

Chair  
Cabinet State Sector Reform and Expenditure Control Committee

## RESOLVING HISTORIC CLAIMS OF ABUSE – PROPOSAL TO BRING FUNDING FORWARD

### Proposal

- 1 This paper seeks Cabinet approval for the Ministry of Social Development (the Ministry) to bring forward a total of \$26 million into the years 2014/15, 2015/16 and 2016/17 from the years 2020/21 to 2026/27. This will be used to meet the costs involved in settling the backlog of historic claims of abuse that has built up over several years and to enable the ongoing resolution of claims with the goal of completing all historic claims by 31 December 2020.

### Executive summary

- 2 Some children and young people who were placed in the care of the State suffered abuse and neglect at the hands of staff members and caregivers, or were otherwise harmed as a result of failures by State agencies. Some of these people have made and are making claims against the Attorney-General on behalf of the Ministries of Education, Health and Social Development. If the person making the claim was in care before 1993 it is referred to as an historic claim.
- 3 The Crown faces considerable legal and fiscal risks through these historic claims of abuse. As an alternative to the costly resolution of the claims through the High Court, Cabinet agreed a Crown Historic Claims Litigation Strategy in 2008. Within that strategy the Ministry has developed an alternative dispute resolution approach that has been very successful in resolving over 560 claims so far.
- 4 Budget 2013 provided \$4 million per year ongoing for the Ministry to continue resolving historic claims at a rate of 100 per year.
- 5 Over time a backlog of 921 historic claims has developed and there are risks associated with delays in resolving these claims. Over 500 of that backlog are claims that are represented by Wellington law firm, Cooper Legal. The remaining 410 are claims that have been brought directly to the Ministry.
- 6 The previous Minister for Social Development, Hon Paula Bennett, in consultation with the Attorney-General approved the Two Path Approach as a means of resolving the backlog of claims and contributing to the goal of settling all historic claims by December 2020.
- 7 The Two Path Approach offers claimants a choice of how their claim can be settled. They can choose an accelerated settlement based on the claim falling within one of six pre-defined categories of increasing severity of abuse. This requires only a brief assessment of the claim and therefore a much faster resolution. Alternatively, claimants can choose for their claim to remain to be assessed using the current process of investigation and assessment of the claim and a personally tailored acknowledgement, apology and payment as appropriate in recognition of abuse.
- 8 The Ministry has been progressing the implementation of the Two Path Approach to the 921 backlogged claims. This has included consulting with Cooper Legal on applying the Two Path

Approach to the claims represented by them. The Ministry is still negotiating with Cooper Legal on an approach to implement the Two Path Approach for its clients. The Ministry is implementing the Two Path Approach for the other 410 direct claimants. Funding currently available would not allow the Ministry to make good faith offers to that number of claimants.

- 9 It is proposed to bring forward a total of \$26 million from outyear historic claims funding (2020/21 to 2026/27) to meet the costs involved in settling the backlog of claims.

## Background

- 10 Some children and young people who were placed in the care of the State suffered abuse and neglect at the hands of staff members and caregivers, or were otherwise harmed as a result of failures by State agencies. Some of these people have made and are making claims against the Attorney-General on behalf of the Ministries of Education, Health and Social Development. If the person making the claim was in care before 1993 it is referred to as an historic claim.
- 11 These claims had been dealt with through the High Court but this was costly in time and money. To recognise the legitimacy of these claims and resolve them in a way that is beneficial both for the claimant and for government, the Crown's Historic Claims Litigation Strategy was approved by Cabinet in 2008 [ROL (08) 98 refers]. That strategy was reconfirmed by joint Ministers and the Attorney-General in January 2011 [Crown Law Report SOL115/2169 refers].
- 12 The Litigation Strategy has three prongs:
  - 12.1 agencies will seek to resolve grievances early and directly with an individual to the extent practicable
  - 12.2 the Crown will endeavour to settle meritorious claims
  - 12.3 claims that do proceed to a Court hearing because they cannot be resolved will be defended.
- 13 Between 1 January 2004 and 31 October 2014, 1,633 historic claims have been made against the Ministry. Of those, 563 have been resolved leaving 1,070 still outstanding. New historic claims continue to be received each year, but an analysis of the trend in volumes of claims being received completed by the Economics and Strategy Group Ltd in 2013 forecasts that a steadily declining number of claims will be made over coming years. The significant majority – estimated to be an additional 500 – are expected to be received between 2014 and 2020. In total therefore, it is expected that an estimated 1,500 claims will require resolution over the coming six years.
- 14 While the Ministry has committed to resolving those claims by 31 December 2020, the possibility of further claims being made through the Courts from 2021 onwards cannot be discounted. It will not be until 2050 that, through natural attrition of the ageing population of eligible claimants, no further pre 1993 claims will be received.

## The historic claims process is innovative and cost effective, but time consuming

- 15 The Ministry's alternative dispute resolution approach to historic claims is innovative, world leading and very cost effective. Through efficiencies in process, the Ministry has continually reduced the cost to bring a claim to resolution to an average per claim cost of \$37,700 (including settlement payment). This compares with an average cost of \$640,000 (excluding

any settlement payment) to take a single claim to High Court trial. It is a high quality, personalised approach which achieves enduring resolution both for many of those who suffered abuse while in state care as children, and for the Crown. Consequently over the past 4 years the number of claims filed in the High Court has reduced dramatically from 73 percent of all claims made to 13 percent while the number brought to the Ministry for resolution directly with the claimant has increased proportionately.

- 16 The Ministry's alternative dispute resolution approach involves meeting directly with the claimant to hear their story and the way their care experience has adversely impacted on their life. A thorough examination of their claim is then carried out which includes a detailed assessment of the social work practice. A further meeting is held with the claimant to report on the investigation findings, any identified failures are acknowledged and a personal apology made. If appropriate an ex gratia or settlement payment is made along with a written apology from the Chief Executive of the Ministry. This approach earned the Ministry, and its historic claims partners, the Prime Minister's Award for Public Service Excellence in the 2012 IPANZ awards.

### **A backlog of claims has built up over the past four years**

- 17 A consequence of the Ministry's alternative dispute resolution approach is that it is lengthy and time consuming. While claims have been resolved at a steadily increasing rate over the past six years and are now averaging 116 per year, an average of some 213 new claims have been received each year over the same period. The difference between the received and resolved numbers has resulted in a backlog of 921 outstanding claims that have been received before 28 February 2014, with 336 of them being more than three years old and a number being 10 years old.
- 18 Of the backlog, 283 are proceedings that have been filed in the High Court and almost all of these are represented by Wellington law firm Cooper Legal. The remainder are claims that have been brought direct to the Ministry, of which 228 are also represented by Cooper Legal.
- 19 That backlog and the consequent ageing of claims carries with it a number of risks, for example: loss of confidence and trust in the process; the potential of a renewed call for a public enquiry into historic claims; claimants looking to the Courts for resolution, albeit costly and time consuming; or an alternative process being called for either by the Courts or through public opinion and pressure. It is therefore in the interests of claimants, the Ministry and the Crown for these claims to be resolved as expeditiously as possible.
- 20 Analysis of the claims received to date and future modelling suggests that there will be a steady reduction in the number of claims received over the next five years. If the backlog can be addressed inflow and outflow of claims can be managed.

### **Efficiencies have been made to speed up the resolution process**

- 21 Over the past three years the Ministry has instituted a number of efficiencies in process which have resulted in an almost 30 percent increase in the number of claims closed at no extra administrative cost. These include a more focussed case review process, an enhanced workload management system and the provision of more support services to those staff investigating the claims. On their own however, they are not enough to address the backlog of claims within an acceptable timeframe.

**A Two Path Approach has been established to offer claimants a choice and to speed up the resolution of claims to reach the goal of clearance by 2020**

- 22 In September 2013 the Ministry provided the then Minister for Social Development, Hon Paula Bennett, with options to resolve all historic claims of abuse by 31 December 2020 and to address the backlog of claims that had developed. In consultation with the Attorney-General, Hon Bennett:
- approved further development of the preferred option, the Two Path Approach
  - directed the Ministry to negotiate agreement with Cooper Legal on the Two Path Approach
  - directed the Ministry to report back on the outcome of those negotiations and advise on the financial implications of implementation.
- 23 In February 2014 the Ministry reported to Hon Bennett on the funding implications for bringing historic claims to an end by 2020 including implementing the Two Path process. Hon Bennett supported the Two Path Approach, agreed in principle to a Budget 2014 bid of \$26 million, but requested that the bid be delayed for 12 months.
- 24 The Two Path Approach offers claimants a choice of how their claim can be settled. They can choose an Accelerated Settlement based on the claim falling within one of six pre-defined categories of increasing severity of abuse. The Accelerated Settlement requires only a brief assessment of the claim and therefore a significantly faster resolution. The category definitions and settlement amounts are based solely on the outcomes and range of settlement payments made to those 500 claims resolved to date, to ensure as much as possible, equity between past and current claims.
- 25 Alternatively, claimants can choose for their claim to be assessed using the current process of investigation and assessment of the claim and a personally tailored acknowledgement, apology and payment in recognition of abuse.
- 26 This approach will mean that a significant number of the backlog of claims will be settled faster. While the average settlement amount will largely remain unchanged, the processing cost per claim will be significantly reduced down from \$17,700 to approximately \$5,000.
- 27 The Ministry has been progressing the implementation of the Two Path Approach to the 921 backlogged claims. This has included consulting with Cooper Legal on applying the Two Path Approach to the claims represented by them. The Ministry is still negotiating with Cooper Legal on an approach to implement the Two Path Approach for its clients. The Ministry is implementing the approach for the other 410 direct claimants. Funding currently available would not allow the Ministry to make good faith offers to that number of claimants.

**Financial implications: earlier resolution of historic claims means the funding must be drawn down sooner**

- 28 Budget 2013 approved \$16 million for the continued resolution of historic claims over the four years to 30 June 2017 and \$4 million per year for outyears [CAB Min (13) 12/6 (24) refers]. This was premised on resolving 100 claims per year at a total cost (including settlement payment) of \$40,000 per claim reflecting the actual historic claims costs at that date (recent efficiencies and increased throughput of resolved claims has reduced the average per claim cost to \$37,700). It also recognised that any significant increase in the number of settlements

made in any year would require additional funding. Funding of \$4 million per year would mean that the resolution of all historic claims could not be completed until 2026/27.

- 29 Implementing the Two Path Approach alongside continued resolution of claims using the normal historic claims process will enable 530 claims to be resolved in the 2014/15 year – 410 of the backlogged claims and 120 current claims. Further, through applying the Two Path Approach to the remaining 500 backlogged claims the Ministry anticipates resolving up to 630 claims in the 2015/16.
- 30 To meet the settlement costs arising from a significantly larger number of claims being settled in the current year and in 2015/16, and to enable the ongoing resolution of claims with the goal of completing all claims by 31 December 2020, Cabinet approval is sought to bring forward a total of \$26 million into the years 2014/15, 2015/16 and 2016/17 from the years 2020/21 to 2026/27.
- 31 By 2018 the Ministry will be able to accurately identify the remaining number of historic claims that require completion by the end of 2020 and whether or not any additional funding is required to do so. If necessary, a final budget bid will be made in Budget 2018.

### **Consultation**

- 32 The Treasury and Crown Law Office have been consulted in the preparation of this paper, and the Ministries of Education and Health and the Department of Internal Affairs have been informed. Treasury and Crown Law endorse the Two Path Approach as a means of effectively addressing historic claims, and Treasury supports the bringing forward of funding to enable settlement of claims.

### **Human rights implications**

- 33 The continued resolution of historic claims is consistent with New Zealand's obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to provide fast and effective remedies to people who have experienced such abuse.

### **Legislative implications**

- 34 Not applicable.

### **Regulatory impact and compliance cost statement**

- 35 Not applicable.

### **Gender implications**

- 36 Not applicable.

### **Disability perspective**

- 37 Not applicable.

## Publicity

38 No public communications are planned, but officials will be communicating with Cooper Legal.

## Recommendations

39 It is recommended that the Committee

- 1 **endorse** the Two Path Approach to support the goal of the Crown settling historic claims by December 2020
- 2 **note** that implementing the Two Path Approach will allow the Crown to offer timely resolution of historic claims, reduce the fiscal risk to the Crown and address a significant backlog of historic claims
- 3 **note** that implementing the Two Path Approach to the backlog of claims will result in a significantly larger than normal number of claims being settled within the 2014/15 and 2015/16 years thereby exceeding current funding available for those years
- 4 **note** that total funding of up to \$50 million is required to resolve all historic claims by December 2020
- 5 **agree** to bring forward a total of \$26 million into the years 2014/15, 2015/16 and 2016/17 from the years 2020/21 to 2026/27 to enable the implementation of the Two Path Approach and the ongoing resolution of claims

**AGREE / DISAGREE**

- 6 **approve** the following changes to appropriations to give effect to the decision in recommendation 5 above, with a corresponding impact on the operating balance;

**AGREE / DISAGREE**

Vote Social Development Minister for Social Development	\$m - increase/(decrease)				
	2014/15	2015/16	2016/17	2017/18	2018/19
Departmental Output Expense: Care and Protection Services (funded by revenue Crown)	12.000	13.000	1.000	-	-
	2019/20	2020/21	2021/22	2022/23	2023/24
	-	(4.000)	(4.000)	(4.000)	(4.000)
	2024/25	2025/26	2026/27 & outyears		
	(4.000)	(4.000)	(2.000)		

	\$m - increase/(decrease)						
	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21 & Outyears
<b>Total Operating</b>	12.000	13.000	1.000	-	-	-	(4.000)

- 7 **agree** that the proposed changes to appropriations above be included in the 2014/15 Supplementary Estimates that, in the interim, the increase be met from Imprest Supply

**AGREE / DISAGREE**

- 8 **agree** to carry forward any unspent money to the following fiscal years, and

**AGREE / DISAGREE**

- 9 **note** the funding profile for the resolution of historic claims through to 2020. While there is a possibility of additional claims being made after that date they will likely be small in number and be managed from within baseline.

\$m	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
Resolution of historic claims of abuse	16.000	17.000	5.000	4.000	4.000	4.000

Hon Anne Tolley  
Minister for Social Development

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RELEASED UNDER THE OFFICIAL INFORMATION ACT