



Guidelines on Discretionary Payments in Historic Claims

Last Review date: 22 September 2023 (New policy guidance)
Approved by: Deputy Chief Executive People and Capability
Owner: General Manager Historic Claims

Introduction

- 1 The Historic Claims Business and Process Guidance ("the Handbook") allows for the General Manager to recommend a discretionary amount be included in any settlement payment which is greater than the amount the person would ordinarily be entitled to under the Historic Claims payment categories and/or any payment frameworks in place (including inappropriate detention and BORA).
- 2 The General Manager may consider making a recommendation for a discretionary payment where in their view, the payment would otherwise not provide an adequate remedy in respect of the claim. In particular, the ability to make a payment of a discretionary amount ensures:
 - Fairness in approaching individualised assessments;
 - Flexibility to respond to unique circumstances that cannot be anticipated and/or provided for in existing individualised assessment processes.
- 3 There is no discretion to endorse a rapid payment at an amount that is different to the amount that has been calculated under the rapid payment framework. This is because discretionary payments usually relate to claims that have unique factual situations or circumstances where a person's concerns and care experience have been considered. Under the rapid payment framework there is no consideration given to specific allegations so there is insufficient information to make such a determination.
- 4 The purpose of these guidelines is to provide guidance on when the General Manager may consider recommending a discretionary payment and to ensure transparency for claimants around in what circumstances a discretionary payment may be recommended in respect of their claim.

How may the discretion be exercised?

- 5 The circumstances in which the discretion may be exercised in respect of a claim undergoing an individualised assessment are:

- 5.1 for a quantum which is outside of the payment category (or the point in the payment category) that the Consistency Panel has assessed the claim at (Appendix 1 of the Handbook);
- 5.2 for a quantum where there is an allegation or evidence of false imprisonment that does not fit under the inappropriate detention framework (section 7.12 of the Handbook); or
- 5.3 for a quantum where there is a recommendation to make a payment for a claim undergoing an individualised assessment which includes a potential breach under the New Zealand Bill of Rights Act 1990 (BORA) where the BORA framework amount coupled with the payment category amount and any inappropriate detention amount do not provide for an appropriate remedy (section 7.13 of the Handbook).

When might the discretion be exercised?

- 6 This guidance cannot and does not purport to describe all situations where the General Manager may consider it appropriate to recommend a discretionary payment. Below are examples where applying the frameworks alone to the claim may not ensure that the claimant receives an adequate remedy.
 - 6.1 The claimant makes allegations that have been taken into account that meet the legal threshold of the tort of false imprisonment (where a person is detained without lawful justification) which do not fit under the inappropriate detention framework. Examples include:
 - Where there was no lawful authority to place or hold a claimant in a care residence. This could include situations where there was no Court order in place that permitted placement in a residence (e.g. where only a supervision order was in place).
 - Where a social worker consented to or acquiesced in an overnight stay in Police cells when there was no authority to detain.
 - 6.2 The payment amount determined by applying the relevant frameworks and payment categories may not provide for an adequate remedy in respect of potential breaches of BORA. Examples include where there are allegations:
 - of serious, long-standing or multiple potential breaches of section 9 of BORA.
 - that are potential BORA breaches that fall outside of the BORA framework. For example;
 - allegations about conduct at a bush programme that is not listed on the bush programmes list in the payment frameworks definitions (see Appendix 2 of the Handbook).
 - serious breaches of section 23(5)¹ in a foster or caregiver placement such as locking a person in a room for a lengthy period of time whilst being deprived of necessities;

¹ For this to apply, the act must be done by a section 3 BORA actor – a person directly employed by the State such as a social worker or residential staff member, as well as other persons who while not public servants, are acting on behalf of the State such as foster parents/caregivers or staff employed by NGO contracted providers. The act must be also done in the performance of any public function, power or duty.

- 6.3 Where due to changes in assessment approach over time, a claimant's sibling or whanau member has previously received a higher payment under an assessment that considered individual allegations² and there is no discernible difference in their care experience or concern, a discretionary payment may be appropriate to ensure equity between the two claimants.
- 6.4 The claimant's care experience is profoundly unique or contains novel elements that the payment categories do not provide for.
- 6.5 The claimant's claim journey has been particularly unique, or there have been serious service level failures in the way the claim has been managed (e.g. inordinate delays compared to other similar claims or serious communication errors).
- 6.6 Where a 'second claim'³ is being assessed which has taken into account further allegations, but these have not led to an increase in the payment category amount. In this situation, it may be appropriate to pay an additional payment to recognise these allegations.
- 6.7 Where the claim falls into category 74 of the payment categories (being the highest payment category and which requires a payment above \$55,000).

What is the evidential threshold?

- 7 For any allegation or concern made by a claimant which is to be included as part of the reasoning for the General Manager recommending a discretionary payment, MSD will consider the allegation in a manner consistent with the level of evidence required for that particular allegation required under the Handbook. For example:
 - a 'Step 2'⁵ is required for allegations that are defined as moderate or serious sexual abuse, serious physical abuse, moderate chronic physical abuse or high inaction (see section 7.5 of Handbook and the definitions in Appendix 3);
 - a 'Step 2' is required for allegations of false imprisonment (see sections 7.6 and 7.12 of the Handbook).

Administrative process for exercise of discretion

- 8 Whilst a claimant may ask, no request is required from a claimant for MSD to consider making a discretionary payment.
- 9 Where a request has been made for an additional payment, bespoke calculation, or for the General Manager to consider recommending a discretionary payment or the

² This does not include payments made under the Ministry's Two Path Approach that was in place from approximately 2015 to 2017.

³ See section 1.4 of the Handbook.

⁴ Category 7 claims have circumstances and conditions that are exceptional. They could involve a level of violence, death, exposure, injury that sets it apart from other claimant experiences.

⁵ Step 2 analyses require consideration of whether, on the basis of the information gathered, it is reasonable for the allegation to be taken into account for the purpose of making a settlement offer.

Historic Claims Consistency Panel⁶ identifies that the claim may fall under paragraph 6 above, the Consistency Panel chair (or their nominee) will prepare advice for the General Manager around whether a discretionary payment should be recommended and the proposed amount. The following factors may be relevant when recommending an amount:

- the relevant facts and circumstances of the claim including the severity of these;
- the severity of impact on the claimant;
- previous comparator payments in which a discretionary payment has been made;
- legal advice;
- the average payments of claims more generally.

- 10 Where the request is not supported by the Consistency Panel, the Consistency Panel will make the General Manager aware of the request and the reasons for not supporting it. Reasons could include:
 - the allegations have not met the required evidential threshold;
 - the allegations do not meet the legal requirements for BORA or false imprisonment;
 - it is considered that the proposed settlement amount is sufficient to provide an adequate remedy.
- 11 On receiving the advice, the General Manager may commission any further advice (legal, operational or claim specific) that may be needed to inform a decision.
- 12 In all circumstances, it is a decision of the General Manager whether or not to recommend a discretionary payment. They may choose to endorse any recommendation from the Consistency Panel Chair or alternatively make a different decision and will provide reasons for their decision. That reasoning will then be recorded in writing.
- 13 Where a discretionary payment is being recommended by the General Manager, sufficient reasoning will then be noted in the subsequent Deputy Chief Executive approval memo.
- 14 The Historic Claims team will keep a register of all claims where a recommendation has been provided to the General Manager including details of any reasons why a recommendation was or was not made and the amount of any endorsed discretionary payment. This will be used when considering subsequent requests and recommendations.


Communication of reasons for discretion decision

⁶ The Panel reviews all individualised assessments prior to the recommended settlement payment being endorsed by the General Manager for approval. The Panel is made up of senior staff of Historic Claims who are not directly involved in writing of assessments as well as a member of the MSD Legal team.

- 15 Adequate written reasons are to be provided to all claimants who have requested a discretionary payment or who are receiving a settlement offer which includes a discretionary payment. Reasons may be stated briefly but should reflect those included within the relevant DCE approval memo or in the General Manager's decision in writing.
- 16 Sufficient information should be provided in order to enable those affected to see how the decision was reached and whether some error has been made so as to enable them to make an informed decision on whether to challenge it.

Approve Guidelines on Discretionary Payments in Historic Claims

Approve / Decline



Cain McLeod
Deputy Chief Executive People and Capability
(Acting)

22/9/23

Date