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- 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 face-to-face feedback to both direct and represented claimants.

## **7.2 Offer acceptance and administrative process**

### *For direct claimants*

The claimant will be provided with a Settlement Letter and Settlement Agreement either at feedback or alternatively provided by mail or email after the feedback. The Claimant Support Specialist 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 feedback.

Where the claimant accepts the Settlement Offer and returns the signed Settlement Agreement to MSD; the Claimant Support Specialist 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 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 and verified bank details have been received, the Claims Administration team will, where required, arrange financial payment to the agreed verified bank account. In conjunction, the team will (where relevant) 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 Claims Administrator 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 such as copying in Crown Law where the claim is filed;
- 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 Claims Administrator to the claimant's lawyer for approval and signing; and
- once acceptance has been confirmed, the Claims Administration team will, where required, arrange financial payment to the agreed verified bank account. In conjunction, the team 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.

## 8. Rejection assessment outcome and offer

### 8.1 Review options

Claimants can request a claim review if they are dissatisfied with the outcome of their claim. Where the Settlement Offer is rejected by the claimant, the Team Leader Claims Assessment will decide the next steps 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.

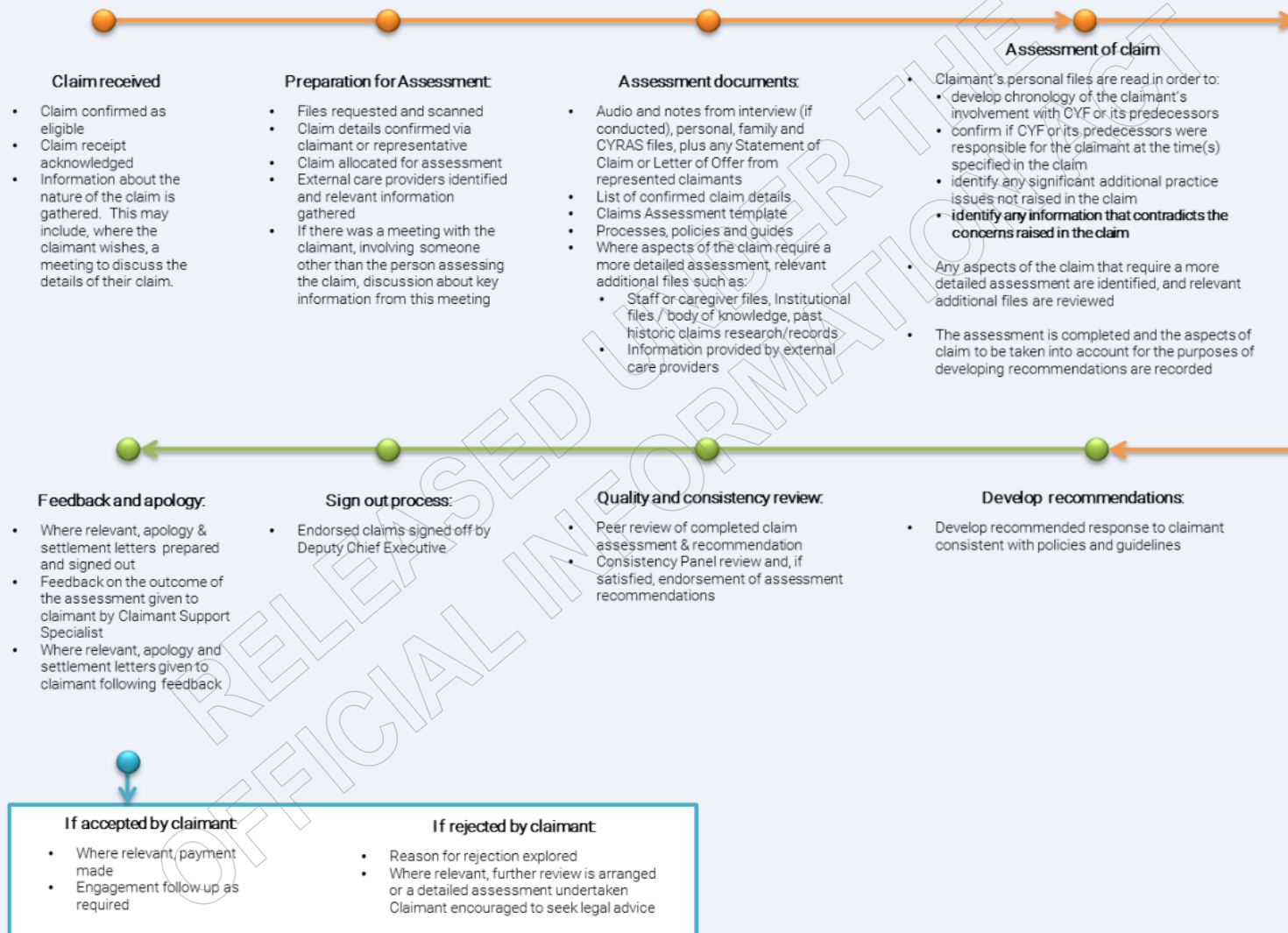
All reviews are carried out by a staff member who was not the initial Claims Assessor or peer reviewer.

Further guidance about reviews and how these should be approached can be found in "*Claim review principles and approach*".

All reviewed claims will require peer review and 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 or making a complaint to the Ombudsman.

# Process for Claim Assessment



### Payment Categories

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 Claims Assessor 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 Claims Assessor should liaise with MSD Legal to consider whether there are other factors (such as BORA) 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.



<p><b>PAYMENT CATEGORIES (Confidential)</b></p> <p>This is guidance only<sup>7</sup>, 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. <sup>8</sup> 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><b>SUGGESTED PAYMENTS</b></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:</i> 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.</p>	<p><b>Category 7</b>  <b>Above \$55K</b>  <b>(1.5% of all claims)</b></p>
<p>Chronic and serious sexual abuse and physical abuse by <u>responsible adult AND/OR 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:</i> 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.</p>	<p><b>Category 6</b>  <b>\$50K</b>  <b>(\$46K - \$55K)</b>  <b>(3% of all claims)</b></p>
<p>A mix of cumulative serious physical and/or serious sexual abuse, frequent and chronic, by <u>responsible adult AND/OR 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:</i> 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.</p>	<p><b>Category 5</b>  <b>\$40K</b>  <b>(\$36K - \$45K)</b>  <b>(6% of all claims)</b></p>
<p>A mix of moderate (chronic) and serious (all form) abuse incidents by <u>responsible adult AND/OR the presence of 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:</i> 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.</p>	<p><b>Category 4</b>  <b>\$30K</b>  <b>(\$26K - \$35K)</b>  <b>(12% of all claims)</b></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:</i> 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</p>	<p><b>Category 3</b>  <b>\$20K</b>  <b>(\$16K - \$25K)</b>  <b>(31% of all claims)</b></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><b>Category 2</b>  <b>\$10K</b>  <b>\$6K - \$15K</b>  <b>(31% of all claims)</b></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><b>Category 1</b>  <b>\$3K</b>  <b>\$1K - \$5K</b>  <b>(15% of all claims)</b></p>

<sup>7</sup> 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.

**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<sup>9</sup>**

*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.

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<sup>9</sup> 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:
<b>Sexual abuse</b> 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	<b>Definition:</b> For the purposes of this definition it is where there is exposure, witnessing sexual acts, grooming or sexualised behaviour. <b>Examples may include:</b> <ul style="list-style-type: none"> <li>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.</li> <li>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).</li> </ul>
	Moderate	<b>Definition:</b> For the purposes of this definition it is where there is sexualised contact that does not meet the definition of unlawful sexual connection. <b>Examples may include:</b> <ul style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>Abuse of power leading to a young person 16 years and over agreeing to have a sexual relationship.</li> </ul>
	Serious	<b>Definition:</b> For the purposes of this definition it is consistent with unlawful sexual connection as determined under the Crimes Act 1961. <b>Examples may include:</b> <ul style="list-style-type: none"> <li>Sexual connection; Rape, penetration and oral sex. This can include a part of the body of another person or an object.</li> </ul>
<b>Physical abuse</b> 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	<b>Definition:</b> 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. <b>Examples may include:</b> 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	<b>Definition:</b> For the purposes of this definition, it is more serious abuse, possible visible injury and an increased level of violence. <b>Examples may include:</b> 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	<b>Definition:</b> 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. <b>Examples may include:</b> 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).
<b>Emotional / Verbal / Psychological abuse</b> Effecting a child's mental or social development, often a pattern of behaviour that causes injury over time		<b>Definition:</b> Witnessing serious abuse / violence, using words to be abusive (as described) <b>Examples may include:</b> 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. <b>Note:</b> We are not differentiating between low, moderate, serious, but noting its presence <b>Note:</b> We are not making a statement here about the long term psychological / traumatic impact of all forms of abuse.
<b>Neglect</b> A child is not given the care, supervision, affection and support needed for their health, safety and wellbeing	Low (infrequent)	<i>This section refers to physical, supervisory and medical neglect. The severity of the neglect is determined by duration and nature of neglect.</i> <b>Examples may include:</b> 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 <b>inaction, insufficient action and/or inappropriate action</b> by the Ministry referenced as lack of action. Abuse is all forms (sexual, physical, emotional (verbal, psychological) abuse and/or neglect)					
<b>Note:</b> 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"> <li>• <b>Failure of the Ministry to investigate or adequately investigate concerns either at home or in a foster or residential placement.</b> E.g: Reported concerns received with inadequate investigation/assessment, reported concerns not investigated/assessed due to case transferring between sites.</li> <li>• <b>Failure of the foster parent or staff member to act on concerns of abuse.</b> 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.</li> <li>• <b>Failure to take complaint or Court action where there are grounds to do so.</b> 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.</li> <li>• <b>Lack of supervision by foster parent or staff member contributing to abuse of a child or young person.</b> 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.</li> </ul> <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.**

<b>Alleged Inadequate practice;</b> failures which do not contribute to abuse of a child or young person.		
<b>Note:</b> 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.		
<b>Note:</b> 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.		
Minor 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.
Multiple 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.	
Wide-ranging practice failures	<u>Wide-ranging failures:</u> Across a number of staff members, times and places.	

<b>Aggravating factors relevant for influencing payment category ratings</b>	
<b>Vulnerability:</b> 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.	
<b>Prompts to refer for legal consideration</b>	
<b>Potential causes of action under the Bill of Rights Act (BORA) 1990:</b> Allegations which occurred after 1 January 1990 that are unusual, inhumane, contain a degree of cruelty, humiliation or insult the dignity of a claimant could potentially meet the definition of a BORA allegation and should be escalated through your manager to MSD Legal for review. While a BORA breach is difficult to define some examples of allegations which have been previously given are when claimants have alleged that they have been; unlawfully strip searched, tied to a tree, made to fear for their lives or detained in a way which caused extreme distress to the claimant. False imprisonment: Claimants often allege 'false imprisonment' when they are held in residences or secure care. In most of these situations the Department or its predecessors had the legal authority to hold a young person and choose to place them either in secure or a residence. However in situations where a young person was held without lawful authority this should be raised with MSD Legal as it could constitute false imprisonment.	