



Policy and practice guidance on deceased claimants

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Approved by: General Manager Historic Claims
Owner: General Manager Historic Claims

Policy guidance

This policy guidance outlines Historic Claims policy on how claims can be progressed where the claimant dies prior to their claim being resolved. It also provides operational guidance to staff on how this can be done.

What happens to a claim where a person dies before their claim is resolved?

Claimants who have made a claim during their lifetime and who die before their claim has been resolved, are able to have their claim completed (and a payment and apology made to their estate) unless their estate instructs otherwise.

Care should be taken around assessing claims where the claimant may have lodged a claim before their death but has not been interviewed. There may be sufficient information from the initial discussion with the claimant when they lodged their claim or from the social work records themselves. However, we should not look to fill the gaps by talking with the claimant's whānau about what the claimant's concerns could have been.

Who continues with the claim if the claimant dies before their claim is resolved?

It is the claimant's estate who has the legal authority to continue with a claim. An estate consists of either:

- Any executors appointed in the will of the deceased;
- Any administrators subsequently appointed by the Court; or
- If there is no executor or administrator, those that are beneficially entitled to inherit from the estate under the Administration Act 1969.

If Historic Claims staff learn that a claimant has died, the staff member should ask whoever has notified us of this as to whether there are any executors or administrators of the Estate. An executor is appointed in a person's will and administrators are appointed by the Court on the request of a person's whānau if the person has died without a will. If there are executors or administrators in place, any further discussions or correspondence in relation to the claim should be had with those person(s).

If there is no executor or administrator, you can continue to communicate with the notifier if you believe that the whānau has authorised them to communicate with the Ministry. If you have any concerns that they might not be the appropriate person for you to be

communicating with, discuss with your team leader. For example, the claimant might have spoken about challenging whānau relationships where there are factions within siblings.

Where we do not know whether the deceased's whānau are aware that they have made a claim it is not appropriate for us to contact the whānau and let them know about the claim as doing this may cause significant trauma if they did not know their whānau member has been abused in state care. If this situation applies, the claim is to be marked as inactive in the Historic Claims Application. If whānau contact Historic Claims in the future, the claim will be reactivated and progressed at that point taking into consideration guidance regarding authorised whānau members as noted above.

How much information can I give to the estate or a claimant's whānau about the claim?

The Privacy Act does not apply to those that are deceased, but agencies may refuse to disclose any information request if the disclosure would involve the unwarranted disclosure of the affairs of others. The Office of the Privacy Commissioner website states:

"Some information is inherently sensitive, for example mental or sexual health information. It could be unfair to release such information to those who are just curious and have no good reason to see it. In addition, if known, the wishes of the deceased person will be important to consider, although not necessarily determinative in all cases."

This means that care needs to be taken with the information that is provided. Important considerations include:

- What do I need to tell to enable the claim to be resolved?
- What does the estate/whānau know about the claim and any allegations made? If it is clear that they know the details of the claim (e.g they may have attended an interview with the claimant with Historic Claims staff), you may be able to more freely discuss it.
- Are there any known views of the claimant about whether they would want their information being shared with whānau?
- How sensitive is the information?
- What relationship does the person have to the claimant?

It is recommended that prior to any discussion with the whānau member, the staff member discusses and records a plan (and saves this into the claimant's Objective folder) with their team leader.

Can claims be lodged by whānau on behalf of a deceased whānau member?

Claims brought on behalf of those that are deceased do not currently come within the scope of the Ministry's Historic Claims process¹. Any changes to this policy are a Crown decision and will likely be considered as part of the design of the new independent redress system.

¹ There may be the occasional case where an estate files a claim in Court. These cases will be dealt with on a case by case basis in consultation with the MSD legal team.

What are the settlement requirements before we can make a payment to an estate?

Where probate or letters of administration have been obtained

- If the Court has granted probate of the claimant's will or appointed an administrator, settlement is to be entered into with the executor(s) or administrator(s) and payment made to them (or their legal representative).

Where the payment is \$30,000 or under and probate or letters of administration are not being obtained

- Where this applies, the Ministry may enter directly into a settlement agreement with a person who is 'beneficially entitled' under the Administration Act 1969 to inherit from the claimant's estate as a representative of the estate.

Where the payment is over \$30,000 or probate or letters of administration are being obtained for another purpose

- Where this applies, the Ministry requires either probate of the claimant's will or a Court appointed administrator before payment is made. Settlement is to be entered into with the executor(s) or administrators(s) and payment made to them (or their legal representative).

Who are 'beneficially entitled' and what must be in place before a payment can be made?

The term 'beneficially entitled' refers to persons entitled to inherit either under the will or under the Administration Act 1969 if the person died without a will. Usually this will be a person's spouse/partner or children or if these do not apply, closest other blood relatives (parents, siblings).

Historic Claims staff should discuss with the whānau member they are working with to understand who might be entitled to inherit from the claimant's estate. Once known, confirmation is required that those entitled to inherit consent to the payment being made to the proposed person who will receive the settlement payment (the nominated person).

There is no set approach to receiving consents. These might be in written form (e.g. email consents) or a file note from a staff member recording a conversation had with one of the beneficiaries giving oral consent.

For claimants represented by a lawyer, confirmation from their lawyer will be sufficient.

If Historic Claims staff have any concerns about who can enter into a settlement agreement, whether the Ministry should be entering into an agreement with that person (especially when there are multiple 'beneficially entitled' people) or how to document consents, this should be discussed with your team leader who may need to seek advice from the Strategy, Planning and Reporting team on next steps.

What do we need from an estate to draft settlement documentation and make payment?

The settlement documentation for estates will need to differ slightly from any standard templates. The following information needs to be obtained.

Where probate or letters of administration have been obtained

- Date of claimant's death;
- A copy of the probate order or letters of administration;
- The name(s) of the administrators appointed by the Court;
- Date of the Order.

Where probate or letters of administration are not being obtained and the payment being made is \$30,000 or under

- Name of the nominated person who will enter into a settlement agreement and receive payment;
- Their relationship to the claimant (e.g. spouse, child);
- For direct claimants, confirmation that Historic Claims staff have discussed with the nominated person;
 - whether there are other beneficiaries that are entitled to inherit under the claimant's estate;
 - if there are, that those beneficiaries have provided consents to the nominated person receiving the payment on the estate's behalf;
 - that the nominated person understands that they are receiving the funds on behalf of the estate and will need to distribute it in accordance with the law.
- For legally represented claimants, these same issues will need to be clarified with the lawyer. An email should be sent asking that they confirm:
 - who the representative is that will receive the funds and that person undertakes to apply the funds in due course of administration;
 - that any other beneficiaries agree to the confirmed representative receiving the funds;
 - that there are no other further beneficiaries; and
 - that administration is not being obtained in New Zealand.

Once the above information has been obtained, this information can be entered into any relevant templates in place. Assistance can be requested from the Strategy, Planning and Reporting team if templates need adapting.

How does an apology work?

An apology from the Ministry's Chief Executive can still be provided if the estate wishes to receive one. You will need to ask the whānau member who they would like the letter addressed to – this could be addressed to multiple people. The standard wording of the letter will need to be amended to reflect that it is being provided to the whānau, rather than the claimant. There will also need to be caution as to what is recorded in the letter depending on how aware the whānau are of the claimant's concerns.

If the payment is over \$30,000, will Historic Claims pay for the legal fees of obtaining probate or letters of administration?

No, Historic Claims has a policy that it will not pay these legal fees. However, it is able to pay the reasonable legal fees for the nominated person to obtain legal advice on the settlement agreement before they sign this.

Approve policy and practice guidance on deceased claims guidance

Approve/~~Decline~~



Linda Hrstich-Meyer

General Manager Historic Claims

12.6.2023

Date