



MINISTRY OF  
SOCIAL DEVELOPMENT  
*Te Manatū Whakahiato Ora*

# report

Date: 25 September 2013 Security Level: IN CONFIDENCE  
To: Hon Paula Bennett, Minister for Social Development

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## The timely resolution of all historic claims of abuse by the end of 2020

### Purpose of the report

- 1 This report sets out options for the timely resolution of all historic claims by 31 December 2020. It presents the Ministry's preferred option and seeks your agreement to that option and a mandate for the Ministry to work with key external stakeholders to implement that strategy from 1 March 2014.

### Executive summary

- 2 The Ministry is currently facing the risk of client frustration due to the number of historic claims on hand and the length of time it is taking to resolve them. As at 31 August 2013 there were 774 historic claims on hand and we expect to receive a further 500 claims before bringing this work to a close by the end of 2020. Currently more than a third of the claims on hand have been waiting for more than three years and the oldest claim is nine years old. Three hundred and three of these claims have been filed in Court.
- 3 Four options that might enable the timely and effective resolution of all current and future claims by December 2020 have been explored. These are: retaining the status quo; undertaking a bulk settlement; outsourcing to an alternate provider; and a two path approach.
- 4 The two path approach is the Ministry's preferred option. It gives most claimants the choice as to the approach to be used for their claim. It will not incur any additional costs although costs would need to be brought forward to accommodate an expected significant increase in the resolution rate.
- 5 The two path approach offers the claimant **either** an accelerated settlement with a dollar figure based on the claim falling within one of five claim categories **or** to have their claim assessed using the current process. The five claim categories reflect increasing severity of abuse.
- 6 It is proposed that the accelerated settlement process would involve only a brief assessment of the claim against a set of pre-defined criteria (based on the 455 claims closed so far), and therefore a much faster resolution than the current resolution process.
- 7 Around two thirds of claims would fall within the boundaries of the five accelerated settlement categories. Where a claim falls outside either end of those categories (currently 2% are above and 33% are below), or where the claimant elects it, the claim will be

resolved under the current historic claims process. Any payment made as a result will, as now, reflect the individual nature and circumstances of the claim.

- 8 We have consulted with Crown Law, the Ministries of Education and Health, Legal Aid Services and the Confidential Listening and Assistance Service and the Department of Internal Affairs in developing the two path approach and they are supportive of it.
- 9 Your agreement is now sought for us to finalise this approach in consultation and negotiation with Cooper Legal, who represent the majority of the filed claimants and around 55 unfiled claimants and who would be involved in administering the accelerated settlement approach for their clients. Following this we will come back to you seeking final sign off of the approach by 6 December for implementation by 1 March 2014 if you agree.
- 10 While the Ministry faces the bulk of claims, given the interest of your colleagues in this issue, including the Attorney-General, you may wish to take the matter to Cabinet for discussion.

### Recommended actions

It is recommended that you:

- 1 **Note** it is now forecast that, in addition to the 774 historic claims on hand, we expect to receive a further 500 claims before bringing this work to a close by the end of 2020,
  - 2 **Note** that 37% of current claims are over three years old,
  - 3 **Note** that four options have been explored to address these claims; retaining the status quo; undertaking a bulk settlement; outsourcing to an alternate provider; and a two path approach,
  - 4 **Agree** to further explore the two path approach giving claimants the choice to opt for an accelerated settlement process to determine eligibility for a category payment of a pre-determined sum in full and final settlement of the claim,  
*Please add this by AG.*
- Agree /  Disagree
- 5 **Note** that we have developed five accelerated settlement categories based on the experience of the 455 claims already closed,
  - 6 **Direct** the Ministry to negotiate agreement with Cooper Legal, solicitor for 358 claimants, on the two path approach that includes five accelerated settlement categories that have been developed directly from the experience of the 455 claims already closed,
- Yes /  No
- 7 **Agree** that in seeking such agreement with Cooper Legal, the Ministry has the mandate to specify a fiscal envelope of \$6 million (from existing historic claims funding) within which settlement payments for those 358 claims can be made,
- Agree /  Disagree
- 8 **Direct** officials to report back to you by 6 December 2013 on the result of those negotiations and including a paper for you to seek Cabinet approval to implement this approach by 1 March 2014; and

Yes /  No

- 9 Note that further advice is being prepared on how to approach a small number of outstanding historic claims from people who have committed high-tariff criminal offences such as murder.



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David Shanks  
Deputy Chief Executive  
Corporate and Governance

26/9/2013  
Date



\_\_\_\_\_  
Hon Paula Bennett  
Minister for Social Development

30/9/15  
Date

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## Background

- 11 Since 2004 the Ministry of Social Development has been operating a process to resolve historic claims of abuse and neglect suffered by children who were in the care of the State prior to 31 December 1992. The process has moved progressively from litigating claims in the High Court to resolving them where possible directly with the claimant and outside of the court process. Reflecting that, the number of claims being filed in the High Court has reduced dramatically (only three have been filed since early 2011) while the number that are brought directly to the Ministry and without the need for legal representation or court involvement has significantly increased.
  - 12 That process for resolving historic claims is consistent with the Crown's Historic Claims Litigation Strategy as reconfirmed by joint Ministers and the Attorney-General in January 2011, and has been acknowledged as being a high quality process which achieves enduring resolution for many of those who suffered abuse while in state care as children. For most claimants it involves two or more face to face meetings with the Ministry's historic claims team and a detailed investigation into the details of their claim and the social work service they were provided when in care. This enables the claimant to develop a good understanding of their care history and for the Ministry to acknowledge in a personal way those failures for which we accept responsibility. Any resulting payment and apology is then tailored to the individual claimant.
  - 13 The trade-off for this personalised and high quality process is that it is lengthy and time consuming and, perhaps because of its success, currently more claims are being received each year than can be resolved. Significant efficiencies have sped up the process but this, on its own, cannot address the backlog of claims that has developed. Consequently some 37 percent of claims on hand are now over three years old, with the oldest claim being nine years old.
  - 14 It is in the interests of claimants, the Ministry and the Crown for these claims to be resolved as expeditiously as possible. In doing so there may be some trade-off between speed of resolution on one hand and due process on the other. This report sets out those options that have been considered for the timely resolution of all current and future claims by 31 December 2020. It presents the Ministry's preferred option that provides the best balance of speed and due process and seeks your agreement to engage with external stakeholders to advance development of that option with a view to implementation from 1 March 2014.
- ### Current situation and challenges
- 15 As at 31 August 2013 the Ministry has closed 455 claims, while a further 774 have been received by the Ministry but are yet to be resolved and closed. Three hundred and three of those claims are proceedings that have been filed in the High Court and almost all are represented by Wellington law firm Cooper Legal. The remaining 471 are claims that have been brought direct to the Ministry, almost all of which are not legally represented.
  - 16 As noted above, the current process for resolving claims is a high quality process and good progress has been made in resolving over 450 claims. Over the past six years the Ministry has steadily increased the percentage of claims closed against those received each year from 13 percent to 58 percent. Nevertheless, despite implementing efficiencies in process and the accumulation of knowledge and expertise that enables a faster assessment of claims, there continues to be an unacceptably high number of claims over three years old. As at 31 August, 287 claims (37 percent) were more than three years old while 121 (16 percent) were between two and three years old.
  - 17 The ageing of claims carries with it a number of risks — 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.

- 18 In addition, you will recall that in March 2013 Cabinet agreed to extend the term of the Confidential Listening and Assistance Service to 30 June 2015. The Service provides a valuable service to people who have suffered abuse while in state care across the education, health and welfare sectors. They have referred 350 clients to the Ministry for a detailed examination of their case and possible settlement payment. They also provide valuable pastoral support to those clients while awaiting resolution of their claims.
- 19 In anticipation of that end date and to enable them to meet with all outstanding participants, the Service will cease taking registrations from 31 October 2013.
- 20 The closure of the Service will leave a void for potential claimants who do not feel able to approach the Ministry directly and who do not want a solicitor to act on their behalf. The Department of Internal Affairs and the Ministry of Social Development will jointly report to Cabinet by 31 March 2014 on the implications of the Service closing and how agencies will deal with subsequent claims.

### Forecast of future claims

- 21 In order to understand the task required of bringing all claims to a close by the end of 2020 we need to identify the number of historic claims that might be made in the future.
- 22 The Ministry commissioned Economics and Strategy Group Ltd to carry out a detailed analysis of trends in claims and to forecast the volume of claims that we might expect to be made in the future. Their report has been peer reviewed and we are confident of its accuracy. The report in its entirety is appended for your reference, but the key findings are:
  - 22.1 The major peak in the number of historic claims being made has passed
  - 22.2 Based on the profile of claims made to date it is unlikely that any pre 1993 historic claims will be made beyond 2030
  - 22.3 Using the number of children in care and the incidence of abuse as a proportion of children in care as a benchmark, a further 500 claims are forecast to be made by 2030
  - 22.4 A significant majority of those 500 claims will likely be made by 2020
  - 22.5 The factor most likely to affect that forecast is any change in the current policy settings and particularly:
    - a) the impact of any announcements made in relation to, or publicity about the historic claims process
    - b) any trend or variation over time in the level of payments made to claimants, and
    - c) any changes in the legal sector that aim to pro-actively engage in seeking out and supporting potential claimants.

### Total pool of claims

- 23 In total, based on the recently completed research, the Ministry is faced with addressing and bringing to a close 1274 historic claims, of which 303 are proceedings that have been filed in Court.

## Options for the timely completion of claims

24 A facilitated workshop comprising the Ministry's Deputy Chief Executive Corporate and Governance and Chief Legal Advisor, senior historic claims staff, representatives from Crown Law and the Department of Internal Affairs and the principal of Economics and Strategy Group Ltd, and Munro Duignan Consulting, identified four potential options for significantly reducing the waiting time for claims to be resolved and to bring claims to a close by 2020:

24.1 retaining the current historic claims process – the status quo

24.2 a bulk settlement of all claims

24.3 management of all claims by an alternate provider, and

24.4 a two path approach comprising either an accelerated settlement process or the current historic claims process.

25 Each option has been examined and assessed against the key principles of achieving meaningful and enduring resolution for both claimants and government; enabling the backlog of claims to be addressed; consistency of outcome with claims resolved to date; and enabling closure of all claims by the end of 2020.

### Option 1: Status quo

26 This option involves the continuation of the current process to address claims now and into the future. It clearly maintains consistency with claims resolved to date, the administrative and settlement costs can be accurately predicted, and it maintains the high quality assessment and support of individual claimants meaning that the outcome for each claimant accurately reflects the reality of their care experience.

27 While efficiencies in process have resulted in an increase in the number of claims being resolved each year, without significant additional resources it will not deal with the backlog of claims in a timely way. The increasing age of outstanding claims presents therefore a considerable risk and needs to be addressed as quickly as possible.

### Option 2: Bulk settlement

28 This approach would need development of a standard offer that includes a flat rate payment, made to all claims, without any individual assessment. It would address claims quickly and could resolve the current backlog. Operational costs would be lower than the status quo, but its standardised, single payment and "no assessment" basis carries the risk that it will generate a higher number of new claims which may or may not have merit.

29 It is also inconsistent with the basis on which claims have been dealt with to date, does not provide any level of quality or service for the claimant and carries with it the risk of undermining trust and faith in Government and the Ministry.

### Option 3: Alternate provider

30 This option would see an alternate provider managing all current and future claims on behalf of the Crown. One example of such a provider is the Crown owned company, Dispute Resolution Services Ltd. Dispute Resolution Services provides a range of mediation, arbitration and adjudication services, with its core business being operation of the ACC review process.

- 31 While this option would provide independence from the Ministry, the lack of which has been a criticism of the current claims process from counsel representing the majority of filed claimants, any process used by such a provider would however, be subject to similar costs and constraints as face the Ministry. There would be significant change over costs in building up the alternate provider's knowledge and skill base and this would be likely to exacerbate the current backlog. For these reasons it is not a preferred option for dealing with the bulk of claims.
- 32 We note however, that using an alternate provider does have potential merit as an escalation point for claims that cannot be resolved between a claimant and the Ministry yet do not require the need for High Court intervention, with its associated cost and time. We are further exploring this option with Cooper Legal.

#### **Option 4: The two path approach (Preferred option)**

- 33 This option combines elements of a more standardised assessment approach, but based on the knowledge and experience of claims resolved to date (the Accelerated Settlement process), with the status quo (the Historic Claims Investigation process). It would give claimants the ability to choose one of those two options, the combination of which would balance faster resolution of claims with maintaining the integrity and quality of the current historic claims process for those claimants for whom this is important.
- 34 The two path approach offers **either** an Accelerated Settlement based on the claim falling within one of five categories of increasing severity of abuse that requires only a brief assessment of the claim and therefore a much faster resolution; **or** resolution in accordance with the current process of investigation and assessment of the claim and a personally tailored acknowledgement, apology and payment in recognition of abuse.

#### *Accelerated Settlement Package*

- 35 Five categories of payment are proposed from Category One paying \$42,500 through to Category Five paying \$5,000 (detail of categories attached as appendix 1). These categories are tightly aligned to the extensive knowledge built up from the 455 claims closed and 297 payments made to date. This allows us to accurately predict the cost of payments that will be made using this approach.
- 36 The majority of claims fall within the Accelerated Settlement boundaries. Where a claim is assessed as falling outside either end of those categories (currently 2 percent are above and 33 percent are below or would be found not to merit any payment), or where the claimant elects the option, the claim will be resolved under the current historic claims process. Any payment made as a result will, as now, reflect the individual nature and circumstances of the claim.
- 37 The brief assessment required for the Accelerated Settlement process will mean that valuable resources can be focused on those claims most deserving of the full investigation and assessment process. The smaller number of claims needing to be addressed through the full process will also mean that they are dealt with faster than at present.
- 38 For those claimants who are legally represented, the accelerated settlement process involves the client's solicitor administering the process with clearly defined and agreed criteria and a transparent fiscal envelope and defined number of claimants it applies to. This is very similar to the model developed for the Crown Health Financing Agency (CHFA) settlements which achieved an almost 100% success rate and involved Cooper Legal, the legal firm who represented all of the filed claimants, in developing and agreeing the final categories.

- 39 Unlike the CHFA settlements, in this case we have the added advantage of having dealt with 455 claims to date and agreeing settlement payments in 297 of those. The draft categories described above have been precisely developed on the basis of those 297 payments. They directly reflect the key characteristics of each of those claims and the payment they received.
- 40 Our experience to date also accurately tells us how much we will spend on settlement payments across a given number of claims. That will enable us to identify a clear fiscal envelope within which all existing claims must be settled.
- 41 A group of 27 claims include the Ministry of Education as a co-defendant. To date, any settlement payments made in respect of these cases have been shared between the two agencies. Agreement of the category into which each of those joint claims will fall will therefore include the Ministry of Education.

#### *Historic Claims Investigation Process*

- 42 Where the claimant or, acting on their instructions their solicitor, elects to have their claim considered in detail and in a more personalised and supported way rather than by way of the accelerated settlement package, or where a claim is assessed as falling outside either end of the package categories, then the normal historic claims investigation and assessment process will be applied. This has recently undergone significant review to improve efficiency and includes a detailed investigation and assessment of the allegations and social work practice. In order to support the claim the Ministry must, from all the information available, form a reasonable belief that an element or elements of the claim have merit.
- 43 Any payment made as a result of the investigation will, as it does now, reflect the individual nature and circumstances of the claim and will be consistent with other similar claims.

#### **Implications and risks**

- 44 There are trade-offs with all options considered, including the preferred two path approach. The current process relies on a detailed investigation to determine the facts of each claim. The outcome of the investigation enables us to accept or not accept allegations of abuse made by the claimant and to identify any practice failures on the part of the Ministry that caused the claimant harm. This ensures claimants receive an individualised response, only claims with merit are accepted and the payment for a claim reflects the seriousness of that claim. As a result, 67 percent of claims receive a payment and a personalised acknowledgement and apology. It is however a time consuming process and is therefore contributing to the current backlog of aging claims.
- 45 One of the purposes of the Accelerated Settlement process is to speed up the resolution process so by definition there will not be the same detailed and time consuming investigation and assessment. The claims will therefore be assessed largely on the basis of the information provided by the claimant or their solicitor, but with important cross-checking of key facts against Ministry records. Primarily this will be around allegations of abuse rather than practice failures and the proposed five categories have been developed to account for this.
- 46 The Accelerated Settlement approach may therefore result in some claims with serious practice failures not being identified and paid accordingly. It is also possible that some less meritorious claims will receive a payment higher than they otherwise would if they had been subject to the historic claims investigation. From the claimants perspective this may be mitigated by the fact of a faster and more straightforward resolution of their claim. From a financial perspective this will be mitigated by the fact that the fiscal envelope will



result in no more than the equivalent of 70 percent of claims receiving a payment, although it is possible that the total funds may be spread across a larger proportion of claims. This is further mitigated by lower operational costs from less time intensive investigation and the much faster resolution of the claims.

- 47 This option will mean that there is a speedy and straightforward process for those claimants who wish such a process and a more detailed supportive process for those who demand such. One implication of the former is that definitive findings cannot be made about specific elements of a claim. Formal acknowledgement and apologies in those cases will then only be of a general nature to ensure they do not wrongly implicate any innocent individual named in a claim.

### Financial implications

- 48 The current historic claims process incurs operational costs of \$19,860 to close each claim. Settlement and legal aid payments average \$19,870 per closed claim, giving a total average cost of \$39,730 to bring each claim to a close. On that basis Budget 2013 confirmed historic claims funding of \$16 million for the 2013 to 2017 period. This was based on resolving around 100 claims per year.
- 49 To bring the 1274 current and forecast claims to a close using the current process will cost an estimated \$50.6 million.
- 50 We cannot predict the number of claimants that will opt for the Accelerated Settlement approach, although we anticipate that the majority of the 303 filed claimants will. For that reason we cannot accurately forecast the cost of the two path approach. However, it will not cost any more than the status quo. There will be savings in administration costs for the Accelerated Settlement process in addition to the faster resolution of the claims and the resulting reduction in risk. We anticipate that there will also be savings in legal aid costs.
- 51 Regardless of the approach taken, based on the 297 payments made to date we can predict the total settlement payments that will be made across a specified group of claims. For the current 774 outstanding claims we would expect settlement payments to total \$12 million, of which \$6 million will meet the settlement payments for those claimants represented by Cooper Legal. Accordingly, should the two path approach be approved we will negotiate with Cooper Legal on that basis. Some funding will need to be brought forward to accommodate the expected significant increase in the resolution rate and payment of settlements.
- 52 A detailed assessment of the funding requirements through to 31 December 2020 and the end of the historic claims work will be included in the 6 December paper so that it can feed into the budget planning process for 2014.

### Crown litigation strategy

- 53 A 14 January 2011 report to joint Ministers including the Attorney-General [Crown Law Report SOL115/2169] confirmed the Crown's historic claims litigation strategy which takes a three-pronged approach:
- 53.1 Departments should seek to resolve claims early and directly with the person where practicable
- 53.2 Settlement should be considered for any meritorious claim and in particular where the legal risk justifies settlement, and

53.3 Claims that do proceed to court because they cannot be resolved should be defended.

54 The preferred option is consistent with this strategy for historic claims. It is consistent also with the Ministry of Health's historic abuse resolution process and is a potential framework by which other agencies facing similar claims may address those claims.

### **Consultation**

55 The Crown Law office has been consulted and involved throughout the development of this option. The Ministries of Education and Health, Legal Aid Services, the Confidential Listening and Assistance Service and the Department of Internal Affairs have been consulted also and are in agreement with the preferred option.

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## Resolution of Historic Claims

### The Accelerated Settlement Package

Where a claimant or their solicitor elects for the claim to be addressed according to the Accelerated Settlement package, a decision will be made either by the claimant's solicitor or, where they are not represented, by the Ministry's Historic Claims staff on which category the claim falls into. That decision will be based on the following information:

- a) the claimant's statement of claim. For existing claimants this will draw on their account of their care experience as recorded in either their original Statement of Claim, written statement, letter of offer or interview transcript and/or notes.
- b) confirmation from the records that the Ministry had a legislative responsibility for the claimant at the time relevant to the claim
- c) confirmation from the records of the claimant's placement in the residence/s and/or care placement/s at the time relevant to the claim
- d) confirmation from the records of any alleged perpetrator's presence in the residence/s and/or care placement/s at the time relevant to the claim.

The absence of relevant records (through loss, destruction or lack of accessibility) will not in itself defeat the claim, but positive evidence that the claimant or alleged perpetrator was not in the residence or care placement could do so.

The proposed category descriptions and payment levels are as follows:

Category	Description
<p><b>Category 1</b></p> <p><b>Serious abuse with distinguishing characteristics</b></p> <p><b>\$42,500</b></p> <p><b>(based on 33 existing payments made between \$35,000 and \$50,000)</b></p>	<p>section 9(2)(a)</p>

**Category 2 section 9(2)(a)**

**Serious abuse  
or false  
imprisonment**

**\$30,000**

(based on 29  
existing  
payments made  
between  
\$26,000 and  
\$35,000)

**Category 3**

**Moderate  
abuse or  
secure care  
over 3 weeks**

**\$20,000**

(based on 100  
existing  
payments made  
between  
\$16,000 and  
\$26,000,000)

**Category 4**

**Abuse less  
serious or  
failure leading  
to abuse**

**\$12,000**

(based on 75  
existing  
payments made  
between \$9,000  
and \$16,000)

<p><b>Category 5</b></p> <p><b>Failures not leading to abuse</b></p> <p><b>\$5,000</b></p> <p>(based on 53 existing payments made between \$1150 and \$9,000)</p>	<p>section 9(2)(a)</p>
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