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Minister of State Services

Review of Strategy for the Resolution of Historic Claims

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Office of the Minister of State Services
Office of the Attorney-General

Chair, Cabinet Social Wellbeing Committee

Review of strategy for the resolution of historic claims

Purpose

1 On 8 April 2019, Cabinet directed officials to "consider whether the approach to the conduct of current historic claims litigation could better reflect the proposed principles, and report back on this to the Social Wellbeing Committee by the end of October 2019". [CAB-19-MIN-00139.01 refers].

2 This paper provides the Committee with advice on whether the current historic claims litigation strategy could better reflect the principles that the Government has agreed will guide the Crown's response to the Royal Commission of Inquiry into Abuse in State Care and in the Care of Faith-based Institutions (the Royal Commission), and proposes amendments to better align the strategy with the principles.

Executive summary

3 Government has agreed six principles to guide the Crown's engagement with the Royal Commission: manaakitanga, openness, transparency, learning, being joined up, and meeting our obligations under Te Tiriti o Waitangi.

4 The current Crown Litigation Strategy was adopted in May 2008 and last reviewed in January 2011. The Strategy has three principles:

4.1 Principle 1: agencies will seek to resolve grievances early and directly with the individual;

4.2 Principle 2: settlement will be considered for any meritorious claims (particularly where legal risk justifies settlement). Where merited settlement would be full and final with no admission of liability; and

4.3 Principle 3: claims that do proceed to court hearing because they cannot be resolved will be defended in Court, considering and relying on defences such as the Limitation Act defence, the ACC bar and the Mental Health Act immunity.

5 Since Cabinet directed this review of the approach to conducting historic claims litigation, the Royal Commission has announced it will conduct a hearing in March 2020 into the experiences of survivors in making civil claims against the Crown for abuse in state care and whether the Crown's responses to civil claims have been adequate/appropriate (the first Redress Hearing). The Royal Commission has stated that it will hold a number of public hearings covering different aspects relating to redress.

6 Criticism about the Crown's approach to resolving historic claims of abuse in state care has been expressed by claimants and their legal representatives. This criticism includes delays in responses to claims, redactions on personal information provided, uncertainty around the process and the level and consistency of settlement offers. There is also criticism of the reliance on legal defences in litigation, such as the limitation defence which prevents the litigation of claims that are not brought within a specified period.

7 It is important to acknowledge this criticism and the need for improvement to ensure that the Crown Litigation Strategy, including Alternative Dispute Resolution (ADR) which forms a significant part of the approach, reflects the six principles as much as possible.

8 Some immediate improvements can be made to the Crown Litigation Strategy, to reflect current practice and to make the approach better reflect the principles, in particular the principles of manaakitanga, transparency and openness. It is proposed the Strategy is renamed the Crown Resolution Strategy, to better recognise its key objective to resolve claims outside of the court process, with five updated principles:

8.1 Principle 1: agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes;

8.2 Principle 2: settlement will be considered for all meritorious claims. Settlement will generally be full and final without admission of liability;

8.3 Principle 3: if claimants become aware of additional material information or circumstances that were not considered by the Crown at that time, the Crown may consider that new information and whether any additional response should be made;

8.4 Principle 4: where claimants wish to litigate their claims in court, the Crown will concede any factual matters it does not dispute and will rely on appropriate factual and legal defences; and

8.5 Principle 5: the Crown's approach to Alternative Dispute Resolution and litigation of historic abuse claims will be guided by the principles of manaakitanga, openness, transparency, learning, being joined up and meeting the Crown's obligations under Te Tiriti o Waitangi, and the outcomes that support those principles.

9 There has also been criticism of the Crown for failing to provide an approach to resolving claims consistently with tikanga Māori. The Ministry of Social Development, which receives the largest number of claims, has reviewed its historic claims process including undertaking engagement with claimants to understand how processes could better reflect tikanga Māori and has made changes as a result. A review of other agencies' claims processes could be beneficial.

10 Other potential improvements to the Crown Litigation Strategy require further careful consideration, given their potential impacts on the natural justice rights of alleged perpetrators and financial and resource implications for both the Crown and non-Crown parties to litigation. It is recommended officials be directed to commence consideration of the following, with report backs to be agreed at a later stage given the Royal Commission's upcoming investigation of redress systems:

10.1 potential options for the central assessment or review of historic claims; and

10.2 legislative reform of the Limitation Act 2010 in respect of historic claims of abuse in care.

Background

11 On 8 April 2019, Cabinet directed officials to "consider whether the approach to the conduct of current historic claims litigation could better reflect the proposed principles and report back on this to the Social Wellbeing Committee by the end of October 2019" [CAB-19-MIN-00139.01 refers].

12 The principles referred to above are set out in the strategic approach that the Government has agreed will guide Crown engagement with the Royal Commission. These are: manaakitanga, openness, transparency, learning, being joined up and meeting our obligations under Te Tiriti o Waitangi.

13 The review of the approach to the conduct of historic claims litigation was led by the Crown Law Office, working with the Ministries of Health, Education and Social Development. Each of these agencies has received claims of abuse in state care.

Progress in the Royal Commission

14 Since Cabinet directed this report back, the Royal Commission has announced that in March 2020 it will conduct a hearing into the experiences of survivors in making civil claims against the Crown for abuse in state care and whether the Crown's responses to civil claims have been adequate/appropriate (the first Redress hearing). The Royal Commission has stated that it will hold a number of public hearings covering different aspects relating to redress as part of a wider investigation into redress processes that will be carried out over the lifetime of the Royal Commission.

15 Officials expect that this in-depth and independent investigation, informed by claimant experience, will provide valuable recommendations for the Crown to consider about the Crown's approach to resolving historic claims of abuse in state care. Some of the issues with the Crown Litigation Strategy identified in this paper are significant and may benefit from consideration through the Royal Commission process. Openly acknowledging these issues now is important and paves the way for learning from the Royal Commission process.

16 At the same time, there are improvements that can be made to the Crown Litigation Strategy now to ensure it is more open and transparent, demonstrates manaakitanga to survivors, better reflects the spirit of Te Tiriti o Waitangi and that processes are more joined up. These changes will benefit survivors who are in the process of resolving their claims with the Crown.

Conduct of claims litigation

Current Crown Litigation Strategy

17 The current Crown Litigation Strategy was adopted by Cabinet in May 2008, following a review of the previous litigation strategy (POL (08) 98; POL Min (08) 8/2; CAB Min (08) 20/4 refer). The current "Crown Litigation Strategy" was reviewed and affirmed by Ministers in December 2009 and January 2011. Although entitled

"Crown Litigation Strategy" the strategy encompasses early resolution and settlement of claims, including for claims not filed in Court.

18 The background to the adoption of the current Crown Litigation Strategy was that the Crown was facing a large number of claims of alleged mistreatment at psychiatric hospitals, child welfare institutions, foster homes and residential special education institutions. Most claims concerned events alleged to have occurred in the 1950s to 1980s.

19 As at 31 August 2007, legal aid had been granted for a total of 777 claims. As at 31 December 2007, 416 claims had been filed in the High Court. Two claims had been settled out of court and four heard in court. All four claims had been dismissed by the Court.

20 The legal risk of these claims was assessed as low to low-medium, recognising the legal uncertainty about Crown liability for criminal acts of teachers, social workers, health professionals and other individuals contracted by the state. Even if liability was established, historic claims can be barred by the Limitation Act. Additionally, the Accident Compensation (ACC) legislation prevents courts from awarding compensatory damages to a claimant for personal injuries, the main aspect of many of the claims. The only monetary award possibly available to claimants for these parts of the claims would be exemplary damages (monetary award to punish the wrongdoer for unacceptable behaviour of a very high degree), although it is unclear whether exemplary damages are available against the Crown.

21 The Crown Litigation Strategy adopted in 2008 comprised three strands: the Confidential Listening and Assistance Service (CLAS),[1] the ADR process and the defence of litigation where claimants pursued that option. The strategy stated three principles:

21.1 Principle 1: Agencies will seek to resolve grievances early and directly with the individual;

21.2 Principle 2: Settlement will be considered for any meritorious claims (particularly where legal risk justifies settlement). Where merited, settlement would be full and final with no admission of liability.

21.3 Principle 3: Claims that do proceed to court hearing because they cannot be resolved will be defended in Court, considering and relying on defences such as the Limitation Act defence, the ACC bar and the Mental Health Act immunity.

How claims are currently resolved

22 Litigation forms only a small part of how claims are managed. No claim has been determined substantively by the Court hearing since the Crown Litigation Strategy was adopted.[2]

1 The CLAS enabled claimants to access their personal records and counselling opportunities as well as an opportunity to tell their story to someone independent, who could connect them to the agencies' ADR processes, other practical forms of assistance (such as employment or housing), and to Police, where relevant. The CLAS service was provided from 2008 to June 2015 and was then disestablished.

2 In 2007, the Court gave judgment in the White case (*White v Attorney-General* High Court, Wellington, 28/11/2007, Miller J CIV-1999-485-85, CIV-2001-485-864; [2010] NZCA 139). That case did not result in any award of damages for the claimants.

23 All of the claims are resolved through alternative dispute resolution processes that are individually developed by each of the Ministries of Health, Education and Social Development.

24 Claims are brought against each of these agencies either directly (unfiled) or by filing a claim in the High Court. Some claimants have legal representation and others do not. Some agencies have an initial meeting with claimants to hear their story. In considering how to respond to a claim, agencies:

24.1 Obtain relevant records from offsite archives and share these with the claimant where requested. Records are redacted where necessary to protect the personal information of other people in accordance with the Privacy Act;

24.2 Review the records to ascertain whether the claimant resided at or attended the location (institution, school or foster care placement where the abuse was said to occur) at the relevant time and whether there are any indications in the records that support the abuse claimed;

24.3 Where the claimant wishes to speak directly with an agency, the agency interviews the claimant; and

24.4 Respond to the claimant acknowledging their claim and offering an apology for their experience in care, a settlement payment, payment of legal costs, and, in some cases, assistance to access suitable counselling services. Present practice is that the offer is made in full and final settlement of the claim. Some claims are not upheld, including when the Crown is not the correct respondent to a claim, and a settlement offer is not made in these cases.

25 During this process, apart from where there are concerns about the safety of children and young people currently in care, agencies do not usually contact alleged perpetrators and ask them to respond to any allegations of abuse or neglect. Where there are concerns about the safety of children and young people, agencies seek to refer the allegations to the Police or any other relevant agency.[3]

26 The current picture of claims resolved and to be resolved is:

26.1 As at September 2019, the Ministry of Education has resolved 13 filed and 26 unfiled claims. A further 67 filed and 26 unfiled claims are awaiting resolution.

26.2 As at September 2019, the Ministry of Health has resolved 209 unfiled claims. A further 8 unfiled claims are awaiting resolution (6 of which are currently under offer, 1 is being reviewed and 1 is still to be considered). 329 further claims were resolved by the Crown Health Financing Agency prior to its dissolution in July 2012.

26.3 As at 30 June 2019, the Ministry of Social Development has resolved 479 filed and 1344 unfiled claims including 111 legally represented claimants and 1,233 direct claimants. The Ministry of Social Development has 1,951 claims waiting for resolution in any part of the claims process. Of those, 1088 are legally represented and 863 are direct claimants. The legally represented claims are made up of 212

3 Where claims are filed with the Court, such referrals currently require the Court's consent unless claimants consent to the referrals being made: *J v Attorney-General* [2018] NZHC 1331 (upheld on appeal).

filed claims, 249 unfiled claims and 627 claims for which the Ministry is awaiting either a Statement of Claim (filed) or letter of offer (unfiled).

27 In view of the significant backlog of claims awaiting resolution, in Budget 2019 the Ministry of Social Development received increased funding for three years to respond to and settle more claims of abuse in state care, and provide appropriate support to claimants, with an anticipated 20 per cent reduction in waiting times for redress.

28 Since the announcement of the Royal Commission of Inquiry, the lawyers representing the majority of claimants have elected for either one or two claims to progress towards an August 2020 hearing.

Issues with the Crown Litigation Strategy and process for resolving claims

29 Claimants and their representatives have raised issues with the Crown's processes for resolving claims including:[4]

29.1 delays in receiving responses to their claims,

29.2 redactions made to their personal information when provided to them,

29.3 uncertainty regarding how the claims review process works,

29.4 settlement amounts offered in response to claims,

29.5 the level of proof or verification required by the different agencies,

29.6 consistency of offers made to claimants and

29.7 difficulties experienced in bringing claims to multiple agencies.

30 There has also been criticism of the Crown for failing to provide an approach to resolving claims consistent with tikanga Māori. The Waitangi Tribunal is considering an application to hear a claim on this basis urgently. The Ministry of Social Development has reviewed its claims process including undertaking engagement to understand how processes could incorporate tikanga Māori and has made changes as a result.[5]

31 The Ministries of Health and Education, which have significantly smaller volumes of claims, have not undertaken this type of review and currently their processes adapt to the needs of claimants on a case by case basis. A similar review of these processes to capture the feedback and experiences of claimants could be beneficial.

4 Many of these criticisms were raised during the Ministry of Social Development's consultation process on its historic claims resolution process. See *Claimant Engagement on Historic Claims Resolution Process* (Final Report; 13 June 2018; Allen & Clarke).

5 Key changes include the introduction of a new organisational structure that significantly increased the size and makeup of the Historic Claims team to ensure a diverse workforce (from both a cultural perspective and a skills-based perspective) that offers options and choice for claimants and more effectively allows the team to respond to the different needs of claimants; a new assessment process that streamlines the assessment process and where possible assesses claims without the need to investigate fully each of the concerns; refreshed communication material (website and brochure) providing clear information to claimants about the new process, what to expect and the changes and future changes that are planned.

32 Some claimant representatives have also suggested that ADR processes should be conducted independently from the agency responsible for the alleged abuse.

33 While no claim has progressed to a substantive hearing since the Crown Litigation Strategy was adopted in 2008, there has also been criticism of the Crown's reliance on legal defences in litigation, the investigation of evidence in the lead up to the hearing, and the approach of Crown counsel to cross examination of witnesses during the court hearing of the *White* claim (that predated the Crown Litigation Strategy) in 2007.

The principles and what they mean

34 In April 2019, Cabinet agreed an approach to guide Crown engagement with the Royal Commission that comprises six principles [CAB 19 MIN 0139.01 refers]:

34.1 manaakitanga – treating people with humanity, compassion, fairness, respect and responsible caring that upholds the mana of those involved;

34.2 openness – being honest and sincere, being open to receiving new ideas and willing to consider how we do things currently, and how we have done things in the past;

34.3 transparency – sharing information, including the reasons behind all actions;

34.4 learning – active listening and learning from the Royal Commission and survivors, and using that information to change and improve systems;

34.5 being joined up – agencies work together closely to make sure activities are aligned, engagement with the Royal Commission is coordinated and the resulting actions are collectively owned; and

34.6 meeting our obligations under Te Tiriti o Waitangi – honouring the Treaty, its principles, meeting our obligations and building a stronger Māori-Crown relationship through the way we operate and behave.

Analysis of the current Crown Litigation Strategy and its impact on survivors against the principles for engagement with the Royal Commission

Litigation Strategy Principle 1: agencies will seek to resolve grievances early and directly with the individual

35 Given the uncertainty about whether claims would succeed at law noted in paragraph 20, the ADR process proceeds on the basis of the moral obligation of the Crown to acknowledge and resolve claims of abuse in state care. From a survivor perspective, the ADR process enables a claim to be considered without the cost of litigation and for claimants to speak directly to officials, get assistance to understand their records and have their grievances acknowledged, even if a claim may not succeed in court.

36 There are however issues in relation to the ADR processes, such as delay and difficulties in bringing claims to multiple agencies. The delay in the ADR processes has the potential to re-traumatise survivors. Additional resources can help to reduce delays. The additional funding provided to the Ministry of Social Development (noted in paragraph 27) is intended to prevent further increases and begin to reduce current delays in the Ministry's ADR process.

37 Agencies should consider the individual in the wider context of whānau, hapū, iwi and community as part of their ADR processes. For example, MSD's new historic abuse claims resolution process is designed to focus on a claimant's cultural needs, and MSD encourages wider whānau involvement in an individual's claims process where the claimant wishes.

38 However, officials recognise that the current principle, which only refers to "the individual" does not reflect this wider context, nor does it encourage continuous improvements in practice which accommodate consideration of the individual's whānau, hapū, iwi and community. Care will be taken to ensure that the costs of the process (as opposed to compensation payable) do not escalate unduly.

39 Officials therefore recommend amending the first principle of the Crown Litigation Strategy to state "Principle 1: agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes".

40 Agencies will need to continue to consider the way they engage with claimants and their whānau and possible strategies to engage and partner with hapū and iwi in addressing complaints. To support this process, officials suggest that a new fifth litigation strategy principle is adopted, demonstrating the Crown's commitment to the principles for engagement with the Royal Commission. The proposed new fifth principle is discussed below.

Litigation Strategy Principle 2: settlement will be considered for any meritorious claims (particularly where legal risk justifies settlement). Where merited settlement would be full and final with no admission of liability.

41 Existing Crown Litigation Strategy Principles 1 and 2 are related and, to the extent that principle 2 ensures that settlement of claims is prioritised over defending claims in court, it should be retained for the reasons above.

42 However, the wording of principle 2 might suggest to claimants that the Crown will only resolve claims if a particular threshold is met and that once resolved claimants cannot come back to the Crown if they become aware of additional material information that was not available at the time that they settled their claim.

43 The historic nature of these claims, as well as the circumstances of them, mean that claimants may have difficulty accessing evidence to substantiate their allegations. Requiring a particular threshold for settlement of historic claims, and for the Crown to refuse to engage with claimants over additional material information they might have, is not consistent with the principles of manaakitanga.

44 Nor does such a threshold accurately reflect the approach that agencies are taking to claims that are currently received. Most agencies consider allegations for settlement (where appropriate) without necessarily testing all the evidence or reaching a conclusion on whether the allegations are proven. Where claimants subsequently become aware of additional material information or circumstances that were not considered at the time of settlement, some agencies consider that new information and whether any additional response should be made. The wording of principle 2 does not reflect current practice for all agencies with historic claims process and is therefore inconsistent with the principle of transparency.

45 Officials therefore recommend that the second principle of the Crown Litigation Strategy is amended to become two principles:

"Principle 2: Settlement will be considered for all meritorious claims. Settlement will generally be full and final without admission of liability.

Principle 3: If claimants become aware of additional material information or circumstances that were not considered by the Crown at the time of settlement, the Crown may consider that new information and whether any additional response should be made".

Litigation Strategy Principle 3: Claims that do proceed to a court hearing because they cannot be resolved will be defended in Court, considering and relying on defences such as the Limitation Act defence, the ACC bar and the Mental Health Act immunity.

46 Litigation is time consuming, costly and stressful. Court processes are inherently difficult and even more so for historic claims because of the unavailability of witnesses and the difficulty for a court in reaching a conclusion on disputed facts in these circumstances. The ADR process is designed to facilitate resolution of claims without claimants having to resort to litigation. The potential therapeutic benefits of a well-run informal ADR process are lost when Court processes are used. Nonetheless, as recognised in the April 2019 Cabinet paper, claimants have a right to litigate their claims.

47 The defences available to the litigation of historic claims are not simply technical barriers to advancing a claim in court. The defences recognise important societal considerations, such as the cost of litigation to society and the prejudice that can arise from claims that are brought long after the relevant events. Some of these defences are discretionary, and defendants can elect whether to rely on them. Other defences are in the form of a statutory bar and defendants have no discretion as to whether they apply.

48 Statutory bars include the Mental Health Act immunity, which prohibits or otherwise places statutory restrictions on the ability of those in mental health care before 1993 from bringing claims in Court. Another statutory bar is in s 317 of the Accident Compensation Act 2001 in respect of claims for injuries after 1 April 1974, which prohibits any person from bringing proceedings for damages arising from personal injury covered by that Act or previous Acts (with the exception of proceedings for exemplary damages (s 319)). The ACC bar reflects the social contract affirmed by successive New Zealand parliaments; that compensation and support for personal injury should be provided on a no-fault basis and that the societal cost of litigation for personal injury should be avoided. Departure from either of these statutory bars would have substantial policy consequences and would require legislative amendment.

49 The other commonly available defence in historic claims litigation is the limitation defence.[6] The Crown, as a defendant, can elect whether or not to rely on a limitation defence. The defence seeks to prevent the litigation of claims which because of their old age raise natural justice issues for defendants against whom findings of fault might be made, because of the unavailability of witnesses and other evidence.

6 Contained in the Limitation Act 1950 or the Limitation Act 2010, depending on the date on which the claim was brought.

50 However, there are also considerations engaged by these types of claims that weigh in favour of enabling claims to proceed, despite the delay in initiating proceedings. The abuse of children is particularly abhorrent and there is no public benefit in allowing perpetrators or those vicariously liable for their acts to escape civil liability. Moreover, the very nature of abuse against children and abuse in the context of a dependent relationship can prevent a claimant from coming forward and promptly bringing a proceeding, in some circumstances even until later on in adulthood. The legislation providing for this defence recognises that in some cases a longer time period for bringing a claim is appropriate, for example, time is not counted until an individual reaches adulthood or a person no longer suffers from an incapacity.

51 The limitation defence has a significant impact on the ability of claimants to advance their claims in court. While the ACC system precludes awards of compensatory damages for personal injury, which is the main aspect of most of these claims, if claims were not limitation barred it is possible that in some circumstances claimants could successfully advance claims for exemplary damages. While there are circumstances in which the limitation defence will not be available (for example, where medical evidence satisfies the court that a plaintiff has been unable to bring their claim earlier), the likely availability of the limitation defence would nonetheless discourage some plaintiffs from attempting to advance their claims in court.

52 For these reasons, officials consider that reliance on the limitation defence where claims progress to court may be considered to be in tension with the principles adopted by Cabinet, principally in terms of showing manaakitanga to survivors.[7] In contrast to ADR processes, the Court process results in findings of fact and liability. The Crown must carefully consider any change in its approach to ensure that changes do not undermine the right of alleged perpetrators to natural justice. Consideration must also be given to the significant resource and financial implications.

53 Pending consideration of any significant reform in this area, a matter addressed further below, officials recommend that the third principle of the current Crown Litigation Strategy is retained. It is important that the Crown is transparent about the approach it will take to litigation, including the reliance on defences, so that claimants can make informed decisions when evaluating whether they want to advance their claims in court.

54 The proposals above would result in four litigation strategy principles:

54.1 Principle 1: Agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes.

54.2 Principle 2: Settlement will be considered for all meritorious claims. Settlement will generally be full and final without admission of liability.

54.3 Principle 3: If claimants become aware of additional material information or circumstances that were not considered by the Crown at the time of settlement, the Crown may consider that new information and whether any additional response should be made.

7 Manaakitanga as agreed by Cabinet [CAB 19 MIN-0139.01 refers] is defined in para 34.1.

54.4 Principle 4: Where claimants wish to litigate their claims in court, the Crown will concede any factual matters it does not dispute and will rely on appropriate factual and legal defences.

Additional Fifth Litigation Strategy Principle and the intended impact on survivors

55 Officials recommend that the Crown Litigation Strategy is renamed the Crown Resolution Strategy. The current name incorrectly indicates that the emphasis is on litigation, which it is not. Emphasising the resolution of claims better reflects the Crown principles and the centrality of the ADR processes available in engaging with historic claims.

56 In addition, officials recommend that an additional fifth Crown Resolution Strategy principle is adopted. It is expected that this additional principle will guide a process of continual improvement of the Crown ADR processes and approach to litigation of historic claims consistent with the principles for engagement with the Royal Commission. For example, the additional fifth principle will support review of processes to better reflect tikanga Māori.

57 A way of measuring success against this principle is whether the Crown is achieving the outcomes described in the April 2019 Cabinet paper, which are:

57.1 survivors are heard – any they feel heard;

57.2 harm is acknowledged (recognition and reconciliation);

57.3 the government care system is improved;

57.4 this type of harm does not happen again;

57.5 Māori experiences and their impacts are recognised and respected; and

57.6 disabled peoples' experiences and their impacts are recognised and respected.

58 Officials suggest this principle could be: "the Crown's approach to ADR and litigation of historic abuse claims will be guided by the principles of manaakitanga, openness, transparency, learning, being joined up and meeting the Crown's obligations under Te Tiriti o Waitangi, and the outcomes that support those principles".

59 This principle would be intended to give survivors confidence that the principles adopted to guide the Crown's engagement with the Royal Commission will also be influential in the Crown's engagement with survivors over resolution of their claims.

60 The following changes to the ADR processes and approach to litigation illustrate the types of improvements that can be expected consistent with this principle.

ADR process

61 Changes can be made to the ADR process to reduce the difficulty for claimants in bringing their claims to the appropriate agency. While different agencies may need to consider and respond to different aspects of a claim, claimants should be able to come to one agency involved with the claim who will then ensure the claim (or aspects of the claim) is provided to all appropriate agencies.

62 The steps that an agency will go through when considering and responding to a claim should be transparent. Some agencies also have policies in place to ensure claimants can engage in resolution processes before filing their claims in court, with processes to protect their position under the Limitation Act. All agencies should adopt such policies and promote these steps on their websites and have additional written material, in an accessible format, available for claimants.

Approach to litigation of claims

63 The Attorney-General sets expectations for the conduct of Crown litigation, which include that the Crown will behave as a model litigant. These expectations are relevant to the conduct of the Crown's defence to historic claims litigation and are applied in a manner that is tailored to the needs of the individual proceeding.

64 Officials consider, however, that it may be valuable for claimants to be aware of additional expectations they can have regarding Crown conduct in the litigation process for historic claims, consistent with the principles of openness and transparency. For example, the Crown will:

64.1 encourage communication with individuals and their representatives to arrange tools such as witness screens, name suppression in appropriate cases, statements of agreed facts and alternative hearing locations; and

64.2 ensure investigation of claims complies with the SSC model standards *Information Gathering and Public Trust*.[8]

Other improvements that require further consideration

65 Officials recognise that the Royal Commission's Redress Hearing is likely to provide additional survivor perspectives on the Crown's approach to resolution of historic claims, and new proposals for how this approach might be improved.

66 Two of the issues that officials have considered are the Crown's approach to the limitation defence and whether the ADR process should be centrally managed.

Central assessment and/or review of historic claims

67 Claims are currently considered and resolved by different agencies, taking into account their different levels of responsibility for claims arising from different time periods. Claimant representatives have expressed frustration at the difficulties in pursuing claims through different agencies and at the differences in amounts of settlement payments offered. However some claimants value a response by the agency that caused them harm. There are also concerns about the power imbalance between claimants and the Crown, and the difficulties in having to seek resolution for abuse from the agencies perceived as having caused that abuse in the first place.

68 A form of centralised assessment of claims would provide some distance from the agency responsible for a claim, streamline the claim resolution process and enable redress to be more consistent. Consideration could involve strategies to engage and partner with hapū and iwi in addressing complaints. The Crown would be able to

8 http://www.ssc.govt.nz/assets/Legacy/SSC-Model-Standards-information-gathering-and-public-trust.pdf

consider whether to extend the process to include claims for which School Boards of Trustees and District Health Boards are now responsible.

69 Such changes could have a significant impact on the survivor experience. Being able to come to one agency or body which could take a holistic view of a survivor's experience in care would be more consistent with the principles of manaakitanga and being joined up. Another view is that claimants might want the opportunity to address their issues directly with the agency responsible.

70 There would be several options for how such a central assessment could occur. An independent body could be created to receive, consider and respond to claims. Alternatively, an existing agency could be tasked with this responsibility. Another option would be to provide for an optional outside review of agency responses, in addition to the review available under the Ombudsman Act. Consideration would need to be given to whether this process should include a review of claims already settled. The details of these different options would require careful evaluation. A detailed cost estimate will be done in due course.

71 A change to a centralised process could also have significant financial and resource implications. To avoid creating a backlog and further delays in the claims process, the agency or body would need to be well resourced and the implications for claims already settled would need to be worked through. The Royal Commission's first Redress Hearing may result in recommendations that relate to the establishment of any centralised process.

72 Officials seek Ministers' direction on whether consideration of options for central assessment or review of historic claims should be commenced. Timing for the work will need to be confirmed in light of the Royal Commission's March 2020 hearing on redress.

Reform of the Limitation defence

73 The important reasons both favouring and weighing against a limitation defence for historic abuse claims, as well as reform in overseas jurisdictions, may mean it is an appropriate time for reform of this defence in New Zealand. It is possible for the Crown to decide not to rely on a limitation defence, without the need for legislative reform. However, this would mean that plaintiffs with identical claims against non-Crown parties (such as faith-based institutions) would continue to face the potential barrier of a limitation defence. Legislative reform would enable the position of all plaintiffs to be addressed with consistency, rather than on an ad hoc basis.

74 Legislative reform could take a number of forms, including expanding the existing discretion of the courts to grant relief in claims of abuse of minors, providing a legislative presumption that the defence will not apply to such claims, or by removing the defence to such claims altogether. Reform could also consider whether there are other categories of claims that should be approached in the same way.

75 Reform of the limitation defence would likely have significant financial and administrative consequences. Removal of the limitation defence, for example, would improve claimants' prospects of success in court and as such may lead to an increase in the number of claimants who decide to pursue their claims in court (with hearings likely being long, complex and unavoidably costly). An increase in the number of such trials would have an impact on the High Court caseload and on legal aid expenditure. In addition, individuals who have previously settled their claims may

wish to revive their claims for consideration under the new position. Some overseas jurisdictions have expressly provided for, or are in the process of considering this possibility. Any legislative process would need to consider all of these factors to reach a position appropriate to the New Zealand context.

76 Officials seek Ministers' indication of whether consideration of legislative reform should be commenced. The Crown Law Office has previously provided detailed legal advice to the Attorney-General on the possibility of reform, which could form a starting point for this consideration.

Consultation

77 This paper has been developed and agreed collaboratively by an interagency working group made up of the Ministries of Health, Education, Justice, and Social Development, Oranga Tamariki, the State Services Commission, Crown Law, the New Zealand Police and the Department of Corrections.

78 Advice was provided by Archives New Zealand and Te Puni Kōkiri. The Ministry for Pacific Peoples, the Office for Disability Issues and the Ministry for Women were also consulted.

79 The Department of Prime Minister and Cabinet and the Treasury have been informed.

Financial implications

80 The work to consider central assessment and/or review of historic claims will not have financial implications, but any changes proposed as a result of that work is likely to have financial implications. There are also potential financial implications from the proposed new principle for the Crown to consider new information that comes to light following a settlement, although given the typically extensive nature of claims considered the implications are assessed as relatively low at this time. There will be a lead in time for any additional costs for central assessment/review and reconsideration of settlements, which should allow agencies to factor in any budget considerations.

Treaty of Waitangi implications

81 One of the principles agreed by Cabinet to guide the Crown's response to the Royal Commission is "meeting the Crown's obligations under Te Tiriti o Waitangi: Honouring the Treaty, its principles and building a stronger Māori-Crown relationship through the way the government operates and behaves". The proposals in this paper are intended to make the Crown's processes more consistent with te Tiriti.

Human rights implications

82 A strong rationale for this work, and for the work of the Royal Commission, is to uphold human rights. This work will help make changes to create a more transparent and accessible system for those making, or who may wish to make, historic claims.

83 Human rights implications include procedural fairness for all parties, whether they are claimants or non-Crown parties to claims.

84 The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 and will support New Zealand to meet its obligations under various relevant international treaties and obligations. These include the UN Convention on the Rights of the Child, the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the UN Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the UN International Convention on the Elimination of All Forms of Racial Discrimination and the UN Declaration on the Rights of Indigenous People.

Legislative implications

85 This paper has no immediate legislative implications, but proposes areas for further consideration that would involve legislative amendments.

Regulatory impact and compliance cost statement

86 This paper has no regulatory or compliance implications.

Gender implications

87 This work may have some gender implications. Data from the Ministry of Social Development's Historic Claims Unit shows that 72% of their 3631 claimants are male and 28% are female, with a very small number identifying as transgender. It is not known whether this is because girls and vulnerable women were less likely to be abused in care, or because women are less likely to come forward as historic claimants under the current approach.

88 It may be possible to better understand the nature of the current gender difference in claimants as more information on the nature and scale of abuse is gathered as part of the Royal Commission's inquiries. This work can then consider how to ensure women are not discouraged from making historic claims.

89 This work needs to be consistent with the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). In particular the Committee on the Elimination of Discrimination Against Women noted in their 2012 report that they were "concerned about the situation of disadvantaged groups of women, including women with disabilities, women of ethnic and minority communities, rural women and migrant women."

Disability perspective

90 One in four New Zealanders identify as disabled. Many disabled children and adults were deprived of their liberty or taken into state care solely due to their physical or intellectual, disability, or mental health status, particularly in the period before de-institutionalisation in the early 1990s. Disabled people and their experiences of abuse in state care need to be recognised and respected.

91 Government services, systems and processes need to be available to all, and developed with the input of those that will use them. This work needs to ensure the approach to historic claims reflects the needs of disabled people and are fully accessible, for example that the information used in the resolution of historic claims must be in accessible formats. The work also needs to be consistent with the United

Nations Convention on the Rights of Persons with Disabilities (UNCRPD), in particular Article 13 – access to justice. The Crown needs to ensure procedural and age-appropriate arrangements are in place to facilitate disabled people's role as direct and indirect participants in all legal proceedings and processes.

Proactive release

92 We propose to proactively release this paper in whole within 30 working days of Cabinet's decision on it. It will be published on the State Services Commission website, with other agencies linking to the page as required.

93 Separate legal advice on risks arising from the review of the strategy will be shared with Ministers by the Attorney-General. It is not intended that legal privilege over this advice will be waived.

94 Pending agreement to the proposed changes to the Crown Litigation Strategy, we propose issuing a press release at the time this paper is proactively released noting the changes.

Recommendations

95 It is recommended that the Committee:

1 **note** that in April 2019 Cabinet directed officials to consider whether the approach to the conduct of current historic claims litigation could better reflect the principles guiding Crown engagement with the Royal Commission, and report back on this to the Social Wellbeing Committee by the end of October 2019;

2 **note** that the principles guiding engagement with the Royal Commission are manaakitanga, openness, transparency, learning, being joined up and meeting the Crown's obligations under Te Tiriti o Waitangi;

3 **note** that the current Crown Litigation Strategy for historic claims of abuse in state care comprises three principles:

(a) Principle 1: Agencies will seek to resolve grievances early and directly with the individual;

(b) Principle 2: Settlement will be considered for any meritorious claims (particularly where legal risk justifies settlement). Where merited settlement would be full and final with no admission of liability.

(c) Principle 3: Claims that do proceed to court hearing because they cannot be resolved will be defended in Court, considering and relying on defences such as the Limitation Act defence, the ACC bar and the Mental Health Act immunity.

4 **note** that the current Crown Litigation Strategy for historic claims of abuse in state care was adopted in May 2008 and last reviewed in January 2011;

5 **note** that issues have been raised with the Crown's response to historic claims of abuse in state care by claimants and their legal representatives, including criticism of the Crown for failing to provide an approach to resolving claims consistent with tikanga Māori;

6 **note** that the Royal Commission will hold a public hearing on the Crown response to civil claims of state abuse in March 2020, and has stated it will hold a number of public hearings covering different aspects relating to redress over the course of its inquiries;

7 **note** that there are immediate opportunities to amend the Crown Litigation Strategy to better reflect the guiding principles and longer term aspects that can be considered in light of the Royal Commission's hearings;

8 **agree** that the Crown Litigation Strategy should be renamed the Crown Resolution Strategy for historic claims of abuse in state care, to better recognise its key objective which is to resolve claims outside of the court process;

9 **agree** that the Crown Resolution Strategy comprise five overarching principles:

(a) Principle 1: agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes;

(b) Principle 2: settlement will be considered for all meritorious claims. Settlement will generally be full and final without admission of liability;

(c) Principle 3: if claimants become aware of additional material information or circumstances that were not considered by the Crown at that time, the Crown may consider that new information and whether any additional response should be made;

(d) Principle 4: where claimants wish to litigate their claims in court, the Crown will concede any factual matters it does not dispute and will rely on appropriate factual and legal defences; and

(e) Principle 5: the Crown's approach to Alternative Dispute Resolution and litigation of historic abuse claims will be guided by the principles of manaakitanga, openness, transparency, learning, being joined up and meeting the Crown's obligations under Te Tiriti o Waitangi and the outcomes that support those principles;

10 **direct** officials to commence consideration of:

(a) potential options for the central assessment or review of historic claims; and

(b) legislative reform of the Limitation Act 2010 in respect of historic claims of abuse in care; and

11 agree that, in light of the Royal Commission's March 2020 hearing on redress, the timing of report backs on the consideration per recommendation 10 will be coordinated by the Minister of State Services and the Attorney-General with the Committee Chair.

Authorised for lodgement

Hon Chris Hipkins
Minister of State Services

Hon David Parker
Attorney-General

SWC-19-MIN-0193

Cabinet Social Wellbeing Committee

Minute of Decision

Review of Strategy for the Resolution of Historic Claims

Portfolios **State Services / Attorney-General**

On 4 December 2019, the Cabinet Social Wellbeing Committee:

1 **noted** that in April 2019, Cabinet directed officials to consider whether the approach to the conduct of current historic claims litigation could better reflect the principles guiding Crown engagement with the Royal Commission of Inquiry into Abuse in State Care and in the Care of Faith-based Institutions (the Royal Commission), and report back to the Cabinet Social Wellbeing Committee by the end of October 2019 [CAB-19-MIN-0139.01];

2 **noted** that the principles guiding engagement with the Royal Commission are manaakitanga, openness, transparency, learning, being joined up, and meeting the Crown's obligations under Te Tiriti o Waitangi;

3 **noted** that the current Crown Litigation Strategy for historic claims of abuse in state care comprises three principles:

3.1 Principle 1: agencies will seek to resolve grievances early and directly with the individual;

3.2 Principle 2: settlement will be considered for any meritorious claims (particularly where legal risk justifies settlement), where merited settlement would be full and final with no admission of liability;

3.3 Principle 3: claims that do proceed to court hearing because they cannot be resolved will be defended in Court, considering and relying on defences such as the Limitation Act 2010 defence, the ACC bar and the Mental Health Act 1983 immunity;

4 **noted** that the current Crown Litigation Strategy for historic claims of abuse in state care was adopted in May 2008 and last reviewed in January 2011;

5 **noted** that issues have been raised with the Crown's response to historic claims of abuse in state care by claimants and their legal representatives, including criticism of the Crown for failing to provide an approach to resolving claims consistent with tikanga Māori;

6 **noted** that the Royal Commission will hold a public hearing on the Crown response to civil claims of state abuse in March 2020, and has stated it will hold a number of public hearings covering different aspects relating to redress over the course of its inquiries;

7 **noted** that there are immediate opportunities to amend the Crown Litigation Strategy to better reflect the guiding principles and longer term aspects that can be considered in light of the Royal Commission's hearings;

8 **agreed** that the Crown Litigation Strategy should be renamed the Crown Resolution Strategy for historic claims of abuse in state care, to better recognise its key objective of resolving claims outside of the court process;

9 **agreed** that the Crown Resolution Strategy comprise five overarching principles:

9.1 Principle 1: agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes;

9.2 Principle 2: settlement will be considered for all meritorious claims, and will generally be full and final without admission of liability;

9.3 Principle 3: if claimants become aware of additional material information or circumstances that were not considered by the Crown at that time, the Crown may consider that new information and whether any additional response should be made;

9.4 Principle 4: where claimants wish to litigate their claims in court, the Crown will concede any factual matters it does not dispute and will rely on appropriate factual and legal defences;

9.5 Principle 5: the Crown's approach to Alternative Dispute Resolution and litigation of historic abuse claims will be guided by the principles of manaakitanga, openness, transparency, learning, being joined up and meeting the Crown's obligations under Te Tiriti o Waitangi and the outcomes that support those principles;

10 **directed** officials to commence consideration of:

10.1 potential options for the central assessment or review of historic claims;

10.2 legislative reform of the Limitation Act 2010 in respect of historic claims of abuse in care;

11 **agreed** that, in light of the Royal Commission's March 2020 hearing on redress, the timing of report backs on the consideration referred to in paragraph 10 will be coordinated by the Minister of State Services and the Attorney-General with the Committee Chair.

Vivien Meek
Committee Secretary

Hard-copy distribution (see over)

Present:
Rt Hon Jacinda Ardern
Rt Hon Winston Peters
Hon Kelvin Davis
Hon Grant Robertson
Hon Chris Hipkins
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Jenny Salesa
Hon Kris Faafoi
Hon Tracey Martin (Chair)
Hon Willie Jackson
Hon Poto Williams
Jan Logie, MP

Officials present from:
Office of the Prime Minister
Officials Committee for SWC
Crown Law
Oranga Tamariki – Ministry for Children
Office of the Chair

Hard-copy distribution:
Minister of State Services
Attorney-General

SWC-19-SUB-0193

Cabinet Social Wellbeing Committee

Summary

Review of Strategy for the Resolution of Historic Claims

Portfolios **State Services / Attorney-General**

Purpose This paper seeks agreement to the updated Crown Resolution Strategy for the resolution of historic claims.

Previous Consideration In April 2019, Cabinet directed officials to consider whether the approach to the conduct of current historic claims litigation could better reflect the proposed principles (the review), and report-back to SWC by the end of October 2019 [CAB-19-MIN-0139.01].

Summary

The current Crown Litigation Strategy was adopted in May 2008 and last reviewed in January 2011. The Strategy includes three principles: agencies will seek to resolve grievances early and directly with the individual, settlement will be considered for any meritorious claims, and claims that do proceed to court hearing because they cannot be resolved will be defended in Court.

Since the review began, the Royal Commission has announced it will conduct a hearing in March 2020 into the experiences of survivors in making civil claims against the Crown for abuse in state care and whether the Crown's responses to civil claims have been adequate/appropriate.

Criticism about the Crown's approach to resolving historic claims of abuse in state care has been expressed by claimants and their legal representatives. This criticism includes delays in responses to claims, redactions on personal information provided, and uncertainty around the process and the level and consistency of settlement offers. There is also criticism of the reliance on legal defences in litigation, such as the limitation defence, which prevents the litigation of claims that are not brought within a specified period.

Some immediate improvements can be made to the Crown Litigation Strategy, to reflect current practice and to make the approach better reflect the principles. It is proposed the Strategy is renamed the "Crown Resolution Strategy", to better recognise its key objective to resolve claims outside of the court process, with five updated principles:

- Principle 1: agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community where the claimant wishes;
- Principle 2: settlement will be considered for all meritorious claims, and Settlement will generally be full and final without admission of liability;

- Principle 3: if claimants become aware of additional material information or circumstances that were not considered by the Crown at that time, the Crown may consider that new information and whether any additional response should be made;

- Principle 4: where claimants wish to litigate their claims in court, the Crown will concede any factual matters it does not dispute and will rely on appropriate factual and legal defences; and

- Principle 5: the Crown's approach to Alternative Dispute Resolution and litigation of historic abuse claims will be guided by the principles of manaakitanga, openness, transparency, learning, being joined-up and meeting the Crown's obligations under Te Tiriti o Waitangi, and the outcomes that support those principles.

Regulatory Impact Analysis	Not applicable.
Baseline Implications	None from this paper.
Legislative Implications	None from this paper.
Timing Issues	None specified.
Announcement	None proposed.
Proactive Release	The Minister intends to release the paper.
Consultation	Paper prepared by Crown Law and SSC. Corrections, MSD (Disability Issues, Social Development), MoE, MoH, MoJ, TPK (Māori Development), Police, Women, Pacific Peoples, and Oranga Tamariki were consulted. The Treasury and DPMC (Prime Minister) were informed. Archives New Zealand were also consulted. The Minister indicates that the Minister of Corrections and Māori Crown Relations: Te Arawhiti, Minister of Finance, Minister of Education, Minister of Justice, Minister for Social Development and the Disability Issues, Minister of Health, Minister of Police, Minister for Children and Internal Affairs, Minister for Women, and the Minister for Pacific Peoples were consulted. The Minister also indicates that New Zealand First and the Green Party were consulted.

The Minister of State Services and the Attorney-General recommend that the Committee:

1 note that in April 2019, Cabinet directed officials to consider whether the approach to the conduct of current historic claims litigation could better reflect the principles guiding Crown engagement with the Royal Commission of Inquiry into Abuse in State Care and in the Care of Faith-based Institutions (the Royal Commission), and report back to the Cabinet Social Wellbeing Committee by the end of October 2019 [CAB-19-MIN-0139.01];

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10 direct officials to commence consideration of:

10.1 potential options for the central assessment or review of historic claims; and

10.2 legislative reform of the Limitation Act 2010 in respect of historic claims of abuse in care; and

11 agree that, in light of the Royal Commission's March 2020 hearing on redress, the timing of report backs on the consideration referred to in paragraph 10 will be coordinated by the Minister of State Services and the Attorney-General with the Committee Chair.

Jenny Vickers
Committee Secretary

Hard-copy distribution:
Cabinet Social Wellbeing Committee

CAB-19-MIN-0651

Cabinet

Minute of Decision

Report of the Cabinet Social Wellbeing Committee: Period Ended 6 December 2019

On 9 December 2019, Cabinet made the following decisions on the work of the Cabinet Social Wellbeing Committee for the period ended 6 December 2019:

[redacted]

SWC-19-MIN-0193 **Review of Strategy for the Resolution of Historic Claims** CONFIRMED

Portfolios: State Services / Attorney-General

[redacted]

Michael Webster
Secretary of the Cabinet

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Cabinet Social Wellbeing Committee
Attorney-General