

**Under** The Inquiries Act 2013  
**In the matter** of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions

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**Brief of Evidence of Linda Ljubica Hrstich-Meyer for the Ministry of Social Development–Redress**

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<b>1</b>	<b>Introduction .....</b>	<b>3</b>
<b>2</b>	<b>Overview .....</b>	<b>3</b>
	2007 – 2013: Development and implementation of the Historic Claims Process.....	3
	The development of the Historic Claims Process through to 2018 .....	3
	The Ministry’s current approach to Historic Abuse Claims – November 2018 onwards.....	5
<b>3</b>	<b>2007 - 2013: Establishing the Historic Claims Process .....</b>	<b>5</b>
	The establishment of an alternative dispute resolution process .....	5
	Description of the Historic Claims Process.....	6
	Approach to working with other agencies .....	14
<b>4</b>	<b>Access to personal information.....</b>	<b>16</b>
<b>5</b>	<b>Development of the Historic Claims Process through to 2018.....</b>	<b>20</b>
	Review of MSD Processes .....	20
	The Two Path Approach .....	21
	KPMG Report: Lessons from the Two Path Approach .....	23
	Waitangi Tribunal claims suspend development of updates to the claim assessment process .....	24
	Consultation .....	25
<b>6</b>	<b>The current process for historic abuse claims – November 2018 onwards .....</b>	<b>27</b>

## **1 Introduction**

- 1.1 My full name is Linda Ljubica Hrstich-Meyer.
- 1.2 I am the General Manager (previously Director) of Historic Claims at the Ministry of Social Development (**Ministry**). I have held that position since 2017. I have been employed by the Ministry in various roles for over 20 years.
- 1.3 In my role as General Manager of Historic Claims, I am responsible for the strategic oversight and management of the Ministry's claims resolution work, being the assessment and resolution of claims of abuse and neglect of children and young people while in the care of the Ministry (or its predecessors) prior to 1 April 2017.
- 1.4 I was not involved in all of the events referred to in this brief of evidence, and have at times relied on the relevant material held by the Ministry.

## **2 Overview**

- 2.1 The Ministry has provided its evidence across two witnesses. I will discuss the evolution of the Ministry's current processes for assessing historic claims, which was developed from 2007, shortly after the Ministry became responsible for claims relating to abuse while in child welfare care and subsequent work began around exploring options for an out of court settlement process. My colleague Simon MacPherson will discuss events prior to the current process, as well as some of the issues ancillary to the Ministry's assessment process. I have provided an overview of the matters I will discuss in this brief below, split across three key time periods.
- 2.2 The Historic Claims Team has been called other names at various stages in time such as the "Care Claims and Resolution" team and "Claims Resolution". In this brief I will simply refer to the team as the Historic Claims Team.

### **2007 – 2013: Development and implementation of the Historic Claims Process**

- 2.3 The Historic Claims Process is an out of court alternative dispute resolution which was developed and implemented by the Ministry across 2007 and 2008. It represented a significant change in the Ministry's approach to resolving claims of historical abuse by actively seeking to settle claims through an out of court process, rather than solely responding to claims that had been filed in court. This section focuses on describing the key elements of the Historic Claims Process developed from 2007 onwards, including processing requests for personal information from claimants.

### **The development of the Historic Claims Process through to 2018**

- 2.4 This section focuses on significant developments in the Historic Claims Process. The process was reviewed in 2009 by Sir Rodney Gallen and again in 2012 by a unit within the Ministry (the Centre for Social Research and Evaluation). These reviews were generally positive, though highlighted some areas in which the Ministry could make improvements.

- 2.5 Over time it became apparent that even though the Ministry was endeavouring to efficiently settle claims and avoid litigation that can be traumatic for claimants and onerous in terms of time and cost, it was still receiving claims faster than it could settle them. As the number of claims continued to increase, the Ministry found it increasingly difficult to respond to the claims in an effective and timely manner. In response, the Ministry began developing the Two Path Approach, eventually rolled out in May 2015. Claimants could choose which “path” they preferred. They could continue to have their claim assessed as they had been to date, or they could elect an abbreviated “fast track” process. On the “fast track” path, some elements of the claim would be less thoroughly examined in order to be able to make an offer of settlement more quickly. The Two Path Approach was intended to provide claimants with a meaningful alternative for faster resolution in a way that still addressed the underlying issues arising from their care experience. It was always intended to be a one-off mechanism for reducing the number of claims, to allow the Ministry to return to its usual process with a reduced number of claims to progress. At the time, forecasts had indicated the number of claims against the Ministry would begin dropping off by 2020<sup>1</sup>, which was part of the rationale for a one-off reduction of claims using this approach.
- 2.6 Although the Two Path Approach was effective at settling a large number of claims efficiently and achieving a more timely outcome for claimants, as time went on and the rate of receiving claims stayed steady it became apparent that the anticipated drop in claim numbers had been incorrectly forecasted. The Ministry began taking steps to incorporate lessons learned from the “fast track” path into its usual claim assessment process. This work was quite well progressed when, in 2017, claims were filed in the Waitangi Tribunal relating to abuse in State care. Among other things, the claims alleged that the Ministry’s Historic Claims Process had insufficient regard to tikanga, te Tiriti o Waitangi, and the fact that Māori were significantly overrepresented among those in State care. The Ministry halted work on updating its process to incorporate the “fast track” elements discussed above. After considering the Waitangi Tribunal claims and deciding that the Ministry could and should do a better job of recognising the large number of Māori claimants seeking redress for historic abuse, the Ministry decided to undertake consultation with claimants, with a particular focus on Māori claimants.<sup>2</sup>
- 2.7 The Ministry was in the process of arranging this claimant consultation when the 2017 election resulted in a new government with a stated policy of shortly establishing the present Royal Commission of Inquiry. The Ministry briefly put the claimant consultation, and associated development of its historic abuse claims process, on hold while it considered whether the change of government necessitated a different approach. Eventually two rounds of consultation with claimants and professionals involved in this field of work were carried out, one with a particular focus on Māori claimants.<sup>3</sup>

<sup>1</sup> Ministry of Social Development *The timely resolution of all historic claims of abuse by the end of 2020* (Report to the Minister for Social Development, 26 September 2013).

<sup>2</sup> Ministry for Social Development *Historic Claims update* (Report to the Minister for Social Development, 23 February 2018).

<sup>3</sup> Matahaere-Atariki and Douglas *Report on the Consultation Process on the Historic Claims Resolution Process with Māori Claimants* (Ministry of Social Development, 20 July 2018).

## The Ministry's current approach to Historic Abuse Claims – November 2018 onwards

- 2.8 All of this work, beginning with the development of the Two Path Approach through to claimant consultation, culminated in a new process for assessing historic abuse claims rolled out from 1 November 2018. The Ministry made changes to the actual process for assessing claims, significantly increased the capacity and diversity of the Historic Claims Team, and put continuous improvement measures into place.

## 3 2007 - 2013: Establishing the Historic Claims Process

- 3.1 This section covers the development and implementation of the Ministry's Historic Claims Process from 2007, an overview of the structure and staffing of the Historic Claims Team, and a description of the process.

### The establishment of an alternative dispute resolution process

- 3.2 The Ministry began developing the Historic Claims Process in 2007. Around this time, approximately 150 historical child welfare claims had been filed.<sup>4</sup> The gross contingent liability for the filed claims was approximately \$100 million.<sup>5</sup> By 31 December 2007, this number had jumped to over 220 claims filed in the High Court.<sup>6</sup>
- 3.3 Although 2014 marks the point at the Historic Claims Process was documented in formal practice guidance<sup>7</sup>, this recorded the existing practices of the team which had been in development since 2007 was fully implemented from 2008. Initially, the focus of the Historic Claims Process was on establishing an out of court process for the filed claims. It was around this period that that Historic Claims began to receive claims directly from claimants who did not have a claim filed in court, nor a legal representative.
- 3.4 In 2007 the Chief Executive publicly stated that he would “ensure that each and every one of the individuals involved is treated with dignity and respect. They will be listened to.”<sup>8</sup> The Historic Claims Process aimed to recognise this commitment by establishing a more client-centred, principled approach to addressing claims, whether or not they were filed in court. This allowed the Ministry to address claims and claimants' needs more broadly and to fully consider their grievances.
- 3.5 The process consisted of a meeting with claimants to hear their concerns, an assessment of claims to determine the facts where possible, a further meeting to provide a response and then seeking agreement on a way forward to resolve

<sup>4</sup> Ministry of Social Development *Management of Child Welfare Historical Claims* (Report to the Associate Minister for Social Development and Employment, 4 May 2007).

<sup>5</sup> Ministry of Social Development *Management of Child Welfare Historical Claims* (Report to the Associate Minister for Social Development and Employment, 4 May 2007).

<sup>6</sup> Cabinet Policy Committee “Review of the Litigation Strategy for Historic Claims of Abuse” (16 May 2008) POL (08) 98.

<sup>7</sup> Ministry of Social Development *Historic Claims Policy and Practice Handbook* (10 June 2014).

<sup>8</sup> Ministry of Social Development Historic Claims Press Release, 9 May 2007.

the claims. This approach largely remained the same from 2008 until 2018, with the exception of the Two Path Approach. The process is detailed further below.

### Description of the Historic Claims Process

#### *Philosophy of process*

- 3.6 The Historic Claims Process is an alternative dispute resolution process aimed at providing an opportunity for claimants to have their concerns heard, and for the Ministry to acknowledge any harm or failure that occurred to that person to assist their efforts to heal. Irrespective of whether a claimant elects to file proceedings in court, gain representation or engage directly with the Ministry, the approach to assessing claims under the Historic Claims Process is underpinned by the same principles (though the process may be different in some respects).
- 3.7 In 2014, at the point that the Historic Claims Process was documented, the principles underpinning the Historic Claims Process included:<sup>9</sup>
- (a) natural justice;
  - (b) taking a moral rather than a legalistic approach;
  - (c) looking beyond legal defences and the courts' view of causation when deciding whether to make a settlement;
  - (d) working with claimants to acknowledge wrongdoing; and
  - (e) focussing on facts and acting on what was probable and credible.
- 3.8 The Ministry recognises that it has two main defences to claims available to it being the limitation defence in the Limitation Act 1950 and the bar in the accident compensation statutes. The combined effect of these provisions is that most claims do not have strong prospects of success in the courts. However, for the purposes of the Historic Claims Process, the Ministry has committed to doing what is right for claimants and puts these defences to one side and will consider the alleged events without these barriers in place. The Ministry's payments to claimants are generally based on a moral responsibility, rather than a legal liability.
- 3.9 A claimant who has received an ACC payment in relation to sexual abuse is not precluded from registering a claim with the Ministry; each agency holding a different function.
- 3.10 Claimants are free to pursue their claim directly through court without engaging in the Historic Claims Process. Court proceedings provide an option for claimants seeking factual findings about allegations of abuse, though can have disadvantages for claimants who may find this process traumatic and be challenged during court proceedings about abuse they have been subjected to.
- 3.11 Below I set out the key steps in the process that have existed since the implementation of the Historic Claims Process. Although the process has

<sup>9</sup> Ministry of Social Development *Historic Claims Policy and Practice Handbook* (10 June 2014).

continued to evolve, the same broad structure has been in place since 2008 and continues at present (albeit with some significant changes introduced in November 2018).

*Registering a claim and meeting with claimant*

- 3.12 The process for registering a claim has remained largely consistent since the commencement of the Historic Claims Process. Claimants can register a claim in several ways; by contacting the Historic Claims team directly (by phone, email or letter), by a solicitor contacting the Ministry on their behalf or by filing court proceedings.
- 3.13 Once a claim is registered, the next step is to gather the details of the claimant's experience in care. This meeting, typically face-to-face, is central to the process, providing the opportunity for claimants to share their experience and the impact it has had on them, and for the Ministry to listen to the claimant's account and gather the necessary details about the claim to enable it to be assessed.
- 3.14 Historic claims staff regularly travel to meet with claimants close to their home. For safety reasons and to preserve privacy, meetings do not occur in claimants' homes. Efforts are made to ensure that the venue is as comfortable as possible for the claimant, given the sensitive nature of the discussion. Staff will travel to prisons to meet with claimants who are currently in the care of the Department of Corrections. Although usually not the preferred option, where claimants are unable to meet in person, phone and video conference facilities can be used. This ensures that where safety concerns exist for staff in meeting with a claimant, the claimant still has the opportunity to engage with the claims process.
- 3.15 Meetings are always attended by two Historic Claims staff members, and claimants are encouraged to bring one or more support people. Staff are mindful of the significance of this conversation, which at times will be the first time that a person has shared their experience. The interview is not forensic in nature, but rather aims to ensure that claimants can share their story at a pace and level of detail which feels comfortable and allows staff to gather sufficient information to enable a claim to be assessed.
- 3.16 Originally claimants were invited to take part in these initial meetings with historic claims staff regardless of whether they were legally represented or not. In 2012, the Ministry agreed with Cooper Legal that it would not meet with Cooper Legal clients unless it was expressly requested.<sup>10</sup> The intention was to reduce duplication for claimants who had already been interviewed by their own lawyer, and speed up the process by removing this step. In such circumstances the Ministry would base its assessment on the claim as set out in written documentation provided by their lawyer. Today, all claimants, regardless of whether they are direct or represented, are invited to meet with Ministry staff to share their experience. It remains the claimant's choice as to whether they elect to meet with representatives of the Ministry or whether they prefer all communication to be managed via their representative.

<sup>10</sup> Affidavit of Carolyn Risk filed in Judicial Review of Two Path Approach (*XY v Attorney General* [2016] NZHC 1196), dated 27 November 2015.

### *Supports*

- 3.17 Understanding and responding to claimants' support needs has been a constant component of the Historic Claims Process. Historic Claims assists claimants to access counselling and link them in with other services where necessary, such as Work and Income. Where ACC or community support options are not appropriate for the claimant to access, Historic Claims will fund counselling or therapy costs for a specific number of sessions. This funding support does not rely on a claim having been assessed.
- 3.18 Enhancing support options for claimants is an area which received significant focus in the changes made to the Historic Claims Process in 2018.

### *Supporting claimants with disabilities through the claims process*

- 3.19 Claimants' particular needs and circumstances, including disabilities, are responded to on an individual basis. Historic Claims referral process includes capturing details of any disabilities shared by the claimant.
- 3.20 When claimants meet with Historic Claims staff to share the details of their claim, staff work with the claimant to ensure that this meeting is held with appropriate people present who know the claimant and can assess their comfort level, as well as building in additional time for meetings so that the discussion can proceed at a pace suited to the claimant. While this is not exclusive to those with disabilities, particular care and consideration is placed on this in these circumstances.
- 3.21 Information and advice is also sought to ensure that access for meetings is suitable for those with physical disabilities (ie ensuring wheelchair access at meeting venues), and that supports are in place for those with impaired vision or hearing.
- 3.22 Depending on the circumstances of the claimant, Historic Claims will encourage claimants to engage independent advocacy support to assist them.

### *Release of information*

- 3.23 The provision of claimants' social work files is a critical element of the Historic Claims Process. Obtaining their personal files assists claimants in understanding their care journey. Claimants are advised of their right to access information about their time in care early in the claim process though can access this at any stage of the claims process.

### *Assessment of claim*

- 3.24 Once the Ministry has obtained the relevant information and met with the claimant (if that has occurred), the next step is to assess the allegations made in the claim. Those allegations that the Ministry accepts for the purpose of the claim are factored into the settlement payment offered as part of the outcome.
- 3.25 Previously, in determining whether a particular allegation was able to be taken into account in the outcome of a claim, the Ministry needed to have a reasonable belief that the event occurred and that it was reasonable for the Ministry to take responsibility for it.



- 3.26 Consideration of the information gathered from the following sources assists staff in determining what information there is to support particular allegations:
- (a) the reported experience of the claimant;
  - (b) written records about the claimant (eg the claimant's personal and family files);
  - (c) staff/HR files/caregiver records of any staff member/caregiver implicated in the claim;
  - (d) Other relevant claims (ie where another claimant has made allegations against the same alleged perpetrator); and
  - (e) any relevant information about the institutions or care facilities involved.
- 3.27 As well as considering the specific allegations raised by the claimant about their time in care, the Ministry also considers any failures in the provision of care to the claimant. The Ministry recognises that claimants will not necessarily have an understanding about the standard of care they should expect to have received, and so assesses the general social work practice of the case regardless of whether the issue has been raised by the claimant. The focus for this part of the claim has generally been on social work practice that has adversely impacted on the claimant's care experience. Where appropriate, any failures not raised as concerns by the claimant will be acknowledged in the outcome of a claim. In determining whether practice standards of the day were met, the assessment focusses on care legislation, handbooks and policy relevant to the time the claimant was in care.
- 3.28 In the early stages of Historic Claims Process, the practice was to make efforts to speak with alleged perpetrators of abuse. This has evolved over time, and is not part of current practice under the Ministry's process. There are logistical issues with an approach which requires alleged perpetrators be spoken with. With some claims reaching back as far as the 1950s, staff from this period are largely deceased. Even in later years, many alleged perpetrators are likely to be elderly, infirm or deceased. The complexities of managing a process which relies on speaking with elderly ex-staff and caregivers are significant. Further, there are practical issues in approaching ex-staff or caregivers, as the Ministry does not typically have contact details for ex-staff and caregivers, nor necessarily the right to establish contact details for alleged perpetrators for this purpose.
- 3.29 A process which requires this level of investigation has a significant consequence in the increased time it would take to settle claims. This is an example of the complexities which the Ministry has needed to balance when developing its redress process. For those claimants who are seeking factual findings about allegations of abuse, court proceedings provide this option.
- 3.30 The process for assessment of a claim is the same whether a claimant is represented or not. In the early stages of the Historic Claims Process, filed claims were managed by the Ministry's legal team, with social work practice reviews prepared by Historic Claims social work staff. This changed around 2014, when the legal team began to base its advice on an assessment prepared by the Historic Claims team. Unfiled claims have largely been driven by the

Historic Claims team, with the legal team providing advice in relation to liability issues and quantum, or when a particular issue requires specialist legal advice.

- 3.31 Claims have generally been assessed in the order that they have been received, with the Ministry prioritising claims in some circumstances (ie when the claimant has a terminal illness). Further, there have been claims prioritised with the agreement of their lawyer. In 2013, the Ministry set out a policy on prioritisation of claims, which noted that for each claim represented by Cooper Legal that is allocated for assessment, one direct claim would be allocated. In January 2018, the Ministry discontinued this policy after recognising that it unfairly impacted represented claimants. Claims were then allocated in order of when they had been received (with the continued ability to give priority in a small number of circumstances such as terminal illness).
- 3.32 This assessment process was comprehensive, detailed and time consuming. Once the assessment process commenced, an assessment would take an average of four to six weeks of fulltime work by one staff member to complete. Efforts to shorten the assessment period resulted in the development of the Two Path Approach and subsequent changes introduced in November 2018, both discussed later in this brief.
- 3.33 Where the Ministry identifies failures or decides it is reasonable to accept for the purpose of a claim that a claimant suffered abuse in State care that the Crown should take responsibility for, the claimant is offered a financial payment and an apology. Historic Claims staff take the opportunity to acknowledge the experience of the claimant, and the apology is provided by the Chief Executive in writing.

#### *Quantum*

- 3.34 Acknowledging a person's experience in care through a monetary payment is challenging. Initially the Ministry sought Crown Law advice on quantum of settlement offers on a case by case basis. Crown Law assessed quantum based on what facts would likely be established if the matter was decided by a court. Crown Law considered earlier settlement offers made by Child, Youth and Family, ACC lump sum payments and exemplary damages awarded by the courts as well as international case law. Assessments also contained consideration of whether statutory defences contained in Accident Compensation and Limitation statutes could be made out in relation to all or part of the claim and factored this into the amount of damages that might be expected if the claim was successful. Over time the Claims Team developed a database of assessments covering a range of claims and allegations of different severity.
- 3.35 As the Claims Team adapted its process and moved away from a full assessment model it has used this database of assessments to keep settlement payments consistent by comparing like claims with like to ensure payments are similar. Although every person's experience is unique, this enables the Ministry to make payments that are broadly fair and consistent over time.
- 3.36 Up until November 2018, when Historic Claims implemented a new operating model, payments were reached by use of comparator cases for claims assessed under the Ministry's full assessment model. This involved reviewing several (typically between three and five) cases of a similar nature and determining a payment amount based on these similar claims.

- 3.37 Under the Two Path Approach, the Ministry assessed the key elements of the claim that then enabled it to be placed into one of six payment categories developed for the fast track option. The payment categories were \$5,000, \$12,000, \$20,000, \$30,000, \$40,000 and \$50,000. Where the details of a claim were such that a payment higher than \$50,000 may have been warranted a full assessment was carried out. When a full assessment was carried out, the payment would be reached using the comparator model as described above.
- 3.38 As part of the implementation of the Ministry's new process, the Ministry has developed payment categories based on payments it has made in previous claims.
- 3.39 As the number of claims assessed by the Ministry grew larger it became necessary to develop payment categories so staff could compare new claims with previous assessments more quickly. These categories were arrived at by grouping earlier case assessments together based on the severity of allegations. See the below table showing the full range of the category band, as well as the percentage of claims that fall within each band), and an example of a claim that would fall within each category. The percentages reflect payments of that value made over time and are not based on any budgetary constraint.

<b>Payment category</b>	<b>An example of a claim that would fall within this category</b>
Category 7 Above \$55k (1.5 per cent of all claims)	This category is available to use for those claims which have the nature of abuse noted in a category 6 claim, with clear aggravating factors which are exceptional in nature.
Category 6 \$50K (\$46K- \$55K) (3 per cent of all claims)	During a care experience of eight years, the claimant was raped on multiple occasions by three different Ministry caregivers, and subjected to multiple instances of being punched and kicked by several Ministry caregivers during his care journey. On one occasion, one of these caregivers broke the claimant's arm. This caregiver had not been assessed according to policy, and information about them was known to the Ministry which would see them as being unsuitable to provide care. On numerous occasions, staff were made aware that this claimant was unsafe and failed to adequately respond. The monitoring of this claimant's case was inadequate, including him not being visited for lengthy periods during his care journey, which contributed to the claimant remaining in an unsafe environment over a number of years.
Category 5 \$40K (\$36K - \$45K) (6 per cent of all claims)	The claimant was raped and severely beaten on two occasions by a staff member while in residence. The claimant disclosed to several people (including his social worker) what had happened, and no action was taken. This claimant had multiple placements over a six year period in the care system, and was subjected to hitting, punching, kicking for prolonged periods by both residential staff members and Family Home caregivers at four of these placements. On one occasion, the claimant was so severely beaten that he lost consciousness. A review of his records showed considerable failings in the planning and monitoring of his case, which was found to have contributed to this claimant remaining unsafe.
Category 4 \$30K (\$26K - \$35K) (12 per cent of all claims)	The claimant was fondled and forced to masturbate a Ministry caregiver on several occasions over a two year placement. During this placement, the claimant was not visited according to policy, including having the opportunity to speak on his own to his social worker. The claimant was also subjected to two instances of being punched in the face by a staff member while in residence, which resulted in the claimant suffering injuries including a broken nose. During a period of eight years in the care system, inadequate arrangements were made for the claimant to maintain and strengthen relationships with his whānau.
Category 3 \$20K (\$16K - \$25K)	The claimant was subjected to regular physical abuse (hitting and kicking) by a Ministry caregiver over a two year placement. During a

(31 per cent of all claims)	respite care weekend, the respite caregiver touched the claimant's breasts and bottom over her clothes. Upon disclosing this assault to her social worker, no action was taken. This claimant was involved with the Ministry for a five year period, and a failure was found in the absence of planning in her case.
Category 2 \$10K (\$6K – 15K) (31 per cent of all claims)	The claimant was kicked up the bottom by a staff member on two occasions, and threatened with further violence if he disclosed this. Prior to coming into care, the claimant's home circumstances had not been adequately assessed, and two specific allegations of abuse had not been adequately followed up, leading to the claimant remaining at home when information reported to the Ministry indicated it was unsafe.
Category 1 \$3K (\$1K – 5K) (15 per cent of all claims)	The claimant was not visited according to policy for a six month placement and case note recording of the claimant's time in care was inadequate.

- 3.40 Payments can be placed lower or higher within a band depending on factors such as the severity and frequency of abuse, or particular circumstances or vulnerabilities of the child into account (such as being pre-verbal or having a serious disability).
- 3.41 Where potential Bill of Rights Act breaches are identified, the Ministry considers whether this warrants further increase to quantum.
- 3.42 Payment recommendations go through a sign off process which includes Historic Claims senior management endorsement before being approved by the Deputy Chief Executive of the business unit that Historic Claims sits within.
- 3.43 To date, the Ministry's payments have ranged from \$1,000 to \$90,000 with the most common payments sitting in the \$10,000 to \$25,000 range. The average payment is approximately \$20,000.
- 3.44 While the method of how payments are reached has evolved, the principles of ensuring fairness and consistency across claims remains the same. This is irrespective of whether a claim is direct or represented.

#### *Feedback*

- 3.45 Following the assessment of a claim, Historic Claims staff meet with each claimant to provide feedback on the outcome of their claim. As with the initial meeting, this discussion is essential in the Ministry's response to a claim. This discussion provides the claimant an opportunity to develop their understanding of their time in care by discussing information held within records. Claimants are often provided with a timeline of their involvement with the state and receive answers about particular questions they may have had about their care experience. This is also an opportunity for the Ministry to acknowledge the claimant's experience and formally advise of the outcome of the claim for them to consider.
- 3.46 For those that are legally represented, generally feedback meetings have not taken place. Rather, the Ministry has responded in writing to the claimant from Crown Law or the Ministry's legal team via the claimant's representative. A detailed letter is provided which responds to the allegations made. The Ministry does offer represented claimants the opportunity to meet in person to discuss their claim should they choose. This is being actively encouraged under the Ministry's new process implemented in November 2018.

### *Outcomes*

- 3.47 As at 31 October 2019, the Ministry had closed 1677 claims with either a settlement payment, ex gratia payment or recommendation for no payment<sup>11</sup>. Of this number 91 per cent of claims have been settled with either a settlement or ex gratia payment to acknowledge their claim. Nine per cent have been closed with a decision for no payment to be made, which may occur when the assessment concludes that the Ministry is not the responsible agency to respond to the abuse a person has been subjected to, or that there is insufficient information to support the claim.
- 3.48 Claimants are not compelled to make a quick decision in relation to the Ministry's offer and are encouraged to take time to consider their position. If the claimant is not satisfied with the outcome, Historic Claims staff will outline the claimant's options which may include an internal review of their claim, seeking legal advice or approaching the Ombudsman.
- 3.49 Historically the majority of payments made to direct claimants have been done so on an ex gratia basis. Ex gratia payments were made where the Ministry considered abuse or neglect occurred and the Ministry accepted a moral duty to address the claim, but did not consider it gave rise to liability. Such payments were sometimes made conditional on full and final settlement of the claim.
- 3.50 Some exceptions to this existed; payments over \$30,000 were resolved by way of settlement, as were some cases where other claims about a particular provider were proceeding through court.
- 3.51 Although some early claims from legally represented claimants were settled by way of ex gratia payment, by in large these claimants have been asked to sign full and final settlement documentation due to the nature of their proceedings.
- 3.52 Under the Ministry's new process, all claims are settled by way of a settlement agreement which is full and final.

### *Contribution to Legal costs*

- 3.53 The Ministry's position on payment of legal fees for direct claimants has evolved over time to offer all claimants a contribution to the costs of obtaining legal advice on the terms of the offer.
- 3.54 In approximately 2011 the Ministry and the Ministry of Justice entered into an arrangement where the Ministry of Justice will invoice the Ministry for two thirds of the legal aid debt and the Ministry of Justice writes off the remaining third of the debt.<sup>12</sup> Likewise, for represented claimants who are not eligible for legal aid, the Ministry pays reasonable legal costs. This enables the claimant to retain their full settlement payment, without needing to allocate a portion of their settlement to legal costs.

<sup>11</sup> Internal Historic Claims data provided by Principal Analyst.

<sup>12</sup> Letter from the Legal Service Commissioner to the General Manager of Client Advocacy and Review at the Ministry of Social Development, "Resolution of Historic Abuse Claims" 28 October 2011.

## Approach to working with other agencies

### *Ministry of Education (MOE) and Ministry of Health (MOH)*

- 3.55 Where a person was in State care and their claim related in part to concerns about a MOE facility (ie a Special Residential School), Historic Claims works collaboratively with MOE to determine the most appropriate response for that individual case and its circumstances. Individual consideration of each claim is required, given that in different cases there may be a different responsibility that each agency had to the claimant. For example, a child may have been under the care of Social Welfare, while attending a Special Residential School. The nature of the claim will impact on the degree of responsibility that each agency had for the child, for the purpose of settling a claim. Claims may be managed by seeking input from MOE as to the relevant part of the claim, or by transferring the relevant part of the claim to MOE to respond to. Separate or joint offers may be made, and claimants may be offered apologies for both agency.
- 3.56 Some early claims which related in part to concerns about a MOH facility had already had the health component settled before the welfare component of their claim was assessed. Claims received in relation to a health facility are not assessed by the Ministry but are referred to MOH to respond to.

### *Non-Government Organisations (NGOs)*

- 3.57 Similarly, where a person was in State care and their claim related in part to concerns about an operating NGO contracted by the state to provide care, individual consideration is given to the most appropriate means of responding to the claim (eg whether solely by the Ministry, or jointly with the NGO).
- 3.58 Where the NGO is no longer operating and the Ministry had responsibility for the care of the child or young person at the time of the placement, the Ministry will usually assess and take into account any allegation of abuse that took place for the purposes of making a settlement offer. This ensures that a claimant is not disadvantaged just because an NGO is no longer operating.
- 3.59 In October 2018, the Ministry formalised its practice of engaging with operating NGOs. This includes the NGO providing relevant information to the Ministry to support the assessment of a claim, and consulting on the outcomes reached. Consideration is also given to what role the NGO may have in the claimant feedback meeting and apology process. Prior to this, NGOs were not always advised of the allegations made about the care they had provided in the past.
- 3.60 The Ministry recognises the importance of assisting providers in the context of historic claims, and where possible allowing claimants to settle claims via one avenue. When providers are implicated in historic claims, the Ministry can typically assess these as part of the ADR process. However, there are complexities in determining legal liability in these circumstances, which is one of the reasons that the individual circumstances of a case need to be considered. This complex area raises legal questions that have not been dealt with by the courts.

*Faith-based organisations*

- 3.61 The Ministry has received a small number of claims which relate in part to events which occurred in Faith-based institutional residential care. Although the management of each claim is addressed on a case by case basis, it has been the general practice that where a part of a claim relates to a faith-based service which has its own redress system (eg the Catholic Church), then this aspect of the claim will be referred to that agency to be addressed.

*Oranga Tamariki – Ministry for Children*

- 3.62 In 2019, the Minister for Social Development and the Minister for Children agreed to the Ministry being responsible for managing claims or abuse and neglect in State care for the period up to 1 April 2017. Oranga Tamariki are responsible for managing claims from 1 April 2017 onwards.<sup>13</sup> Previously, the Ministry had been responsible for claims up until 31 December 2007.
- 3.63 Where a claimant's concerns relate to both time periods that the Ministry and Oranga Tamariki are responsible for, these are managed on a case by case basis, with both agency working to ensure that the process is as simple as possible for the claimant.

*Structure and staffing of the Historic Claims Team*

- 3.64 The staffing structure has naturally grown to align with the development of Historic Claims. The structure has been adapted over time to meet the needs of the differing processes developed at various stages, with efforts made to increase staff as well as establishing new initiatives (eg Two Path Approach) to respond to increasing numbers of claims.
- 3.65 On 21 July 2004 the Executive Committee of CYF approved the establishment of a "Historic Claims Team" to manage civil claims that were anticipated to be filed against the department. It was to be part of the Legal Services team, with the Chief Social Worker (CSW) being the instructing client.<sup>14</sup> The Historic Claims Team was effectively a continuation of the team that had been established to address the Salvation Army complaints (discussed in Mr MacPherson's evidence), with an expansion of its role to include all civil claims of historical abuse against CYF.<sup>15</sup> This indication of future work, prompted by Cooper Legal making a number of information requests<sup>16</sup>, led the Ministry to employ four casual information officers during this period in order to respond to this increasing demand.

<sup>13</sup> Ministry of Social Development *Questions and Answers – Transferring responsibility of claims from Oranga Tamariki to the Ministry of Social Development's Historic Claims Team* (online information sheet: <https://www.msd.govt.nz/documents/about-msd-and-our-work/work-programmes/historic-claims/qas-transfer-of-management-of-claims-to-msd.pdf>).

<sup>14</sup> Ministry of Social Development *Historical Claims: Options for Resolution* (Report to the Associate Minister for Social Development, 29 September 2006).

<sup>15</sup> Ministry of Social Development *Historical Claims: Options for Resolution* (Report to the Associate Minister for Social Development, 29 September 2006).

<sup>16</sup> Child, Youth and Family *Historic Claims Team – Update, Policy Developments and 2005/06 Fiscal Year (F06) Resourcing* (Submission to Executive Committee, 20 April 2005).

- 3.66 During 2005, two additional staff were appointed to assist with the project work; one FTE Senior Social Work Adviser and a FTE team administrator.<sup>17</sup>
- 3.67 In 2006, CYF merged with the Ministry, and the existing team in place were transferred to the Ministry as part of this merger. Ms Cooper advised of a potential 600 claims by the end of December 2006. The Ministry responded by increasing staff, predominantly within the legal team, which is reflective of the continued litigation focus at this point.
- 3.68 Between 2007 and 2009, the number of Senior Social Work Advisors increased to five FTEs to assist with the increasing number of claims.
- 3.69 Between 2012 and 2014, a significant shift occurred to confirm permanent positions and to appoint an increased number of staff, bringing the number of Senior Social Work Advisors to eight FTEs. It was during this period that funding was brought forward for the Two Path Approach, with a goal to complete all claims by 2020 in light of forecasting carried out in 2013. A project team of contract staff were appointed on a short term basis to complete the work associated with the Two Path Approach, with management and support from permanent Historic Claims staff.
- 3.70 During a similar time period (2013 – 2014) the responsibility for responding to information requests sat with CYF. In 2014, this transferred to Historic Claims, initially managed as a task force before steadily growing its capacity on a permanent basis with both information request staff and Discovery staff appointed. By 2018, 15 staff were employed for the purpose of responding to information and Discovery requests.
- 3.71 Between 2014 and 2016, the Contemporary Claims Team was established to manage claims that fell between 1993 and 2007. Contemporary claims (defined as all claims with allegations of abuse occurring between 1 January 1993 and 31 December 2007) were responded to by this team. A further five FTE Senior Social Work Advisors were appointed during this time, predominantly to work in this new team, that worked alongside the Historic Claims Team. In 2017, the Contemporary Claims Team and Historic Claims Team merged and all Senior Social Work Advisors worked on claims based on a date order approach as opposed to separating out claims with historic and contemporary time frames.
- 3.72 In 2018, the structure of Historic Claims substantially changed. This occurred following the 2018 consultation period, to ensure that the new operating model was supported by a change in staff structure. When at full complement, this structure includes 40 Claims Assessors and 20 Claimant Support Specialists, 16 Information Coordinators (who are responsible for responding to claimants' information requests) and an administrative team of 14. These staff are supported by a management structure of team leaders and senior Managers. The structural changes also resulted in the appointment of a range of roles designed to support the ongoing development of Historic Claims.

## **4 Access to personal information**

- 4.1 Since the establishment of the Historic Claims team, the team has had a dedicated workforce that has responded to and processed information requests

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<sup>17</sup> Data has been sourced from the Ministry's Human Resources department.



from claimants or lawyers for their social work files. Nearly all clients of Cooper Legal will request a copy of their files and a significant proportion of direct claimants do as well.

- 4.2 As at 31 October 2019, the Ministry has provided information for 3925 claimants. These are made up of 1261 releases to direct claimants and 2664 releases to their lawyer or a third party.<sup>18</sup>
- 4.3 Numbers of requests for information remain high. In the year from January 2019 to December 2019, the Ministry received 663 requests. A small number of these requests (approximately 80) were for non-social welfare records (eg audio recording of their interview with Historic Claims staff).
- 4.4 On average, a claimant's social work files will contain approximately 1000 pages that needs to be considered for any release.<sup>19</sup> For claimants in care prior to the early 1990s, their files will be paper based only. For claimants in care after this, their files will be a mix of paper and electronic files.
- 4.5 The Ministry views information releases as an important part of the Historic Claims Process. For many claimants, their files help them understand their time in care and will answer important questions, such as how they came to be in care. Though valuable for many claimants, it can be distressing for some claimants to read documentation about their time in care. The Historic Claims Process does not require claimants to read their files in order to register a claim if they do not wish to. Historic Claims undertakes to support claimants to read their files if they wish (eg by linking them in with a counsellor to support them through this process, or by answering questions a claimant may have about the content of their files).
- 4.6 For information requests that come from claimants' lawyers, the Ministry understands claimants' files assist their lawyers with formulating their claim. However, to clarify, a claimant does not need a copy of their files to make a claim. What is important is that they have the opportunity to share their memories and concerns with the Ministry.
- 4.7 Information requests are appropriately redacted in accordance with the provisions under the Privacy Act 1993 and the Official Information Act 1982 (where applicable). There have been various challenges to the Ministry's processes around information requests over the years. Some of the challenges that the Ministry faces in carrying out information requests are unique to social welfare claims:

*Balancing privacy interests or Crown interests against a claimant's request for their whole unredacted files*

- 4.8 The Ministry is very conscious of its obligations under the Privacy Act and the Official Information Act. It is prevented from disclosing information that would involve the unwarranted disclosure of the affairs of other individuals.
- 4.9 This has been challenging as social work files in the past were typically structured around the whole family unit. Throughout 'family files' and even in

<sup>18</sup> Information prepared by Manager Administration and Information Coordination for the Royal Commission's 20 request.

<sup>19</sup> This is based on pages reviewed by the Information Coordination in 2019.

'personal files',<sup>20</sup> the claimant's information will be interwoven with personal information belonging to their siblings and parents. From time to time, there may also be personal information included about other residents that shared a placement with that claimant. Some of this information about others can be highly sensitive (such as medical information or prior history of sexual abuse). Given this information is peppered through the files, there are often a large number of redactions in files provided to claimants.

- 4.10 The Ministry also redacts for legal privilege, which the Ministry is required to withhold unless the Attorney-General approves the release. Legally privileged material is common in social work files given the legal processes underpinning the care system. Files will often include a range of legal advice.
- 4.11 There have been criticisms from claimants over the years, including in the recent 2018 consultation reports, that the Ministry 'blacks out' too much information. The consultation report from Donna Matahaere-Atariki noted that this can reinforce mistrust of government departments and reinforced the notion that information was being withheld from them.<sup>21</sup>

#### *Delays and legislative compliance*

- 4.12 Processing and redacting a claimant's social work files is a time intensive task – as noted claimants' files require review of an average of 1000 pages. Paper files are stored throughout New Zealand in secure storage facilities. Some files are also held by Archives New Zealand.
- 4.13 After files arrive and before they can be reviewed, they must be scanned manually to enable any relevant redactions to be made. A lot of the files (especially prior to 1980) are old and fragile, some with limited legibility. Often the files must be carefully scanned page by page; a time consuming process in itself.
- 4.14 When files have been scanned and are in electronic form, the allocated staff member reviews each file in its entirety to determine whether any material needs redaction. There are also quality assurance processes that take place before the files are released.
- 4.15 The large number of information requests, the extent of information to be considered and the time consuming process has over the years contributed to delays in providing information.
- 4.16 On 29 April 2015, 93 Cooper Legal claimants filed a claim in the Human Rights Review Tribunal alleging that the Ministry had breached Privacy Principle 6 of the Privacy Act by its delay to provide personal information. Some claimants had been waiting more than 12 months to receive their social work records.
- 4.17 The Ministry accepted that the delays were not acceptable, that claimants' rights had been breached, and made settlement payments to recognise these breaches throughout 2017.

<sup>20</sup> Social work files that focus on an individual child or young person.

<sup>21</sup> Matahaere-Atariki and Douglas *Report on the Consultation Process on the Historic Claims Resolution Process with Māori Claimants* (Ministry of Social Development, 20 July 2018).

- 4.18 After these proceedings, the Ministry undertook a number of initiatives to help ensure that it could provide timely responses to claimants' information requests going forward and comply with its statutory obligations. These included the following:
- (a) The Ministry engaged consultancy firm Allen + Clarke to undertake a review of its information request process<sup>22</sup>. A number of process improvements were implemented such as:
    - (i) setting timelines for responding to requests only after the size of the request has been fully scoped;
    - (ii) implementing a formal induction process for new employees;
    - (iii) updating process guides;
    - (iv) a review of letter templates; and
    - (v) changes to Quality Assurance processes to ensure that only senior team members were providing peer reviews.
  - (b) The Ministry also employed a taskforce of 20 staff from December 2017 to February 2018 to process the backlog of requests. These staff were all trained and had previous experience in processing social welfare information requests. This was highly effective in that it eliminated the 'backlog' so that the permanent team had a manageable number of requests to respond to.
  - (c) There was further recruitment for the permanent team with most team members being offered permanent employment agreements, retaining the experience and expertise within the team.
- 4.19 The Ministry recognises that 12 months is far too long for a claimant to receive their files. The current timeframes for information releases have reduced, and timeframes are actively monitored to ensure that when delays are anticipated, additional steps can be taken to prevent this where possible.

*Plans to continue to improve information releases for claimants*

- 4.20 The Ministry has also been exploring whether documents that have been redacted in accordance with the Act in the past could in fact be released. In late 2018, after the release of a clarifying High Court decision, the Historic Claims team changed its approach to the release of court documents and will now routinely release these. We are also considering with Crown Law as to whether there is a possibility of obtaining a waiver for some documents that would ordinarily attract legal privilege.
- 4.21 The Ministry has taken on board feedback from claimants arising from the 2018 consultation about their concerns around information releases and is committed to continuing to make improvements in this area, discussed further below.
- 4.22 A focus during 2019 has been to redraft the covering letters to claimants that enclose the files. The letter has been redesigned so that the information

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<sup>22</sup> Allen + Clarke *Review of Privacy Act Requests for the claims resolution function* (28 August 2017).

important to them is up front with a Frequently Asked Questions sheet attached with more detail which aims to better explain the reasons for redactions and assure claimants that all possible information has been provided to them. The language used is also a lot simpler.

- 4.23 Going forward, the Ministry will be exploring what assistance could be provided to claimants to read and understand their files.

## 5 Development of the Historic Claims Process through to 2018

- 5.1 This section covers:

- (a) two reviews of the Historic Claims Process in 2009 and 2012 respectively;
- (b) the Ministry's adoption of the Two Path Approach; and
- (c) work undertaken to reform the Historic Claims Process based on learnings from the implementation of the Two Path Approach and feedback from claimant consultation, with a focus on Māori claimants.

### Review of MSD Processes<sup>23</sup>

*2009: Review by Sir Rodney Gallen "Assessment of MSD Processes on Historic Claims"*

- 5.2 In 2009 the Ministry asked Sir Rodney Gallen, reviewer and assessor of the Lake Alice psychiatric claims, to undertake a review of the Historic Claims process. Sir Rodney reviewed and made comment on eight files as case studies, making specific comments and/or criticisms of the Ministry's processes and policies followed by the Ministry is assessing claims.<sup>24</sup> He also considered the obligations of staff who assessed each claim as to its prospects for settlement outside of court; the general concern of delays; legal advice; and the disposal of outstanding claims.

- 5.3 While Sir Rodney made specific comments of the process adopted in the specific case studies, his overall assessment of the Ministry's process was positive. He found that the Ministry operated "with a degree of sensitivity, which is commendable, and with sympathy for the complainants"<sup>25</sup>. He also noted that the Historic Claims Process offered settlement where the Crown was not legally liable but held a moral obligation to the claimant.

### *Centre of Social Research and Evaluation*

- 5.4 In December 2012 the Centre of Social Research and Evaluation (a business unit within the Ministry) completed an evaluation<sup>26</sup> of Historic Claims processes. Ninety per cent of direct claimants said they felt heard and were treated with respect by the Historic Claims Team and two thirds of direct claimants and

<sup>23</sup> Sir Rodney Gallen *Assessment of MSD Processes on Historic Claims* 27 November 2009.

<sup>24</sup> Sir Rodney Gallen *Assessment of MSD Processes on Historic Claims* 27 November 2009.

<sup>25</sup> Sir Rodney Gallen *Assessment of MSD Processes on Historic Claims* 27 November 2009.

<sup>26</sup> Ministry of Social Development, Centre For Social Research and Evaluation *Care, Claims and Resolution Evaluation* (December 2012).

nearly half of filed claimants reported that completing the process had made a positive difference for them. This positive difference was achieved through the acknowledgment of their experience, settlement payments and receiving information that answered important questions.

- 5.5 There were issues identified through this evaluation, which have similarities to feedback received through consultation undertaken with claimants in 2018, discussed later in my brief. These issues involved dissatisfaction with the apology letter provided at the conclusion of a claim, communication through the process and delays.
- 5.6 While first identified within a research context in 2009,<sup>27</sup> delays in the resolution of claims has continued to be a continued criticism of the Historic Claims Process. The wait time for claims to be settled has gradually increased. The combination of increased numbers of claims and the time intensive nature of claim assessments has resulted in a current wait time of approximately four years for a claim to be resolved from the point of registration. Attempts have been made to address these delays, including the implementation of the Two Path Approach (described below).
- 5.7 While the delays have affected the general claimant group, some factors also affected specific groups of claimants to create an ever longer delay (eg those affected by the proposed High Tariff Offender policy were significantly delayed while this policy was being considered).
- 5.8 The Ministry unreservedly acknowledges that the current wait time is not satisfactory. The delays were a key driver in the development of a new assessment model and resource structure which will allow the Ministry to respond to 1864 claims<sup>28</sup> over the next three years.

### **The Two Path Approach<sup>29</sup>**

- 5.9 In February 2013, the Ministry began developing the “Two Path Approach” in an effort to deal with a significant backlog of unresolved claims and ensure that timely resolution could be obtained for all historic claims by 31 December 2020.<sup>30</sup> The Two Path Approach received Cabinet approval in December 2014.<sup>31</sup>
- 5.10 The Two Path Approach was intended to provide claimants with a meaningful alternative for faster resolution in a way that still addressed the underlying issues arising from their experience in State care. The timely and equitable resolution of historic abuse claims was in the interest of both the claimants and the Ministry. It was intended as a one-off mechanism to reduce the number of backlogged claims. At the time, it had been forecasted that the major peak in

<sup>27</sup> Sir Rodney Gallen *Assessment of MSD Processes on Historic Claims* 27 November 2009.

<sup>28</sup> Wellbeing budget.

<sup>29</sup> Ministry of Social Development *Resolving Historic Claims of Abuse – Proposal to Bring Funding Forward* (Report to Minister for Social Development, 13 November 2014). See also affidavit of Ines Gessler filed in Judicial Review of Two Path Approach, dated 14 December 2015

<sup>30</sup> Affidavit of Linda Hrstich-Meyer filed in the Waitangi Tribunal (WAI 2615 and WAI 1247, 13 April 2017).

<sup>31</sup> Ministry of Social Development *Resolving Historic Claims of Abuse – Proposal to Bring Funding Forward* (Report to Minister for Social Development, 13 November 2014).

the number of claims had passed and a further 500 claims would be likely to be received, with a significant majority of these to be made by 2020.<sup>32</sup>

- 5.11 The Two Path Approach added a “fast track” option, under which the Ministry aimed to resolve the claim more efficiently. Under the fast track, the Ministry assessed the key elements of the claim that then enabled it to be placed into one of six payment categories developed for the fast track option (separate to those developed for the new process). Allegations were accepted at face value with only a basic fact check to ensure that the Ministry had some legal responsibility for the claimant at the time of the alleged abuse, and that they were placed at the residence or placement where the alleged abuse occurred and at the relevant time, and where a staff or caregiver was named, that the person was working at that location at the time. There were six payment categories; \$5,000, \$12,000, \$20,000, \$30,000, \$40,000 and \$50,000. Where the details of a claim were such that a payment higher than \$50,000 may have been warranted a full assessment was carried out. No claim received a nil payment unless the fact check was unsuccessful.
- 5.12 The payment categories were developed to reflect as much as possible the payments made for claims assessed previously, so regardless of the method of assessment, similar claims would receive a similar payment. The payment recommendations were moderated to ensure that offers were comparable with past settlements. It was important to the Ministry that there was fairness between claimants whose claims has been previously resolved under the full assessment process and claimants who received a fast track offer. Claims were not moderated to ensure they fitted within a predetermined budget.
- 5.13 Claimants were entitled to reject their offer and elect to have their claim fully assessed by the Ministry using its usual assessment process detailed above. Some claimants represented by Cooper Legal chose to opt out of the process before receiving a fast track offer and continue with a full assessment of their claim.
- 5.14 The process applied to all claims that had been received by 31 December 2014 and were not already part way through a full assessment. There were some exclusions such as those affected by the proposed High Tariff Offender policy.
- 5.15 The Ministry engaged with Cooper Legal while developing the Two Path Approach from October 2013 to May 2015. Cooper Legal raised a variety of concerns which assisted the Ministry in refining its process. However, as the Ministry continued to develop its model it did not always accept Cooper Legal’s recommendations. This culminated in Cooper Legal advising they were no longer willing to meet with the Ministry and would be seeking advice on judicial review in May 2015.
- 5.16 Some of Cooper Legal’s recommendations which the Ministry did not implement were the inclusion of social work practice failures into the categories and additional payment recognition for potential Bill of Rights Act breaches. These are complex areas (both legally and factually) which ordinarily require more detailed assessment. If these had been included in the Two Path Approach, the Ministry’s goal of more timely resolution would likely have been affected, undermining the process for the wider claimant group. If claimants wanted a

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<sup>32</sup> Ministry of Social Development *Resolving Historic Claims of Abuse – Proposal to Bring Funding Forward* (Report to Minister for Social Development, 13 November 2014).

more thorough assessment of these issues, the option of electing to have a full assessment was open to them.

- 5.17 The Ministry divided claimants into separate tranches according to whether they were legally represented or not. The first tranche (unrepresented claimants) began to receive offers of settlement in May 2015.
- 5.18 The Ministry intended to make offers to the second tranche of claimants (represented claimants) from November 2015, however this was put on hold when Cooper Legal, acting for the majority of legally represented claimants, sought to judicially review the Two Path Approach. The claim sought a declaration that the Two Path Approach was invalid and sought an order prohibiting the Ministry from implementing it. The Ministry opposed the judicial review on the basis that the matter was not justiciable. It was important for the Ministry to be able to make operational decisions on how it responds to the management of claims. The Court dismissed the application on 9 May 2016.<sup>33</sup> The Court noted that it would be rare if ever that it is in the public interest for courts to review the process or policies under which the Crown intends to settle legal claims. Offers for tranche two (represented claimants) were duly made from September 2016.
- 5.19 The Two Path Approach was very successful for the Ministry in both providing more timely resolution for claimants who accepted their offer and reducing the backlog of claims.
- 5.20 As at 27 October 2017,<sup>34</sup>
- (a) 379 of the 424 offers made to claimants under tranche 1 were accepted. This was an 89 per cent uptake.
  - (b) 221 of the 281 offers made to claimants under tranche 2 were accepted. This was a 79 per cent uptake.

#### **KPMG Report: Lessons from the Two Path Approach**

- 5.21 The success of the Two Path Approach in reducing the backlog of claims provided impetus to the Ministry to consider wider reform of the Historic Claim Process. KPMG was engaged to provide advice to the Ministry on systems and processes for responding to claims, considering what lessons from the Two Path Approach could be incorporated into the Ministry's usual process. KPMG reported back to the Ministry on 3 June 2016.<sup>35</sup>
- 5.22 KPMG's key findings and recommendations were:
- (a) Any process would need to consider the trade-off between the robustness of the process and the impact that this has on timeliness. KPMG advised that claimants were more likely to be satisfied with a claims process, and ultimately the resolution of the claim, if it was resolved in a timely manner, however the Ministry needed to ensure that enough controls were built into the process so claimants and the public could have confidence in it.

<sup>33</sup> *XY v Attorney-General* [2016] NZHC 1196.

<sup>34</sup> Data prepared by the Ministry.

<sup>35</sup> KPMG *Ministry of Social Development: Historical Claims Process Advice* (3 June 2016).

- (b) The level of claim assessment was a key factor in the length of time required to resolve claim. Therefore KPMG recommended the Ministry adopt a dual process that included a standard assessment as the default process (indicative timeframe of six months from registration to completion of claim), and a comprehensive assessment, which would be performed if certain aggravating factors were present (indicative timeframe of up to two years). These indicative timeframes would be contingent on no existing backlog to address.
- (c) Claimant interviews were an important part of the process, but a time- and resource-intensive part.

5.23 KPMG recommended:

- (a) face to face interviews were critical, and:
- (b) use of locally-based Ministry staff would allow for interview to be conducted in a timely manner and at a lower cost than using a specialist team; and
- (c) follow up interviews should only be performed if there is a specific client need.

5.24 KPMG further recommended that settlement offers be determined through a process of baselining claims, either against a sample of similar previous claims, or through using a rating scale that categorised claims based on the level, seriousness and complexity of the claim. KPMG also recommended that the Ministry consider the use of a moderation panel to review claims in order to ensure consistency of payments.

5.25 The Ministry took substantial steps to begin incorporating KPMG's recommendations into its processes, including holding internal workshops and using some claims assessments as tests.

5.26 The Ministry paused the final development and potential implementation of a revised process due to the filing of Waitangi Tribunal claims, discussed below.

#### **Waitangi Tribunal claims suspend development of updates to the claim assessment process**

5.27 In March and April 2017, while the Ministry was working on how to implement the recommendations of the KPMG report, seven claims were filed in the Waitangi Tribunal relating to the abuse of young Māori in State care.

5.28 These claims were wide-ranging but primarily concerned:

- (a) allegations of historical breaches of the Treaty of Waitangi that were centred on the placement and treatment of Māori children and young people in State care from the 1940s onwards; and
- (b) allegations of contemporary breaches of the Treaty of Waitangi that were centred on:



- (i) the alleged failure to provide a Treaty-compliant process for the settlement of claims that incorporates tikanga and is independent; and
  - (ii) a challenge to the Crown's decision not to conduct a comprehensive inquiry into the State care system and its treatment of Māori children and young people.
- 5.29 The claimants requested an urgent inquiry for the Tribunal to make recommendations that there be an inquiry into the treatment and over-representation of Māori children and young people in State care. They also sought recommendations that the Crown implement a new process for settling claims that is independent, Treaty compliant and incorporates tikanga.
- 5.30 Shortly after the claims were filed the Ministry stopped the rollout of the updates to its claims process while consideration was given to the claims filed in the Waitangi Tribunal. The Ministry recognised that more focussed consultation with claimants, particularly with Māori claimants, was required to help the Ministry better understand how the claims process could meet claimants needs and address the issues raised in these claims.
- 5.31 The Waitangi Tribunal released its decision on 25 October 2019 and agreed with the Crown position that applicants were not “suffering significant and irreversible prejudice” which would justify an urgent hearing, especially in light of the commencement of the Royal Commission. The Tribunal did note that the concerns would be considered as part of a future kaupapa inquiry.

### Consultation

- 5.32 The Ministry began planning for consultation with Māori claimants in October 2017. This planning was interrupted by the election of a new government which indicated an intention to establish an inquiry into abuse in State care with planning for consultation being placed on hold until details of the scope and role of the inquiry were confirmed and the new Minister could be briefed and consulted about the proposed approach. Following the announcement of the establishment of a Royal Commission of Inquiry, planning resumed for the consultation with claimants on the historical claim process which commenced in May 2018.

#### *Consultation with Māori claimants*

- 5.33 The Ministry contracted Donna Matahaere-Atariki<sup>36</sup> and Hera Douglas<sup>37</sup> to facilitate, record and report back on the consultation workshops held with Māori claimants regarding changes to the Historic Claims Process. The consultation process encompassed a tikanga Māori approach and was developed in conjunction with the Ministry. The oversight of kaumātua and a Senior Māori Leadership Group served to recognise and maintain the mana of the claimants,

<sup>36</sup> Donna Matahaere-Atariki is from Ngai Te Ruahikihiki Ngati Taoka and Te Atawhiua. Ms Mataharea-Atariki is Chair of Te Runanga o Otakau and has experience in Treaty issues, whānau development and the education needs of Māori children.

<sup>37</sup> Hera Douglas is from Ngati Maniapoto, Te Aupouri and Ngati Wai. Ms Douglas has a 20-year policy background across a range of portfolios including resource and environmental planning, health, children’s rights and social services particularly care and protection issues and family violence. The past 10 years has been spent in volunteering work.

and supported the Ministry to undertake a culturally appropriate consultation process that would lead to a carefully designed, respectful and culturally appropriate claims process. The Senior Māori Leadership Group's role was to endorse the consultation approach, as well as the outcomes reached as a result of the consultation. The members were Dame Tariana Turia (Chair), Tā Mark Solomon and Whaea Druis Barrett.

- 5.34 Six workshops were held with male and female claimants currently engaged in the Historic Claims Process or who had completed their claims. One workshop was held with legally represented claimants and included some of the earliest claims. Legal counsel selected these claimants. Some claimants brought along support people who contributed valuable insights into the Historic Claims Process. The last workshop was held with a group of professionals working with the claimants as legal representatives, advocates or service providers or who had an academic or human rights interest in this area.
- 5.35 On 20 July 2018 the facilitators reported back to the Ministry on the consultation process, providing a comprehensive description of the process and the feedback gathered.<sup>38</sup>
- 5.36 The general feedback from Māori claimants was that the process was clinical, detached, and at times lacking empathy and understanding of their experiences while in State care. All claimants reported that they had not encountered any Māori during the process nor did they feel that their cultural needs were recognised or catered for. Claimants did not believe that the Ministry was meeting its aim of providing a claimant-centred process. They also felt that the process should be based on tikanga and the principles of mana, aroha, whakapapa, whanaungatanga, manaakitanga and pono. Claimants also wanted the process to accommodate a collective and inclusive approach.

#### *General consultation*

- 5.37 While consultation with Māori claimants was being carried out, the Ministry also contracted Allen + Clarke to undertake wider consultation with claimants on their experience of the Historic Claims Process and to obtain feedback on developing an improved approach.
- 5.38 On 13 June 2018 Allen + Clarke reported back to the Ministry on the consultation, providing a number of recommendations as to how the Ministry could improve its process.<sup>39</sup>

#### *Ministry response to feedback from consultation*

- 5.39 After considering the two consultation reports, the Ministry published a report to provide specific responses to the feedback and suggested ideas that arose out of the two rounds of consultation.<sup>40</sup>
- 5.40 The Ministry considered that the feedback fell into four key themes:<sup>41</sup>

<sup>38</sup> Matahaere-Atariki and Douglas *Report on the Consultation Process on the Historic Claims Resolution Process with Māori Claimants* (Ministry of Social Development, 20 July 2018).

<sup>39</sup> Allen + Clarke *Claimant Engagement on Historic Claims Resolution Process Final Report* (13 June 2018).

<sup>40</sup> Ministry of Social Development *Consultation Process on the Historic Claims Resolution Process: Ministry of Social Development response to feedback* (undated).

- (a) The process needs to recognise the individual needs of the claimant. All claimants are different and have different cultural and personal needs. Claimants seek choice and options about who and how they engage in the claims process.
- (b) Resolution takes time and requires more than just money. Claimants want the Ministry to recognise that the harm caused by abuse in State care has lifelong impacts and it will take time for healing and resolution.
- (c) Communication is key. Claimants seek more information about the process, what is expected from them, what they can expect and when. Information needs to be provided more regularly and through a variety of channels.
- (d) There was universal support for streamlining the process for assessments to reduce wait times.

*Stakeholder engagement – Claimants and their representatives*

- 5.41 The Ministry recognises that claimants and their representatives are key stakeholders in the work it undertakes. The consultation process outlined above, and the actions taken to align with feedback from this shows the Ministry's commitment to reflecting claimants' voices in the development of Historic Claims. This will continue in the future, where claimants' and their representatives' views will be sought as the Ministry's continual improvement approach embeds.
- 5.42 The Ministry's relationship with Cooper Legal has changed over the years that Historic Claims has been operating. At times, the Ministry has met regularly with Cooper Legal to talk through issues, both in relation to specific policy decisions (eg development of the Two Path Approach) and general claim management issues. In later years, this changed to more paper based correspondence between the Ministry and intermittent meetings.
- 5.43 Cooper Legal are an important stakeholder given the number of Historic Claims claimants they represent. Therefore, the Ministry actively engages with this law firm on issues which impact their clients. The Ministry remains committed to ongoing communication with Cooper Legal to seek input about the Historic Claims Process.

## **6 The current process for historic abuse claims – November 2018 onwards**

- 6.1 The feedback from the KPMG report on incorporating lessons learnt from the Two Path Approach and the two rounds of consultation motivated by the Waitangi Tribunal claims resulted in the implementation of an updated Historic Claims Process on 1 November 2018.

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<sup>41</sup> *Claims Resolution Service Design* (Ministry of Social Development, Report to the Minister for Social Development, 9 August 2018).

- 6.2 The purpose of the current approach is to work with people who have been abused or neglected in care to:<sup>42</sup>
- (a) help them understand their journey through care;
  - (b) acknowledge and recognise harm and take steps to help put this right; and
  - (c) share past mistakes and what the Ministry has learnt with Oranga Tamariki and other agencies providing care services so that things can be better for tamariki in care, today and in the future.
- 6.3 This purpose reflects the feedback provided by claimants in consultation as to what they want and need to help them begin to heal: understanding and validation, formal acknowledgement of the harm, help to put the harm right, and reassurance that what they experienced will not happen to others.<sup>43</sup>
- 6.4 Meeting face to face with people to hear their accounts of the experience they had while in care and how they have been affected remains central to the claims process. The fundamental changes to the new process are designed so that the process is more responsive to claimants.<sup>44</sup>
- 6.5 Additional funding was provided in Budget 2019 for three years to increase staffing and support changes to the Historic Claims process. This was to enable the Ministry to respond to and settle more claims and provide appropriate support to claimants.
- 6.6 The new approach is anticipated to take three to four years to fully implement. While some changes have already been put into place, others will occur over a longer period of time with further testing to ensure that the proposed changes are aligned with claimants needs and views.

*Changes made to the claims process to date*

- (a) The assessment process has been streamlined. Where possible, claims are assessed without fully investigating each concern. The new claims process looks to acknowledge claimants' reported experience, with some more serious allegations requiring additional checks to be completed. These changes have significantly decreased the length of time needed to complete an assessment.
- (b) The Ministry has increased staff numbers in the Historic Claims Team considerably. Over 40 new staff have been hired since November 2018. This has expanded the team from approximately 30 staff prior to the implementation of the new model to approximately 85 current staff. Thirty more staff are to begin within the first several months of 2020.

<sup>42</sup> Ministry of Social Development *Claims Resolution Service Design* (Report to the Minister for Social Development, 9 August 2018).

<sup>43</sup> Ministry of Social Development *Claims Resolution Service Design* (Report to the Minister for Social Development, 9 August 2018).

<sup>44</sup> Ministry of Social Development *Claims Resolution Service Design* (Report to the Minister for Social Development, 9 August 2018).

- (c) Significant steps have also been taken to diversify the Historic Claims workforce from both a cultural and skills-based perspective, in order to support claimants to have more choice in who they engage with through the claims process.
- (d) New roles were established to support Historic Claims to offer a service which aligns with what claimants have identified as important to them. This has included the implementation of a dedicated Claimant Support team, whose focus is on supporting claimants through the process from the point of registration for the duration of their claim. This team is responsible for meeting with claimants to gather the details of their claim, and for providing feedback to the claimant after the assessment of their claim, in addition to supporting claimants to access counselling and support services where required. At full complement, there are twenty dedicated Claimant Support staff working with claimants.
- (e) The Ministry's commitment to reducing the wait time for claimants is reflected in a significant increase of staff assessing claims from approximately ten to twelve (who also held a claimant engagement role), to forty dedicated assessors when fully staffed, and the faster assessment process.
- (f) The Ministry has appointed a Lead Partnerships Advisor who is responsible for developing key partnerships with other government and non-government agencies to strengthen claimants' access to other services, focussing on the development of wrap around services that claimants have identified a need for. This role has a strong cross sector view of claimant services, monitoring how they contribute to claimant outcomes.
- (g) A Principal Analyst has been appointed to provide expert analysis and advice to support policy development within Historic Claims, with a strong focus on building Historic Claims capacity to share learnings from claimants' care experiences to providers such as Oranga Tamariki, to improve the current care system.
- (h) The Ministry has produced a range of communication material to increase transparency around the process. A new claims brochure outlines the end-to-end process for claimants, and the Historic Claims Business Process and Guidance is also available online. Increased communication with claimants is a focus of the current process. Claimants are offered regular contact from a member of the Historic Claims team to update them on the status of their claim and establish any presenting support needs that the claimant may need assistance to access.
- (i) In November 2019 the Ministry began using a knowledge management database which provides a range of significant benefits. The database stores analysis about claimants' past experiences in care, which can be anonymously shared with agencies such as Oranga Tamariki to improve the current care system. Providing input back from the experiences of people who suffered abuse and negligence in care to frontline processes, such as those run by Oranga Tamariki, was a key recommendation identified in claimant consultation. The database also provides a secure facility to store structured information about

residences, care facilities and other claimants' experiences to support the assessment of claims. The database also supports Historic Claims work with claimants by providing easy access to information for staff about specific claimant needs (ie literacy issues, identified barriers to service, preferred communication approaches), helping Historic Claims to engage with claimants and take their individual needs into account.

- (j) The adoption of a continual improvement approach based on feedback from all parties to the process, including claimants, the Ministry, NGO partners and Ministry staff, will enable continual development and improvement in Historic Claims over time. In July 2019, a survey seeking feedback from claimants following key points of engagement with the Historic Claims team was introduced. This is providing valuable feedback about how claimants have experienced the Historic Claims process and is intended to help the Ministry to understand key issues and identify further improvements to the service.

- 6.7 The Ministry is committed to ensuring that the principles of Te Titiri o Waitangi have been incorporated into the changes to the Historic Claims operating model, and further detail in relation to this can be found in Mr MacPherson's evidence.

*Changes to occur over the next few years*

- 6.8 As noted above, implementing this new approach is anticipated to take three to four years. Further elements to be implemented include:
  - (a) The development of wraparound services delivered by a single point of contact responsible for supporting the claimant through the process as well as acting as a coordination access to the supports the claimant needs (ie such as Kāinga Ora, Work and Income, health services). Access to the service would not be contingent on a claim having been assessed, and will be available after the claim is formally closed by the Ministry.
  - (b) An independent, local facilitator to engage with the Ministry on the claimant's behalf. This would allow claimants to go through the claims process without direct contact with the Ministry if this is their preference.
  - (c) Investigating the possibility of including whānau reconnection support as part of the package of support offered to claimants.
  - (d) Investigating existing support networks for survivors of abuse in State care, to understand whether there are gaps in the current supports available and to gain advice on the Ministry's role in addressing any identified gaps.
  - (e) New options for how a claimant may receive an apology. We have sought feedback from claimants about what they would like to receive as part of their apology and are considering ways to further tailor apologies to individual circumstances and needs.
  - (f) Improvements to how Historic Claims provides information to Oranga Tamariki so that this can support improvements to the current care system. Communicating these improvements back to claimants will be an important part of this process.

- (g) A system that empowers the claimant to make choices about who they engage with, where, the speed of the process, and what supports or services they access and when. As part of this work, Historic Claims will investigate the possibility of using a group approach to assessing whānau claimants, holding group interviews where requested and options for alerting other whānau members to a claim so that they could participate in a group assessment if they wished.
- (h) Further communications material, developed in conjunction with claimants, that provides clear, detailed and transparent information to claimants about the claims system, the choices available to claimants, what to expect, and what information will be needed to progress the claim.
- (i) Changes to how personal information is provided back to claimants and what supports are offered to claimants to better assist them to read and understand their personal records, including explaining why information has been redacted.
- (j) Regular proactive contact with claimants to ensure that they have the information they need about their claim, and that they have the right support.
- (k) Ongoing work on continuous improvement and incorporating feedback that the Ministry will continue to receive. Continual improvement will be embedded in the culture of the service, and will be implemented incrementally, including a formal evaluation of the new operating model after sufficient time has passed.



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