside of the Historic Claims safety checking process, these concerns should be reported to Oranga Tamariki as a report of concern in accordance with the Ministry's Child Protection Protocol. The referral should be discussed with their Team Leader or Manager prior to any referral being made.

4. Assessment of a Claim

There are two types of assessment a claimant can choose from; a rapid payment or an individualised assessment. Claimants who choose a rapid payment are also free to reject any rapid payment offer that is made and request to have an individualised assessment.

MSD introduced rapid payments into its claims process in November 2022 to offer options to claimants about how their claim is resolved depending on what is important to them. Rapid payment offers are able to be progressed within a faster timeframe than is available under an individualised assessment.

4.1 Rapid payments

Rapid payments are not calculated based on a person's individual experience and concerns, but rather the length of time a person was involved with Child Youth and Family or its predecessor agencies. This acknowledges that the longer a person has been involved with the State, the more likely they will have experienced repeated harm.

These payments can be calculated more quickly as a person's care records will not be checked to consider what information supports a person's specific concerns. Further information about rapid payments can be found in section 6.

Any claimant that chooses to receive a rapid payment is still entitled to all other parts of the claims process. This includes having the opportunity to tell their story, receive their care files, be supported to access counselling and receive an apology for their experience.

4.2 Individualised claim assessments

An individualised claim assessment considers a claimant's specific concerns and care experience including reviewing a claimant's state care records. Allegations that are able to be taken into account for recommending a settlement offer are categorised and payment is determined by using the Payment Categories and Definition Sheet (Appendix 1 and 3). Further information about individualised assessments can be found in section 7.

5. Gathering information to support the assessment

5.1 Discussing assessment options with a claimant

Prior to beginning an assessment, a discussion should be had with a claimant about their assessment options and what each option might mean for the outcome of their claim. It will be important for the staff member to discuss the main differences between the assessment options, the information the claimant would need to provide for each option, timeframes and how outcomes might differ (if known).

5.2 Gathering information from a claimant

For claimants who choose a rapid payment, detailed information does not need to be gathered from a claimant about their concerns or their care experience unless they wish

to provide this. For some claimants, it will be important for them to have the opportunity to tell their story and therefore they may still wish to discuss their care experience before an assessment begins.

In order to assess a person's claim under an individualised assessment, information needs to be gathered from the claimant about their experience and what they are seeking from MSD. Claimants can provide this information in a variety of ways, depending on their preference and circumstances. This may include one or more of the following:

- a face-to-face meeting. Where a face-to-face meeting is held, all efforts will be taken to ensure that the claimant is comfortable with the venue (although meetings will not be held in their own home);
- audio visual link (AVL);
- telephone conversations;
- in writing;
- gathering information from other sources (with the claimant's consent) such as a counsellor or Police; or
- a Letter of Offer and/or Statement of Claim from a legal representative.

Information may be provided by the claimant via a combination of channels. The claimant will be given the time they need to share their allegations, and at a pace they are comfortable with.

In addition to collecting allegations/concerns from a claimant, some claimants may wish to provide written supporting information that can be considered as part of the assessment. For example, this could include information to confirm the claimant has lodged a complaint with the Police or a sensitive claim with ACC relating to abuse experienced in care.

Staff may need to clarify with the claimant particular details to enable allegations to be correctly categorised (such as frequency and severity) or assessed under a Step 2 (such as identification details of an alleged perpetrator). This clarification can occur at any stage during the process.

6. Rapid Payment assessment

6.1 Introduction

For a person to be eligible for a rapid payment, they must meet the general claim eligibility criteria (see section 1.3) including having a concern that they were harmed as a result of abuse or neglect while in state care.

Rapid Payments are primarily calculated by considering how long a person has been involved with Child, Youth and Family and its predecessor agencies (CYF). The payment bands are:

Under 5 Years	\$10,000
5 – 15 years	\$20,000
Over 15 years	\$25,000

Where applicable, further payments may be added to acknowledge inappropriate detention, potential breaches of the Bill of Rights Act (BORA) and placement at an NGO bush programme.

The maximum rapid payment is \$30,000.

The Rapid Payment Calculator is used by staff to record and calculate the payment to be offered.

6.2 Calculating the payment

To calculate the payment, staff first establish the length of time the claimant was involved with CYF and then identify if inappropriate detention, BORA or NGO bush programme payments apply.

Period of involvement

The period of involvement extends from the first date a claimant came to the notice of CYF as a client through to the last date they ended involvement with CYF as a client.

The length of involvement is established by staff looking through a claimant’s state care records (CYRAS file and/or scans of a claimant’s personal or family file). When carrying out this calculation, staff will need to consider the following:

- involvement is defined as someone who is in the care, custody or has come to the notice of CYF or its predecessor agencies for care and protection or welfare concerns. This includes coming to notice for offending;
- care and protection or welfare concerns do not include things such as:
 - concerns that do not relate to the claimant such as concerns that are confined to a sibling;
 - requests for financial support to assist parents or caregivers where the request or concern does not include any specific care or welfare concerns about the claimant;
 - the seeking of maintenance or child support payments for the custodial parent and in the absence of any specific care or welfare concerns about the claimant;
 - adoption of the claimant where the only involvement of CYF is carrying out its statutory functions under the Adoption Act 1955 and in the absence of any specific care or welfare concerns about the child or young person being adopted.
- where a person has multiple entries and exits into care, the entire period from beginning to end is to be used for the calculation except where there is/are

educational or psychiatric placement(s) that are more than half of the time the person was involved with CYF or is post 1 April 2017 (see section 6.3 for more information)

The end date is defined as the date at which the claimant had no further involvement with CYF as a client. Where the claimant does come to the attention of CYF, but there are no orders in place for the claimant and they are of an age where they fall outside the jurisdiction of the Act⁷, then that does not constitute involvement for the purpose of calculating a rapid payment. Examples of this include but are not limited to:

- the claimant's child has come to attention, or
- where welfare concerns are raised about other children in the home and the claimant is of an age where they fall outside the jurisdiction of the Act⁷.

Inappropriate detention, BORA and NGO bush programme payments

Additional payments are added by staff in the Rapid Payment Calculator to claims which include particular placements where it is known more serious abuse occurred or where a person's legal rights may have been potentially breached. All documents, containing information about the claimants concerns or allegations should be reviewed to determine whether any additional payments should be included as part of the final rapid payment offer. This includes reviewing:

- claim registration forms;
- notes from an interview and/or conversations the claimant has had with historic claims staff;
- information from other sources about the claimants' care experience;
- a letter of offer from the claimant's solicitor;
- a Statement of Claim where the claimant has filed proceedings in court.

The purpose of that review is to identify any of the following:

- where a person has raised concerns about conduct while placed at an NGO run bush programme listed in Appendix 2 (up to \$5,000);
- where a person has raised concerns about being placed in secure care or detained in another placement (up to \$5,000);
- where a person has raised concerns about conduct while placed at an NGO run bush programme (up to \$8,000) or residential placement⁸ (up to \$4,000) on or after 25 September 1990. Where the date of placement could be close to 25 September 1990, a claimant's personal files are used to confirm the date of placement.

⁷ The Child Welfare Act 1925; the Children and Young Persons Act 1974 or the Oranga Tamariki Act 1989 as appropriate.

⁸ Placement in secure in a residence constitutes conduct of concern for the purpose of BORA.

In determining if additional payments should be added for inappropriate detention and/or BORA, the general principles of the frameworks (as referenced at sections 7.12 and 7.13) apply⁹. However, the payments may not mirror those made in an individualised assessment given that a total rapid payment cannot exceed \$30,000.

These additional payments are included based on the information provided to Historic Claims by the claimant, therefore, it may be necessary to clarify with the claimant or their representative, details around these, such as the length of time in secure, the length of the residential placement and the number of residential placements, to ensure these payments are calculated correctly.

Verification of secure placements or attendance at bush programmes from the claimant's records is not necessary. Where a claimant cannot recall the timeframe of a placement, the claimant's records can be used to determine whether an additional payment acknowledging potential BORA breaches should be included in the calculation of the rapid payment.

Once all relevant information has been entered into the Rapid Payment Calculator, a total payment is generated by the calculator. Rapid payments cannot exceed \$30,000.

Bespoke BORA payments referenced in section 7.13 and bespoke false imprisonment payments referenced in section 7.12 do not apply for rapid payments.

6.3 Exclusions from rapid payment calculations

As noted in section 1.3, allegations that relate to events that took place at an educational placement including a Residential Special Schools or a health institution such as a psychiatric hospital do not fall within the scope of MSD's claims process. There are other redress processes run by other agencies for these types of allegations.

However, for the purposes of calculating a rapid payment only, educational or health placements can be included when calculating the 'length of involvement' except where they fall under the exclusion below. Please note that any inclusion in the "length of involvement" calculation can not be viewed as MSD responding to those allegations and claimants continue to be free to lodge a separate claim with the relevant claims agency.

When calculating the 'length of involvement' period, the following periods of time shall be excluded:

⁹ The main exception to this is that when considering adding an additional payment for BORA, as no assessment has been carried out the requirement under the BORA framework for individualised assessments, the requirement that a claim must have had at least one allegation taken into account for the purpose of recommending a settlement offer (see section 7.13) does not apply. It is instead sufficient for the claimant to raise concerns about either an NGO run bush programme or care residence which are defined in section 7.13 and appendix 2.

- Unless agreed otherwise by MSD and Oranga Tamariki, any period post 1 April 2017;
- Where from a brief review of the claimant's files it is clear that the claimant spent more than half of the time they were involved with CYF or its predecessor agencies in educational or health placements, the length of any such placement(s).

6.4 Where a claimant has shared concerns about their time in care

If a claimant has shared concerns about their time in care:

- all allegations made by a claimant are to be recorded in the Data Collection Template and also inputted into the Application;
- staff should identify any allegations requiring a safety check if this has not been completed or an updated safety check if new information has been received, and progress these for checking (see section 3.2);
- staff should identify any allegations relating to either a current or past staff member or caregiver of an operating care NGO and share these with that NGO to inform them of the allegations. Though care needs to be taken with claims that are filed in Court (see section 7.8).

7. Individualised Claim Assessment

It is important to note that Historic Claims do not investigate allegations of abuse. It is also acknowledged that the team cannot measure the significant impact abuse has had on a person's life. Allegations are assessed based on the incident or event itself for the purposes of settlement, and not the impact of that abuse.

7.1 Steps prior to allocation

Prior to allocation of a claim for an individualised claim assessment, the claimant's Objective file is reviewed to ensure that all relevant information is available, which may include an audio recording of a meeting with a claimant and notes, Letter of Offer, as well as confirming that the claimant's personal and family files are available.

7.2 Preparing for assessment

Once a claim is allocated, the staff member reviews the information provided by the claimant to identify the allegations to be assessed. This may include reading the Letter of Offer or Statement of Claim, listening to interview recordings and reviewing relevant files and notes held on the claimant's file. Each allegation is then recorded in the Application.

For further information, see "*Practice guidance – How to identify and write an allegation*".

Once each allegation has been entered into the Application the complete list can be generated and downloaded. This list may be helpful when carrying out the assessment or can be used with claimants to confirm that all the allegations they would like Historic

Claims to look at as part of their claim have been identified and correctly understood (if this would be helpful for the claimant).

Prior to beginning an assessment, the staff member reviews all of the allegations to be assessed to identify any:

- allegations that may require additional checks, including allegations that may require a Step 2 (see section 7.5) analysis, so that additional files can be ordered as early as possible;
- any allegations that are the responsibility of the Ministry of Education to assess (see *Historic Claims Policy on Ministry of Education Claims*);
- further allegations that relate to an operating NGO so that appropriate consultation can be had; and
- any allegations requiring a safety check if this has not been completed.

The following resources should also be gathered to guide the assessment:

- Historic Claims practice guidance and any other policies that guide how an assessment is to be carried out;
- a summary of policies, legislation, legal authorities, manuals and practice guidance that relate to the time period being assessed and links to full documents;
- payment categories and definitions (Appendix 1 and 3).

7.3 Assessing a Claim

An assessment of each allegation included in the claim is based on the information held in the personal and family files (including CYRAS records where available) relating to the claimant's involvement with CYF or its predecessors.

Key dates and decisions relating to the claimant's time in care are noted. This information helps the staff member understand the role the State played in the claimant's life at different points, enables the construction of a timeline and assists in providing feedback to the claimant about their time in care. Further information about timelines can be found in '*Practice Guidance – Timelines*'.

For each allegation the staff member will capture information that will help them to:

- complete a fact check to confirm that MSD or its predecessors had a responsibility for the claimant at the time of the alleged event;
- identify any relevant policy, legislation or guidance;
- identify any information found in the file that points against the alleged abuse or practice failure not having occurred or conversely points towards the alleged abuse or practice failure having occurred; and
- categorise the allegation using the allegation categories on page 17.

All relevant information is recorded in the Claim Assessment Template and in the Application as appropriate.

An assessment of the claim will also consider any other significant practice failures or abuse identified by the staff member during the review of the claimant's records.

Advice can be sought from the Senior or Lead Claims Advisor on technical matters, wherever appropriate, to ensure the correct legal statuses, policies and legislation, are always cited in the Claim Assessment template for each allegation.

Once the available information has been gathered it will enable and require an objective decision to be made as to whether the allegation can be taken into account for the purpose of recommending a settlement offer. Advice and guidance should be sought as appropriate from the staff member's Team Leader in the first instance. The Senior Claims Advisor, Lead Claims Advisor, Strategy Team and/or MSD Legal are also available to assist if needed. The rationale for any recommendation must be clearly documented in the Claim Assessment Template.

Any allegations taken into account for the purposes of recommending a settlement offer are categorised and the level of seriousness is determined using the Payment Categories and Definition Sheet (Appendix 2 and 3). This includes assessing the severity of the alleged abuse, neglect, inaction and inadequate practice and recording the frequency, age and any other specific vulnerabilities of the claimant at the time of the alleged abuse or practice failure. For further information about assessing frequency, see "*Practice Guidance – Assessing frequency*".

Historic Claims categories of allegations:

- **abuse or neglect by responsible adult**
Responsible adult is an individual employed, contracted or otherwise engaged by the State who have care and protection responsibilities for the child or young person;
- **inaction, insufficient action or inappropriate action** of the State (and responsible adult) that contributed to the abuse of the child or young person;
- **inadequate practice** that affected the standard of care the child or young person experienced but did not contribute to abuse.

For further information see '*Legal framework underpinning Claims Resolution process*'¹⁰ and '*Practice Guidance – Responsible Adults, Inaction and Inadequate Practice*.'

¹⁰ This document is legally privileged.

7.4 Allegations not taken into account

An allegation will be taken into account for the purposes of recommending a settlement offer unless any of the following apply:

- they meet the criteria outlined in section 7.5 'Step 2' and should therefore be considered using the guidance in that section;
- it has not been confirmed that MSD or its predecessors had a responsibility for the claimant at the time of the alleged event;
- we are aware the allegation has been previously reviewed and considered by MSD or another agency (either government or non-government) and there are no factors that indicate it may be appropriate for the claim to be reviewed. For allegations previously reviewed by MSD, see further the document titled '*Requests to register second claims or revisit claims*'.
- Information has been identified in the assessment that points against the allegation.

Examples of the type of information that may point against the allegation include:

- where an allegation of physical abuse has been made but there is clear medical information which does not support physical abuse;
- documented investigation of an allegation which has been raised in the claim, where that investigation is deemed to meet the reasonable standards of the time and which concludes that the alleged incident did not happen;
- records that indicate regular social worker visits and face to face contact with the claimant where the opposite is alleged;
- records that indicate attendance at school and/or reasonable efforts to enrol the claimant in education where it is alleged that they did not attend school. Note that allegations about the standard/quality of a claimant's education are not for MSD to respond to;
- records that indicate medical/dental treatment where it is alleged no such treatment was provided;
- clear information that a named staff member or caregiver about whom an allegation is made was not present at the time of the alleged abuse.

Where there is some ambiguity about the effect some information may have on the claim, advice and guidance should be sought as appropriate from the staff member's Team Leader.

It is not necessary to identify information which supports an allegation in order for that allegation to be taken into account for the purposes of recommending a settlement offer. However, where such information is identified this should be recorded and referenced. This provides valuable information that assists with providing feedback to the claimant.

Given the difficulties of memory and the length of time that some claimants wait before bringing a claim, if the claimant has misidentified the person they make allegations against, this does not automatically point against taking the allegations into account for the purpose of settlement.

7.5 Step 2 – Additional information for particular allegations

Where the allegations are of a more serious nature, consideration of additional information provides increased rigour around the assessment of these allegations. This enables MSD to have a better understanding of the more serious abuse alleged by those who were in care and provides confidence in the robustness of the information shared with current care providers including Oranga Tamariki.

It also ensures payment recommendations are fair, consistent and align with past payments.

Step 2 analysis is required where allegations against a responsible adult involve any of the following:

- Moderate (chronic) physical abuse;
- Serious physical abuse;
- Moderate and serious sexual abuse;
- When high levels of inaction are alleged or identified;
- Where there is a potential false imprisonment, which does not fit under the inappropriate detention framework (see section 7.6 and section 7.12 for further information).

Step 2 analyses require consideration of whether, on the basis of the information gathered, it is reasonable for the allegation to be taken into account for the purpose of making a settlement offer.

The types of additional information that may be considered as part of this analysis includes:

- other claims made against the alleged abuser;
- other claims involving allegations about specific providers, programmes or institutions;
- institutional files about residences or providers;
- information held in the alleged perpetrator's staff or caregiver files;
- other relevant information.

Further information about information sources can be found in "*Practice guidance – Information sources for assessment.*"

The following considerations may assist when undertaking a Step 2 analysis of an allegation of abuse:

- whether documents confirm contact between the person the claimant alleged abused them;
- whether the claimant's allegations are consistent with information MSD holds about the alleged staff member, caregiver or institution. This may include consideration of other allegations received or documentary information held by MSD;
- whether descriptions and/or modus operandi described align with other known allegations; or
- the certainty of other similar allegations for example criminal convictions or complaints made and investigated at the time.

Further guidance about Step 2s can be found in "*Practice Guidance – How to prepare a step 2 analysis*".

7.6 Seeking Legal Advice

From time to time, there will be claims that require legal advice. For example, where it is not clear whether an alleged perpetrator would fall under the 'responsible adult' definition.

All requests for legal advice must be emailed the Legal inbox and included in the Application.

False imprisonment allegations that do not fit under the inappropriate detention framework (see section 7.12) need to be identified and a Step 2 completed. Before completing the step 2, advice can be requested from MSD Legal on whether the allegation is likely to amount to false imprisonment.

7.7 Allegation against a current MSD staff member

Allegations against current MSD staff may require a more detailed assessment. In addition to any obligations to the claimant, if an allegation is made about a current staff member, MSD has an obligation to the employee to advise them of the complaint and to manage this in a fair and transparent way. In these circumstances the Manager Historic Claims will seek guidance about the approach to assessing the claim.

Note: if the staff member finds new information that indicates the allegations in the claim relate to a current Oranga Tamariki or NGO staff member they should check that a safety check has been completed and refer these for checking if this has not been completed (see section 3.2).

7.8 Engaging with operating Non-Government Organisations (NGO)

Where an allegation is made in relation to either a current or past staff member or caregiver of an operating NGO, information may be shared or gathered to support the assessment of the claim. There are Court Orders in place that prohibit some disclosures of information in claims that are filed with the Court. Breach of these orders would likely constitute contempt of Court. MSD Legal should be contacted before sharing any details of a claim filed in Court with an NGO.

Where an allegation is made in relation to either a current or past staff member or caregiver of an operating NGO the staff member will:

- prepare a summary outlining the NGO's known involvement with the claimant and the relevant allegations relating to that NGO;
- identify specific information needed to support the assessment of the claim;
- discuss with the Lead Claims Advisor, and get advice from MSD Legal if necessary, on the best approach to consult with the NGOs;
- advise the claimant (or their legal representative) that the Ministry is intending on consulting with the NGO. Any concerns raised by the claimant about this engagement should be considered and addressed so far as possible.
- at the conclusion of their assessment the staff member will refer a copy of the draft outcomes for the relevant allegation/s to the NGO for their review and feedback.
- if the NGO provides information that is used in the claims assessment, this is to be set out in the settlement offer letter.

7.9 Loss of claimant records

A claimant's records should confirm their placement in the home, residence or provider at the time the allegation occurred in order for their allegation to be taken into account for the purpose of recommending a settlement offer.

CYF and its predecessors were obligated to maintain and retain records for children and young people who were placed in their care, custody or guardianship. In some instances and for various reasons some of those records have either been lost or destroyed making it impossible to verify facts such as legal status and placement details. The absence of those records places the claimant at a disadvantage for which they should not be penalised.

Where records are absent, further investigation will be required to enable an assessment to be made about whether the allegation can be taken into account for the purpose of recommending a settlement offer. Additional steps should be taken in an attempt to confirm the key facts of the claim such as reviewing any potentially relevant residential registers, logbooks and diaries, and caregiver records to determine if the claimant was placed as stated. Where no information can be identified, the staff member will need to

determine whether the lack of information means the allegations are not taken into account for the purpose of recommending a settlement offer. Advice should be sought from their Team Leader in the first instance.

7.10 Referencing guidance

Where information has been relied on for the purpose of determining whether an allegation should be taken into account for the purpose of recommending a settlement offer, referencing allows for the information to be easily located where necessary. Referencing becomes crucial if the claimant seeks a Review.

There are two types of referencing – (1) reference the allegation and (2) referencing information used to assess the claim. These references are recorded in the relevant fields in the Application.

Referencing allegations

Staff record a time stamp, or a page and paragraph number, indicating where the allegation was mentioned in the claimant's description of their time in care.

Multiple references can be recorded, where the same allegation is mentioned more than once in their description of their time in care.

Referencing information used to assess a claim

A reference should include the name of the document and/or the file reference and specific page/folio that the information is on where available.

Specific reference examples include:

- 50000XXXXX, page 1
- 50000XXXXX, folio 2
- R 12 XXX XXX, page 3
- R 12 XXX XXX, folio 4
- Child Welfare Manual 1984, Section A.1.23
- 'Name of claimant' CYRAS, page 1
- Delium DCN.001.0014
- Objective 'Title of file/document', page 1

7.11 Developing recommendations for payment

The allegations taken into account for recommending a settlement offer are recorded in the Summary of Allegations section of the Claim Assessment template. The staff member uses these allegations to determine the appropriate payment category, the range within the category (low, mid or high) and the rationale for the recommended payment is included in the Recommendation for Payment section of the Claims Assessment template. A Recommendation for Payment should clearly document why the staff member is recommending the claim sits within a particular category (having regard to the wording of the categories) and any reasons for why it should be placed low or high in the category. This is a nuanced exercise which should focus on the totality of the claimant's care

experience rather than how many allegations of abuse, inaction or inadequate practice there have been. Further guidance can be found in 'Practice Guidance - How to write a Recommendation for Payment'.

7.12 Inappropriate detention

In 2021, the Ministry developed a policy framework (that is not designed to mirror legal liability) in order to enable equitable and prompt resolution to possible claims of unlawful detention and, more broadly, to recognise additional circumstances where detention may have been inappropriate.

The inappropriate detention framework applies to claims which include an allegation of inappropriate detention or confinement in any placement (including residential, caregiver and NGO placements), and/or where the claimant was placed at a residence which had a secure care unit and alleges that they were held in secure care on at least one occasion. Types of allegations that would fall under this framework include being:

- detained in a secure unit within a residential facility;
- detained in a place or room (e.g. locked garden shed or bedroom) where this went beyond the exercise of normal and reasonable parental controls in terms of the nature, type, and duration;
- detained in a place as part of community care settings where this was inappropriate or unreasonable (e.g. being sent to 'Alcatraz' as punishment while attending the Whakapakari programme on Great Barrier Island).

Definitions for this framework (including a list of residences which had a secure unit) can be found in Appendix 2.

Where the framework is to be applied, staff establish:

- If a secure care placement is alleged in a residence that had a secure care unit, whether the claimant had one or multiple residential placements.
 - if there is only one residential placement, the length of that placement.
- The duration of any other placement where the claimant makes an allegation of inappropriate detention or confinement;
- Whether the claimant makes any allegation of continuous detention lasting 29 days or longer.

Using the inappropriate detention framework table (included in Appendix 1) this information is used to determine an additional payment amount. This is added to the payment category amount in calculating the offer to be made to the claimant.

Note – other than alleged continuous detention for 29 days or longer, the claimant does not need to have provided a duration for the detention or confinement (e.g. the secure care placement). All that is needed is that they indicate they spent time in secure care or other confinement.

For any claims undergoing an individualised assessment where there is an allegation or evidence of false imprisonment that does not fit under this framework (e.g. for example, when placement in a residence does not align with an order), a 'Step 2' will be required

and any process for determining an appropriate payment will require legal advice and bespoke calculation of an appropriate payment.

7.13 Potential breaches under the New Zealand Bill of Rights Act 1990 (BORA)

In July 2022, the Ministry implemented its approach to how it will respond to potential BORA breaches that are included in claims that are being considered as part of its alternative dispute resolution process. A BORA policy framework has been developed in order to enable equitable and prompt resolution to claims that include potential BORA breaches. While not designed to mirror legal liability, the framework has been developed in light of the human rights and fundamental freedoms affirmed in BORA, including in section 23(5).

The BORA framework applies for any claimant who has had at least one allegation taken into account for the purpose of recommending a settlement offer in relation to conduct at residences or NGO bush programmes on or after 25 September 1990 (being when BORA came into force). For those that are eligible, an additional payment is to be calculated in accordance with the below framework:

BORA setting	Additional payment *
Where a claimant has had at least one allegation taken into account for the purpose of recommending a settlement offer in relation to any residential placement** on or after 25 September 1990 but <u>did not</u> have any allegations taken into account in relation to any placement at an NGO bush programme.	\$4,000
Where a claimant has had at least one allegation taken into account for the purpose of recommending a settlement offer in relation to any NGO bush programme** placement on or after 25 September 1990.	\$8,000

* The two additional payments are alternatives and are not cumulative. The maximum payment is \$8,000.

** The residence must have had a secure unit and the allegation taken into account must be in relation to conduct at that residence or bush programme. A list of these residences and the relevant NGO bush programmes are contained in Appendix 2.

Any additional payment is added to the payment category amount and any inappropriate detention amount in calculating the offer to be made to the claimant. It is this combined total payment, coupled with other aspects of the Ministry’s settlement offer (e.g. an apology) which provide the Ministry’s total BORA remedy.

There may be the occasional claim undergoing an individualised assessment which includes a potential BORA breach where the BORA framework coupled with the payment category amount and any inappropriate detention payment do not provide for an appropriate remedy as determined by the Ministry. In these cases, any process for determining an

appropriate payment may require legal advice and will require bespoke calculation and approval from the General Manager, Historic Claims.

Where a staff member identifies such a situation, further consideration and discussion about next steps will be needed in conjunction with their Team Leader/Manager.

8. Settlement documentation and sign out

8.1 Preparation of settlement documentation

At the same time as the assessment is being completed, the staff member will also prepare the following documentation:

- Settlement Offer Letter;
- Settlement Agreement; and
- Apology Letter and accompanying Memo to the Chief Executive.

Further guidance on these documents can be found in the guidance titled "*Settlement Documentation*".

If the claimant has died prior to their claim being resolved, the documents will require some edits. See *Policy and practice guidance on deceased claimants* for information.

8.2 Sign out of Claim Assessments

Team Leaders are responsible for monitoring claims through the assessment process, ensuring outcomes align with policies and guidelines.

Once completed, settlement recommendations (including recommendations for no payment) under an individualised assessment are referred to the Consistency Panel for endorsement. The Consistency Panel's role is to ensure that all recommended payments are consistent, fair and in line with past and present payments. The make-up of the panel may change from time to time, but will generally include senior staff of Historic Claims not directly involved in writing of assessments (for example, the Managers Historic Claims or Director Strategy) as well as a member of the MSD Legal team.

Once endorsed, the staff member responsible for the assessment will complete the DCE memo for the claim and send this through to their Team Leader for review and approval. The completed DCE memo will be endorsed by the General Manager Historic Claims, sent to the Chief Legal Advisor, for certification before being sent to the Deputy Chief Executive, People and Capability, who has the delegation to approve settlement payments.

Once the memo is approved the staff member responsible for the assessment will record any relevant information on the individual claimant's file and the Application. This includes confirmation of the approved settlement offer for the claimant.

9. Feedback with claimants

9.1 Guidance for providing feedback to claimants

The staff member responsible for providing the outcome of the assessment to the claimant contacts the claimant to arrange feedback. Feedback is an important part of the claims process, especially for individualised claim assessments. It allows for MSD to acknowledge a claimant's account of their experience in care and provide factual information about their involvement with CYF or its predecessors, support their understanding about their care journey and where appropriate, provide a settlement offer.

It is important for claimants to have a clear understanding of the claims process from the point of first contact and that needs to be reinforced throughout their contact with Historic Claims, including that:

- it is an Alternative Dispute Resolution (ADR) process;
- it has limitations to the way claims are assessed. It does not seek to establish the facts of a claim in the same way a court does;
- we do not usually interview anyone other than the claimant;
- we do not accept allegations but will take certain allegations into account for the purposes of making a settlement offer.

It is helpful to begin the feedback conversation by reinforcing the purpose and limitations of the process. Caution and careful consideration should be applied to language which infers taking responsibility for an allegation of abuse, given that this is an Alternative Dispute Resolution process and does not test evidence to the degree that a Court would. Further guidance to support these discussions can be found in the document titled '*Engaging with claimants under the new Historic Claims process (key messages)*'.

We offer feedback meetings to both direct and represented claimants.

For those claimants who have chosen a rapid payment (and therefore have not had their care files reviewed in detail), the feedback will likely be more limited to any particular questions the claimant may have about their care experience, a time-line (if requested by the claimant) and providing the settlement offer.

9.2 Offer acceptance and administrative process

For direct claimants

The Settlement Letter and Settlement Agreement will usually be provided by email to the claimant directly after the feedback meeting or it may be provided in hardcopy at the meeting if it is in person. The settlement documents can also be sent by mail if necessary. If providing the documents in person to the claimant, the staff member should strongly encourage claimants to take away the document to read it and consider before signing as well seeking legal advice if they wish. It will not generally be appropriate to allow a claimant to sign the agreement at the feedback meeting.

Where the claimant accepts the Settlement Offer and returns the signed Settlement Agreement to MSD; the staff member providing feedback to the claimant will:

- obtain verified bank details for the account where the claimant would like any financial payment to be made;
- obtain the claimant's IRD number;
- obtain written consent of the claimant and the bank account holder if the bank account is not in the name of the claimant (see "Alternate Bank Account Consent form");
- confirm the physical address or email address the claimant would like their written apology and/or closure letter sent to; and
- once the signed Settlement Agreement, verified bank details and IRD number have been received, the staff member will, where required, arrange financial payment to the agreed verified bank account and arrange the sign-out of an apology letter by the Chief Executive as well as a closure letter to send to the claimant.

For represented claimants:

- the staff member will email the Settlement Letter from the Historic Claims Admin inbox to the claimant's legal representative in accordance with any administrative process in place at the time;
- if the claimant accepts the offer, their lawyer will confirm acceptance;
- where required, verified bank account details will be obtained;
- a Settlement Agreement will then be provided by the staff member to the claimant's lawyer for approval and signing; and
- once acceptance has been confirmed, financial payment to the agreed verified bank account will be arranged in line with any payment policies at the time. In conjunction, the staff member will (where relevant) arrange the sign-out of an apology letter by the Chief Executive and send an original copy along with the signed Settlement Agreement to their lawyer, plus a copy to Crown Law for filed claims;
- For filed claims, the claim cannot be closed until a Notice of Discontinuance is received from the claimant's lawyer (which will likely be passed on from Crown Law).

Once payment has been made, the staff member is to update the Application with all relevant redress information. The claim in the HCA can be closed once all outstanding matters above have been addressed.

10. Rejection assessment outcome and offer

10.1 Review options

Claimants can request a claim review if they are dissatisfied with the outcome of their claim under an individualised assessment. Where the Settlement Offer is rejected by the

claimant, next steps will be based on the claimant's reasons for rejecting the offer and their individual circumstances. A review **may** include a:

- review of an allegation to ensure the accuracy of the outcome based on the existing information; and/or
- completing a detailed assessment of an allegation by considering all available information; and/or
- payment review, to confirm that the claim outcome and payment category and range is consistent with similar claims.

All reviews are carried out by a staff member who was not the initial assessor or peer reviewer.

All reviews will be completed in accordance with the Historic Claims current assessment model outlined in section 7 of this document.

All reviewed claims will require Consistency Panel endorsement, and where changes are made to their settlement offer, DCE approval will be sought.

The claimant will be kept informed about what is happening with their claim and the outcome of the review. Should they remain dissatisfied with the outcome of the review they will be informed of their options, which could include seeking legal advice, making a complaint to the Ombudsman or requesting a rapid payment (if not previously received).

Payment Categories for Individualised Claim Assessments

Determining a payment recommendation:

An overarching principle is that we are providing an offer of settlement taking into account particular allegations of abuse, inaction and compromised standard of care. We are not compensating for the long-term impact of alleged abuse inaction or compromised care except by acknowledgment of what they experienced in care. Therefore, payments are structured around the incidents and experiences, and lack of service that it has been determined will be taken into account for the purposes of an offer.

To enable recommendations to remain consistent and fair to past claimants, recommended payments for assessments are determined by the categories outlined below. In order to fall within a payment category, all aspects of the description do not need to be met. The cumulative nature of allegations can be accommodated within a category. Allegations of practice failures are assessed against the policy and practice requirements at the time and in that era.

Further guidance is provided within the payment categories to support decision making. When making this payment recommendation, the Definitions sheet should also be referred to.

Following completion of a claims assessment or a detailed assessment the staff member uses the summary of the claimant's experience and guided by the payment categories identifies the payment category into which the claim could fall and where in this band it may fall (low, mid or high). As appropriate the staff member should liaise with MSD Legal to consider whether there are other factors that should be taken into account when determining the recommended payment amount. The rationale for the proposed payment is then documented as part of the assessment.

The Inappropriate Detention Framework and the BORA Framework provide for a top-up payment in some claims, additional to what is determined by payment category. It does not apply unless the criteria set out in section 7.12 and/or 7.13 are met.

<p>PAYMENT CATEGORIES (Confidential)</p> <p>This is guidance only¹¹, and each case will turn on its own facts and circumstances. As such there will be exceptions and these will be considered by the Consistency Panel and where appropriate the General Manager, Historic Claims. While these categories, and the terms used, simplify the complexities of the alleged abuse, its intention is not to minimise a survivor’s lived experience or infer a lesser impact of their lived experience. Each claim will be handled sensitively and with respect.</p>	<p>SUGGESTED PAYMENTS</p>
<p>These are the claims that have clear aggravating factors and the mix of abuse detailed in Category 6; with circumstances and conditions that are exceptional. It could involve a level of violence, death, exposure, injury that sets it apart from other claimant experiences.</p> <p><i>Guidance: A small proportion of claims have been settled at this level. These claims are likely managed through a detailed assessment, and in consultation with the Manager.</i></p>	<p>Category 7 Above \$55K</p>
<p>Chronic and serious sexual abuse and physical abuse by <u>responsible adult</u> AND/OR <u>high levels of inaction</u> contributing to extreme abuse AND a context of chronic <u>wide-ranging practice failures</u> that contribute to a prolonged and severely harmful care experience.</p> <p><i>Guidance: For a claim to reach this threshold there is an assumption of increasing severity and may also involve serious abuse when the child was profoundly vulnerable. If a Category 6 payment is recommended it may benefit from a detailed assessment. Your manager will provide further guidance.</i></p>	<p>Category 6 \$50K (\$46K - \$55K)</p>
<p>A mix of cumulative serious physical and/or serious sexual abuse, frequent and chronic, by <u>responsible adult</u> AND/OR <u>high levels of inaction</u> contributing to serious chronic physical or sexual abuse. Serious abuse at a time when the child is highly vulnerable AND a continued impact of <u>wide-ranging practice failures</u>.</p> <p><i>Guidance: For the most part this category will involve increasing chronic and serious physical and / or sexual abuse by a responsible adult or from high levels of serious and chronic inaction that has been evidenced by a STEP 2 to be in scope. It may also involve serious abuse when the child was highly vulnerable.</i></p>	<p>Category 5 \$40K (\$36K - \$45K)</p>
<p>A mix of moderate (chronic) and serious (all form) abuse incidents by <u>responsible adult</u> AND/OR the presence of <u>high levels of inaction</u> contributing to more frequent serious abuse or chronic moderate abuse AND a backdrop of <u>wide-ranging practice failures</u>.</p> <p><i>Guidance: Where an allegation is relied on to recommend this level of payment a STEP 2 analysis is required; against a responsible adult involving sexual abuse (moderate or serious) or physical abuse (chronic moderate or serious) or inaction that contributed to serious abuse. The definition matrix guides the meaning of high levels of inaction. If inadequate practice is wide-ranging this may be considered an aggravating factor and justify a recommendation for a higher payment in the band.</i></p>	<p>Category 4 \$30K (\$26K - \$35K)</p>
<p>A mix of low and moderate (all form) abuse by <u>responsible adult</u> – the experience of more frequent abuse. May include acute or infrequent incidents of more serious abuse AND/OR <u>medium levels of inaction</u> contributing to abuse (all forms) including abuse by third party (family, friends, other young people) AND <u>multiple or wide-ranging practice failures</u> for a prolonged period, a context of practice that has allowed the above more serious abuse to occur.</p> <p><i>Guidance: The definition matrix guides the meaning of medium inaction. The use of AND/OR identifies the primary factors that are present in a band. From Category three and higher, abuse by responsible adult and inaction are the drivers</i></p>	<p>Category 3 \$20K (\$16K - \$25K)</p>

<p>for recommending that payment. One or both may be present but not necessarily so. Inadequate practice may also be present as the care context but on its own would not likely reach a Category 3 or higher payment. It may be seen as an aggravating factor for a higher payment in the band.</p>	
<p>The presence of low level (all form) abuse by <u>responsible adult</u> that may increase in frequency. May include acute or infrequent incidents of more moderate abuse <u>AND/OR low levels of inaction</u>, investigating concerns, assessing home or care circumstances, or carrying out the statutory role, allowing low or moderate (all form) abuse to occur or continue <u>AND/OR multiple practice failures</u> that may impact on the standard of care, contribute to placement and schooling instability, lack of access to health and education and access to family and culture. Harsh / excessive physical discipline.</p> <p><i>Guidance:</i> This category is where we acknowledge a mix of low level (all form) abuse either by responsible adults or from inaction. Low levels of inaction are detailed on the definition matrix. To remain consistent, claims that have inadequate practice as the highest-level allegations, for the most part, will be accommodated in Category 1 or 2. Not all aspects (abuse or inadequate practice) need to be present but where they are, a higher payment may be recommended. Flexibility in recommended payment within the band stands on the nature of the claim.</p>	<p>Category 2 \$10K \$6K - \$15K</p>
<p>Predominantly <u>inadequate practice</u>. Concerns not investigated or failure to visit, monitor, supervise, plan or assess – where <u>minor practice failures</u> did not contribute to abuse. A lack of training and skills, poor decision making, lack of proper process, and casenote recording. Failure to enable contact with siblings/whānau.</p> <p><i>Guidance:</i> Claims within this range will likely be at the minor end of inadequate practice, one-off concerns, and / or for a short period of time.</p>	<p>Category 1 \$3K \$1K - \$5K</p>

¹¹ The payment categories provide guidance for analysis of those allegations that will be taken into account for the purposes of recommending settlement with reference to the type and severity of allegations. For clarity where this page refers to a form of abuse, inaction or practice failure, the reference is to an allegation of such conduct that it has been determined will be taken into account for the purposes of a settlement offer.

Inappropriate Detention Framework¹²	
Time spent in qualifying detention or confinement	Additional payment
One residential or care placement which included an allegation of 'detention' or confinement, where the placement is less than 84 days	\$1,500
One residential or care placement which included an allegation of 'detention' or confinement where the placement is 84 days or more; OR Multiple residential placements with at least one of these placements including an allegation of 'detention' or confinement; OR One care placement which included an allegation of 'detention' or confinement along with at least one residential placement which included an allegation of 'detention' or confinement; OR Multiple care placements that include an allegation of 'detention' or confinement.	\$2,500
Where claimant alleges lengthy detention or confinement in a residential or care placement of 29 days continuous or more.	\$5,000

BORA Framework¹³	
BORA setting	Additional payment *
Where claimant has had at least one allegation taken into account for the purpose of recommending a settlement offer in relation to any residential placement** on or after 25 September 1990 but <u>did not</u> have any allegations taken into account in relation to any placement at an NGO bush programme.	\$4,000
Where claimant has had at least one allegation taken into account for the purpose of recommending a settlement offer in relation to any NGO bush programme** placement on or after 25 September 1990.	\$8,000

* The two additional payments are alternatives and are not cumulative. The maximum payment is \$8,000.

** The residence must have had a secure unit and the allegation taken into account must be in relation to conduct at that residence or bush programme. A list of these residences and the relevant NGO bush programmes are contained in Appendix 2.

¹² The definitions for who is covered by this framework can be found in section 7.13 of this Handbook. Any reference to 'residential' must be a residence that had a secure unit.

¹³ Further information about this framework can be found in section 7.14 of this Handbook.

Definitions for payment frameworks – rapid payments, inappropriate detention and BORA

Residences which had a secure unit

- Allendale Girls' Home (aka Auckland Girls' Home)
- Beck House
- Bollard Girls' Home
- Dey Street (aka Hamilton Girls' Home)
- Dunedin Boys' Home (aka Lookout Point)
- Dunedin Girls' Home (aka Elliot Street)
- Epuni
- Hamilton Boys' Home (aka Melville Boys' Home, but not Melville Family Home)
- Hokio
- Kingslea (aka Burwood Girls' Home and later Te Oranga) – *secure from 1952*
- Kohitere – *cottage used for secure from 1955, dedicated unit from 1967* (Kiwi Villa 'semi-secure' inclusive within our framework)
- Korowai Manaaki Youth Justice
- Lower North Youth Justice (aka Te au Rere a te Tonga Youth Justice)
- Melville Boys' Home
- Miramar Girls' Home (aka Wellington Girls' Home, but not Miramar Receiving Home)
- Owairaka – *one secure room from 1958, unit from 1970*
- Palmerston North Girls' Home (aka Margaret Street)
- Puketai
- Stanmore Road Boys' Home (aka Christchurch Boys' Home)
- Strathmore Girls' Home (aka Christchurch Girls' Home)
- Te Maioha o Parekarangi
- Te Poutama Arahi Rangatahi
- Te Oranga
- Te Puna Wai ō Tuhinapo
- Weymouth (aka Northern Residential Centre)
- Whakatakopokai (aka Weymouth)
- Youth Justice North

Any facility called a 'Receiving Home' is assumed to not include a secure unit, although allegations of confinement are still considered if they arise. Some of the receiving homes become more secure facilities in later years, with a change of name (e.g. Miramar Receiving Home became Miramar Girls' Home).

Detained in a place or room where this went beyond the exercise of normal and reasonable parental controls

As well as being physically detained in a place or room (e.g. being locked in a garden shed or bedroom) beyond what would be reasonable, this part of the framework can also include allegations that relate to being confined in a specific place, such as being tied to a tree or being held in the “Michael Whiting hold” at homes/programmes run by the Youthlink Family Trust (also known as The Glade, Rowan House or Felix Donnelly College). This was a restraint hold which involved staff holding a young person with his or her arms crossed in front of them and held by the staff member, while they are restrained between the staff members knees. This practice could go on for multiple hours.

NGO bush programmes¹⁴

- Whakapakari
- Moerangi Treks
- Eastland Rescue Youth Trust
- Tarawera Treks/Tarawera Trust
- Wairaka Kokiri
- Whaakaro Kotahi Charitable Trust/ Te Tewha Tewha Trust

¹⁴ This list contains bush programmes in isolated settings run by NGO providers who were contracted by Child, Youth and Family or its predecessor agencies to provide care for young people in state care. This list is not a conclusive list of bush programmes, but rather programmes where there is sufficient evidence that abuse and inappropriate practices likely occurred that may be more serious potential breaches of a person’s BORA rights. This list may be updated from time-to-time if more information comes to hand.

Definition sheet

The purpose of this Definition sheet is to guide the assessment of severity and frequency of the incidents of alleged abuse, and the extent of alleged practice failures. Simply stated these definitions allow an understanding of the type of abuse alleged and the extent of that alleged abuse. While loosely based on the Crimes Act, these definitions are not restricted by the threshold of criminal liability.

Definition of terms used ¹⁵

Acute/Infrequent abuse: Refers to one-off incidents, or other infrequent, low instances and more variable abuse, to the level described (low, moderate or serious). This is days or weeks / months, not years. Where abuse is unspecified it could default as low.

Frequent / repeated abuse: Refers to abuse that has a pattern of regularity to it, recurrent but not to the level of chronic or prolonged. This can be a high number of months, to several years.

Chronic / prolonged abuse: Refers to persisting, repetitive or recurring, long-lasting abuse, to the level described (low, moderate or serious). This is a number of years.

¹⁵ For clarity where this page defines a form of abuse, inaction or practice failure, the definition relates to an allegation of such conduct that is being taken into account for the purposes of recommending a settlement offer.

Alleged abuse by <u>responsible adults</u>		
Defined as agents of the Ministry who have the care, protection and justice responsibility for the child		
Abuse is all forms (sexual, physical, emotional (verbal/psychological) abuse and / or neglect)		
TYPE	SEVERITY Internal description only	MEANING; A child or young person may experience:
Sexual abuse Child used for sexual purposes or involved in a sexual act Acts involving circumstances of indecency with, or sexual violation of a child, or using a child in the making of sexual imaging Note vulnerability of the child	Low	Definition: For the purposes of this definition it is where there is exposure, witnessing sexual acts, grooming or sexualised behaviour. Examples may include: <ul style="list-style-type: none"> Being exposed to indecent material (whether, written, spoken, visual), sitting on lap for the sexual gratification of perpetrator, being watched when undressing or showering, made to watch or view genitals, inappropriate sexual talk. Encouraging a child to look at pornography or behave in a sexually inappropriate way. Grooming a child in preparation for sexual abuse (this may be done via the internet).
	Moderate	Definition: For the purposes of this definition it is where there is sexualised contact that does not meet the definition of unlawful sexual connection. Examples may include: <ul style="list-style-type: none"> Sexualised contact but not unlawful sexual connection. This can be under or over clothing. This includes sexual activity which may be consented but under age. Non-penetrative acts such as kissing, fondling, rubbing, genital touching or masturbation. Forcing or enticing a child to take part in sexual activities whether or not a child is aware of what is happening. Abuse of power leading to a young person 16 years and over agreeing to have a sexual relationship.
	Serious	Definition: For the purposes of this definition it is consistent with unlawful sexual connection as determined under the Crimes Act 1961. Examples may include: <ul style="list-style-type: none"> Sexual connection; Rape, penetration and oral sex. This can include a part of the body of another person or an object.
Physical abuse Actions that result in, or could potentially result in, physical harm or injury being inflicted on a child Non accidental injury of a child Note vulnerability of the child Note: This includes physical abuse by another young person where that abuse is directed by a responsible adult.	Low	Definition: For the purposes of this definition, it is punishment beyond standards allowed and relevant policy, or abuse that results in no more than bruising injury. Examples may include: Harsh punishment, discipline or harsh treatment, smacked or hit with open hand or object. It may involve tripping up, kicking, slapping and shoving. A responsible adult instructing a young person to abuse another young person. Depending on the circumstances, this may be considered more serious.
	Moderate	Definition: For the purposes of this definition, it is more serious abuse, possible visible injury and an increased level of violence. Examples may include: Striking, closed fist punching, whipping, stomping/kicking. Can include blows and kicks to head and/or body. May cause multiple bruises, blisters, cuts and welts. Use of an object as a weapon (i.e. broom, belt, bat)
	Serious	Definition: By legal definition assault, but also prolonged, ordinarily requires (or should require) more intensive medical attention or hospitalisation. Enhanced maliciousness or cruelty in the abuse. Examples may include: Physical assault resulting in dislocated joints, serious burns, internal injuries, brain damage, broken bones, lifelong injury. Concussion or loss of consciousness. Bruising and abrasions where the child is extremely young (infant, not yet mobile).
Emotional / Verbal / Psychological abuse Effecting a child's mental or social development, often a pattern of behaviour that causes injury over time		Definition: Witnessing serious abuse / violence, using words to be abusive (as described) Examples may include: Telling a child he or she is unwanted or unloved, treating them differently from other children in the home, showing little interest. Calling a child names, criticising, belittling, demeaning, mocking, and racist slurs. Accusing, blaming, insulting, threatening abandonment, manipulating, taking advantage, screaming, yelling, confining, engaging child in criminal acts, making them tell lies, encouraging. Exposing a child to violence, especially domestic and / or sexual violence. Note: We are not differentiating between low, moderate, serious, but noting its presence Note: We are not making a statement here about the long term psychological / traumatic impact of all forms of abuse.
Neglect A child is not given the care, supervision, affection and support needed for their health, safety and wellbeing	Low (infrequent)	This section refers to physical, supervisory and medical neglect. The severity of the neglect is determined by duration and nature of neglect. Examples may include: An environment with periods where there is no food, running water, power, functioning toilet, where it is unhygienic. Overcrowding. Failing to provide enough food, or clothing. Repeatedly leaving a child in an inappropriate person's care (for days or weeks at a time). Failing to provide the care required for a child or young person to maintain adequate personal hygiene. Allowing a child to miss school unjustifiably. Condoning the use of drugs, alcohol, or involvement in crime. Not supervising a child or young person appropriately. Not ensuring access to necessary medical or dental care. Endangering by not taking child to hospital or seeking appropriate medical help for serious illness or injury.
	Moderate (repeated / frequent)	
	Serious (chronic)	

Alleged abuse due to inaction, insufficient action and/or inappropriate action by the Ministry referenced as lack of action. Abuse is all forms (sexual, physical, emotional (verbal, psychological) abuse and/or neglect)					
Note: Many of the practice failures here are also seen in inadequate practice – but are differentiated due to whether practice <u>contributed to abuse</u> (in many circumstances this may be abuse from a non-responsible adult).					
Duration of abuse					
Severity of abuse		Infrequent	Repeated/ frequent	Chronic	<p><i>Inaction, insufficient action and/or inappropriate action is a lack of action where it is expected and appropriate. The statutory role and responsibility is not enacted, non-intervention where intervention is recommended, dereliction of responsibility.</i></p> <p><i>The severity of the inaction is determined by considering the <u>presence</u> of the inaction, the <u>duration</u> of the abuse and the <u>severity</u> of the abuse.</i></p> <p>Common practice failures recognised as a lack of action contributing to abuse:</p> <ul style="list-style-type: none"> • Failure of the Ministry to investigate or adequately investigate concerns either at home or in a foster or residential placement. E.g: Reported concerns received with inadequate investigation/assessment, reported concerns not investigated/assessed due to case transferring between sites. • Failure of the foster parent or staff member to act on concerns of abuse. E.g: Foster parent fails to pass on concerns for a child or young person, staff member fails to act to ensure the child or young person is safe in their placement. • Failure to take complaint or Court action where there are grounds to do so. This can often be a consequence of inadequate or lack of investigation/assessment. E.g: multiple reports of concern received and threshold met for Court action but not taken, inappropriate intervention taken when considering the nature of the case, failure to recognise cumulative abuse over time which warrants action. • Lack of supervision by foster parent or staff member contributing to abuse of a child or young person. E.g: a supervision level which is inadequate when considering the age of the child, inadequate safety planning when children with known at-risk behaviour (i.e. harmful sexual behaviour) are placed with other children, abuse by other children/young people in institutions and kingpin culture where this is known and no protective action is taken. <p><i>The above are <u>examples</u> of commonly recognised inaction, insufficient or inappropriate action, rather than a complete list.</i></p>
	Low	Inaction (low levels)	Inaction (low levels)	Inaction (medium levels)	
	Moderate	Inaction (low levels)	Inaction (medium levels)	Inaction (high levels)	
Serious	Inaction (medium levels)	Inaction (high levels)	Inaction (high levels)		

Note: When high levels of inaction is found, consider whether a step 2 analysis is required.

Alleged Inadequate practice; failures which do not contribute to abuse of a child or young person.		
Note: Practice failures are where the standard of care a child/young person receives does not meet the standards of the time. The standards of the time can be determined by reference to the legislation, policy and practice guidelines of the time.		
Note: The severity of the practice failure/s is based on the frequency and nature of the failures. The number of failures and duration of failures can be considered.		
<u>Minor</u> practice failures	<u>Minor failures:</u> Policy and practice requirements of that time period not met – these may be minor in nature or infrequent. Records not maintained/lost/destroyed may be captured within this category.	<u>Inadequate practice may include:</u> -failure to assess a caregiver as per policy at that time -failure to meaningfully plan or engage with the CYP which results in identifiable consequences – this could include the failure to monitor, failure to visit and see CYP on their own or severe lack of long term planning. This may also include failure to implement whanau contact plans. -inappropriate use of secure care -a claimant being overworked or being subjected to inappropriate exercise.
<u>Multiple</u> practice failures	<u>Multiple failures:</u> A combination of basic tasks, role and responsibilities not attended to, that impact on the standard of care experienced by the child. These responsibilities have been outlined in legislation, policy and practice guidance, with the expectation that staff will know and have been trained in the practice requirements. Having high number of vacancies, casual or untrained staff, or high workloads may explain the failure but does not excuse it. This could be one practice failure repeated over a period of time, or multiple different failures.	
<u>Wide-ranging</u> practice failures	<u>Wide-ranging failures:</u> Across a number of staff members, times and places.	

Aggravating factors relevant for influencing payment category ratings	
<u>Vulnerability:</u> Vulnerability can be synonymous with childhood, and heightened vulnerability can occur when children and young people are in the care system. For the purpose of determining a heightened vulnerability which may influence payment category ratings, it refers to <i>profound vulnerability</i> (pre-verbal children, extreme physical or intellectual disability). The intent is to recognise when a child or young person is unable to verbalise abuse or neglect, or physically remove themselves from risk due to restricted mobility or cognition.	

Hon Chris Hipkins
Minister of State Services

Review of Strategy for the Resolution of Historic Claims

Date of Issue: 17 December 2019

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Title: Review of Strategy for the Resolution of Historic Claims
SWC-19-MIN-0193 Minute
SWC-19-SUB-0193 Summary
CAB-19-MIN-0651 Report of the Cabinet SWC Minute

Author: State Services Commission

This is a suite of documents released by the Hon Chris Hipkins, Minister of State Services that has informed the Government's proactive release of information policy.

In Confidence

Office of the Minister of State Services
Office of the Attorney-General

Chair, Cabinet Social Wellbeing Committee

Review of strategy for the resolution of historic claims

Purpose

- 1 On 8 April 2019, Cabinet directed officials to “consider whether the approach to the conduct of current historic claims litigation could better reflect the proposed principles, and report back on this to the Social Wellbeing Committee by the end of October 2019”. [CAB-19-MIN-00139.01 refers].
- 2 This paper provides the Committee with advice on whether the current historic claims litigation strategy could better reflect the principles that the Government has agreed will guide the Crown’s response to the Royal Commission of Inquiry into Abuse in State Care and in the Care of Faith-based Institutions (the Royal Commission), and proposes amendments to better align the strategy with the principles.

Executive summary

- 3 Government has agreed six principles to guide the Crown’s engagement with the Royal Commission: manaakitanga, openness, transparency, learning, being joined up, and meeting our obligations under Te Tiriti o Waitangi.
- 4 The current Crown Litigation Strategy was adopted in May 2008 and last reviewed in January 2011. The Strategy has three principles:
 - 4.1 Principle 1: agencies will seek to resolve grievances early and directly with the individual;
 - 4.2 Principle 2: settlement will be considered for any meritorious claims (particularly where legal risk justifies settlement). Where merited settlement would be full and final with no admission of liability; and
 - 4.3 Principle 3: claims that do proceed to court hearing because they cannot be resolved will be defended in Court, considering and relying on defences such as the Limitation Act defence, the ACC bar and the Mental Health Act immunity.
- 5 Since Cabinet directed this review of the approach to conducting historic claims litigation, the Royal Commission has announced it will conduct a hearing in March 2020 into the experiences of survivors in making civil claims against the Crown for abuse in state care and whether the Crown’s responses to civil claims have been adequate/appropriate (the first Redress Hearing). The Royal Commission has stated that it will hold a number of public hearings covering different aspects relating to redress.

- 6 Criticism about the Crown's approach to resolving historic claims of abuse in state care has been expressed by claimants and their legal representatives. This criticism includes delays in responses to claims, redactions on personal information provided, uncertainty around the process and the level and consistency of settlement offers. There is also criticism of the reliance on legal defences in litigation, such as the limitation defence which prevents the litigation of claims that are not brought within a specified period.
- 7 It is important to acknowledge this criticism and the need for improvement to ensure that the Crown Litigation Strategy, including Alternative Dispute Resolution (ADR) which forms a significant part of the approach, reflects the six principles as much as possible.
- 8 Some immediate improvements can be made to the Crown Litigation Strategy, to reflect current practice and to make the approach better reflect the principles, in particular the principles of manaakitanga, transparency and openness. It is proposed the Strategy is renamed the Crown Resolution Strategy, to better recognise its key objective to resolve claims outside of the court process, with five updated principles:
 - 8.1 Principle 1: agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes;
 - 8.2 Principle 2: settlement will be considered for all meritorious claims. Settlement will generally be full and final without admission of liability;
 - 8.3 Principle 3: if claimants become aware of additional material information or circumstances that were not considered by the Crown at that time, the Crown may consider that new information and whether any additional response should be made;
 - 8.4 Principle 4: where claimants wish to litigate their claims in court, the Crown will concede any factual matters it does not dispute and will rely on appropriate factual and legal defences; and
 - 8.5 Principle 5: the Crown's approach to Alternative Dispute Resolution and litigation of historic abuse claims will be guided by the principles of manaakitanga, openness, transparency, learning, being joined up and meeting the Crown's obligations under Te Tiriti o Waitangi, and the outcomes that support those principles.
- 9 There has also been criticism of the Crown for failing to provide an approach to resolving claims consistently with tikanga Māori. The Ministry of Social Development, which receives the largest number of claims, has reviewed its historic claims process including undertaking engagement with claimants to understand how processes could better reflect tikanga Māori and has made changes as a result. A review of other agencies' claims processes could be beneficial.
- 10 Other potential improvements to the Crown Litigation Strategy require further careful consideration, given their potential impacts on the natural justice rights of alleged perpetrators and financial and resource implications for both the Crown and non-Crown parties to litigation. It is recommended officials be directed to commence consideration of the following, with report backs to be agreed at a later stage given the Royal Commission's upcoming investigation of redress systems:

- 10.1 potential options for the central assessment or review of historic claims; and
- 10.2 legislative reform of the Limitation Act 2010 in respect of historic claims of abuse in care.

Background

- 11 On 8 April 2019, Cabinet directed officials to “consider whether the approach to the conduct of current historic claims litigation could better reflect the proposed principles and report back on this to the Social Wellbeing Committee by the end of October 2019” [CAB-19-MIN-00139.01 refers].
- 12 The principles referred to above are set out in the strategic approach that the Government has agreed will guide Crown engagement with the Royal Commission. These are: manaakitanga, openness, transparency, learning, being joined up and meeting our obligations under Te Tiriti o Waitangi.
- 13 The review of the approach to the conduct of historic claims litigation was led by the Crown Law Office, working with the Ministries of Health, Education and Social Development. Each of these agencies has received claims of abuse in state care.

Progress in the Royal Commission

- 14 Since Cabinet directed this report back, the Royal Commission has announced that in March 2020 it will conduct a hearing into the experiences of survivors in making civil claims against the Crown for abuse in state care and whether the Crown’s responses to civil claims have been adequate/appropriate (the first Redress hearing). The Royal Commission has stated that it will hold a number of public hearings covering different aspects relating to redress as part of a wider investigation into redress processes that will be carried out over the lifetime of the Royal Commission.
- 15 Officials expect that this in-depth and independent investigation, informed by claimant experience, will provide valuable recommendations for the Crown to consider about the Crown’s approach to resolving historic claims of abuse in state care. Some of the issues with the Crown Litigation Strategy identified in this paper are significant and may benefit from consideration through the Royal Commission process. Openly acknowledging these issues now is important and paves the way for learning from the Royal Commission process.
- 16 At the same time, there are improvements that can be made to the Crown Litigation Strategy now to ensure it is more open and transparent, demonstrates manaakitanga to survivors, better reflects the spirit of Te Tiriti o Waitangi and that processes are more joined up. These changes will benefit survivors who are in the process of resolving their claims with the Crown.

Conduct of claims litigation

Current Crown Litigation Strategy

- 17 The current Crown Litigation Strategy was adopted by Cabinet in May 2008, following a review of the previous litigation strategy (POL (08) 98; POL Min (08) 8/2; CAB Min (08) 20/4 refer). The current “Crown Litigation Strategy” was reviewed and affirmed by Ministers in December 2009 and January 2011. Although entitled

“Crown Litigation Strategy” the strategy encompasses early resolution and settlement of claims, including for claims not filed in Court.

- 18 The background to the adoption of the current Crown Litigation Strategy was that the Crown was facing a large number of claims of alleged mistreatment at psychiatric hospitals, child welfare institutions, foster homes and residential special education institutions. Most claims concerned events alleged to have occurred in the 1950s to 1980s.
- 19 As at 31 August 2007, legal aid had been granted for a total of 777 claims. As at 31 December 2007, 416 claims had been filed in the High Court. Two claims had been settled out of court and four heard in court. All four claims had been dismissed by the Court.
- 20 The legal risk of these claims was assessed as low to low-medium, recognising the legal uncertainty about Crown liability for criminal acts of teachers, social workers, health professionals and other individuals contracted by the state. Even if liability was established, historic claims can be barred by the Limitation Act. Additionally, the Accident Compensation (ACC) legislation prevents courts from awarding compensatory damages to a claimant for personal injuries, the main aspect of many of the claims. The only monetary award possibly available to claimants for these parts of the claims would be exemplary damages (monetary award to punish the wrongdoer for unacceptable behaviour of a very high degree), although it is unclear whether exemplary damages are available against the Crown.
- 21 The Crown Litigation Strategy adopted in 2008 comprised three strands: the Confidential Listening and Assistance Service (CLAS),¹ the ADR process and the defence of litigation where claimants pursued that option. The strategy stated three principles:
 - 21.1 Principle 1: Agencies will seek to resolve grievances early and directly with the individual;
 - 21.2 Principle 2: Settlement will be considered for any meritorious claims (particularly where legal risk justifies settlement). Where merited, settlement would be full and final with no admission of liability.
 - 21.3 Principle 3: Claims that do proceed to court hearing because they cannot be resolved will be defended in Court, considering and relying on defences such as the Limitation Act defence, the ACC bar and the Mental Health Act immunity.

How claims are currently resolved

- 22 Litigation forms only a small part of how claims are managed. No claim has been determined substantively by the Court hearing since the Crown Litigation Strategy was adopted.²

1 The CLAS enabled claimants to access their personal records and counselling opportunities as well as an opportunity to tell their story to someone independent, who could connect them to the agencies' ADR processes, other practical forms of assistance (such as employment or housing), and to Police, where relevant. The CLAS service was provided from 2008 to June 2015 and was then disestablished.

2 In 2007, the Court gave judgment in the *White* case (*White v Attorney-General* High Court, Wellington, 28/11/2007, Miller J CIV-1999-485-85, CIV-2001-485-864; [2010] NZCA 139). That case did not result in any award of damages for the claimants.

- 23 All of the claims are resolved through alternative dispute resolution processes that are individually developed by each of the Ministries of Health, Education and Social Development.
- 24 Claims are brought against each of these agencies either directly (unfiled) or by filing a claim in the High Court. Some claimants have legal representation and others do not. Some agencies have an initial meeting with claimants to hear their story. In considering how to respond to a claim, agencies:
- 24.1 Obtain relevant records from offsite archives and share these with the claimant where requested. Records are redacted where necessary to protect the personal information of other people in accordance with the Privacy Act;
- 24.2 Review the records to ascertain whether the claimant resided at or attended the location (institution, school or foster care placement where the abuse was said to occur) at the relevant time and whether there are any indications in the records that support the abuse claimed;
- 24.3 Where the claimant wishes to speak directly with an agency, the agency interviews the claimant; and
- 24.4 Respond to the claimant acknowledging their claim and offering an apology for their experience in care, a settlement payment, payment of legal costs, and, in some cases, assistance to access suitable counselling services. Present practice is that the offer is made in full and final settlement of the claim. Some claims are not upheld, including when the Crown is not the correct respondent to a claim, and a settlement offer is not made in these cases.
- 25 During this process, apart from where there are concerns about the safety of children and young people currently in care, agencies do not usually contact alleged perpetrators and ask them to respond to any allegations of abuse or neglect. Where there are concerns about the safety of children and young people, agencies seek to refer the allegations to the Police or any other relevant agency.³
- 26 The current picture of claims resolved and to be resolved is:
- 26.1 As at September 2019, the Ministry of Education has resolved 13 filed and 26 unfiled claims. A further 67 filed and 26 unfiled claims are awaiting resolution.
- 26.2 As at September 2019, the Ministry of Health has resolved 209 unfiled claims. A further 8 unfiled claims are awaiting resolution (6 of which are currently under offer, 1 is being reviewed and 1 is still to be considered). 329 further claims were resolved by the Crown Health Financing Agency prior to its dissolution in July 2012.
- 26.3 As at 30 June 2019, the Ministry of Social Development has resolved 479 filed and 1344 unfiled claims including 111 legally represented claimants and 1,233 direct claimants. The Ministry of Social Development has 1,951 claims waiting for resolution in any part of the claims process. Of those, 1088 are legally represented and 863 are direct claimants. The legally represented claims are made up of 212

³ Where claims are filed with the Court, such referrals currently require the Court's consent unless claimants consent to the referrals being made: *J v Attorney-General* [2018] NZHC 1331 (upheld on appeal).

filed claims, 249 unfiled claims and 627 claims for which the Ministry is awaiting either a Statement of Claim (filed) or letter of offer (unfiled).

- 27 In view of the significant backlog of claims awaiting resolution, in Budget 2019 the Ministry of Social Development received increased funding for three years to respond to and settle more claims of abuse in state care, and provide appropriate support to claimants, with an anticipated 20 per cent reduction in waiting times for redress.
- 28 Since the announcement of the Royal Commission of Inquiry, the lawyers representing the majority of claimants have elected for either one or two claims to progress towards an August 2020 hearing.

Issues with the Crown Litigation Strategy and process for resolving claims

- 29 Claimants and their representatives have raised issues with the Crown's processes for resolving claims including:⁴
 - 29.1 delays in receiving responses to their claims,
 - 29.2 redactions made to their personal information when provided to them,
 - 29.3 uncertainty regarding how the claims review process works,
 - 29.4 settlement amounts offered in response to claims,
 - 29.5 the level of proof or verification required by the different agencies,
 - 29.6 consistency of offers made to claimants and
 - 29.7 difficulties experienced in bringing claims to multiple agencies.
- 30 There has also been criticism of the Crown for failing to provide an approach to resolving claims consistent with tikanga Māori. The Waitangi Tribunal is considering an application to hear a claim on this basis urgently. The Ministry of Social Development has reviewed its claims process including undertaking engagement to understand how processes could incorporate tikanga Māori and has made changes as a result.⁵
- 31 The Ministries of Health and Education, which have significantly smaller volumes of claims, have not undertaken this type of review and currently their processes adapt to the needs of claimants on a case by case basis. A similar review of these processes to capture the feedback and experiences of claimants could be beneficial.

⁴ Many of these criticisms were raised during the Ministry of Social Development's consultation process on its historic claims resolution process. See *Claimant Engagement on Historic Claims Resolution Process* (Final Report; 13 June 2018; Allen & Clarke).

⁵ Key changes include the introduction of a new organisational structure that significantly increased the size and makeup of the Historic Claims team to ensure a diverse workforce (from both a cultural perspective and a skills-based perspective) that offers options and choice for claimants and more effectively allows the team to respond to the different needs of claimants; a new assessment process that streamlines the assessment process and where possible assesses claims without the need to investigate fully each of the concerns; refreshed communication material (website and brochure) providing clear information to claimants about the new process, what to expect and the changes and future changes that are planned.

- 32 Some claimant representatives have also suggested that ADR processes should be conducted independently from the agency responsible for the alleged abuse.
- 33 While no claim has progressed to a substantive hearing since the Crown Litigation Strategy was adopted in 2008, there has also been criticism of the Crown's reliance on legal defences in litigation, the investigation of evidence in the lead up to the hearing, and the approach of Crown counsel to cross examination of witnesses during the court hearing of the *White* claim (that predated the Crown Litigation Strategy) in 2007.

The principles and what they mean

- 34 In April 2019, Cabinet agreed an approach to guide Crown engagement with the Royal Commission that comprises six principles [CAB 19 MIN 0139.01 refers]:
 - 34.1 manaakitanga – treating people with humanity, compassion, fairness, respect and responsible caring that upholds the mana of those involved;
 - 34.2 openness – being honest and sincere, being open to receiving new ideas and willing to consider how we do things currently, and how we have done things in the past;
 - 34.3 transparency – sharing information, including the reasons behind all actions;
 - 34.4 learning – active listening and learning from the Royal Commission and survivors, and using that information to change and improve systems;
 - 34.5 being joined up – agencies work together closely to make sure activities are aligned, engagement with the Royal Commission is coordinated and the resulting actions are collectively owned; and
 - 34.6 meeting our obligations under Te Tiriti o Waitangi – honouring the Treaty, its principles, meeting our obligations and building a stronger Māori-Crown relationship through the way we operate and behave.

Analysis of the current Crown Litigation Strategy and its impact on survivors against the principles for engagement with the Royal Commission

Litigation Strategy Principle 1: agencies will seek to resolve grievances early and directly with the individual

- 35 Given the uncertainty about whether claims would succeed at law noted in paragraph 20, the ADR process proceeds on the basis of the moral obligation of the Crown to acknowledge and resolve claims of abuse in state care. From a survivor perspective, the ADR process enables a claim to be considered without the cost of litigation and for claimants to speak directly to officials, get assistance to understand their records and have their grievances acknowledged, even if a claim may not succeed in court.
- 36 There are however issues in relation to the ADR processes, such as delay and difficulties in bringing claims to multiple agencies. The delay in the ADR processes has the potential to re-traumatise survivors. Additional resources can help to reduce delays. The additional funding provided to the Ministry of Social Development (noted in paragraph 27) is intended to prevent further increases and begin to reduce current delays in the Ministry's ADR process.

- 37 Agencies should consider the individual in the wider context of whānau, hapū, iwi and community as part of their ADR processes. For example, MSD's new historic abuse claims resolution process is designed to focus on a claimant's cultural needs, and MSD encourages wider whānau involvement in an individual's claims process where the claimant wishes.
- 38 However, officials recognise that the current principle, which only refers to "the individual" does not reflect this wider context, nor does it encourage continuous improvements in practice which accommodate consideration of the individual's whānau, hapū, iwi and community. Care will be taken to ensure that the costs of the process (as opposed to compensation payable) do not escalate unduly.
- 39 Officials therefore recommend amending the first principle of the Crown Litigation Strategy to state "Principle 1: agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes".
- 40 Agencies will need to continue to consider the way they engage with claimants and their whānau and possible strategies to engage and partner with hapū and iwi in addressing complaints. To support this process, officials suggest that a new fifth litigation strategy principle is adopted, demonstrating the Crown's commitment to the principles for engagement with the Royal Commission. The proposed new fifth principle is discussed below.

Litigation Strategy Principle 2: settlement will be considered for any meritorious claims (particularly where legal risk justifies settlement). Where merited settlement would be full and final with no admission of liability.

- 41 Existing Crown Litigation Strategy Principles 1 and 2 are related and, to the extent that principle 2 ensures that settlement of claims is prioritised over defending claims in court, it should be retained for the reasons above.
- 42 However, the wording of principle 2 might suggest to claimants that the Crown will only resolve claims if a particular threshold is met and that once resolved claimants cannot come back to the Crown if they become aware of additional material information that was not available at the time that they settled their claim.
- 43 The historic nature of these claims, as well as the circumstances of them, mean that claimants may have difficulty accessing evidence to substantiate their allegations. Requiring a particular threshold for settlement of historic claims, and for the Crown to refuse to engage with claimants over additional material information they might have, is not consistent with the principles of manaakitanga.
- 44 Nor does such a threshold accurately reflect the approach that agencies are taking to claims that are currently received. Most agencies consider allegations for settlement (where appropriate) without necessarily testing all the evidence or reaching a conclusion on whether the allegations are proven. Where claimants subsequently become aware of additional material information or circumstances that were not considered at the time of settlement, some agencies consider that new information and whether any additional response should be made. The wording of principle 2 does not reflect current practice for all agencies with historic claims process and is therefore inconsistent with the principle of transparency.

- 45 Officials therefore recommend that the second principle of the Crown Litigation Strategy is amended to become two principles:

“Principle 2: Settlement will be considered for all meritorious claims. Settlement will generally be full and final without admission of liability.

Principle 3: If claimants become aware of additional material information or circumstances that were not considered by the Crown at the time of settlement, the Crown may consider that new information and whether any additional response should be made”.

Litigation Strategy Principle 3: Claims that do proceed to a court hearing because they cannot be resolved will be defended in Court, considering and relying on defences such as the Limitation Act defence, the ACC bar and the Mental Health Act immunity.

- 46 Litigation is time consuming, costly and stressful. Court processes are inherently difficult and even more so for historic claims because of the unavailability of witnesses and the difficulty for a court in reaching a conclusion on disputed facts in these circumstances. The ADR process is designed to facilitate resolution of claims without claimants having to resort to litigation. The potential therapeutic benefits of a well-run informal ADR process are lost when Court processes are used. Nonetheless, as recognised in the April 2019 Cabinet paper, claimants have a right to litigate their claims.
- 47 The defences available to the litigation of historic claims are not simply technical barriers to advancing a claim in court. The defences recognise important societal considerations, such as the cost of litigation to society and the prejudice that can arise from claims that are brought long after the relevant events. Some of these defences are discretionary, and defendants can elect whether to rely on them. Other defences are in the form of a statutory bar and defendants have no discretion as to whether they apply.
- 48 Statutory bars include the Mental Health Act immunity, which prohibits or otherwise places statutory restrictions on the ability of those in mental health care before 1993 from bringing claims in Court. Another statutory bar is in s 317 of the Accident Compensation Act 2001 in respect of claims for injuries after 1 April 1974, which prohibits any person from bringing proceedings for damages arising from personal injury covered by that Act or previous Acts (with the exception of proceedings for exemplary damages (s 319)). The ACC bar reflects the social contract affirmed by successive New Zealand parliaments; that compensation and support for personal injury should be provided on a no-fault basis and that the societal cost of litigation for personal injury should be avoided. Departure from either of these statutory bars would have substantial policy consequences and would require legislative amendment.
- 49 The other commonly available defence in historic claims litigation is the limitation defence.⁶ The Crown, as a defendant, can elect whether or not to rely on a limitation defence. The defence seeks to prevent the litigation of claims which because of their old age raise natural justice issues for defendants against whom findings of fault might be made, because of the unavailability of witnesses and other evidence.

6 Contained in the Limitation Act 1950 or the Limitation Act 2010, depending on the date on which the claim was brought.

- 50 However, there are also considerations engaged by these types of claims that weigh in favour of enabling claims to proceed, despite the delay in initiating proceedings. The abuse of children is particularly abhorrent and there is no public benefit in allowing perpetrators or those vicariously liable for their acts to escape civil liability. Moreover, the very nature of abuse against children and abuse in the context of a dependent relationship can prevent a claimant from coming forward and promptly bringing a proceeding, in some circumstances even until later on in adulthood. The legislation providing for this defence recognises that in some cases a longer time period for bringing a claim is appropriate, for example, time is not counted until an individual reaches adulthood or a person no longer suffers from an incapacity.
- 51 The limitation defence has a significant impact on the ability of claimants to advance their claims in court. While the ACC system precludes awards of compensatory damages for personal injury, which is the main aspect of most of these claims, if claims were not limitation barred it is possible that in some circumstances claimants could successfully advance claims for exemplary damages. While there are circumstances in which the limitation defence will not be available (for example, where medical evidence satisfies the court that a plaintiff has been unable to bring their claim earlier), the likely availability of the limitation defence would nonetheless discourage some plaintiffs from attempting to advance their claims in court.
- 52 For these reasons, officials consider that reliance on the limitation defence where claims progress to court may be considered to be in tension with the principles adopted by Cabinet, principally in terms of showing manaakitanga to survivors.⁷ In contrast to ADR processes, the Court process results in findings of fact and liability. The Crown must carefully consider any change in its approach to ensure that changes do not undermine the right of alleged perpetrators to natural justice. Consideration must also be given to the significant resource and financial implications.
- 53 Pending consideration of any significant reform in this area, a matter addressed further below, officials recommend that the third principle of the current Crown Litigation Strategy is retained. It is important that the Crown is transparent about the approach it will take to litigation, including the reliance on defences, so that claimants can make informed decisions when evaluating whether they want to advance their claims in court.
- 54 The proposals above would result in four litigation strategy principles:
- 54.1 Principle 1: Agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes.
- 54.2 Principle 2: Settlement will be considered for all meritorious claims. Settlement will generally be full and final without admission of liability.
- 54.3 Principle 3: If claimants become aware of additional material information or circumstances that were not considered by the Crown at the time of settlement, the Crown may consider that new information and whether any additional response should be made.

⁷ Manaakitanga as agreed by Cabinet [CAB 19 MIN-0139.01 refers] is defined in para 34.1.

- 54.4 Principle 4: Where claimants wish to litigate their claims in court, the Crown will concede any factual matters it does not dispute and will rely on appropriate factual and legal defences.

Additional Fifth Litigation Strategy Principle and the intended impact on survivors

- 55 Officials recommend that the Crown Litigation Strategy is renamed the Crown Resolution Strategy. The current name incorrectly indicates that the emphasis is on litigation, which it is not. Emphasising the resolution of claims better reflects the Crown principles and the centrality of the ADR processes available in engaging with historic claims.
- 56 In addition, officials recommend that an additional fifth Crown Resolution Strategy principle is adopted. It is expected that this additional principle will guide a process of continual improvement of the Crown ADR processes and approach to litigation of historic claims consistent with the principles for engagement with the Royal Commission. For example, the additional fifth principle will support review of processes to better reflect tikanga Māori.
- 57 A way of measuring success against this principle is whether the Crown is achieving the outcomes described in the April 2019 Cabinet paper, which are:
- 57.1 survivors are heard – any they feel heard;
 - 57.2 harm is acknowledged (recognition and reconciliation);
 - 57.3 the government care system is improved;
 - 57.4 this type of harm does not happen again;
 - 57.5 Māori experiences and their impacts are recognised and respected; and
 - 57.6 disabled peoples' experiences and their impacts are recognised and respected.
- 58 Officials suggest this principle could be: “the Crown’s approach to ADR and litigation of historic abuse claims will be guided by the principles of manaakitanga, openness, transparency, learning, being joined up and meeting the Crown’s obligations under Te Tiriti o Waitangi, and the outcomes that support those principles”.
- 59 This principle would be intended to give survivors confidence that the principles adopted to guide the Crown’s engagement with the Royal Commission will also be influential in the Crown’s engagement with survivors over resolution of their claims.
- 60 The following changes to the ADR processes and approach to litigation illustrate the types of improvements that can be expected consistent with this principle.

ADR process

- 61 Changes can be made to the ADR process to reduce the difficulty for claimants in bringing their claims to the appropriate agency. While different agencies may need to consider and respond to different aspects of a claim, claimants should be able to come to one agency involved with the claim who will then ensure the claim (or aspects of the claim) is provided to all appropriate agencies.

- 62 The steps that an agency will go through when considering and responding to a claim should be transparent. Some agencies also have policies in place to ensure claimants can engage in resolution processes before filing their claims in court, with processes to protect their position under the Limitation Act. All agencies should adopt such policies and promote these steps on their websites and have additional written material, in an accessible format, available for claimants.

Approach to litigation of claims

- 63 The Attorney-General sets expectations for the conduct of Crown litigation, which include that the Crown will behave as a model litigant. These expectations are relevant to the conduct of the Crown's defence to historic claims litigation and are applied in a manner that is tailored to the needs of the individual proceeding.
- 64 Officials consider, however, that it may be valuable for claimants to be aware of additional expectations they can have regarding Crown conduct in the litigation process for historic claims, consistent with the principles of openness and transparency. For example, the Crown will:
- 64.1 encourage communication with individuals and their representatives to arrange tools such as witness screens, name suppression in appropriate cases, statements of agreed facts and alternative hearing locations; and
- 64.2 ensure investigation of claims complies with the SSC model standards *Information Gathering and Public Trust*.⁸

Other improvements that require further consideration

- 65 Officials recognise that the Royal Commission's Redress Hearing is likely to provide additional survivor perspectives on the Crown's approach to resolution of historic claims, and new proposals for how this approach might be improved.
- 66 Two of the issues that officials have considered are the Crown's approach to the limitation defence and whether the ADR process should be centrally managed.

Central assessment and/or review of historic claims

- 67 Claims are currently considered and resolved by different agencies, taking into account their different levels of responsibility for claims arising from different time periods. Claimant representatives have expressed frustration at the difficulties in pursuing claims through different agencies and at the differences in amounts of settlement payments offered. However some claimants value a response by the agency that caused them harm. There are also concerns about the power imbalance between claimants and the Crown, and the difficulties in having to seek resolution for abuse from the agencies perceived as having caused that abuse in the first place.
- 68 A form of centralised assessment of claims would provide some distance from the agency responsible for a claim, streamline the claim resolution process and enable redress to be more consistent. Consideration could involve strategies to engage and partner with hapū and iwi in addressing complaints. The Crown would be able to

⁸ <http://www.ssc.govt.nz/assets/Legacy/SSC-Model-Standards-information-gathering-and-public-trust.pdf>

consider whether to extend the process to include claims for which School Boards of Trustees and District Health Boards are now responsible.

- 69 Such changes could have a significant impact on the survivor experience. Being able to come to one agency or body which could take a holistic view of a survivor's experience in care would be more consistent with the principles of manaakitanga and being joined up. Another view is that claimants might want the opportunity to address their issues directly with the agency responsible.
- 70 There would be several options for how such a central assessment could occur. An independent body could be created to receive, consider and respond to claims. Alternatively, an existing agency could be tasked with this responsibility. Another option would be to provide for an optional outside review of agency responses, in addition to the review available under the Ombudsman Act. Consideration would need to be given to whether this process should include a review of claims already settled. The details of these different options would require careful evaluation. A detailed cost estimate will be done in due course.
- 71 A change to a centralised process could also have significant financial and resource implications. To avoid creating a backlog and further delays in the claims process, the agency or body would need to be well resourced and the implications for claims already settled would need to be worked through. The Royal Commission's first Redress Hearing may result in recommendations that relate to the establishment of any centralised process.
- 72 Officials seek Ministers' direction on whether consideration of options for central assessment or review of historic claims should be commenced. Timing for the work will need to be confirmed in light of the Royal Commission's March 2020 hearing on redress.

Reform of the Limitation defence

- 73 The important reasons both favouring and weighing against a limitation defence for historic abuse claims, as well as reform in overseas jurisdictions, may mean it is an appropriate time for reform of this defence in New Zealand. It is possible for the Crown to decide not to rely on a limitation defence, without the need for legislative reform. However, this would mean that plaintiffs with identical claims against non-Crown parties (such as faith-based institutions) would continue to face the potential barrier of a limitation defence. Legislative reform would enable the position of all plaintiffs to be addressed with consistency, rather than on an ad hoc basis.
- 74 Legislative reform could take a number of forms, including expanding the existing discretion of the courts to grant relief in claims of abuse of minors, providing a legislative presumption that the defence will not apply to such claims, or by removing the defence to such claims altogether. Reform could also consider whether there are other categories of claims that should be approached in the same way.
- 75 Reform of the limitation defence would likely have significant financial and administrative consequences. Removal of the limitation defence, for example, would improve claimants' prospects of success in court and as such may lead to an increase in the number of claimants who decide to pursue their claims in court (with hearings likely being long, complex and unavoidably costly). An increase in the number of such trials would have an impact on the High Court caseload and on legal aid expenditure. In addition, individuals who have previously settled their claims may

wish to revive their claims for consideration under the new position. Some overseas jurisdictions have expressly provided for, or are in the process of considering this possibility. Any legislative process would need to consider all of these factors to reach a position appropriate to the New Zealand context.

- 76 Officials seek Ministers' indication of whether consideration of legislative reform should be commenced. The Crown Law Office has previously provided detailed legal advice to the Attorney-General on the possibility of reform, which could form a starting point for this consideration.

Consultation

- 77 This paper has been developed and agreed collaboratively by an interagency working group made up of the Ministries of Health, Education, Justice, and Social Development, Oranga Tamariki, the State Services Commission, Crown Law, the New Zealand Police and the Department of Corrections.
- 78 Advice was provided by Archives New Zealand and Te Puni Kōkiri. The Ministry for Pacific Peoples, the Office for Disability Issues and the Ministry for Women were also consulted.
- 79 The Department of Prime Minister and Cabinet and the Treasury have been informed.

Financial implications

- 80 The work to consider central assessment and/or review of historic claims will not have financial implications, but any changes proposed as a result of that work is likely to have financial implications. There are also potential financial implications from the proposed new principle for the Crown to consider new information that comes to light following a settlement, although given the typically extensive nature of claims considered the implications are assessed as relatively low at this time. There will be a lead in time for any additional costs for central assessment/review and reconsideration of settlements, which should allow agencies to factor in any budget considerations.

Treaty of Waitangi implications

- 81 One of the principles agreed by Cabinet to guide the Crown's response to the Royal Commission is "meeting the Crown's obligations under Te Tiriti o Waitangi: Honouring the Treaty, its principles and building a stronger Māori-Crown relationship through the way the government operates and behaves". The proposals in this paper are intended to make the Crown's processes more consistent with te Tiriti.

Human rights implications

- 82 A strong rationale for this work, and for the work of the Royal Commission, is to uphold human rights. This work will help make changes to create a more transparent and accessible system for those making, or who may wish to make, historic claims.
- 83 Human rights implications include procedural fairness for all parties, whether they are claimants or non-Crown parties to claims.

- 84 The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 and will support New Zealand to meet its obligations under various relevant international treaties and obligations. These include the UN Convention on the Rights of the Child, the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the UN Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the UN International Convention on the Elimination of All Forms of Racial Discrimination and the UN Declaration on the Rights of Indigenous People.

Legislative implications

- 85 This paper has no immediate legislative implications, but proposes areas for further consideration that would involve legislative amendments.

Regulatory impact and compliance cost statement

- 86 This paper has no regulatory or compliance implications.

Gender implications

- 87 This work may have some gender implications. Data from the Ministry of Social Development's Historic Claims Unit shows that 72% of their 3631 claimants are male and 28% are female, with a very small number identifying as transgender. It is not known whether this is because girls and vulnerable women were less likely to be abused in care, or because women are less likely to come forward as historic claimants under the current approach.
- 88 It may be possible to better understand the nature of the current gender difference in claimants as more information on the nature and scale of abuse is gathered as part of the Royal Commission's inquiries. This work can then consider how to ensure women are not discouraged from making historic claims.
- 89 This work needs to be consistent with the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). In particular the Committee on the Elimination of Discrimination Against Women noted in their 2012 report that they were "concerned about the situation of disadvantaged groups of women, including women with disabilities, women of ethnic and minority communities, rural women and migrant women."

Disability perspective

- 90 One in four New Zealanders identify as disabled. Many disabled children and adults were deprived of their liberty or taken into state care solely due to their physical or intellectual, disability, or mental health status, particularly in the period before de-institutionalisation in the early 1990s. Disabled people and their experiences of abuse in state care need to be recognised and respected.
- 91 Government services, systems and processes need to be available to all, and developed with the input of those that will use them. This work needs to ensure the approach to historic claims reflects the needs of disabled people and are fully accessible, for example that the information used in the resolution of historic claims must be in accessible formats. The work also needs to be consistent with the United

Nations Convention on the Rights of Persons with Disabilities (UNCRPD), in particular Article 13 – access to justice. The Crown needs to ensure procedural and age-appropriate arrangements are in place to facilitate disabled people's role as direct and indirect participants in all legal proceedings and processes.

Proactive release

- 92 We propose to proactively release this paper in whole within 30 working days of Cabinet's decision on it. It will be published on the State Services Commission website, with other agencies linking to the page as required.
- 93 Separate legal advice on risks arising from the review of the strategy will be shared with Ministers by the Attorney-General. It is not intended that legal privilege over this advice will be waived.
- 94 Pending agreement to the proposed changes to the Crown Litigation Strategy, we propose issuing a press release at the time this paper is proactively released noting the changes.

Recommendations

- 95 It is recommended that the Committee:
 - 1 **note** that in April 2019 Cabinet directed officials to consider whether the approach to the conduct of current historic claims litigation could better reflect the principles guiding Crown engagement with the Royal Commission, and report back on this to the Social Wellbeing Committee by the end of October 2019;
 - 2 **note** that the principles guiding engagement with the Royal Commission are manaakitanga, openness, transparency, learning, being joined up and meeting the Crown's obligations under Te Tiriti o Waitangi;
 - 3 **note** that the current Crown Litigation Strategy for historic claims of abuse in state care comprises three principles:
 - (a) Principle 1: Agencies will seek to resolve grievances early and directly with the individual;
 - (b) Principle 2: Settlement will be considered for any meritorious claims (particularly where legal risk justifies settlement). Where merited settlement would be full and final with no admission of liability.
 - (c) Principle 3: Claims that do proceed to court hearing because they cannot be resolved will be defended in Court, considering and relying on defences such as the Limitation Act defence, the ACC bar and the Mental Health Act immunity.
 - 4 **note** that the current Crown Litigation Strategy for historic claims of abuse in state care was adopted in May 2008 and last reviewed in January 2011;
 - 5 **note** that issues have been raised with the Crown's response to historic claims of abuse in state care by claimants and their legal representatives, including criticism of the Crown for failing to provide an approach to resolving claims consistent with tikanga Māori;

- 6 **note** that the Royal Commission will hold a public hearing on the Crown response to civil claims of state abuse in March 2020, and has stated it will hold a number of public hearings covering different aspects relating to redress over the course of its inquiries;
- 7 **note** that there are immediate opportunities to amend the Crown Litigation Strategy to better reflect the guiding principles and longer term aspects that can be considered in light of the Royal Commission's hearings;
- 8 **agree** that the Crown Litigation Strategy should be renamed the Crown Resolution Strategy for historic claims of abuse in state care, to better recognise its key objective which is to resolve claims outside of the court process;
- 9 **agree** that the Crown Resolution Strategy comprise five overarching principles:
 - (a) Principle 1: agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes;
 - (b) Principle 2: settlement will be considered for all meritorious claims. Settlement will generally be full and final without admission of liability;
 - (c) Principle 3: if claimants become aware of additional material information or circumstances that were not considered by the Crown at that time, the Crown may consider that new information and whether any additional response should be made;
 - (d) Principle 4: where claimants wish to litigate their claims in court, the Crown will concede any factual matters it does not dispute and will rely on appropriate factual and legal defences; and
 - (e) Principle 5: the Crown's approach to Alternative Dispute Resolution and litigation of historic abuse claims will be guided by the principles of manaakitanga, openness, transparency, learning, being joined up and meeting the Crown's obligations under Te Tiriti o Waitangi and the outcomes that support those principles;
- 10 **direct** officials to commence consideration of:
 - (a) potential options for the central assessment or review of historic claims; and
 - (b) legislative reform of the Limitation Act 2010 in respect of historic claims of abuse in care; and
- 11 **agree** that, in light of the Royal Commission's March 2020 hearing on redress, the timing of report backs on the consideration per recommendation 10 will be coordinated by the Minister of State Services and the Attorney-General with the Committee Chair.

Authorised for lodgement

Hon Chris Hipkins
Minister of State Services

Hon David Parker
Attorney-General

PROACTIVELY RELEASED BY THE MINISTER OF STATE SERVICES



Cabinet Social Wellbeing Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Review of Strategy for the Resolution of Historic Claims

Portfolios **State Services / Attorney-General**

On 4 December 2019, the Cabinet Social Wellbeing Committee:

- 1 **noted** that in April 2019, Cabinet directed officials to consider whether the approach to the conduct of current historic claims litigation could better reflect the principles guiding Crown engagement with the Royal Commission of Inquiry into Abuse in State Care and in the Care of Faith-based Institutions (the Royal Commission), and report back to the Cabinet Social Wellbeing Committee by the end of October 2019 [CAB-19-MIN-0139.01];
- 2 **noted** that the principles guiding engagement with the Royal Commission are manaakitanga, openness, transparency, learning, being joined up, and meeting the Crown's obligations under Te Tiriti o Waitangi;
- 3 **noted** that the current Crown Litigation Strategy for historic claims of abuse in state care comprises three principles:
 - 3.1 Principle 1: agencies will seek to resolve grievances early and directly with the individual;
 - 3.2 Principle 2: settlement will be considered for any meritorious claims (particularly where legal risk justifies settlement), where merited settlement would be full and final with no admission of liability;
 - 3.3 Principle 3: claims that do proceed to court hearing because they cannot be resolved will be defended in Court, considering and relying on defences such as the Limitation Act 2010 defence, the ACC bar and the Mental Health Act 1983 immunity;
- 4 **noted** that the current Crown Litigation Strategy for historic claims of abuse in state care was adopted in May 2008 and last reviewed in January 2011;
- 5 **noted** that issues have been raised with the Crown's response to historic claims of abuse in state care by claimants and their legal representatives, including criticism of the Crown for failing to provide an approach to resolving claims consistent with tikanga Māori;
- 6 **noted** that the Royal Commission will hold a public hearing on the Crown response to civil claims of state abuse in March 2020, and has stated it will hold a number of public hearings covering different aspects relating to redress over the course of its inquiries;

- 7 **noted** that there are immediate opportunities to amend the Crown Litigation Strategy to better reflect the guiding principles and longer term aspects that can be considered in light of the Royal Commission's hearings;
- 8 **agreed** that the Crown Litigation Strategy should be renamed the Crown Resolution Strategy for historic claims of abuse in state care, to better recognise its key objective of resolving claims outside of the court process;
- 9 **agreed** that the Crown Resolution Strategy comprise five overarching principles:
- 9.1 Principle 1: agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes;
 - 9.2 Principle 2: settlement will be considered for all meritorious claims, and will generally be full and final without admission of liability;
 - 9.3 Principle 3: if claimants become aware of additional material information or circumstances that were not considered by the Crown at that time, the Crown may consider that new information and whether any additional response should be made;
 - 9.4 Principle 4: where claimants wish to litigate their claims in court, the Crown will concede any factual matters it does not dispute and will rely on appropriate factual and legal defences;
 - 9.5 Principle 5: the Crown's approach to Alternative Dispute Resolution and litigation of historic abuse claims will be guided by the principles of manaakitanga, openness, transparency, learning, being joined up and meeting the Crown's obligations under Te Tiriti o Waitangi and the outcomes that support those principles;
- 10 **directed** officials to commence consideration of:
- 10.1 potential options for the central assessment or review of historic claims;
 - 10.2 legislative reform of the Limitation Act 2010 in respect of historic claims of abuse in care;
- 11 **agreed** that, in light of the Royal Commission's March 2020 hearing on redress, the timing of report backs on the consideration referred to in paragraph 10 will be coordinated by the Minister of State Services and the Attorney-General with the Committee Chair.

Vivien Meek
Committee Secretary

Hard-copy distribution (see over)

Present:

Rt Hon Jacinda Ardern
Rt Hon Winston Peters
Hon Kelvin Davis
Hon Grant Robertson
Hon Chris Hipkins
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Jenny Salesa
Hon Kris Faafoi
Hon Tracey Martin (Chair)
Hon Willie Jackson
Hon Poto Williams
Jan Logie, MP

Officials present from:

Office of the Prime Minister
Officials Committee for SWC
Crown Law
Oranga Tamariki – Ministry for Children
Office of the Chair

Hard-copy distribution:

Minister of State Services
Attorney-General

PROACTIVELY RELEASED BY THE MINISTER OF STATE SERVICES



Cabinet Social Wellbeing Committee

Summary

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Review of Strategy for the Resolution of Historic Claims

Portfolios State Services / Attorney-General

Purpose This paper seeks agreement to the updated Crown Resolution Strategy for the resolution of historic claims.

Previous Consideration In April 2019, Cabinet directed officials to consider whether the approach to the conduct of current historic claims litigation could better reflect the proposed principles (the review), and report-back to SWC by the end of October 2019 [CAB-19-MIN-0139.01].

Summary The current Crown Litigation Strategy was adopted in May 2008 and last reviewed in January 2011. The Strategy includes three principles: agencies will seek to resolve grievances early and directly with the individual, settlement will be considered for any meritorious claims, and claims that do proceed to court hearing because they cannot be resolved will be defended in Court.

Since the review began, the Royal Commission has announced it will conduct a hearing in March 2020 into the experiences of survivors in making civil claims against the Crown for abuse in state care and whether the Crown's responses to civil claims have been adequate/appropriate.

Criticism about the Crown's approach to resolving historic claims of abuse in state care has been expressed by claimants and their legal representatives. This criticism includes delays in responses to claims, redactions on personal information provided, and uncertainty around the process and the level and consistency of settlement offers. There is also criticism of the reliance on legal defences in litigation, such as the limitation defence, which prevents the litigation of claims that are not brought within a specified period.

Some immediate improvements can be made to the Crown Litigation Strategy, to reflect current practice and to make the approach better reflect the principles. It is proposed the Strategy is renamed the "Crown Resolution Strategy", to better recognise its key objective to resolve claims outside of the court process, with five updated principles:

- Principle 1: agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes;
- Principle 2: settlement will be considered for all meritorious claims, and Settlement will generally be full and final without admission of liability;

- Principle 3: if claimants become aware of additional material information or circumstances that were not considered by the Crown at that time, the Crown may consider that new information and whether any additional response should be made;
- Principle 4: where claimants wish to litigate their claims in court, the Crown will concede any factual matters it does not dispute and will rely on appropriate factual and legal defences; and
- Principle 5: the Crown’s approach to Alternative Dispute Resolution and litigation of historic abuse claims will be guided by the principles of manaakitanga, openness, transparency, learning, being joined-up and meeting the Crown’s obligations under Te Tiriti o Waitangi, and the outcomes that support those principles.

Regulatory Impact Analysis Not applicable.

Baseline Implications None from this paper.

Legislative Implications None from this paper.

Timing Issues None specified.

Announcement None proposed.

Proactive Release The Minister intends to release the paper.

Consultation Paper prepared by Crown Law and SSC. Corrections, MSD (Disability Issues, Social Development), MoE, MoH, MoJ, TPK (Māori Development), Police, Women, Pacific Peoples, and Oranga Tamariki were consulted. The Treasury and DPMC (Prime Minister) were informed. Archives New Zealand were also consulted.

The Minister indicates that the Minister of Corrections and Māori Crown Relations: Te Arawhiti, Minister of Finance, Minister of Education, Minister of Justice, Minister for Social Development and the Disability Issues, Minister of Health, Minister of Police, Minister for Children and Internal Affairs, Minister for Women, and the Minister for Pacific Peoples were consulted.

The Minister also indicates that New Zealand First and the Green Party were consulted.

The Minister of State Services and the Attorney-General recommend that the Committee:

- 1 note that in April 2019, Cabinet directed officials to consider whether the approach to the conduct of current historic claims litigation could better reflect the principles guiding Crown engagement with the Royal Commission of Inquiry into Abuse in State Care and in the Care of Faith-based Institutions (the Royal Commission), and report back to the Cabinet Social Wellbeing Committee by the end of October 2019 [CAB-19-MIN-0139.01];
- 2 note that the principles guiding engagement with the Royal Commission are manaakitanga, openness, transparency, learning, being joined up, and meeting the Crown's obligations under Te Tiriti o Waitangi;
- 3 note that the current Crown Litigation Strategy for historic claims of abuse in state care comprises three principles:
 - 3.1 Principle 1: Agencies will seek to resolve grievances early and directly with the individual;
 - 3.2 Principle 2: Settlement will be considered for any meritorious claims (particularly where legal risk justifies settlement). Where merited settlement would be full and final with no admission of liability;
 - 3.3 Principle 3: Claims that do proceed to court hearing because they cannot be resolved will be defended in Court, considering and relying on defences such as the Limitation Act defence, the ACC bar and the Mental Health Act immunity.
- 4 note that the current Crown Litigation Strategy for historic claims of abuse in state care was adopted in May 2008 and last reviewed in January 2011;
- 5 note that issues have been raised with the Crown's response to historic claims of abuse in state care by claimants and their legal representatives, including criticism of the Crown for failing to provide an approach to resolving claims consistent with tikanga Māori;
- 6 note that the Royal Commission will hold a public hearing on the Crown response to civil claims of state abuse in March 2020, and has stated it will hold a number of public hearings covering different aspects relating to redress over the course of its inquiries;
- 7 note that there are immediate opportunities to amend the Crown Litigation Strategy to better reflect the guiding principles and longer term aspects that can be considered in light of the Royal Commission's hearings;
- 8 agree that the Crown Litigation Strategy should be renamed the Crown Resolution Strategy for historic claims of abuse in state care, to better recognise its key objective of resolving claims outside of the court process;
- 9 agree that the Crown Resolution Strategy comprise five overarching principles:
 - 9.1 Principle 1: agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes;
 - 9.2 Principle 2: settlement will be considered for all meritorious claims, and will generally be full and final without admission of liability;

- 9.3 Principle 3: if claimants become aware of additional material information or circumstances that were not considered by the Crown at that time, the Crown may consider that new information and whether any additional response should be made;
- 9.4 Principle 4: where claimants wish to litigate their claims in court, the Crown will concede any factual matters it does not dispute and will rely on appropriate factual and legal defences; and
- 9.5 Principle 5: the Crown's approach to Alternative Dispute Resolution and litigation of historic abuse claims will be guided by the principles of manaakitanga, openness, transparency, learning, being joined up and meeting the Crown's obligations under Te Tiriti o Waitangi and the outcomes that support those principles;
- 10 direct officials to commence consideration of:
- 10.1 potential options for the central assessment or review of historic claims; and
- 10.2 legislative reform of the Limitation Act 2010 in respect of historic claims of abuse in care; and
- 11 agree that, in light of the Royal Commission's March 2020 hearing on redress, the timing of report backs on the consideration referred to in paragraph 10 will be coordinated by the Minister of State Services and the Attorney-General with the Committee Chair.

Jenny Vickers
Committee Secretary

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Cabinet

Minute of Decision

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Report of the Cabinet Social Wellbeing Committee: Period Ended 6 December 2019

On 9 December 2019, Cabinet made the following decisions on the work of the Cabinet Social Wellbeing Committee for the period ended 6 December 2019:

SWC-19-MIN-0193 **Review of Strategy for the Resolution of Historic Claims** CONFIRMED
Portfolios: State Services / Attorney-General



Michael Webster
Secretary of the Cabinet

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Attorney-General

PROACTIVELY RELEASED BY THE MINISTER OF STATE SERVICES