



Listening, learning, changing Mā Whakarongo me Ako ka huri te tai

Crown Response to the Abuse in Care Inquiry

COVERSHEET

Minister	Hon Erica Stanford	Portfolio	Lead Coordination Minister for the Government's Response to the Royal Commission's Report into Historical Abuse in State Care and in the Care of Faith-based Institutions
Title of briefing	Meeting Pack – 21 August 2024 Ministerial Group – Crown Response to the Abuse in Care Inquiry	Date to be published	8 October 2025

Withholding grounds

Information within this document has been withheld as if it had been requested under the Official Information Act 1982. Where this is the case, the reasons for withholding have been listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

- section 9(2)(h) to maintain legal professional privilege



Meeting pack – 21 August 2024

Ministerial Group – Crown Response to the Abuse in Care Inquiry

Membership:

- Hon Erica Stanford as Lead Coordination Minister for the Government's Response to the Royal Commission's Report into Historical Abuse in State Care and in the Care of Faith-based Institutions (Chair) and as Minister of Education;
- Hon Dr Shane Reti as Minister of Health and Minister for Pacific Peoples;
- Hon Paul Goldsmith as Minister of Justice;
- Hon Louise Upston as Minister for Social Development and Employment and Minister for Disability Issues;
- Hon Judith Collins KC as Attorney-General;
- Hon Mark Mitchell as Minister of Corrections and Minister of Police;
- Hon Tama Potaka as Minister for Māori Development and Māori Crown Relations: Te Arawhiti;
- Hon Matt Doocey as Minister for ACC, Minister for Mental Health, and Minister for Youth;
- Hon Karen Chhour as Minister for Children and Minister for the Prevention of Family and Sexual Violence; and
- Hon Casey Costello as Associate Minister of Health and Associate Minister of Police.

Meeting pack:

- Aide-memoire: agenda and items for discussion;
- Update paper: Responding to the recommendations of Whanaketia – the Royal Commission's final report; and
- Discussion paper: Three redress eligibility parameters.
- Treaty of Waitangi paper (previously circulated)



Aide-memoire

Agenda and items for discussion

For: Ministerial Group – Crown Response to the Abuse in Care Inquiry

Date: 15 August 2024

Security level:

Purpose

1. This pack provides the Ministerial group for the Crown Response to the Abuse in Care Inquiry (the Ministerial Group) with an agenda and papers to support its discussion on 21 August 2024.

Agenda

	Item	Timing
1.	Accelerating the Crown Response (Closed item) - Ministers and advisors only	20 minutes
2.	Responding to the recommendations of Whanaketia – the Royal Commission’s final report - Providing an initial view of early opportunities for progressing responses to the recommendations	20 minutes
3.	Consideration of three redress eligibility parameters - Seeking Ministers endorsement on the approach for each of three parameters relating to who can seek redress in the future	20 minutes
4.	Other business - Responding to Royal Commission’s Treaty of Waitangi findings - Upcoming Cabinet papers	15 minutes

Item 1: Accelerating the Crown Response

2. Lead Coordination Minister to update Ministers on discussions with Prime Minister on response
3. A Cabinet paper is being drafted proposing five recommendations to support an accelerated response to the Royal Commission’s final report. The draft paper (or high level overview) is intended to be circulated for Ministerial consultation the week of 19 August, with the intention it be considered at the Cabinet Business Committee on 2 September.

Item 2: Responding to the recommendations of Whanaketia – the Royal Commission’s final report

4. This item seeks your feedback on the initial high-level triage of the recommendations from *Whanaketia* and your views on any further early opportunities to progress responses to those of the recommendations that can be readily agreed.
5. This analysis will be brought to Ministers and to Cabinet in mid-September for formal decisions on the Government’s agreed direction, on recommendations that can be readily agreed for early progress, and to commission work on recommendations which may be more complex and far-reaching.
6. Note agencies have indicated that some recommendations may require re-prioritisation and/or additional funding. Initial decisions on if and how this is supported in this financial year will be sought through the Cabinet paper “Accelerating the Crown Response”.

Item 3: Consideration of three redress eligibility parameters

7. The Ministerial Group is working through key high-level parameters for redress for survivors of abuse in care, to inform a paper seeking Cabinet decisions to guide the detailed development of redress. Included among the parameters are six that guide the eligibility for redress.
8. Two eligibility parameters – the care settings and forms of abuse to be covered – have already been considered by the Ministerial Group. The attached discussion paper (*Consideration of three redress eligibility parameters*) seeks endorsement of recommended approaches for three more of the eligibility parameters – length of time redress needs to operate; the extent to which survivors who have settled claims under current or past processes can access redress; and, whether whānau of deceased survivors can make a redress claim.
9. Further advice will be provided to Ministers on potential broader whānau access to redress alongside survivors as part of apology, payment, and support service frameworks, intended to be considered at the next Ministerial Group meeting.
10. The remaining eligibility parameter is the care time period to be covered by redress. This parameter is closely tied with potential phasing and prioritisation approaches for managing demand on redress. It is intended care time period will be covered in later advice to the Ministerial Group on the potential detailed design process.



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Item 2

Responding to the recommendations of Whanaketia – the Royal Commission’s final report

Initial view and early opportunities

August 2024

Crown Response Unit

Decision sought and recommended approach

Decision required by the Ministerial Group

- Provide feedback on the initial high-level triage of the recommendations from *Whanaketia* and identify further early opportunities to progress responses to those of the recommendations that can be readily agreed.

Recommended option

- Endorse progressing specific identified recommendations to demonstrate forward momentum and a positive response to the Royal Commission's report: *Whanaketia*, while concurrently progressing further analytical work to identify which of the more complex and far-reaching recommendations can be implemented in the medium term.

Next steps

- Bring this analysis to Ministers and to Cabinet by mid-September to seek decisions to confirm the government's agreed direction and to commission work on the outstanding recommendations which may be more complex and far-reaching.
- Note that some of these recommendations will require additional funding, and a parallel Cabinet paper on "Accelerating the Crown Response" is seeking to establish a tagged contingency that could potentially be used for this.
- Commence RAG reporting and develop a "week by week" view, noting that the initial version of this will be included in the paper seeking decisions from Cabinet in mid-September.
- Continue to triage and sort the recommendations to identify any more that can be readily agreed and progressed, which will require limited further work to implement, and which are more complex and far-reaching and will require deeper analysis over the short to medium term.

Overview of the categories of recommendations

Agencies are working to complete initial advice for Ministers on if and how to progress recommendations and associated decisions relating to re-prioritisation and costs. The recommendations have been divided into the seven categories below.

- **Redress:** Most of the 20 redress recommendations relate to a new redress scheme and are the subject of anticipated Cabinet decisions later this year. Some of these key decisions could be announced as part of the 12 November 2024 apology. Several other redress recommendations are discrete and small scale but potentially meaningful actions that can be progressed immediately.
- **Justice:** Around half of the 21 justice recommendations entail legislative change and MoJ is working to identify any early opportunities in this space. Most Police and Crown Law recommendations are supported to progress are fairly discrete and can be implemented in the short to medium term.
- **Care safety:** These 38 recommendations will be more complex to work through because they apply across multiple and diverse care settings. Some elements are already in place in the mental health, child and youth, and education care sectors, and, to a lesser extent, in the disability care sector. The focus of work will therefore be on identifying gaps in existing standards, vetting, complaints, registrations, training processes etc and understanding how well existing mechanisms are working. Advice will also be developed on the feasibility, costs, risks and benefits of introducing common standards, processes etc across all care settings as recommended by the Royal Commission. Work is also required with the faith-based care providers to understand gaps and opportunities.

- **Prevention and empowering communities:** The 15 recommendations relating to prevention and individual and community empowerment offer opportunities for new initiatives that could be implemented relatively quickly with relatively small funding boosts, though work is still needed on anticipated benefits. They involve providing advocates for those in care, working more closely to connect those in care with whānau and communities and social and educational campaigns to prevent abuse or respond to it. One recommendation however, (on establishing a commissioning body for all care services) would involve significant work and large-scale structural machinery of government and service delivery change.
- **Monitoring and oversight:** These three recommendations require a review of the oversight bodies for the mental health, child protection, education, and disability care sectors to identify any gaps or duplication and investigating combining the Oranga Tamariki oversight bodies.
- **Implementation:** In terms of the 16 implementation recommendations, there is an opportunity to move early to establish a new office within a central agency to drive Government's response to the Royal Commission reports. The remaining recommendations mainly focus on how the implementation of the recommendations should be done.
- **Faith based institutions:** The recommendations for faith-based institutions mostly reiterate the recommendations for the State but in faith contexts, for example that faith entities should ensure religious leaders are accountable, should work with the Care Safety Agency, ensure staff are professionally trained and supervised etc.

The table below identifies which of the categories above each of the recommendations have been allocated to, and **bold** indicates recommendations in the “fully accept,” “partially accept,” or “accept in principle,” categories. Some of these may also be open to early agreement either in full or in part.

Whanaketia: Through Pain and Trauma, from Darkness to Light

Abuse in Care Inquiry: Final Report Recommendations (138)

Faith-based recs (25)

- R4 Catholic church to write to the Pope
- R12-13 Catholic Bishop of Christchurch and St John of God to ensure redress
- R89-110 Faith-based entities to adopt the same standards and processes as for the State

Comment:

The above recs apply to faith-based institutions only. Additional recs that apply to both State and faith-based institutions are included in other categories. The Crown is engaging with relevant faith-based institutions on responding to these.

Redress (20)

- R1 Implement the 95 redress recs
- **R2-3 Public apologies**
- **R5 Change public signage**
- R8-9 Include faith groups in redress
- R10 Backdate eligibility to redress
- R11 Provide enough compensation
- R14 Give effect to the Treaty of Waitangi in the redress scheme
- R15-17 Embed human rights in the redress scheme
- **R18 Review Lake Alice settlements for parity**
- **R19 Investigate unmarked graves**
- **R20 A contestable fund for community harm**
- R21 Whānau harm payments for those cared for by survivors
- **R81 Record-keeping principles**
- **R82 document accounts of people's time in care (care histories)**
- R83-84 Retention of records and sharing information to prevent abuse

Comment:

These recommendations reflect or build on those in the December 2021 redress report: 'He Pūrapura ora, He Māra Tipu'. Work is already underway on these.

Care Safety (38)

- **R39 Care Safety Principles**
- R40 National Care Safety Strategy
- R41-42 Establish a Care Safety Agency to report annually
- **R43 pre-work to analyse functions of a Care Safety Agency**
- R44 Care Safety Agency work to begin in a Care System Office
- R45-46 Care Safety Act (incl. Review of legislation)
- R47 Standards & penalties
- R48-49 Accreditation of "care" agencies and charities
- **50-56 Safeguarding (incl. Designating safeguarding leads, and ensuring safeguarding is a high priority)**
- R57-64 Registration, **vetting** and training of staff, **pre-employment screening, code of conduct** (incl. Caregivers and volunteers)
- **R65-67 Complaints are reported and responded to**
- R68-69 A centralised complaints database and mandatory reporting.
- **R70-71 Minimise use of Institutional environments**
- R72-75 Make Institutional environments safer and ban restrictive practices
- **R88 Gloriavale: Take steps to ensure safety**

Comment:

Some of these recs could be considered in the short term, while others, such as the establishment of a Care Safety Agency, would take longer.

Monitoring and oversight (3)

- R85 Review independent monitoring entities and consolidate the C&P and YJ monitoring bodies
- R86-87 Roles of oversight bodies and removal of barriers and constraints to monitoring (incl. resourcing)

Prevention and empowering people in care and their communities (15)

- R76-77 Independent advocates for people in care (incl. care experienced)
- **R78-80 Support connections to whānau and communities and understanding of culture**
- R111-112 Social and educational campaigns
- **R113 disseminate copies of Whanaketia**
- R114 review policy and legislation to enable those in care and whānau to participate more
- **R115 contemporary approaches to care – incl. devolution, social investment, whānau centred, community led**
- R116 establish a Commissioning Agency
- R117-118 partner with Māori to give effect to the Treaty, and uphold the rights of Māori, Pacific, Deaf, disabled and women.
- R121-122 Community based prevention programmes

Comment:

These recommendations are closely related to the care safety ones.

Justice Sector (21)

- **R6-7 Torture: Investigate if not already done**
- **R22-24 Amend prosecution guidelines and train prosecutors on those guidelines**
- R25 Judicial-led initiatives such as Te Ao Marama
- R26 Amend the Crimes Act
- R27 Amend the Sentencing Act
- R28 Amend the Oranga Tamariki Act
- R29 Amend the Criminal Records (Clean Slate) Act
- R30 Amend the Victims Rights Act
- **R31 List of specialist Lawyers**
- R32 Amend the Evidence Act
- **R33 Education & training on the Inquiry findings, discrimination, neurodivergence, and human rights.**
- **R34 Review the Police Manual**
- R35 Establish a specialist Police Unit
- R36 Courts should prioritise
- R37 Review the Legal Services Act
- R38 Amend the Evidence Act
- R119 Review NZ Human rights framework
- R120 Performance indicators based on domestic and international obligations

Implementation (16)

- **R123-124 Care System Office/Ministry of the Care System – to implement all recs**
- R125 Take action to give effect to all recs including the 95 redress recs
- R126-127 Partner with iwi and co-design with communities to give effect to Te Tiriti & UNDRIP in implementing the recommendations

- R128 content of public awareness work (relates to recs 111 and 112)
- **R129 Any appointments to reflect diversity and survivor experience**
- **R130-131 publish responses to findings and recommendations**
- **R132-138 seek cross party agreement, annual reporting for 9 years, reports to select committee, review the implementation, co-design response with communities**

Comments:

Consideration of a Care System Office will be the first MoG decision

Early thinking on potential recommendations for immediate implementation

The 113 [non faith-based] recommendations have been categorised as recommend: Fully accept (10), accept the intent – in principle (31), partially accept (4), further analysis needed (65), and possible early no (3).

Some recommendations in the “fully accept” or “partially accept” or “accept in principle” categories have been identified (so far) that could be progressed immediately, and these are listed below. Note that the ones marked with an asterisk may require a small amount of additional funding to progress:

- 2-3 Public apologies.* This would be largely completed by the public apology planned for 12 November 2024.
- 5 Change Public signage, honours etc: This could be completed by asking bodies responsible to actively seek out locations that may be connected to abuse or abusers.
- 6 Police to open investigations into potential cases of torture: Police can work closely with Crown Law to investigation situations highlighted by the Royal Commission and survivors
- 18 Review Lake Alice settlements for parity.*
- 19 Investigate unmarked graves.*
- 20 A contestable fund to address community harm.*
- 34 Review the Police manual to ensure it is consistent with human rights and international law (this is done on a regular cycle).
- 39 Care safety principles.
- 81 Record keeping principles.
- 113 Dissemination and publication of the Royal Commission’s final report: This is being done already.
- 123 Establish a Care System Office to progress the implementation.*
- 130 publish the Government’s response to the findings of the Royal Commission’s final report.
- 131 publish the Government’s response to the recommendations of the Royal Commission’s final report.

Many recommendations in the “accept in principle” category describe ongoing elements of existing work programmes such as staff registration, vetting, and training which could be improved in the relatively short term to fulfil the requirements of those recommendations.

We are also working to identify ways Government can encourage or support other parties (such as faith-based groups or local bodies) to take action where this is recommended,

Other recommendations that can be progressed more quickly will be identified in the next week and included in the advice in the September Cabinet paper

Discussion paper



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Consideration of three redress eligibility parameters

For: Ministerial Group – Crown Response to the Abuse in Care Inquiry

Date: 15 August 2024

Security level: Sensitive

Decision required

1. This paper seeks decisions on three parameters relating to who can seek redress in the future. These decisions will then guide the development of advice for Cabinet on the broader set of redress eligibility parameters in September.

Recommended approach

2. It is recommended the Ministerial Group:
 - a) endorse the recommended approach for each of three redress eligibility parameters:

Eligibility parameter	Recommended approach	Key considerations
1. Length of time redress needs to operate.	• An open-ended approach with a compulsory review no more than five years after a new redress system is implemented, with the review to look at whether there is a case to introduce an end date for redress.	• Demand for redress will become clearer through the first five years of operation of a new redress system at which point decisions can be made about the length of time redress needs to operate.
2. Extent to which those who have settled claims under current or past processes can access redress.	• Those with previously settled claims are able to access new redress, with the redress payment adjusted to reflect past settlements.	• Ensuring equity between survivors who have already come forward and those yet to engage with redress.
3. Whether whānau of deceased and/or survivors can access some aspects of redress.	• Whānau of deceased survivors who had applied for redress or clearly signalled their intent to apply before they died can continue with or make an application for redress.	• Acknowledging deceased survivors' experiences and clearly expressed wishes.
	• Make decisions around potential whānau eligibility for supports and services as part of decisions on the supports and services framework in October.	• Allowing the Ministerial Group to consider support service options in their full context.
	• Make decisions around potential whānau eligibility for payments as part of decisions on the redress payment frameworks in October.	• Allowing the Ministerial Group to consider support service options in their full context.

- b) **note** the Group has previously considered two other redress eligibility parameters, the:
- care settings to be covered, where the Group endorsed redress cover both State and non-State, noting it will be important non-State organisations fund their portion of redress costs; and
 - forms of abuse, where the Group endorsed physical, sexual, emotional, and psychological abuse and neglect defining access to redress, with cultural and spiritual abuse and neglect being compounding factors.

Context: There are six separate eligibility parameters, two of which have already been discussed with the Ministerial Group

3. There are six separate parameters to determine who can access redress, which taken together define the scope of redress's coverage:
- a) the care settings to be covered;
 - b) the forms of abuse to be covered;
 - c) the care time period to be covered;
 - d) the length of time redress needs to operate (e.g. fixed time period, ongoing);
 - e) the extent to which those who have previously settled claims through existing or past processes can access the system; and
 - f) whether whānau of survivors (deceased and/or living) can access some aspects of redress.
4. The first two parameters – care settings and forms of abuse to be covered by redress – were discussed by the Ministerial Group in June 2024 with decisions as set out in recommendation 2(b) above.
5. Three of the remaining parameters and the options for each are summarised in Table One, with commentary on each parameter provided in the following sections. The care time period to be covered by redress is closely tied with potential phasing and prioritisation approaches to managing demand on redress and are intended to be discussed with you in October as part of draft options for the detailed design process.

Table One. Range of potential options for three redress eligibility parameters

Parameter	Summary of options for the parameter
1. Length of time redress needs to operate	• Fixed duration • Fixed duration with review point – confirming whether or not there is a strong case to extend duration • Open ended with review point – confirming whether or not there is a strong case to introduce an end date • Open ended
2. Extent to which survivors who have settled claims under current or past processes can access redress	• Access as per a new claimant • Access with redress adjusted to reflect past settlements • No access

Parameter	Summary of options for the parameter
3. Whether whānau of deceased survivors can make a redress claim	• Next of kin can continue a lodged claim on behalf of a deceased survivor • Next of kin can submit a claim on behalf of a deceased survivor where there is clear evidence the survivor intended to apply • Next of kin can submit a claim on behalf of a deceased survivor where there is no evidence the survivor intended to apply • Next of kin cannot continue with a lodged claim nor submit a new claim for a deceased survivor

6. Appendix One summarises the Royal Commission and Design Group's recommendations for each parameter and the current approach by New Zealand abuse claims processes. Appendix Two summarises how each parameter is approached by four comparable international schemes – Australia, the Republic of Ireland, Northern Ireland, and Scotland.

Commentary on the three eligibility parameters under consideration

Parameter 1: The length of time redress needs to operate

An open-ended redress system with a compulsory review point would allow the Government to take into account care safety improvements to determine the type and level of ongoing redress required

- As Ministers have identified, a key challenge with addressing historical abuse in care is that abuse in care is still occurring. This makes it challenging to set a fixed date for the length of time redress should operate. If a fixed date was set at the start of a new redress system, there would need to be clear expectations on work that would be done ahead of the system's conclusion for abuse claims that come forward after such a date.
- There are limited ways to pursue redress through civil litigation in New Zealand, which represents the primary alternative path in the overseas jurisdictions that have fixed lengths of time for their redress schemes. In the absence of litigation reform, other alternative dispute resolution processes would need to be considered if a redress system had a fixed duration.
- A formal review at a prescribed point, by an independent group, would be an effective way to assess a redress system's overall performance and whether any changes are needed to reflect changes in the wider environment in which the system is operating. For an open-ended redress system a review would determine whether, after a period of safety improvements in the wider care system, a redress end date could feasibly be set.
- A review within five years of a redress system's establishment would allow a suitable time for care improvements to have more effect. Such a review point also sends a strong signal of the expectation care will continue to become much safer.
- A lesson from overseas schemes is that ongoing demand for redress is generally easier to model after the scheme has been operating for a period of time, meaning a formal review is also useful for monitoring a system's financial sustainability. Depending on the nature of survivor participation in the governance or operation of a redress system, an independent review can also help to strengthen a system's integrity (real and perceived).

Parameter 2: Extent to which those who have settled claims can access redress

The survivor cohort with settlement agreements is fairly well defined

12. Most claims for abuse in State care that have been resolved have been concluded by way of a settlement agreement entered into between the Crown and the survivor that records the terms of the agreement between parties, including generally that the settlement is 'full and final'. This approach reflects the Crown Resolution Strategy (last updated in 2019). A similar process has been followed by many non-State care organisations.
13. There are approximately 4229 survivors that have resolved claims with the State (through the various claims processes) and at least 1266 survivors that have resolved claims with non-State organisations. The number of non-State settled claimants is anticipated to be higher, as data has come from faith groups with established redress processes and there are several faith groups whose redress processes are not well established.

9(2)(h)

14. 9(2)(h)

15. Following Cabinet decisions to establish a new independent redress system [SWC-21-MIN-0204] an additional clause was added to settlement agreement stating that by entering into the agreement a survivor is not prevented from accessing the new redress system should it be made available to settled survivors. 9(2)(h) however survivor expectations are likely to have been raised following the addition of the redress clause.

Consistency and fairness considerations support survivors with settled claims being able to access redesigned redress, but with the redress provided reflecting earlier settlements

16. For most current and past claims, the form of redress has generally been financial with an apology and varying degrees of access to personal records, counselling, and other targeted supports. Given the level of variation in services survivors have received through Crown and non-State redress processes, we consider previously settled claimants should be able to access any new apologies and support services with minimal modification to reflect past settlements.
17. Given the nature of what they experienced in care, settled survivors should not be disadvantaged for having come forward when they did to seek redress from the options available at the time. Many survivors, due to the impacts of the abuse on their life course, have experienced financial hardship and have accepted settlements because they need the money, rather than feeling that the terms offered were fully acceptable. Such survivors should therefore have access to any improved payments offered through redesigned redress.
18. However, settled survivors should not have unmoderated access to new payments. Survivors that have not yet come forward to seek redress should not be disadvantaged for having waited (often due to the intense trauma they have had to overcome to even apply for redress). To provide consistency and fairness for all survivors, new redress payments offered should be adjusted to reflect any past settlements.

19. As noted above the number of settled claims is well known, particularly for State claims, which allows for the financial implications of inclusion to be easily factored in when draft payment and support frameworks are provided for the Ministerial Group's consideration in September.

Parameter 3: Whether whānau of deceased and/or living survivors can access redress

Redress should acknowledge the experience of deceased survivors who had made their wishes clear

20. A new redress system should continue with the current practice of allowing next of kin to continue with a claim that has been lodged by a survivor who has subsequently died. This could be expanded to include next of kin lodging an application on behalf of a survivor who passed away before making a claim but who had a clearly documented intent that they planned to apply. In both these circumstances the approach honours the survivor's clear intent and any limitations placed on them by ill health ahead of their passing and provides a posthumous acknowledgement of their experiences.

Advice on potential whānau access to apologies, support services, and payments will be provided at subsequent Ministers' meetings so they can be considered in context

21. Advice will be provided to Ministers at the September and October meetings on potential broader whānau access to redress as part of a wider package on advice on the support services, apology, and payment frameworks.

Next steps

22. Following Ministerial Group feedback on the eligibility parameters, a draft options Cabinet paper will be circulated for review covering the functions, scope, and high-level structure of redress. It is intended the paper will seek Cabinet endorsement of draft options for consultation with the Redress Design Group, to inform the detailed analysis to support final Cabinet decisions.

Appendix One: Royal Commission and Design Group recommendations and current New Zealand claims processes approach to the three redress eligibility parameters under consideration

Parameter	1. Length of time redress operates	2. Extent to which those who have settled claims can access redress	3. Whether whānau of deceased survivors can make a redress claim
Royal Commission and Design Group recommendations regarding the parameter	- The Royal Commission recommended the scheme be open ended with a review conducted by an independent agency two years after opening. - The Design Group did not recommend a specific review point but did recommend continuous improvement should be an important focus for the system.	- The Royal Commission recommended the redress system be open to all survivors, including those who have been through previous redress processes, with a further recommendation that when determining the size of a financial payment the system should take into account payments from previous redress processes, court cases, or settlements to ensure consistency and fairness for new survivors coming forward. - The Design Group endorsed the Royal Commission's recommendations but noted that adjustments for new payments should only apply when the grounds of the claim are identical. When setting monetary values, the Design Group highlighted the need for consistency and fairness between survivors.	- The Royal Commission recommended whānau should be able to continue a claim to a new redress system if a survivor dies after applying or be able to make a claim on a survivor's behalf if there is clear evidence that the survivor intended to apply. - The Design Group endorsed the Royal Commission's recommendation.
How the parameter is handled by current New Zealand abuse claims processes	- In terms of duration, existing State claims services are all ongoing, subject to funding, and are currently expected to be open for as long as there is a need for them. - Non-State care claims processes are ongoing, subject to the organisations' ability to fund them.	Survivors with settled claims can only seek a new consideration if new material circumstances come to light.	If a survivor dies after making a claim the next of kin can continue the process. Non-State processes are also generally focused on the survivor, with variable approaches to whether next of kin can make a claim on behalf of deceased survivors.

Appendix Two: How four comparable international redress schemes have handled the three redress eligibility parameters under consideration

Parameter	1. Length of time scheme operates	2. Extent to which those who have settled claims can access redress	3. Whether family of deceased survivors can make a redress claim
Australia – National Redress Scheme <i>Scheme operating</i>	Open for applications 1 July 2018 until 30 June 2027 (9 years). Scheme open to process applications 1 July 2018 until 30 June 2028 (10 years).	Yes – relevant prior payments are deducted <i>Details:</i> Those with settled claims can apply, but any relevant prior payments are adjusted for inflation and deducted from any offer of monetary redress. A relevant prior payment is a payment that was made by, or on behalf of, a responsible institution in recognition of the abuse a person experienced or the harm caused by that abuse. Applicants are still entitled to the support or apologies provided by the scheme.	No – limited access where a survivor dies after applying for redress. <i>Details:</i> If a survivor dies after submitting an application to the scheme and they are then determined to be entitled to redress, the scheme will pay the monetary component to an ‘appropriate person’. Apology and support components are not available to the family. The scheme decides who the appropriate person should be, considering the applicant’s will and the law relating to possessions of a deceased person.
Ireland (Republic) – Residential Institutions Redress Board <i>Scheme closed</i>	Opened for applications on 16 December 2002. Initially expected to be open for three years, until 15 December 2005, but the end date was eventually extended to 16 September 2011. The last settlements were paid in 2016.	No <i>Details:</i> A person who received damages from a court or a settlement in respect of the abuse and injuries covered by the scheme could not apply.	Yes – spouses or children of survivors who died after a specific date. <i>Details:</i> If a person would have been entitled to apply for redress but died on or after 11 May 1999, the spouse or children of that person may make an application on their behalf. The scheme defined a spouse as a person with whom the deceased person is or was at a time cohabiting. Only one application could be made in respect of a deceased person. If an applicant died after making an application but before the application was determined by the Board, their spouse or children could proceed with the application.
Northern Ireland – Historical Institutional Abuse Redress Board <i>Scheme operating</i>	Opened for applications on 31 March 2020, expected to be open for five years. The Northern Ireland Government can extend the scheme.	Yes – relevant prior payments are deducted <i>Details:</i> Those with settled claims under previous legal or negotiated processes can apply. Any previous payment is considered when determining a payment under the scheme. Prior payments are adjusted for inflation using the UK process (determined by the UK Treasury).	Yes – partners or children of survivors who died after a specific date. <i>Details:</i> Surviving spouses or partners, or children of deceased survivors (if they are a residual beneficiary of their estate) can apply if the survivor died on or after 28 April 1953.
Scotland – Redress Scotland <i>Scheme operating</i>	Opened for applications on 8 December 2021, expected to be open for five years. The Scottish Government can extend the scheme.	Yes – relevant prior payments are deducted <i>Details:</i> Those with settled claims under previous processes can apply. Any previous payment is considered when determining a payment under the scheme. Prior payments are adjusted for inflation using the UK process (determined by the UK Treasury).	Yes – partners or children of survivors who died after a specific date. <i>Details:</i> Family members of survivors (partners or children) can apply if the survivor would have been eligible for redress but who died on or after 1 December 2004. Next of kin payments are capped at £10,000, which is the lowest possible payment in the Scottish scheme.

Agenda Item Five



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Mā Whakarongo me Ako ka huri te tai
Crown Response to the Abuse in Care Inquiry

Treaty of Waitangi considerations in the public apology

For: Ministerial Group – Crown Response to the Abuse in Care Inquiry

Date: 17 July 2024

Security level:

Purpose

1. This paper responds to questions raised at the Ministerial Group for the Crown Response to the Abuse in Care Inquiry (the Ministerial Group) meeting of 29 May 2024, regarding:
 - whether concessions or acknowledgements of Treaty breach should be included within the public apology to be made by the Prime Minister in the House on 6 November 2024; and
 - what liability implications might arise from the apology in general.

Recommendations

2. It is recommended the Ministerial Group:
 - a. **note** the final report and the findings and recommendations of the Royal Commission have now been received and they contain multiple findings of Treaty breach;¹
 - b. 9(2)(h)
 - c.
 - d. **note** inclusion of a concession of Treaty breach in the public apology presents an opportunity to acknowledge the historical context that helps to explain why disproportionate numbers of Māori were placed in care. The Royal Commission's final report sets out what it considers is the connection between this disproportionality and the Crown's historical role in eroding the ability of Māori whānau and communities to care for and protect tamariki and rangatahi so that they were not in need of state intervention in the first place;

¹ Excerpts and a summary of the Royal Commission's Treaty findings are attached as an appendix.

e. **direct that** either:

- drawing on the provisional work undertaken to date by Crown Law and Te Arawhiti, work is progressed at pace to determine what factual findings related to the Treaty the Crown agrees with in order to enable consideration of concessions of Treaty breach as part of the public apology (recommended by the Crown Response Unit);

Or

- the response to the Royal Commission's findings of Treaty breach should be developed as part of the wider response to the final report, noting this work would not likely be completed in time to allow consideration of the inclusion of Treaty findings in the public apology;

f. 9(2)(h)

g.

At the Ministerial Group meeting on 29 May, Ministers raised questions around anticipated commentary on Treaty breaches in the Royal Commission's final report

3. At the Ministerial Group meeting on 29 May, there was an initial discussion of anticipated commentary by the Royal Commission on Treaty of Waitangi breaches relating to abuse of Māori while in care.
4. Crown Law and Te Arawhiti have had work underway on this matter since 2023, in response to:
 - a. findings in the Royal Commission's interim reports of possible Treaty of Waitangi breaches from abuse in care; and
 - b. feedback from some survivors who are close to the work of the Royal Commission and who the Crown Response Unit (the CRU) has engaged with that the public apology should acknowledge a Treaty breach.
5. One of the aspects of this work was if and what could potentially be reflected on this matter in the public apology scheduled for November.

6. At the Ministerial Group meeting, Ministers raised questions around the role of the Royal Commission in relation to findings of Treaty of Waitangi breaches and the possible implications of making a Treaty breach concession. This included identifying any legal risks associated with a concession of Treaty breach made outside of a Treaty settlement or Waitangi Tribunal process, and whether a Treaty breach concession would enable iwi and hapū access to redress for abuse in care.

7. 9(2)(h)

8.

This briefing outlines advice in response to these questions, including setting out the findings of Treaty breach made in the Royal Commission's final report

9. Since Ministerial Group discussion on this, the final report of the Royal Commission has been provided. It includes a series of findings of Treaty breach. In setting out their findings, the Royal Commission first states that, under their Terms of Reference, they were directed 'to apply te Tiriti and its principles' to its work. This is particularly as 'tamariki, rangatahi and pakeke [adult] Māori are taonga' and 'te Tiriti o Waitangi o Waitangi colours all legislation dealing with the status, future and control of tamariki, rangatahi and pakeke Māori.'² Further, their view is that the experiences of so many Māori in care meant they had no option but to make extensive findings of Treaty breach.
10. This includes questioning whether the scale of Treaty breach could be said to add up to cultural genocide. They note that equivalent Royal Commissions or Commissions of inquiry in Canada and Australia have made findings of cultural genocide targeted at indigenous peoples, and they do not consider conditions in New Zealand to be very different from the settings and experiences that led to those findings in Canada and Australia.
11. Having posed this question, they do not make a specific finding of cultural genocide, while setting out that they consider there is '[s]trong evidence of numerous breaches of te Tiriti and its principles'. These breaches caused significant detriment to many

² Whanaketia Part 6, *Te Tiriti o Waitangi and Human Rights*, *Te ture i raurangi rā* para 8(b)

Māori in care, and to their whānau and to next generations. They state that 'The Inquiry is profoundly concerned about this conclusion.'

12. Specifically, in part 6 of its report, *Te Tiriti o Waitangi and Human Rights, Te ture i raurangi rā*,³ the Royal Commission finds:

- a. There 'is a grave breach' of the Crown's obligations of active protection.
- b. Significant neglect of the Treaty in the design, development and implementation of the care systems. They find this breaches the principles of tino rangatiratanga, kāwanatanga, partnership, active protection, options, equity, equal treatment, good government and redress.
- c. Breach of how the Crown should have legitimately exercised kāwanatanga, requiring the Crown to foster rangatiratanga and ensure laws and policies were just, fair and equitable.
- d. Breach of the principle of options; this includes through the lack of kaupapa Māori options as part of the care systems. This is particularly where the Royal Commission consider there is 'a serious question whether aspects of the care system contained elements of cultural genocide... the laws and practices of removing tamariki, rangatahi and pakeke [adult] Māori involved elements of both systemic racial discrimination and cultural genocide'.
- e. Breach of the principle of equity and equal treatment, evidenced by disparities in abuse and the disproportional impact on Māori and the effect of racism.
- f. Breach of the principle of good government, considering the Crown was 'or should have been aware of the abuse and neglect suffered by Māori while in care'.
- g. That the Crown stripped Māori of their cultural identity through structural racism, and this breached the guarantee of tino rangatiratanga and the principles of kāwanatanga, partnership, active protection and equity.
- h. Failure to uphold the principle of redress, including through ongoing failures to provide consistent redress processes and to address breaches in respect of the care system more broadly.
- i. More broadly, the Royal Commission finds that 'it is clear the Crown has acted in excess of its kāwanatanga powers and breached te Tiriti in a number of ways. The Crown failed to transform the care system in a manner that would uphold rangatiratanga and reflect a true partnership'.
- j. These breaches, the Royal Commission finds, 'transcend' from the individual level to mean trauma has been 'intergenerational and collective', transferred from survivors to their tamariki, mokopuna, whānau, hapū, and iwi. It further comments this is manifested in many ways, including a large range of social problems and indicating clear breaches of the principle of active protection.

³ Whanaketia Part 6, *Te Tiriti o Waitangi and Human Rights, Te ture i raurangi rā* paras 11-42

Crown Law advice on the Royal Commission's findings and whether concessions of Treaty breach should be included in the public apology

13. 9(2)(h)

14.

15.

The inclusion of a concession of Treaty breach in the public apology presents an opportunity to acknowledge the disproportionate numbers of Māori who were placed in care

16. With the public apology, the Crown has an opportunity to acknowledge the historical context that helps to explain why disproportionate numbers of Māori were placed in care. The Royal Commission's final report sets out what it considers is the connection between this disproportionality and the Crown's historical role in eroding the ability of Māori whānau and communities to care for and protect tamariki and rangatahi so that they were not in need of state intervention in the first place.
17. More specifically, based on the engagement that the CRU has done with survivors, the CRU anticipates that a number of Māori, as well as other, survivors:
- would see a recognition of Treaty breach as an important part of a sincere Government response and that will help to build trust that the Crown accepts and understands the full depth of abuse experienced;
 - are likely to be disappointed if they do not hear a specific acknowledgement of or apology for Treaty breach;
 - would expect any acknowledgement of Treaty breach to focus primarily on their individual experiences, rather than for Māori collectives.

Liability that could arise from the apology, both in terms of the Treaty and more generally

18. 9(2)(h)

19.

20.

21.

We seek Ministerial Group indication of whether the apology text should continue to explore consideration of Treaty breach concession

22. To enable preparation of the draft apology text to continue at the speed needed for an apology delivery in November, we seek an indication from Ministers as to whether you want to prioritise work on factual findings relating to potential Treaty breaches. Specifically, we seek an indication of your direction that either:

- drawing on the provisional work undertaken to date by Crown Law and Te Arawhiti, work is progressed at pace to determine what factual findings related to the Treaty the Crown agrees with in order to enable consideration of concessions of Treaty breach as part of the public apology;

Or

⁴ Noting also Recommendation 14 of the Royal Commission's final recommendations is that 'the government should ensure that the puretumu torowhānui system and scheme is designed and operated in a manner that gives effect to te Tiriti o Waitangi and its principles'.

- the response to the Royal Commission's findings of Treaty breach should be developed as part of the wider response to the final report, noting this work would not likely be completed in time to allow consideration of the inclusion of Treaty findings in the public apology.
23. The CRU recommends the first option as it keeps the door open to Ministers deciding to include a Treaty breach concession in the public apology if the outcome of the analysis is that the Treaty was indeed breached.

Next steps

24. Work will continue to confirm the approach to assessing and responding to the Commission's Treaty findings as part of the broader Crown response to the Royal Commission's final report. Timing of the pace of this work will depend on Ministerial preferences in response to the option outlined above.
25. In parallel with this, work will also continue to advance the draft apology text as a whole. This will include working with Crown Law and other agencies to ensure that the substance included in the apology text does not get ahead of decisions by Cabinet on redress and other matters that are still to be decided.
26. An update of progress with the draft apology text, together with an outline of progress with the logistical planning for the public apology event, will be provided at the 21 August 2024 meeting of the Ministerial Group.

Appendix – Excerpts of the Royal Commission’s Treaty findings

27. This section directly quotes from the *Summary of Key Findings* section of the *Preliminaries* part of the final report, specifically from *Wāhanga 5: Ngā haukino o te wā, Part 7: Factors*. It is followed by excerpts from *Part 6 ‘Te Tiriti o Waitangi and Human Rights, Te ture i raurangi rā’*, with its specific focus on Te Tiriti.
28. *The Preliminaries Part of the report, at section/ Wāhanga 5: Ngā haukino o te wā Part 7: Factors, includes these findings⁵ of ‘Breaches of te Tiriti o Waitangi:*
- a. The Crown deprived whānau, hāpu and iwi of exercising tino rangatiratanga over their kāinga (home), to care and nurture the next generation and regulate the lives of their people, and that this breached the principle of active protection in te Tiriti o Waitangi.
 - b. The Crown’s failure to address the on-going effects of colonisation contributed to tamariki, rangatahi and pakeke Māori being placed in care and breached the guarantee of tino rangatiratanga and the principle of active protection in te Tiriti o Waitangi.
 - c. Through failing to appropriately address trauma caused by abuse and neglect in care the Crown failed to prevent inter-generational impacts on Māori, whānau, hapū, and iwi. This breached the principle of active protection in te Tiriti o Waitangi.
 - d. The Crown stripped Māori of their cultural identity through structural racism. This breached the guarantee of tino rangatiratanga and the principles of kāwanatanga, partnership, active protection, and equity in te Tiriti o Waitangi.
 - e. The Crown excluded Māori from decision-making, developing and implementing policies that directly impacted the care of tamariki, rangatahi, and pakeke Māori. This breached the guarantee of tino rangatiratanga and the principles of partnership and active protection in te Tiriti o Waitangi.
 - f. The Crown failed to provide appropriate redress for those who suffered abuse and neglect.’
29. The remaining summary is drawn from the fuller discussion of te Tiriti o Waitangi, at *Part 6 of Whanaketia, Te Tiriti o Waitangi and Human Rights, Te ture i raurangi rā*. In this section of Part 6, the Royal Commission makes a series of specific findings of Treaty breach.⁶ These include that:

⁵ *Wāhanga 5: Ngā haukino o te wā Part 7: Factors*, para 78 onwards

⁶ The following paragraphs are excerpts quoted or paraphrased from Part 6, paras 11 through 42

- a. 'Tamariki, rangatahi and pakeke Māori in care are taonga. While assuming ultimate care and responsibility or an oversight role for these taonga, the Crown failed to protect or prevent the abuse that many suffered. This is a grave breach of the Crown's obligation under te Tiriti o Waitangi to actively protect Māori as well as those institutions who have te Tiriti o Waitangi obligations.'
- b. 'Te Tiriti and its principles were significantly neglected in the design, development and implementation of the care systems and this disregard of te Tiriti went to the heart of the abuse and neglect experienced by many Māori survivors and their whānau. In particular, the overlapping principles of tino rangatiratanga, kāwanatanga, partnership, active protection, options, equity, equal treatment, good government and redress were infringed'.
- c. The Crown breached its duties to recognise rangatiratanga and actively protect Māori, including through 'the failure to address the broader underlying issues that create the circumstances in which Māori are disproportionately taken into the care of State and faith-based institutions was.'
- d. The Royal Commission further states 'the taking of Māori into care was an intrusion into the tino rangatiratanga sphere and undermined the ability of Māori to exercise their right to care for their own supported and enabled by hapū, iwi and communities more broadly. It was also a breach of the legitimate exercise of kāwanatanga (which requires the Crown to foster rangatiratanga and ensure laws and policies were just, fair and equitable) and the principles of partnership and active protection.'
- e. There were breaches of te Tiriti partnership and the Crown's duty of active protection, including through the absence of Māori thought, input, autonomy and influence within the State and faith-based care systems. 'This resulted in Māori being unable to intervene and protect their own from entry into care and from suffering abuse and neglect while in care. It resulted in the safety of Māori not being met.'
- f. There was a breach of the principle of options that follows on from the principles of partnership, active protection, and equity, including through the lack of kaupapa Māori options as part of the care systems. This gives rise, the Royal Commission says, to 'a serious question whether aspects of the care system contained elements of cultural genocide... [noting that similar Commissions in Australia and Canada found so] ... the laws and practices of removing tamariki, rangatahi and pakeke Māori involved elements of both systemic racial discrimination and cultural genocide. The denigration and stripping away of Māori cultural identity as part of a broader system of assimilation was inconsistent with the principles of tino rangatiratanga, kāwanatanga, partnership, active protection and equity.'
- g. This is also considering: '...Māori have long made up the majority of those in placed in social welfare and youth justice care settings. The number of Māori abused in

care is therefore likely to have been pervasive and disproportionate. Further, being Māori was likely to make the impact of the abuse and neglect worse for survivors’.

- h. Disparities in abuse and the disproportional impact on Māori and the effect of racism ‘is also a breach of the principle of equity and equal treatment. Further, the Crown was or should have been aware of the abuse and neglect suffered by Māori while in care. This raises concerns that the Crown has breached the principle of good government particularly by failing to adequately care for Māori or obtain and maintain adequate information or knowledge of any abuse or neglect suffered by Māori while in care, or hold abusers to account.’
 - i. Failures to provide consistent redress process for abuse and neglect in care ‘and the ongoing failure of the Crown to address its breaches in respect of the care system more broadly (which leads to abuse and neglect) is a failure to uphold the principle of redress’.
 - j. ‘More broadly than the shortcomings in the redress process, it is clear the Crown has acted in excess of its kāwanatanga powers and breached te Tiriti in a number of ways. The Crown failed to transform the care system in a manner that would uphold rangatiratanga and reflect a true partnership.’
30. The Royal Commission also finds that the breaches it had identified ‘transcends the individual’ [paras 38-39]:

‘The trauma of the abuse suffered by those in care was intergenerational and collective. That is, it transferred from survivors to their tamariki, mokopuna, whānau, hapū, and iwi. This can manifest itself in many ways. That includes a number of social problems such as inequitable health and education outcomes, higher incarceration rates, gang formation, intimate partner violence and family and whānau violence, unemployment, homelessness, mental distress, substance misuse and abuse, an overall narrowing number of life opportunities, and suicide... This category of harm also breaches the te Tiriti principle of active protection.’

31. The focus on te Tiriti within Part 6 ends with an overall statement that the Royal Commission considers there is ‘Strong evidence of numerous breaches of te Tiriti and its principles’ [Part 6, paras 99-100]. They say that Parts 3 to 5 of their report:

‘provide[s] strong evidence that there have been numerous infringements of te Tiriti o Waitangi principles that apply in relation to the care of tamariki Māori, rangatahi Māori and pakeke Māori across multiple settings. There is strong evidence that te Tiriti o Waitangi and its principles were not taken into account in many care settings, to the significant detriment of tamariki Māori, rangatahi Māori and pakeke Māori in care, and this had a significant inter-related impact on whānau, hapū and iwi, and caused intergenerational harm. The Inquiry is profoundly concerned about this conclusion.’