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In the matter	of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions

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

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1 Introduction

1.1 My full name is Linda Ljubica Hrstich-Meyer.

1.2 I am the General Manager (previously Director) of Historic Claims at the Ministry of Social Development (**Ministry**). I have held that position since 2017. I have been employed by the Ministry in various roles for over 20 years.

1.3 In my role as General Manager of Historic Claims, I am responsible for the strategic oversight and management of the Ministry's claims resolution work, being the assessment and resolution of claims of abuse and neglect of children and young people while in the care of the Ministry (or its predecessors) prior to 1 April 2017.

2 Overview

2.1 I provided this Inquiry with a brief of evidence on behalf of the Ministry dated 27 January 2020 (**primary brief**).

2.2 This further brief of evidence contains the Ministry' response to evidence provided to the Royal Commission by:

(a) Cooper Legal, dated 31 January 2020 (**Cooper Legal brief**);

(b) Kerry Johnson, dated 12 February 2020;

(c) Chassy Duncan, dated 24 February 2020;

(d) Georgina Sammons, on behalf of herself and her sisters Tanya and Alva, dated 24 February 2020;

(e) Keith Wiffin, dated12 February 2020; and

(f) Patrick Stevens, dated 20 February 2020.

2.1 In order to provide the Royal Commission with an effective overview, I will respond to some points at a less granular, more thematic level. When responding to specific points in other evidence briefs, I will reference the relevant parts of those briefs. When addressing thematic issues, I will not necessarily reference specific parts of other briefs, but focus on the broader issues raised within and across those briefs. In some cases I have clarified statements I made in my primary brief of evidence in light of statements made in one or more of the briefs referred to above.

2.2 My intention in providing this further information is to assist the Royal Commission with information relevant to the scope of the Inquiry. I continue to rely on my primary brief, unless specifically addressed otherwise in this brief.

2.3 I was not involved in all of the events referred to in this brief and have at times relied on the relevant material held by the Ministry.

2.4 This brief covers three broad areas:

(a) further comments and clarification about details of the Ministry's claims assessment processes;

(b) responses to specific areas of some of the survivor briefs of evidence; and

(c) ancillary areas relating to the Ministry's policies in relation to the treatment of historic claims.

3 The Ministry's Claims Assessment Processes

Intractable claims process

3.1 Paragraphs 336 to 348 of the Cooper Legal brief discuss what became known as the "Intractable Claims Process".

3.2 From the second half of 2013 until August 2015, the Ministry genuinely engaged with Cooper Legal in trying to design a process which could be used to progress claims which had become "stuck" due to a disagreement on factual issues. It was thought that an independent fact finder could assist the parties by making factual findings for issues in dispute which in turn would assist in settlement discussions. In a letter dated 1 December 2014,[1] Cooper Legal identified seven claims that they considered appropriate for this process.

3.3 Both the Ministry and Cooper Legal, with the assistance of Fairway Resolution Service,[2] spent a significant amount of time discussing and trying to finalise a process. During 2014 there were delays while we tried to find appropriate "fact finders". Some judges (or former judges) put forward were not available or the parties did not agree to them. There was also time spent on finalising the terms of the engagement with the judges.

3.4 I acknowledge that the approach the Ministry took in requiring judicial settlement conferences to take place before claims could be considered "intractable" may have created an additional barrier to resolving these matters and was not part of the terms of references agreed between the parties. I also accept that judicial settlement conferences were not an option for those claimants who had not filed proceedings in Court.

3.5 As discussions continued and the details of how the process would be implemented became apparent, it became evident to the Ministry that the process would not be an effective way to resolve "stuck" claims. It became apparent that the process would be too similar to a Court hearing in that it involved a similar amount of preparation and hearing time, and would create further barriers for claimants to overcome. The process would also not be binding on either of the parties meaning that neither claimants nor the Crown could be certain the matter had been properly resolved. From the Ministry's perspective, there was insufficient focus on resolution. In August 2015, the

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1 Letter from Cooper Legal to Crown Law regarding offers not accepted dated 1 December 2014.

2 Fairway Resolution Service is an independent dispute resolution and conflict management organisation.

Ministry advised Cooper Legal that it was withdrawing from the process for the reasons set out above.

Two Path Approach

3.6 Starting at paragraph 5.9 of my primary brief, I discussed in some detail the Ministry's approach to, and implementation of, the "Two Path Approach". On reading the Cooper Legal brief, there are some areas that I would like to clarify or expand further on.

The "fiscal envelope", principle of consistency, and moderation

3.7 In the Cooper Legal brief (eg see paragraph 375) there is reference to the term "fiscal envelope". By way of clarification, the term fiscal envelope was used by the Ministry to describe the mechanism used to ensure consistency and fairness between the group of claimants whose claims had been previously settled under the full assessment process and the group of claimants whose claims were to be settled under the Two Path Approach. Given that the level of settlement for claims of the same nature was to be the same, the Ministry was able to estimate the total cost of settlement and it was this figure that was referred to as the fiscal envelope. [3]

3.8 Cooper Legal at paragraph 380 of their brief state that the fiscal envelope was fixed. I confirm that this amount was not a fixed amount, but rather reflected the overall predicted value of claims received and was capable of increasing or decreasing depending on the final number of claims that were to receive an offer. It was not to implement a "budget" in the sense of predetermining some amount of money within which the process must be implemented.[4]

3.9 Paragraph 404 of the Cooper Legal brief mentions that the Ministry acknowledged that it had not sought sufficient funding for the process. The Ministry has not been able to find any documents giving this acknowledgment. However, I can explain the funding arrangements for the Two Path Approach. At the time the process was being developed, the Ministry had been given government funding of $16 million over the four years to 30 June 2017 and $4 million per year thereafter. To ensure that there was sufficient funding for the Two Path Approach, Cabinet agreed to bring forward $26 million from future historic claims funding (2020/21 to 2026/27).[5] The $26 million was future funding that was already appropriated but that would be drawn sooner. This funding was sufficient for settling all claims that were to receive a "fast track" offer as can be seen in the fact that the Ministry was able to make payment for every claim that accepted an offer under the Two Path Approach.

Moderation

3.10 Claims were not moderated to ensure they fitted within a predetermined budget, rather they were moderated to fit with previous payments made which

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3 Affidavit of Ines Gessler filed in judicial review of Two Path Approach, dated 14 December 2015.

4 Affidavit of Ines Gessler filed in judicial review of Two Path Approach, dated 14 December 2015.

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

were a "bell curve" shape. Moderation was needed because when claims went through the full assessment process, every allegation was examined in detail and not all allegations were accepted. A consequence of accepting allegations at face value under the Two Path Approach is the risk that these claims would then be treated as more serious, and so result in higher payment, than claims settled after full investigation. This did not accord with the principle of consistency.

Claims that did not receive an offer under the Two Path Approach

3.11 The Cooper Legal brief mentions some groups of claimants who did not receive a fast track offer under tranche two of the Two Path Approach (eg at paragraphs 383, 398 and 408). I thought it would be helpful to set out the exclusions that applied, and the reasons for them, as some exclusions changed during the design of the process.

(a) Those who had undergone a full assessment but had rejected the offer or failed to respond to a settlement offer.

(i) The final Two Path Approach process that was implemented was intended to only apply to claims that had not yet been assessed. It was not intended to be used as a mechanism to resolve "stuck claims".

(b) Those who had separate proceedings before a Court tracking to trial that were against another entity, but related in whole or in part to the same facts.

(i) There were a small group of claimants that had claims lodged or filed against the Ministry, but also had separate proceedings filed against an NGO who had been contracted to care for them. The Ministry was conscious of the complexity around settling claims that are subject to separate proceedings. It also wanted to ensure that there was no ability to obtain payments from multiple agencies for the same events.

(c) Those who had opted not to receive a fast track offer.

(i) As the Two Path Approach was an option only, fast track offers were not made to claimants who had advised that they did not want to receive one.

(d) High Tariff Offenders.

(i) I mentioned at paragraph 5.14 of my primary brief that this group of claimants were excluded. By way of clarification, although this group were excluded from receiving an offer in 2016, they were not excluded altogether from the Two Path Approach. Their offers were held back and were made in February 2018 after the government decided not to introduce legislation that was specific to this group.

3.12 The Cooper Legal brief states at paragraphs 412(d), 417 and 1059 that the offers made reflected the Ministry's position that it was not liable for s 396 providers and this meant some people who had been placed with such providers only received $5,000. This is a misunderstanding. Where a claimant was in state care

(eg under a custody order or guardianship order) and was placed with a s 396 provider, the Ministry included in consideration of its offer any allegations against that provider. It is correct that some claimants placed with such providers only received a $5,000 offer but this was not because they had been placed with a provider. The focus of the Ministry's assessment was on the frequency and severity of abuse alleged, so those who received a $5,000 offer had less serious claims than others in the wider group.

Claims that have Ministry of Education components

3.13 The majority of claims that related to both the Ministry and the Ministry of Education that were eligible for offers under the Two Path Approach were addressed as joint agency claims, with a payment contribution from the Ministry of Education where relevant. A small number of claims were managed differently, by being separated so that the Ministry's components were addressed under the Two Path Approach and any Ministry of Education components (such as relating to a claimant's experience at a Residential Special School) were responded to by the Ministry of Education separately through their claims process. This is further addressed later in my brief in response to Kerry Johnson's evidence.

Payments

3.14 Paragraph 413 of the Cooper Legal brief notes that only a very small number of people received offers of the top payment ($50,000), but there was a very large number of offers between $5,000 and $12,000. It is correct that only a few people received offers of $50,000 as this was consistent with previous payments made. However, approximately 30 per cent of claims received offers of $20,000 and this payment was more common than those who received $12,000.

Settlement of claims for legally represented people who did not accept their fast track offer

3.15 As the Cooper Legal brief explains at paragraphs 420-430, there were legally represented claimants who either rejected their fast track offers or who opted not to receive an offer. In both scenarios, they asked for a full assessment of their claim.

3.16 As was noted in an email to Cooper Legal on 4 September 2019, the Ministry acknowledges that we have not been able to progress these offers as quickly as we would have liked.[6] However, they have not been forgotten and this group of claims are being actively worked on. We continue to make offers as they are ready. Of the list provided to Cooper Legal on 12 March 2018 which has 119 names on it, only 31 claimants are still waiting to receive an offer from the Ministry following a full assessment.[7]

3.17 We have been trying to work through these claims in order of the date they were received by the Ministry. Unfortunately, this group of claims have taken

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6 Email from the Ministry to Cooper Legal regarding offers under new process dated 4 September 2019 (at CL.CH4.1586).

7 Email from the Ministry to Cooper Legal regarding Cooper Legal pre-2015 open claims dated 12 March 2018 (at CL.CH4.1384).

longer to assess and finalise offers for a number of different reasons. These include:

(a) Some of these claims have been very complex as they may have:

(i) a very large number of allegations across a number of different placements over a lengthy period of time (some claimants were in care for most of their childhood);

(ii) contemporary (post-1990) serious allegations leading to consideration of the application of the New Zealand Bill of Rights Act 1990;

(iii) allegations that have been pleaded against both the Ministry of Social Development and the Ministry of Education but this has been done in separate proceedings; and/or

(iv) complex or novel legal issues where the law is not clear.

(b) Offers for claims filed in Court or for those who have a legal representative take longer to finalise. For these claims, a response to the allegations is usually provided in writing. It takes time to draft this letter and then the letter is reviewed by the Ministry's in-house legal team and Crown Law which adds to the time. These claims also tend to have a greater number of allegations than direct claims which means further time is needed in both the assessment and settlement letter drafting stage.

(c) Sometimes claimants amend their claim or provide further allegations. If these are provided after the assessment has already been completed, it takes additional time to go back and consider the new allegations.

3.18 A significant proportion of this group did not accept the Ministry's offer after a full assessment and provided a counter-offer with reasons for why they do not think the Ministry's position is reasonable. Every claimant has the right to do this and we will always review the claim and change our position on allegations if needed. However, this counter-offer process adds to the time taken to resolve claims as the Ministry must balance the review of these counter-offers with progressing the finalisation of new offers that have not yet been made.

3.19 Whenever the Ministry provided timeframes to Cooper Legal, these were provided in good faith and with best endeavours. Due to the complexities noted above, sometimes these timeframes were not able to be met and I acknowledge this would have been frustrating to claimants. As a result, we have stopped providing timeframes when there is any doubt about when we might be able to provide an offer or a response to a counter-offer. However, I acknowledge that frustration around delays still exist.

3.20 There is a suggestion in paragraph 425 of the Cooper Legal brief that the Ministry prioritised consultation with Māori and the development of our new assessment process over the assessment of these claims. This work did not impact on the assessment of claims; the consultation and development referred to was carried out by different staff to the assessment of these claims.

Cooper Legal's concerns about the Ministry's full assessment process

3.21 I discussed the Ministry's full assessment process in paragraphs 3.24 to 3.33 of my previous brief of evidence. Except for claimants who have accepted fast track offers, this has been the process used for all claims up until November 2018 (including those who reject a fast track offer)..

3.22 Paragraphs 431 to 468 of the Cooper Legal brief discuss four claims where there has been dissatisfaction with the Ministry's response to the claim arising from a full assessment process.

3.23 These are claims with extensive allegations and documentation which I do not intend to respond to in a brief of evidence of this kind. They are also still active claims with ongoing settlement discussions and there are also privacy issues that we must be mindful of. However, I do wish to provide some general comments about some of the complexities that arise during a full assessment.

3.24 As discussed at paragraph 3.26 of my primary brief of evidence, when we carry out a full assessment of a claim, the Historic Claims team considers a range of relevant information from different sources. Many allegations are not referenced on a claimant's social work file and so other sources have to be considered. Although considerable focus is given to the claimant's social work records, one of the other sources considered is institutional records (such as diaries from the residence) from the relevant time period where these could assist. For some residences, these records are extensive. There are often different ways these records can be interpreted and sometimes they do not tell a clear story. As the Historic Claims team assesses each allegation, it weighs information that points towards an allegation and information that points against an allegation to come to a conclusion as to whether it is reasonable to accept an allegation for the purposes of settlement. This is an art not a science. There is often not one particular document that is used to reach a conclusion, but rather a range of different documents and factors. These are some of the reasons as to why Cooper Legal and the Ministry might have a different perspective on a claim.

3.25 For allegations where there is no further information corroborating or contradicting the allegation, the Ministry has generally not accepted the allegation for the purposes of settlement. Our full assessment process does not operate on a face value acceptance.

3.26 As there has been very little case law over the years that relates to claims of historic abuse, the applicable law in this area can be unclear. The Ministry, with assistance from Crown Law on occasion, must interpret the law using best endeavours. Where the law is clear, the Ministry will follow it. Where that is not the case, we regularly find ourselves in situations where the Ministry and Cooper Legal disagree on an issue. Sometimes where there is ambiguity, such as the Ministry's liability for contracted providers, the Ministry will take an approach that is favourable for claimants for the purposes of settlement.

3.27 Court judgments are a useful resource. For instance, the factual findings set out in *White* are helpful when assessing claims where the claimant attended a placement that the *White* brothers attended, as long as it was in a similar time period. However, each case has a different set of facts and must be considered on its own merits. Just because the Court reached a factual finding in *White*

about a particular issue, does not mean that it will be appropriate to adopt that finding for every claimant that attended that residence.

3.28 When different views on the facts or the law are held by the Ministry and claimants or their legal representative, the Ministry is always prepared to review its position. Sometimes, after considering the arguments and taking another look at the records, the Ministry will change its position on a particular allegation. This is what has recently happened for two of the four claims that Cooper Legal reference in their brief. The Ministry considered the concerns raised by the claimants through Cooper Legal (including how we had applied the *White* case) and changed its position on some of the allegations meaning that more allegations were able to be taken into account for the purposes of settlement. The Ministry also reviewed payment. I therefore reject the suggestion contained in Cooper Legal's brief at paragraphs 448 and 457 that the Ministry's position is contrary to High Court authority.

3.29 Prior to settlement of a claim, when additional allegations are taken into account the Ministry will reconsider the seriousness of the claim as a whole and what would be an appropriate payment for the whole claim having regard to other similar claims, rather than the increase in the offer that an individual additional allegation may warrant. That is why the Ministry may only offer $1,000 or $2,000 more when less serious allegations are taken into account after review of the claim.

3.30 Finally, I think it is important to correct general statements that Cooper Legal have made in paragraph 431 of their brief, specifically that the Ministry routinely and consistently denies allegations made by male clients about being assaulted in residences, refuses to accept that detentions in the Secure Unit without appropriate legal status are false imprisonments, and will not accept allegations of initiation beatings. The Ministry will consider all allegations and will not dismiss them without careful consideration of the available evidence on a case by case basis.

Description of how outcomes are treated by the Ministry

3.31 Paragraph 509(f) of the Cooper Legal brief refers to the Ministry's advice that it would no longer accept or deny allegations in the way it had previously. As outlined at para 3.25 of my primary brief, previously the Ministry needed to have a reasonable belief that the event occurred and that it was reasonable for the Ministry to take responsibility for it. The Ministry's position in relation to how allegations are treated for the purpose of settling claims has evolved. The claims process is not to find fact, but rather to acknowledge a claimant's account of their care experience, support their understanding about their care journey, and to assess their claim to determine whether their allegations should be taken into account for the purpose of making a settlement offer.

3.32 The claims process is generally document based, with no contact usually made with alleged perpetrators. The Ministry has a responsibility to be fair in its approach to former and current staff members and caregivers who have been implicated in a claim and have not had the opportunity to respond to allegations made about them.

3.33 Natural justice requires the Ministry to act fairly when resolving claims. Before a "finding" could be reached which implicated a former staff member or caregiver,

natural justice requires that person be given the opportunity to be heard in regards to the allegation made against them. As outlined in my primary brief (paragraph 3.28 – 3.29), logistical and practical issues exist in a model which require alleged perpetrators to be spoken with. Even if these obstacles could be overcome, this level of investigation would have a significant consequence in the increased time it would take to settle claims.

3.34 The consequence for a former staff member or caregiver, if information reached a public domain, could result in significant distress to that individual as well as reputational damage. If the Ministry made statements or released information that could damage a person's reputation that has not been factually proven, this individual may have a claim of defamation against the Ministry and the Ministry may not have acted fairly to all involved. Settlement offers need to be carefully managed, in order to recognise the experience of the claimant in a meaningful way while not breaching the rights of another individual or purporting to reach findings of fact which are not possible or appropriate for a non-judicial mechanism.

3.35 Taking an allegation into account for the purpose of settlement, but not accepting the outcome, as a fact allows the Ministry to balance these issues in an out-of-court setting. While I acknowledge that this may be dissatisfying for some claimants, for those individuals who wish to receive factual findings in relation to their allegations, the court process remains open to them.

Transparency of the Ministry's processes

3.36 The Cooper Legal brief raised concern about the transparency of the Historic Claims process, specifically at paragraphs 506-507 and 335.

3.37 The Ministry is committed to ensuring that claimants and their representatives understand the claims process. As part of the implementation of the new Historic Claims process, material has been released which provides claimants with as much information as possible, without compromising the integrity of the claims process. The new process has been designed to balance the needs of claimants for a more responsive, timely process with the protections that the New Zealand public would expect of such a system.

3.38 The high trust nature of the Ministry's updated process allows the Ministry to assess claims far more efficiently than previously. However, this also creates risk that information used to resolve claims that may be false or exaggerated. In order to mitigate this risk, some checks and balances have been incorporated into the model. The primary control put into place to support the use of such a high trust model is to withhold information to prevent a person from understanding the threshold at which a higher level of scrutiny is applied to a claim assessment, or to mould their allegations in accordance with language used in payment category descriptions so that claims attract a higher payment category. Cooper Legal, in paragraph 506, have referenced their complaint to the Ombudsman about the redactions in the Ministry's Business Process document. At the time of writing this brief, no final decision has been made by the Ombudsman. A copy of the Ministry's Business Process document was released with redactions in 2019. Through the process of the Ombudsman complaint, the Ministry reviewed the material again and in October 2019 released a newly redacted version of the Ministry's Business Process document, with additional information released to support transparency. The Ministry's

position remains that the redactions applied to this document are necessary to maintain an acceptable control in place so that the Historic Claims process retains integrity.

3.39 In specific response to paragraph 507 of the Cooper Legal brief, I strongly reject the assertion that *"Effectively, MSD was starting from a position where it said claimants could not be trusted and would lie about their experiences to gain money"*. The Ministry is responsible for ensuring that public funds are appropriately managed within the claims process, and the Historic Claims team is committed to ensuring that the claims process maintains integrity so that claimants' experiences are not devalued by members of the public taking advantage of the process.

3.40 Claimants are encouraged to set out the full extent of their claim within the claims process. The Ministry's assessment then ensures that the basis of their claim is placed into a payment category which ensures consistency for similar claims.

General clarifications

3.41 Paragraph 321 of Cooper Legal's brief refers to a *"new five-step process"*. The Ministry has reviewed its records including the reference provided in the Cooper Legal brief. We have been unable to confirm that this process was agreed upon and put into practice.

3.42 Paragraph 325 of the Cooper Legal brief refers to Ministry frontline staff telling Cooper Legal clients that they did not need to use a lawyer and suggests that the Ministry was encouraging claimants to stop instructing lawyers and deal with the Ministry directly.

3.43 In response, the Ministry fully supports claimants' right to engage in the process through the avenue which is right for them, which may include engaging, changing or ceasing legal representation at any stage of the process. The process adapts to claimants changing the avenue by which they pursue a claim. For some claimants, engaging directly with Ministry staff is important, whereas for some claimants, their preference is to work with the Ministry through a lawyer. It has never been the Ministry's intention or practice to encourage claimants not to instruct lawyers.

3.44 Historic Claims staff do not provide advice to claimants on whether they should seek legal representation or not, although will discuss claimants' options with them to ensure they are informed of their right to access legal representation should they choose. When claimants register a claim directly with the Ministry, Historic Claims staff will confirm whether a claimant is legally represented and ensure that claimants know that they are entitled to seek legal representation at any stage of the process. Likewise, this discussion may also include advising claimants that they are not required to have a lawyer for the process, but that the choice whether to do so is theirs.

3.45 Paragraph 326 of the Cooper Legal brief refers to claimants being cut off in meetings before being able to fully describe their experiences in care. In response, claimants are in control of the detail that they provide, with Historic Claims staff equipped to support the claimant to share their experience to the

degree in which they are comfortable. It has never been part of the Ministry's practice to attempt to stop people sharing their story.

3.46 The Historic Claims new operating model has a particular focus on approaching information-gathering from claimants as an evolving process, beginning with the initial information provided at the point of registration and gathered over time (including during a face to face meeting where relevant) until the assessment of a claim commences. This has included the introduction of a step in the process which looks to confirm a claimant's concerns prior to the commencement of a claim, to ensure that claimants are confident that the Ministry is aware of their care experience to the degree they wish. This is currently being trialled with represented claimant groups, to ensure that adding this step does not cause undue delay.

Group of 559 Cooper Legal clients

3.47 Cooper Legal have referred in paragraphs 473-474 of their brief to the clarification provided by the Ministry in relation to what information was needed to register a claim, noting that the Ministry should have been on notice that a group of 559 claimants intended to register a claim given that Cooper Legal had made Privacy Act requests to the Ministry for these individuals.

3.48 The Ministry responded to Cooper Legal in April 2018,[8] referring them to a letter provided back in February 2014 outlining what the Ministry requires to accept a claim. Notably, Cooper Legal were asked to identity "instances of alleged abuse". Purely requesting a person's records via a request under the Privacy Act does not in and of itself confirm that the individual intends to make a claim, nor does it meet the criteria to register a claim. We were mindful that not all people who request a copy of their social work files go on to make a claim and it sometimes took two to three years before we would find out as there were often long delays after we had provided a person's social work files before a letter of offer was received from Cooper Legal.

3.49 To ensure that there was no confusion going forward, in 2018 the Ministry introduced a basic claim registration form and asked that Cooper Legal complete these on behalf of its clients in order to register the claims of this group of 559. This claim registration form is very straight forward, requiring only basic details about the claimant (ie name, date of birth, ethnicity), the time period that the claimant was in care, and a few brief sentences about their main concerns.[9] Contrary to Cooper Legal's statement in paragraph 474 of their evidence, this form is not used for the purpose of an initial assessment of a claim; it is used purely to confirm that the claim meets the criteria to register as claim. The assessment of a claim will only occur once the claimant has provided a full outline of their concerns. Further, sending a completed form is sufficient to "stop the clock" under the Limitation Act agreement in place.

3.50 The Ministry agreed that although the claim registration form would be required going forward for new claimants to register their claim, in fairness to this group of 559, upon receiving a claim registration form for them the Ministry would register their claims as at the date of their initial Privacy Act request. This meant

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8 Letter from the Ministry to Cooper Legal regarding lodging a claim dated 3 April 2018 (at CL.CH4.1399).

9 Sample Historic Claims Registration Form, Ministry of Social Development.

they entered the queue for assessment as at the date of their Privacy Act request, rather than the date they sent in their completed claim registration form.

4 Survivor evidence

4.1 We appreciate the evidence provided by survivors and acknowledge their experiences with the Ministry's claims processes. We acknowledge the Ministry has not always got things right for claimants. The changes to the claims processes over the years are evidence of the Ministry improving the processes for claimants and we have carried out extensive consultation with claimants to put in place the best system possible for them. Having said that, I acknowledge that the claims process has not always been easy to navigate and that delays have been a consistent issue for many claimants.

4.2 My comments about the Historic Claims processes in my primary brief and this evidence address some of the issues raised in the survivor briefs and it is not my intention to respond in detail individually to the valuable evidence provided by survivors. However, this section responds to some points in survivor briefs that we think is useful information for the Royal Commission to consider.

Mr Keith Wiffin

4.3 I would like to acknowledge Mr Wiffin's account of his experience of the Ministry's redress process. As a person who experienced the Historic Claims process in its early stages, Mr Wiffin's claim traversed some real changes in how the Ministry approached claims as an alternative dispute resolution process was developed. I would particularly like to recognise Mr Wiffin's thoughts in relation to how redress should be treated going forward as outlined in his statement. The Ministry agrees that redress can mean different things to different people, and I have outlined how the new Historic Claims approach is intended to change over the next few years in my primary brief, at paragraph 6.8.

4.4 There are several areas of Mr Wiffin's statement I wish to respond to and provide clarification about.

4.5 In paragraph 21 Mr Wiffin states that following an Official Information Request for information concerning his alleged offender he was told that "there is nothing contained in [the alleged offender's] staff file." The Ministry acknowledges that it was aware of criminal convictions against this person. Mr Wiffin's request was made for information on the Ministry's staff files which did not include information on criminal convictions.

4.6 Paragraph 34 of Mr Wiffin's statement relates to the decision making around Mr Wiffin's alleged perpetrator not being interviewed by the Ministry as part of the assessment of Mr Wiffin's claim. When the Ministry considered this issue in 2008 we thought that, in light of further possible criminal investigations against the alleged perpetrator, we should not seek to interview him because it might prejudice any criminal investigation. I acknowledge that the Ministry did not take further substantive steps to seek an interview prior to our counter-offer to settle Mr Wiffin's claim in April 2009.

4.7 Attempts were made to locate this individual in the early part of 2010, at the point that Mr Wiffin's claim was under reconsideration. This included a letter

which was sent to this individual advising of Mr Wiffin's allegations, as well as taking active steps to locate him when no response was received. This individual did not respond to the Ministry's request to interview him. Despite the Ministry being unable to speak directly with this individual, an offer was made to Mr Wiffin to settle his claim.

4.8 Paragraph 31 of Mr Wiffin's evidence refers to communication he received in 2009 identifying the "considerable legal hurdles" in the form of the ACC bar and the Limitation Act. As outlined in more detail in section 2 of my colleague Simon MacPherson's brief of evidence the early developmental stages of the Historic Claims ADR process is now very different to what we have today; the focus is now on the moral obligation to respond to claims, even if there are legitimate legal defences available to the Ministry. This change in focus is a good illustration of how in practice the thinking shifted over this time, as the Ministry developed its ADR process.

4.9 Paragraph 42 of Mr Wiffin's brief states that he suspects that the ex gratia payment made to him in 2010 was due to increased pressure being placed on the Ministry as a result of several factors such as a recently aired documentary at the time, recent media attention as well as correspondence from Judge Henwood and the efforts of his lawyer.

4.10 The payment made to Mr Wiffin was not made in response to increased pressure as identified above. Mr Wiffin's case was one of the eight case studies reviewed as part of Sir Rodney Gallen's review, as outlined in my primary brief (paragraphs 5.2 and 5.3). The reconsideration of Mr Wiffin's claim occurred directly as a result of comments made in the Gallen Report, resulting in an ex gratia payment of $20,000 made to Mr Wiffin along with a letter of apology from the Chief Executive acknowledging his experiences in care, a letter of apology from the Manager of Historic Claims for the delay of his claim being resolved, payment of legal aid debt and an offer to meet with senior Ministry staff.

4.11 Specifically, the Ministry accepted the Gallen Report's position, in relation to Mr Wiffin's particular case, that where allegations had been substantiated against one person the claimant was entitled to some belief when making similar allegations against another person who had been convicted of the same activity with persons other than the claimant. I accept that the Ministry should have taken a more generous approach in its original response to Mr Wiffin's claim.

Georgina and Tanya Sammons

4.12 Before responding to some specific areas raised in Georgina and Tanya Sammons' statement, I wish to first recognise their desire to have their sister Alva Sammons experience acknowledged through the Historic Claims process. It is clear from their evidence that Alva's experience has been a primary motivation for Georgina and Tanya Sammons in pursuing their own claims. I also acknowledge the statement received from Alva's daughter, Hope Curtin, giving an account of the intergenerational impact of Alva's experience.

4.13 I have not been involved in the processing or assessment of either Georgina or Tanya Sammons' claims, although I have considered the records and provide the following comment.

Georgina and Tanya Sammons' claims

4.14 Paragraph 59 of Georgina and Tanya Sammons' statement refers to the more than five year period from the point that Georgina's claim was filed until she met with staff of the Historic Claims team (previously called the Care Claims and Resolution team) in 2012. I have responded generally about the delays in the resolution of claims in my earlier brief (paragraph 5.6 to 5.8). As was the general practice at times with represented claimants during this period, interviews with claimants were arranged on request from Cooper Legal. Because Cooper Legal only contacted Historic Claims in January 2012[10] to advise that Georgina was agreeable to meeting we were unable to meet with her before this date. Arrangements were made for this interview, which occurred in May 2012.

4.15 Paragraphs 65 to 68 of the Sammons sisters' statement relate largely to the nature of the Ministry's assessment model, including that insufficient evidence existed to accept a component of Georgina's claim in 2013 and the fact that evidence was not sought by speaking with people who may have been able to corroborate Georgina's account. My primary brief (paragraphs 3.24 to 3.33) outlines the Ministry's assessment approach at the time, which had shifted to a largely document-based model by the time the assessment of Georgina's claim was completed. I wish to clarify that a claim outcome of "insufficient evidence", is exactly that; the level of information available is insufficient to reach a conclusion for the purpose of settlement. In no way was this outcome intended to indicate that the Ministry queried Georgina's integrity.

4.16 Paragraph 89 relates to Tanya receiving an offer from the Ministry in 2016 under the Two Path Approach. The Two Path Approach is responded to substantively in paragraphs 5.9 to 5.20 of my primary brief. I make specific reference to paragraph 3.10 of that brief, which outlines the moderation approach taken to ensure that due to the fact that allegations were taken at face value (bar a basic fact check) were not treated as a more serious claim under the Two Path Approach than similar claims which had undergone a full assessment. Due to the different nature of the full assessment and Two Path Approach, each had particular factors that contributed to how offers could be made (ie due to the face value acceptance of allegations in the Two Path Approach, an apology was offered for their care experience as opposed to acknowledging specific events or failures). Tanya was entitled to reject this offer in favour of her claim being fully assessed by the Ministry, which she elected to do.

Consultation

4.17 As with all participants who contributed to the 2018 consultation, the Ministry genuinely appreciated the time given by both Georgina and Tanya Sammons to contribute to the future of Historic Claims. I hope, despite the frustration experienced in giving up their time again, that as the Historic Claims approach develops over the next few years, Georgina and Tanya will see the value of their contribution for claimants going forward. My primary brief details some if this development, including the changes made to the claims process to date (paragraph 6.6) and the changes that will occur over the next few years (paragraph 6.8).

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[10] Email from Cooper Legal to the Ministry regarding Georgina Sammons, dated 25 January 2012.

Alva Sammons

4.18 As described in paragraph 5.12 to 5.14 of this brief, the Ministry's position to date has been that Historic Claims does not accept claims registered by claimants' whānau after the person has died.

4.19 Alva Sammons' claim is an example of this scenario. Documents record that Alva disclosed allegations of abuse to Child Youth and Family Services (CYFS) in 1992 as part of their investigation into allegations by her sibling. Alva passed away in 2000, prior to the Historic Claims team or any process being in place.

4.20 Alva's whānau sought to lodge a claim with the Historic Claims team in 2014. At this stage, we have advised that the Ministry is not able to accept a historic claim from Alva's whānau, but we have offered to acknowledge Alva's abuse in our response to her sister's claim as well as providing an apology from our Chief Executive to Alva's whānau, as agreed with the Ombudsman in December 2016.[11]

Chassy Duncan

4.21 I want to firstly acknowledge that the Ministry has not been able to progress the assessment of Mr Duncan's claim as fast as we would have liked. There have been a number of complexities which I discuss below which have contributed to this. I also wish to clarify some areas and explain why certain actions have been taken.

4.22 I have not been involved in the processing or assessment of Mr Duncan's claim but have considered the relevant records. Mr Duncan filed a statement of claim against the Ministry in October 2009. He then met with the Historic Claims team in September 2012 to provide further details about his concerns and time in care.

Two Path Approach

4.23 Mr Duncan was eligible to receive a fast track offer under the Two Path Approach. All people who were eligible (even if they had opted out) had their claim assessed and moderated to ensure the integrity of moderation. The fast track offer that was prepared for Mr Duncan included all allegations that the Ministry had received up until 31 December 2014, being the allegations in his Statement of Claim and those discussed at his meeting with the Historic Claims team. This included allegations about his time at Waimakoia which had been raised in his Statement of Claim. Waimakoia was a Residential Special School run by the Ministry of Education.

4.24 Mr Duncan initially elected not to receive a fast track offer in 2016, but later changed his mind and requested an offer in April 2018. There were some complexities with this in that by then we were aware Mr Duncan had also filed separate proceedings against the Ministry of Education. If the Crown was going to make the offer already prepared that included Waimakoia allegations, then the Ministry needed to discuss details of the separate claim with the Ministry of Education to understand whether the allegations they had received were the

[11] Letter from the Ministry to the Ombudsman regarding complaint by Cooper Legal on behalf of Georgina Sammons sent by email on 16 December 2016.

same as the ones the Ministry had received. If this was the case, then a fast track offer would be able to be made in respect of both claims. It would not have been appropriate for the Crown to have made an offer of settlement which included payment for Ministry of Education allegations but then allow Mr Duncan to pursue payment for these allegations separately against the Ministry of Education.

4.25 Mr Duncan was asked whether he would consent to the Ministry liaising with MOE. He consented to this. On 8 June 2016, the Ministry made a fast track offer to Mr Duncan of $30,000 which was in settlement of both agencies' claims. This offer was subsequently rejected.

Full assessment of claim

4.26 The Ministry began working on Mr Duncan's full assessment in the second half of 2018. As well as the initial allegations that had been received, the Ministry also assessed the additional allegations contained in the letter of offer from Cooper Legal dated 27 February 2015. Due to the extensive allegations and social work files, this took some time to work through. The large number of allegations also meant that it took some time to draft the settlement letter in response to Mr Duncan's claim.

4.27 The Ministry has also considered the applicability of the New Zealand Bill of Rights Act to Mr Duncan's claim given that he was in care post 1990. This has needed advice from both the Ministry's in-house legal team and Crown Law which has added to the delays in finalising the offer.

4.28 There have also been delays during this period due to the prioritisation of other older claims. In the interests of fairness for all claimants, we have tried to finalise the making of offers in date order. This has meant that progression of Mr Duncan's claim has been put on hold at some points of this full assessment process while the staff working on this group have been focussing on other older claims.

4.29 The Ministry's offer is nearly ready to be made and we hope to be in a position to make this in the coming weeks. Although the Ministry and the Ministry of Education had earlier intended on making a joint offer, to ensure that Mr Duncan receives this offer as quickly as possible, the Ministries have decided to make separate offers.

Referrals

4.30 Mr Duncan refers to two occasions where the Ministry made a referral of his allegations of abuse to Oranga Tamariki as they related to people who were still employed by or who were caregivers for Oranga Tamariki.

4.31 As discussed in Simon MacPherson's brief of evidence at paragraphs 12.1 and 12.6, the Ministry is committed to ensuring that children in state care and in the community are kept safe through sharing information where appropriate with relevant agencies. Our part in this process is that information is shared with these agencies to ensure that they can take the necessary steps to maintain the safety of children in their care.

4.32 These referrals were made on 9 July 2018 and 17 September 2018 after it was identified in the course of carrying out Mr Duncan's assessment that allegations had been made against current staff or caregivers. Historically, referrals have only been made at the time of assessment when the Ministry is reviewing all available information. That is why these referrals were not made earlier. Though as discussed at paragraph 12.2 of Simon MacPherson's brief, the Historic Claims team now has a safety check process in place which considers whether any referrals may need to be made both upon receiving a claim and where further information is identified.

4.33 Mr Duncan was advised of these referrals through Cooper Legal on the day these referrals were made. As part of this email, he was asked whether he had any safety concerns that he would like us to pass on to Oranga Tamariki. This is a usual part of our referral process as the Ministry is conscious that some claimants have concerns for their safety when information is disclosed to Oranga Tamariki. For example, a claimant may have concerns for his safety if they believed the alleged perpetrator had gang connections.

4.34 On the first referral, Cooper Legal initially advised that there were no safety concerns but then shortly after requested that his identity be protected in any referral. Given the referral had already been made, we were not able to do this, but we did advise that if Mr Duncan had any particular safety concern as to whom his identity should not be disclosed to, he could let us know.[12] If we had received this, we would have passed this information on to Oranga Tamariki.

4.35 These referrals have not impacted on the Ministry's timing for being able to make an offer to Mr Duncan.

Kerry Johnson

4.36 I wish to recognise Kerry Johnson for sharing his experience. As referenced in paragraph 3.13 of my brief, and to assist in responding to Mr Johnson's affidavit, I want to provide some clarification about how claims were managed under the Two Path Approach when allegations related to both the Ministry and the Ministry of Education.

4.37 The majority of claims that related to both the Ministry and the Ministry of Education that were eligible for the Two Path Approach were addressed as joint agency claims, with a payment contribution from the Ministry of Education where relevant.

4.38 Several claims were managed differently, including that of Mr Johnson, by being separated so that the Ministry's components were addressed under the Two Path Approach and any Ministry of Education components (such as concerns about a claimant's experience at a Residential Special School such as Campbell Park) were responded to by the Ministry of Education separately through their claims process.

4.39 The nature of these claims generally included those where the allegations about a Residential Special School were the substantial part of the claim, either as a result of the seriousness of the allegation, or where it was evident that the Ministry's involvement in the claimant's care journey was reasonably limited in

[12] Email from the Ministry to Cooper Legal regarding Referral to Oranga Tamariki (Duncan) dated 20 August 2018 (Tab 34 of Mr Duncan's Bundle of Documents).

comparison to the Ministry of Education's involvement. Offers were still made to claimants which reflected the component of the claim relevant to the Ministry. In fairness to claimants such as Mr Johnson where his concerns about Campbell Park were better able to be responded to by the Ministry of Education, this aspect was separated out and not included in his Two Path Approach offer.

Patrick Stevens

4.40 I would like to first acknowledge Mr Stevens for sharing his experience. As outlined in paragraphs 76 and 77 of his evidence, the Ministry received details of Mr Stevens' claim on 9 November 2018, and after progressing his claim in line with the Ministry's prioritisation policy as a result of his health issues, were able to make a settlement offer on 30 November 2018.

4.41 In response to Mr Stevens' affidavit at paragraph 61, I acknowledge that information relating to another person with a similar name was released to Mr Stevens' lawyer. Upon being notified of this, the Ministry immediately requested that the file was destroyed which Cooper Legal confirmed they had done on the same day.

4.42 The Ministry takes its responsibility in protecting personal information seriously. In this situation, Historic Claims took immediate steps to ensure that the issue was contained by ensuring that the information provided in error was destroyed. This was followed by an internal review of how this incident had happened, with the Ministry taking steps to review its systems for how requests for information are processed as a result.

5 Ancillary Issues

Destruction of records

5.1 Paragraph 593 of the Cooper Legal brief states that they do not know whether the Ministry destroyed records in accordance with the General Disposal Authority which was in force between 1 October 2005 and 6 June 2013. From 1990 through 2010 DSW and subsequently the Ministry had a blanket embargo on the destruction of staff files (it is not clear if this applied to a one-off appraisal in 1997). After this embargo was lifted a policy decision was made to retain some classes of CYF staff files due to their potential relevance to the historic claims process. Other staff files were by then covered by General Disposal Authority 1, which expressly allows for the destruction of staff files after seven years in most cases.

5.2 In addition, the inability to locate files does not necessarily indicate intentional destruction, as implied at paragraph 599 of the Cooper Legal brief. Some of the possible reasons for a file being unavailable include:

(a) issues with the integrity of historical record metadata (for example, misnamed files are effectively undiscoverable);

(b) lost or damaged individual records being incorrectly listed as destroyed; or

(c) in some rare instances, for some records, unauthorised and unrecorded destruction may have occurred.

Privacy Act requests and discovery

5.3 Paragraph 607 of the Cooper Legal brief alleges that the Ministry was delaying decisions about information releases and also delaying responses to complaints about these issues. Although we acknowledge there were delays in these processes, we reject that there were any intentional, or calculated delays.

5.4 Paragraphs 634 to 667 of the Cooper Legal brief discusses paragraphs 634 to 667 some of the events that have taken place around the Ministry's response to Privacy Act requests and discovery requests. Below are some general comments in response.

5.5 The Ministry has always taken seriously our legislative obligations around the provision of personal information contained in social work records to historic abuse claimants. We are very conscious of the sensitive nature of the information and our obligations around that. For example, we cannot provide information that relates to other people under a Privacy Act request, if that would be an unwarranted disclosure of that information.

5.6 We are also mindful of our obligations to the Court and the rules around discovery, including when these have changed. For example, as noted in paragraph 649 of the Cooper Legal brief, in December 2013 we began redacting irrelevant information from our discovery releases and restricting discovery to discoverable material only. This change was intended to more properly follow the new relevance test for discovery in the High Court Rules.[13]

5.7 However, the Ministry has always been open to seeking guidance where there has been ambiguity around the interpretation of legislation or our obligations. For example, we agreed with Cooper Legal that WM could be a suitable test case for the Office of the Privacy Commissioner (**OPC**) to consider. OPC provided some views which we were then able to implement generally in relation to our approach to making the names of caregivers available.

5.8 We have also reviewed our position when there have been changes in law or Court decisions that have helped with interpretation. For example, in August 2018 we agreed to change our position on the release of Court documents in Privacy Act responses after a High Court decision provided some useful guidance.[14] Prior to this Court decision, we were of the view that s 7(2) of the Privacy Act 1993 prevented us from providing all Court documents as they were not held by us, but were held by the Court. The Court was the appropriate authority to release them. However, the decision clarified that there were some Court documents that we could release. Since our change in position, at the request of Cooper Legal, we have reviewed the Court documents for many of their clients and have provided these where we can.

5.9 The Court's approach to discovery in *N* v *Attorney-General* further helped in providing a framework for how discovery could be completed going forward by directing that two sets of documents be provided in discovery a redacted set and a set of "clean copies".[15] This balanced the need for counsel for claimants to

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13 Synopsis of submissions filed by the Attorney-General in CIV-2018-485-2041 and other proceedings, dated 2 February 2016, at [12] (at CL.CH5.0395).

14 *Simes v Legal Services Commissioner* [2017] NZHC 2331.

15 *N v Attorney-General* [2016] NZHC 547.

view all information to assess relevancy but also allows for a more conventional litigation approach where only relevant documents are provided.

Revisiting claims

5.10 At paragraphs 469-472, the Cooper Legal brief discussed matters that relate to the Ministry's approach to revisiting claims. Claims are settled based on the information known at the time of the assessment of each particular claim. Claims made by subsequent claimants at a later date, relating to the same alleged perpetrator, may result in a different decision being made for the more recently assessed claim. Based on the individual facts of the new claim, in conjunction with the cumulative information gathered about an alleged perpetrator, a more recent claim may take into account the actions of an alleged perpetrator, where an earlier claim had not. This is consistent with the way in which all claims are assessed, where patterns of alleged and known behaviour by staff are considered in the assessment of claims.

5.11 This matter is complex. Revisiting claims has the potential to undermine the ADR process and result in increased delays. Claimants chose to resolve their claim on the basis of the offer made before them at the time.

5.12 The matter of reconsidering additional information not taken into account by the Crown at the time of a claim being settled has been addressed in the context of the work of Crown Law as part of the Crown's Litigation Strategy released in December 2019. Further work needs to occur in relation to this operational policy following the new Crown Resolution Strategy.

Deceased claimants

5.13 In light of the discussion at paragraphs 672 to 684 of the Cooper Legal brief, and also the evidence of Georgina Sammons, I would like to provide clarification of the Ministry's position for deceased claimants.

5.14 The position the Ministry has taken to date is that where a claimant lodges a claim with the Historic Claims team during their lifetime and provides us with sufficient information to enable us to assess the claim, if the claimant pass away before the claim is resolved and their estate requests us to do so, we will continue with the assessment of the claim and make any payment to the estate.

5.15 We have never accepted into the Historic Claims process claims lodged by claimant's whānau after the claimant has died. This issue was raised in consultation with Māori claimants on our new process in 2018. We considered this feedback but have decided it is a significant Crown policy decision that needs further considered thought and discussion with other agencies and Ministers. The Ministry is not currently in a position to make a decision on this issue. Alva Sammons' claim is an example of this scenario, which I have discussed earlier in this brief.

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Linda Ljubica Hrstich-Meyer