



report

Date: 13 November 2014 Security Level: IN CONFIDENCE
To: Hon Anne Tolley, Minister for Social Development

Resolving Historic Claims of Abuse – Proposal to Bring Funding Forward

Purpose of the report

- 1 This report seeks your agreement to refer the attached paper to Cabinet State Sector Reform and Expenditure Control Committee for approval.
- 2 The Cabinet paper seeks approval for the Ministry of Social Development (the Ministry) to bring forward funding totalling \$26 million into the years 2014/15, 2015/16 and 2016/17 from the years 2020/21 to 2026/27. This funding 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.
- 3 Historic claims are those arising from people who were in State care before 1993 and allege they were abused or harmed during their time in care.

Executive summary

- 4 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.
- 5 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 developed and implemented an alternative dispute resolution approach that has been very successful in resolving over 560 claims so far.
- 6 Budget 2013 provided \$4 million per year ongoing for the Ministry to continue resolving historic claims at a rate of 100 claims per year.
- 7 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 and are not represented by Cooper Legal.

- 8 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 closing all historic claims by December 2020.
- 9 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.
- 10 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.
- 11 It is therefore proposed to bring forward a total of \$26 million into the 2014/15, 2015/16 and 2016/17 years from outyear historic claims funding (2020/21 to 2026/27) to meet the costs involved in settling the backlog of claims.
Not relevant to request

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Recommended actions

13 It is recommended that you:

1 **note** that the previous Minister for Social Development, in consultation with the Attorney-General, approved the Two Path Approach to expedite settlement of the backlog of historic claims and avoid costly, time consuming litigation, and accordingly set a goal of settling all historic claims by December 2020

Yes / No

2 **note** that the Two Path Approach is currently being implemented for 410 direct claims and settling that number of claims will exceed current funding available for the 2014/15 year

Yes / No

3 Not relevant to request

4 **agree** to take the attached paper to Cabinet State Sector Reform and Expenditure Control Committee for its:

4.1 endorsement of the Two Path Approach to support the goal of the Crown settling all historic claims by December 2020, and

4.2 approval to bring forward a total of \$28 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

AT (Agree / Disagree)

5 Not relevant to request

Yes / No

6 **note** that officials are available to discuss the Cabinet paper with you if required.

Yes / No

Wendy Venter
Deputy Chief Executive, Organisational Integrity

13 November 2014

Date

Anne Tolley
Minister for Social Development

16-11-14
Date

Background to historic claims of abuse

- 14 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.
- 15 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 [POL (08) 98 refers]. That strategy was reconfirmed by joint Ministers and the Attorney-General in January 2011 [Crown Law Report SOL115/2169 refers].
- 16 The Litigation Strategy has three prongs:
 - 16.1 agencies will seek to resolve grievances early and directly with an individual to the extent practicable
 - 16.2 the Crown will endeavour to settle meritorious claims
 - 16.3 claims that do proceed to a Court hearing because they cannot be resolved will be defended.
- 17 Consistent with the Crown's Historic Claims Litigation Strategy, the Ministry developed an alternative dispute resolution approach. For those claims that had been filed in the High Court this meant working with the claimant through their solicitor to achieve settlement. Significantly though, it enabled people to bring a claim directly to the Ministry without the need to seek legal representation or to file proceedings in Court. As at 31 October 2014, the Ministry has received 1,633 claims. Of those, 468 were filed in the High Court, while 1,165 were brought directly to the Ministry.
- 18 The Ministries of Education and Health have adopted similar processes for resolving those historic claims they face. To further assist people who experienced abuse and harm while in state care and as part of the whole of government response to historic claims, Cabinet approved the establishment of the Confidential Listening and Assistance Service (the Service). The Service is administered by the Department of Internal Affairs and is an independent body of esteemed panelists, chaired by retired District Court Judge Carolyn Henwood, to listen to, provide supportive services to participants and if requested by the participant, refer them to the appropriate agency for their potential claim to be addressed. Given the success of the Service, its initial five year term was extended by two years and it will now close on 30 June 2015.

Effectiveness of historic claims process

- 19 The Ministry's approach to historic claims is innovative and world leading and has been acknowledged as being a cost effective (compared to the alternative of High Court litigation), high quality, personalised process which achieves enduring resolution both for many of those who suffered abuse while in State care as children, and for the Crown. Consequently the number of claims filed in the High Court has reduced dramatically while the number brought to the Ministry for resolution directly with the claimant has significantly increased.
- 20 The resolution process 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.

- 21 The following table identifies the total number of claims received in the period 1 January 2004 to 31 October 2014, the number that have been resolved and the number yet to be resolved.

	Claims Filed in Court	Claims Brought Direct to The Ministry	TOTAL
Claims Received	468	1,165	1,633
Claims Resolved	185	378	563
Claims Remaining	283	787	1,070

- 22 New historic claims have continued 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 a steadily declining number of claims being made over coming years. The significant majority – estimated to be an additional 500 – are expected to be received by 2020.
- 23 The Ministry has committed to resolving all current and forecast historic claims by 31 December 2020. However, the possibility of further claims being made in the Courts from 2021 onwards cannot be discounted. It will not be until 2050 that, through ageing of claimants, no further pre 1993 claims will be received.

Backlog of claims

- 24 A consequence of the Ministry's personalised and high quality resolution process 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.
- 25 Of the backlog of claims, 283 are proceedings that have been filed in the High Court and almost all 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.
- 26 That backlog and the consequent ageing of claims carries with it a number of risks – loss of confidence and trust in the alternative resolution process; the potential of a renewed call for a public enquiry into historic claims; but primarily claimants - and their solicitor - looking to the Courts for resolution, albeit a much more costly and time consuming option. It is therefore in the interests of claimants, the Ministry, and the Crown for these claims to be resolved as expeditiously as possible.
- 27 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 assuming the

forecasting is accurate. If the backlog can be addressed inflow and outflow of claims can be managed.

Funding for the resolution of claims

- 28 At Budget 2013, funding of \$16 million was approved for the Ministry to continue resolving historic claims over the four years to 30 June 2017 and \$4 million per year thereafter. [CAB Min (13) 12/6 (24) refers]. This was premised on an average total spend, including settlement payments, of \$4 million per year and reflected the funding that had been received to that point, being a reasonable estimate of the requirement going forward. The figure was based on an average settlement payment of \$20,000 per claim along with an average cost of \$20,000 to bring each claim to resolution making \$4 million to settle 100 claims each year. Recent efficiencies and increased throughput of resolved claims has reduced the average per claim cost to \$37,700. The agreed funding recognised, however that any significant increase in the number of settlements made would require additional funding.
- 29 In September 2013 the Ministry reported to the then Minister for Social Development, Hon Paula Bennett, on options for the timely resolution of all historic claims of abuse by 31 December 2020 and to address the backlog of claims that had developed over time. In consultation with the Attorney-General, Hon Bennett approved further development of the preferred option, the Two Path Approach, and asked the Ministry to come back to her with the costs of implementation. In response to the report back Hon Bennett considered a Budget 2014 bid of \$26 million, but requested that the bid be delayed for 12 months.

The Two Path Approach offers claimants a choice and will speed up the resolution of claims to reach the goal of clearance by 2020

- 30 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 approach requires only a brief assessment of the claim and therefore a much 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.
- 31 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. The Two Path Approach therefore balances the significantly faster resolution of claims with maintaining the personalised service of the current historic claims process for those claimants for whom this is important.
- 32 The Ministry has been working with Cooper Legal since October 2013 to implement the Two Path Approach for its clients. The Ministry is still negotiating with Cooper Legal on an approach to implement the Two Path Approach for its clients. The Ministry has been proceeding to implement the Two Path Approach for the remaining 410 direct non-represented claimants. The Ministry anticipates making offers to these claimants early in 2015, if the bringing forward of the funding is approved. The total additional funding required to make these offers is \$7.5 million.
- 33 An additional \$1.2 million is proposed to be brought forward to 2014/15 so that if we reach a point where offers can also be made to a small number of Cooper Legal's clients in the backlog group before 30 June 2015.
- 34 Not relevant to request

Not relevant to request

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Financial implications: earlier resolution means the funding needs to be drawn down sooner

- 36 As noted above, Budget 2013 provided \$4 million per year to 30 June 2017 and \$4 million per year thereafter to enable settlement payments to be made to 100 claims each year. In February 2014 Hon Bennett considered a Budget 2014 bid of \$26 million to implement the Two Path Approach, but requested that the bid be delayed for 12 months.
- 37 If it is possible to bring forward \$12 million of already appropriated funding, the Ministry can now anticipate settlement offers being made to at least 520 claims in the 2014/15 year. The Ministry can also meet the costs of the High Court action which will fall within the 2014/15 year without needing to seek further funding.
- 38 To ensure funding is available to settle the remaining 500 backlogged claims and the ongoing cost of resolving remaining claims from 2015/16 to 2020/21 it is recommended that \$14 million be brought forward into 2015/16 from outyear funding 2020/21 to 2026/27.
- 39 Treasury and Crown Law have been consulted in preparation of the Cabinet paper. They endorse the Two Path Approach as a means of effectively addressing historic claims, and Treasury supports the proposed bring forward of funding to enable settlement of the claims.
- 40 If you agree, I recommend you take the attached paper to Cabinet State Sector Reform and Expenditure Control Committee for approval.

Not relevant to request

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