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NOTE: ORDER IN PLACE PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE RESPONDENTS.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA679/201
8 [2019] NZCA

BETWEEN	ATTORNEY-GENERAL Appellant
AND	J (AND OTHER PLAINTIFFS IN THE DSW LITIGATION GROUP) Respondents

Hearing:	3 April 2019
Court:	Williams, Collins and Toogood JJ
Counsel:	P T Rishworth QC and T M Bromwich for Appellant S M Cooper and E Kim for Respondent
Judgment:	16 October 2019 at 11.30 am
Reissued:	25 October 2019

JUDGMENT OF THE COURT

A The applications to adduce further evidence are granted.

B The appeal is dismissed.

C The appellant must pay the respondent costs for a standard appeal on a band A basis with usual disbursements. We certify for two counsel.

D Costs in the High Court are to be dealt with in that Court.

ATTORNEY-GENERAL v J (AND OTHER PLAINTIFFS IN THE DSW LITIGATION GROUP)
[2019] NZCA 499 [16 October 2019]

REASONS OF THE COURT

(Given by Williams J)

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Introduction

[1] This appeal concerns 210 historical abuse claims currently before the High Court. Most claims have been filed to avoid the effect of limitations. It is expected that many (though not all) will be resolved by alternative dispute resolution and are not being progressed in the Court at this stage. The Ministry of Social Development (MSD) and the Ministry of Education (MoE) are the effective defendants in the majority of cases. They want to pass some of the details disclosed by claimants in

their claims to third parties — the police, Oranga Tamariki (OT), and the alleged abusers and/or their employers — so that the information can be used for purposes unrelated to the Crown's defence. Those purposes include:

> *(a) to allow the police to investigate the allegations and where appropriate to prosecute the alleged abusers;*
>
> *(b) to protect tamariki currently in state care or education; and*
>
> *(c) to address any employment processes that may arise if the alleged abusers are still employed in at risk roles in the state or NGO sectors.*

[2] Various statutory provisions allow MSD and MoE to share some or all of this information for some or all of those purposes.

[3] Some claimants have no difficulty with MSD and MoE's proposal. Other claimants are opposed to it. Some of those opposed fear for their safety if their identity and accusations are communicated to alleged abusers. Some are prison inmates and fear repercussions if it becomes known in prison that they are "narks". Some are deeply distrustful of the state and its motives, especially of the police, and simply do not wish to cooperate for any collateral purposes under any circumstances. Some are too ashamed of what happened to them to want it disclosed outside the proceedings.

[4] In the High Court, Ellis J held that the Court has the inherent power to control its own processes, including the power to control the use of information disclosed in proceedings before it where such control is necessary for the due administration of justice.[1]

[5] Two questions arise in this appeal from Ellis J's judgment. First, do MSD and MoE's information sharing powers and the High Court's inherent powers overlap in historical abuse cases? Second, if they do, which institution should control disclosure, the Court or MSD and MoE?

[6] Both sides sought to adduce further evidence to assist this Court without opposition. This has indeed been helpful. We have admitted it accordingly and refer to it below.

Procedural history

[7] Between January 2004 and 31 August 2017, 2,513 people made claims against MSD alleging physical or sexual abuse, neglect, or other harm while they were young people under MSD's and/or MoE's care or supervision. Not all of these have been filed in the High Court. "Unfiled claims" have been lodged directly with MSD or

[1] *J v Attorney-General* [2018] NZHC 1331.

MoE and, if considered meritorious, are resolved outside formal court processes. As at 31 August 2017, there were 210 unresolved "filed claims" and 720 unresolved "unfiled claims". The claims are managed jointly by MSD and MoE. No substantive cases have been heard in the High Court since 2007.

[8] As Ellis J noted in the High Court, the claimants are a group with particular characteristics. She said:[2]

> …both individually and as a group, the plaintiffs in these proceedings are undoubtedly some of the most vulnerable people in New Zealand society. …[T]heir claims disclose allegations of sexual and physical abuse suffered while in State care. The allegations are often of a deeply personal and traumatic nature.
>
> (Footnotes omitted.)

[9] On 29 August 2017, counsel for the claimants raised an issue about information sharing between MSD and the police. It was understood that certain statements of claim had been provided to the police by MSD to allow investigation of the allegations. The complainants also made a complaint to the Privacy Commissioner under pt 8 of the Privacy Act 1993 (PA). Ellis J made interim orders on 31 August 2017 preventing MSD and MoE from passing on to third parties any material received in the course of

proceedings except to progress the proceeding (the non-disclosure order), and preventing search of the court files except by leave (the no-search order). In a subsequent hearing on the issue, Ellis J then granted the no-search order by consent but declined to continue the non-disclosure order. At that stage the Judge took the view that the Court's jurisdiction was exhausted by the no-search order and all other matters should be left to the Privacy Commissioner to resolve. The Commissioner subsequently declined to uphold the complaint.

[10] On 31 October 2017, MSD and MoE applied to rescind the no-search order and for clarification of the order in any event if it was upheld. Further hearings then

[2] At [18].

took place in February and May 2018. On 7 June 2018, Ellis J issued final orders in the following terms:[3]

(a) There is to be no search of the DSW and MOE litigation files without leave of the Court.

(b) No copies of documents contained on those files (other than documents which comprise the formal court record, as defined in the Senior Courts (Access to Court Documents) Rules 2017) may be provided by a party to the proceedings to a non-party without leave of the Court.

(c) Paragraph (b) does not apply to the provision of copies of such documents:

(i) to counsel or to other persons involved in the conduct of this litigation for the purposes of the conduct of this litigation and any

settlement processes connected thereto;

(ii) between MSD, OT or MOE or within those organisations for the purposes of ensuring the safety of tamariki;

(iii) where the plaintiff consents to the disclosure of the information at issue.

(d) A ministry that is not a party to a proceeding and who receives information pursuant to (c)(ii) (that is, for the purpose of ensuring the safety of children) may not disclose that information further without leave of the Court, except in the circumstances specified at (c).

(e) Any contact by a Crown agency with a particular plaintiff that may be sought as a result of disclosure that has occurred in accordance with (c)(ii) is to occur through the offices of Cooper Legal, the solicitors for

[3] *J v Attorney-General*, above n 1, at [70].

the claimants, in the absence of consent from the plaintiff that contact may be made directly.

[11] We were advised that since that date there have been three applications for leave to disclose information as at 6 March 2019. One was granted by consent and two were granted with conditions.

[12] The Crown appeals against the orders contained in (b) to (e) above on the grounds that:

(a) the High Court either did not have jurisdiction, or if it did, should not have

made the orders because they are inconsistent with ss 15–18 of the Oranga Tamariki Act 1989 (OTA);

(b) the High Court erred in restricting disclosures otherwise permitted by Information Privacy Principle (IPP) 11(f) in respect of the litigation group as a whole because there was not a sufficient factual basis to do so, the Court did not take proper account of the safety interests of tamariki, and there was no "legitimate expectation of privacy and/or confidentiality";

(c) the Court erred in applying different requirements for disclosures between MSD, OT and MoE on the one hand, and disclosures to third party agencies and individuals on the other; and

(d) the Court erred in failing to refer to the appellant's application of 30 April 2018.

The High Court decision

[13] In the High Court, Ellis J reasoned that the claimants were vulnerable and their privacy and confidentiality were appropriate concerns for the Court to take into account in its administration of justice.[4] Failure to control disclosure ran the risk,

[4] *J v Attorney-General*, above n 1, at [63].

the Judge considered, of deterring litigants from seeking redress in the courts due to the risk of exposure.[5]

[14] Further, Ellis J reasoned that the exercise of judicial control in this fashion was not inconsistent with the OTA or the PA. Neither imposed on MSD or MoE a duty to disclose the information received and so could not affect the Court's inherent power.[6] The Judge considered that requiring leave prior to disclosure was not an unreasonable imposition. It

would simply "add a level of process" by requiring the Crown to obtain leave.[7] Further, leave would invariably be granted where the claimant consented, appropriate conditions could protect the claimant's interest, or the Court was satisfied that disclosure was justified in the particular circumstances by some "sufficiently important countervailing interest".[8]

Agreed issues

[15] The parties have agreed on a list of issues. We have reformulated them slightly for clarity, but they are substantively as follows:[9]

(a) What is the appropriate appeal standard?

(b) Can MSD or MoE use s 15 of the OTA to provide material to other agencies?

(c) To the extent that the non-disclosure order prevents disclosure under ss 15, 17 and 18 of the OTA, does the order exceed the Court's inherent powers?

(d) If not, was the making of the disclosure order an "appropriate" exercise of those powers? In particular:

5 At [64].
6 At [66].
7 At [66].
8 At [66].
9 The parties also agreed on the issue whether the Court erred in not considering the directions sought in the appellant's application dated 30 April 2018. The issues raised in that application are covered by the other issues in this appeal and so we need not deal with that application separately.

(i) Was the order too broad and did it therefore lack a proper factual basis to establish necessity?

(ii) Did the Court take appropriate account of the safety of tamariki currently in care or education?

(iii) Did the Court err in relying on the plaintiffs having a legitimate expectation of privacy and/or confidentiality?

(iv) Was there a proper basis for distinguishing between information sharing between MSD, OT and MoE (where no leave is required), and disclosure to other agencies and individuals (where leave is required)?

Appeal standard

[16] The appellant submits that the Court's exercise of its inherent power is discretionary in nature. We agree. This Court previously held in *Taipeti v R* that although classes of decisions that are properly classified as discretionary are dwindling, three possible indicia of a discretion are:[10]

(a) the existence of a large area for personal appreciation of the decision maker;

(b) the procedural nature of the decision; and

(c) the existence of scope for choice between multiple legally correct outcomes.

[17] As will become apparent from the discussion below at [70]–[73], the exercise (or purported exercise) of a court's inherent power to make such orders as in the present case is a "quintessential" exercise of discretion.[11] There is no single legally correct outcome to the exercise of a court's inherent powers. The power is exercised

[10] *Taipeti v R* [2018] NZCA 56, [2018] 3 NZLR 308 at [49].
[11] Marcelo Rodriguez Ferrere "The Inherent Jurisdiction and its Limits" (2013) OLR 107 at 136.

when it is necessary to ensure the due administration of justice, but there is no prescription as to precisely how it must be exercised. Thus in making her decision, Ellis J was free to employ her own appreciation of the most suitable solution to the case.

[18] Accordingly, the principles in *May v May* apply to this appeal.[12] The question is whether Ellis J acted on a wrong principle, failed to take into account some relevant matter or took into account some irrelevant matter, or was plainly wrong.[13]

The evidence

[19] The evidence filed is extensive, but it is necessary here to provide no more than a brief summary as a frame for what is primarily a legal debate.

Crown evidence — safety of tamariki

[20] Andrea Nichols, director of the Safety of Children in Care Unit at OT, gave detailed evidence on this matter. She said that when evidence is received of historical abuse, it is necessary to determine whether such evidence suggests there is a contemporary risk of harm to tamariki currently in care. OT needs the following information "[a]t a minimum" in order to ensure tamariki are protected:

(a) the name and date of birth of the complainant;

(b) the name of the alleged perpetrator if known, otherwise any identifying features or characteristics;

(c) the nature of the alleged abuse and where it took place;

(d) relevant dates; and

(e) the age of the complainant at the time of the incident.

[12] *May v May* (1982) 1 NZFLR 165 (CA).
[13] At 170.

[21] Ms Nichols also stated that in some cases, a delay of even a few days may pose a real safety risk to tamariki currently in care. It is important therefore that OT undertakes necessary checks without delay.

[22] Ms Nichols' evidence was that all allegations in relation to current caregivers, whether OT employees or employees of third party providers, are investigated and assessed by OT. It is important to know whether the historical allegations have already been investigated prior to filing of the proceedings, and if so what the outcome of that investigation was. Where insufficient details are available due to unwillingness of the complainant to co-operate, OT may have no choice but to conclude there is insufficient evidence to substantiate the allegation at this stage and no further steps can be taken. It is also important from a natural justice perspective to give alleged perpetrators an opportunity to respond to any allegations before any action is taken against them.

[23] OT has joint operating procedures in place with police in relation to allegations of behaviour that may constitute an offence. In such cases, police and OT will conduct a joint investigation. This requires the sharing of information.

[24] Ms Nichols advised that in exchanging information, OT takes account of safety concerns for all involved, including complainants. She deposed that staff are all well-experienced in making such decisions, and that safety concerns may be a reason why OT chooses not to provide details such as a complainant's identity to a perpetrator.

[25] For MoE, Bruce Ferguson, principal advisor for Business Capability and Support,

also provided an affidavit. It summarised the formal relationships maintained between MoE and other agencies in order to protect tamariki in the context of historical abuse allegations against currently registered teachers. Given the potential risk, he said MoE considers "it would be appropriate to notify Police, who can then assess whether further action is appropriate".

Crown evidence — criminal investigation and prosecution

[26] The evidence of Linda Hrstich-Meyer, acting director of the Claims Resolution Team at MSD, addressed the issue of police involvement from MSD's perspective. Ms Hrstich-Myer advised that the Ministry's view is that referral of allegations of sexual and physical abuse to police is necessary to avoid prejudice to the maintenance of the law, through the prevention, detection and investigation of criminal offences. MSD recognised some claimants did not wish to make complaints to the police but considered it was still necessary to on-refer such allegations. She said the public interest in the maintenance of law and public safety outweighed the interests of particular complainants. Furthermore, she considered MSD was not equipped to determine whether allegations that had come to its notice warrant further action by the police. Rather, it must be for the police to decide what steps are appropriate in relation to any particular allegations as these are specialist police functions.

[27] Ms Hrstich-Meyer advised that in May 2016, MSD and the police signed an agreement which established an appropriate level of information sharing in light of the wider public interests involved. At the same time, MSD added advice to its historic claims webpage that historical abuse allegations coming to the notice of MSD would be referred to Police National Headquarters. It would then be for the police to decide how to proceed thereafter. Ms Hrstich-Meyer accepted in her affidavit that Cooper Legal was not advised of the existence of the agreement until August 2017.

[28] Detective Inspector David Kirby, manager of Adult Sexual Violence and Child Protection for the police, also provided an affidavit. He advised that following the High

Court orders in this case, the agreement between Police and MSD was updated. It now provides that, where there are allegations of sexual abuse or serious physical abuse or in other cases where MSD reasonably believes that referral to the police is necessary (for example in serious cases of neglect), an application will be made to the High Court for leave to make the referral.

Crown evidence — employment issues

[29] Ms Nichols also provided evidence in relation to employment issues arising from allegations of abuse. Where the allegations are serious enough, she said,

consideration must be given to whether to suspend the staff member pending an investigation. It may be necessary to provide details of the allegation to the staff member concerned to provide them an opportunity to respond. Wider investigations may be necessary; for example, interviewing other tamariki or staff. Disclosing the allegation to those people, as well as police, may therefore be required.

Claimants' evidence

[30] Affidavits in opposition were filed by three complainants whom we will call C1, C2 and C3.

[31] C1 is currently in prison. His allegations of abuse related to a staff member at an Oranga Tamariki placement. He said he was happy for his allegations to be investigated but did not wish to be involved. He does not trust the police because of extensive bad experiences with them in the past. They had, he deposed, failed to protect him when he was abused as a child by family members. And as an adult, he said he felt pressured to plead guilty to offences he had not committed. He does not want further contact with the police. He concluded:

> I want children in care to be protected and I have given consent to disclose my

> identity and allegations to many people and organisations, as the Ministry has requested. My only condition is that I do not want to be involved with the Police. I do not understand why my allegations could not be investigated without making me talk to the Police. I think it is unfair that people might try to make me do this.

[32] C2 also made a complaint in relation to the same staff member who is the subject of C1's claim. C2 said he was assured by MSD that his information would be confidential. Had he known that there would be a risk it would be disclosed, he said he would not have made the allegations he did. MSD in a reply affidavit denied that such a representation was made.

[33] C2's concerns relate to personal safety. He was prepared to allow disclosure of his allegations to police and/or the Care and Protection Resource Panel on condition that there was no risk of his identity being disclosed to the staff member.

[34] C3 alleges he was abused as a child by two people who presumably worked as caregivers. C3 said he was happy to allow his allegations to be disclosed but only on an anonymous basis. He does not wish his allegations to be widely disclosed because he says his and his family's personal safety would be put at risk by one of the alleged abusers. He concluded:

> If the disclosure of my identity is somehow so crucial towards ensuring the safety of children, I may consent to disclosure in the future. However, MSD/OT will need to provide me with assurance for my confidentiality and safety. … I simply want to have some control who my information is going to and how it will be used.
>
> I still want to help to ensure that current children are saved from being abused by [X] or [Y]. There should be a way that I can do this without placing my family's, and my own, safety at risk. As long as I have full assurance that I will be protected – either through the police or by way of anonymity – I would be willing to assist MSD/ OT/police in their processes to ensure the safety of children. I think that this is a reasonable condition.

[35] In reply, Delwyn Clement (lead advisor for Historical Claims at MSD) swore an

affidavit which dealt in part with the claim by C3, and a separate claim by another claimant, C4. By consent, C4's statement of claim was referred to police with his name redacted. Ms Clement considered, however, that the statement of claim by C3 should also be provided with urgency in order to assess any current safety risks with respect to one of the alleged perpetrators. That alleged perpetrator is a current OT caregiver, having the care of tamariki at the time the proceedings were filed.

[36] Expert evidence in support of claimants was provided by Ian Hyslop. He is a lecturer at the School of Counselling, Human Services and Social Work at the University of Auckland. His evidence was that anonymity is usually the only protection MSD and OT can provide to notifiers of abuse and should be provided where possible. He considered that it was "potentially oppressive" for abuse victims to become named notifiers against their wishes as an outcome of working through their own claims of childhood abuse. He considered that the safety of other children could be investigated and provided for without a focus on the identity of historic abuse claimants or a reinvestigation of their claims.

[37] In his second affidavit, Mr Hyslop suggested OT should be more flexible in order to take account of the needs of past abuse victims. He said:

> I understand that the safety of children is the primary focus of OT. However, my view is that the issue at hand is not simply a matter of whether OT is able to **fully** comply with existing procedures and protocols in relation to an
>
> investigation. The issue is whether strict compliance with pre-set procedures is appropriate in the specific circumstances, having due regard for the perceived safety, security and well-being of victims and/or notifiers.
>
> (Emphasis in original.)

[38] He considered OT was asserting an unnecessary "all or nothing" position in relation to compliance with existing investigative protocols. This was, he suggested, unhelpfully narrow and restrictive given the countervailing safety and other needs of past abuse victims.

Submissions

Crown's submissions

[39] In his submissions for the Crown, Mr Rishworth QC accepted that public or private interests maybe compromised by disclosure of the contents of claims or the identity of claimants to other agencies. He accepted also that in some cases the safety of claimants may be affected and, if not properly managed, the risk of disclosure may deter other potential claimants from seeking a remedy in the courts. His submission, however, was that current legislation already provides a comprehensive regime for taking these matters into account.

[40] The regime includes IPPs 11(e)(i) and 11(f) of the PA, which authorise disclosure of personal information where the agency believes on reasonable grounds that it is necessary for the prevention, detection, investigation or prosecution of offences, or for public or individual safety.

[41] Section 15 of the OTA, if also applied, allows "any person" to report suspected abuse of a child or young person. Under s 17, any such report must be investigated. Further, prior to 1 July 2019, ss 59–66 provided a scheme for the production of documents relevant to whether any child or young person is in need of care and protection. The version of s 66 in force prior to 1 July 2019 created a duty on government departments, agents, crown instruments and statutory bodies to, when required, supply a care and protection co-ordinator, OT or the police with any information needed to determine whether a tamaiti is in need of care and protection.

[42] Mr Rishworth pointed out that since July this year, this regime of mandatory reporting on request has been expanded in the new ss 65A–66K. Further, Mr Rishworth said that it was important to bear in mind the wider statutory context within which relevant agencies must operate. These included the special duties

and functions of the police, as provided in the Policing Act 2008, and of OT under the OTA. In addition, these agencies had duties and responsibilities pursuant to health and safety legislation, employment legislation, and the general law of tort which must also govern the way in which they carry out their functions. The Crown's argument was essentially that this complex matrix of statutory and common law duties and functions left little room for the intervention of the Court's inherent powers.

[43] Mr Rishworth accepted that as a general principle, the High Court has inherent power to do that which is necessary to perform its function of administering justice according to law but, he submitted, there are important limits. First, no inherent power can be inconsistent with statute. Secondly, the Court has no general power at large to act in the public interest and to protect wider interests of litigants. It may only act in the context of "the machinery of adjudication". Finally, any such power must take proper account of the rights and interests of all involved and affected by its exercise.

[44] This meant that the cases in relation to disclosure of proceedings to the world, in which the interests of privacy and confidentiality are often given primacy, are not entirely on point in this context. In this case, it was submitted the proposed disclosure is to agencies to allow them to fulfil their own statutory functions. The High Court can have no inherent power to prevent MSD or MoE from utilising s 15 to make a report, where the statutory test of belief in the likelihood of abuse is met. Further, any good faith reporter under s 15 is immune from civil or criminal liability.[14] This immunity was a signal from the legislature that the courts had no role in MSD or MoE's reporting powers.

[45] Mr Rishworth also submitted that the Court's inherent powers must be harmonised with the relevant privacy principles. These principles, the Crown accepted, do not oust the Court's inherent powers, but they must be taken to affect them in this context. This must mean, it was submitted, that whether or not one of

[14] Oranga Tamariki Act 1989, s 16.

the exceptions to IPP 11 applies in a particular case will be a matter for the agency, not the

High Court. Those affected are able to challenge that decision through the regime in the PA, by complaint to the Privacy Commissioner. The Court has no common law power to usurp that process by issuing its own orders.

[46] The Crown submitted that even if there is an inherent power to control disclosure, the Court must take into account other interests potentially harmed — most particularly the safety of tamariki, and the maintenance of law and public or individual safety. In this case the effect of the orders was wide, and the High Court did not refer to the evidence filed on behalf of MSD and OT, indicating that Court can only have failed to take due account of those interests. Furthermore, it was submitted, the Court should only intervene if there is a proper factual basis for the claim of harm. In the present appeal, a blanket prohibition without leave can only be based on speculation about harm for which there is no proper case-specific evidence.

[47] Finally, it was argued, the distinction the High Court drew between agencies for which the sharing of information inter se did not require leave, and those that did, had no logical basis. In fact, the evidence of the claimants suggested that there were also concerns about disclosure within the no-leave group of agencies as well as with other agencies such as the police.

Claimants' submissions

[48] For the claimants, Ms Cooper underlined the point accepted in the High Court that the claimant group is both collectively and individually highly vulnerable. Disclosure created risks both to physical safety and to mental health and wellbeing. These are, counsel submitted, important interests to be weighed in the balance.

[49] Secondly, it was submitted that s 15 was not intended to apply to government agencies. It was designed to provide for reporting from within the community. MSD and MoE are required to utilise the procedure in s 19 of the OTA, which relates to referral of any matter to a care and protection co-ordinator by "any body or organisation (including a

government department or other agency of the Crown, or a

local authority) concerned with the welfare of children and young persons".[15] Section 19, Ms Cooper argued, is a more efficient process than s 15 because it skips the requirement for an investigation under s 17, which would be necessary if a report was made under s 15. This reflects the fact that those who make s 15 reports will often have limited or unreliable information, while government departments such as MSD will have already undertaken initial inquiries.

[50] Furthermore, Ms Cooper submitted that s 66 of the OTA, not ss 15–17, is what applies to MSD. In particular, s 66(2)(a) (now s 66(3)) specifically provides that no information may be shared for the purpose of criminal investigation. And, in any event, the orders are limited; disclosure to OT does not require the Court's leave. The non-disclosure orders are therefore entirely consistent with the applicable provisions.

[51] Insofar as the PA is concerned, Ms Cooper submitted that the identity of claimants need not be disclosed to maintain the law or the safety of tamariki. It was submitted that tip-offs are often anonymous under s 15.

[52] Crucially, Ms Cooper argued, even if s 15 did apply to MSD, the section creates no duty to report. It merely permits any person to choose to make a report. The exercise of the Court's inherent powers here is therefore consistent with s 15 because it does not prevent the exercise of any statutory duty.

[53] Ms Cooper submitted that the effect of the appellant's case is that notifiers who are not victims are entitled to maintain their anonymity, but victims, who are the ones most vulnerable, cannot do so. This would be a very ironic interpretation of the regime. It would also, Ms Cooper submitted, be inconsistent with s 7 of the Victims' Rights Act 2002. While creating no legal duty, that Act still declares that victims are entitled to be treated with courtesy, compassion, and respect for dignity and privacy.

[15] Oranga TamarikiAct, s 19(1)(a).

[54] Finally, Ms Cooper supported the conclusion in the High Court that disclosure of historical abuse details would have a chilling effect on individuals who might otherwise seek a remedy in the courts for historic abuse.

Analysis

[55] Although our system of law and government is complex, the boundaries and relationships between the work of its many institutions are generally clear because they are defined by Parliament, the common law or long practice and convention. But where boundaries are blurred, or functions overlap, problems can sometimes arise. The respective functions of the High Court as a court of justice, and MSD and MoE as core social agencies within a network of such agencies in historical abuse proceedings, is a case in point.

[56] To sharpen up the boundaries or resolve conflicts between overlapping functions requires us to identify the correct statutory road markers and, if these do not provide a complete answer, to reason from first principles.

The statutory context

[57] Section 15 of OTA (as it was prior to 1 July 2019 amendments) provided:

> Any person who believes that any child or young person has been, or is likely to be, harmed (whether physically, emotionally, or sexually), ill-treated, abused, neglected, or deprived may report the matter to the chief executive or a constable.

[58] Presuming (for present purposes) that "any person" includes a person employed by MSD or MoE, s 15 imposes no duty to report. Rather, as this Court noted in *R v*

Strawbridge, it confers a "right" to report where the requisite belief is genuine.[16] Meanwhile, as noted by the appellant, s 16 protects the reporter from civil, criminal or disciplinary proceedings, in relation to the disclosure.

[16] *R v Strawbridge* [2003] 1 NZLR 683 (CA) at [25].

[59] Counsel for the claimants focussed on the terms of s 19, arguing this was the only procedure by which MSD and MoE could report. Its relevant subsections (prior to 1 July 2019) provided:

> (1) Where—
>
> (a) after inquiry, any body or organisation (including a government department or other agency of the Crown, or a local authority) concerned with the welfare of children and young persons; or
>
> (b) in any proceedings, any court—
>
> believes that any child or young person is in need of care or protection on 1 or more of the grounds specified in section 14(1) (other than on the ground specified in section 14(1)(ba)), that body, organisation, or court may refer the matter to a care and protection co-ordinator.
>
> (1A) Every referral pursuant to subsection (1) shall be accompanied by—
>
> (a) a statement of the reasons for believing that the child or young person to whom the referral relates is in need of care or protection; and
>
> (b) particulars sufficient to identify any person, body, or organisation that might be contacted to substantiate that belief; and
>
> (c) a statement indicating whether or not the referral is being made with the consent or knowledge of—
>
> (i) the parents or guardians or other persons having the care of the child or young person to whom the referral relates; or
>
> (ii) the family, whanau, or family group of that child or young person; and

(d) any recommendation as to the course of action the care and protection co-ordinator might take in respect of the referral.

…

(4) Every care and protection co-ordinator to whom a case is referred pursuant to subsection (1) by a court shall,—

(a) within 28 days after receiving that referral, furnish to the court a written report stating—

(i) what action (if any) has been taken with respect to the case as a result of the referral; and

(ii) if any such action has been taken, whether that action has resolved the matter, and, if so, how that matter has been resolved; and

(iii) what further action (if any) is proposed with respect to the case, and, if any such action is proposed, when that action is likely to be completed; and

(b) subject to paragraph (c), where the report furnished pursuant to paragraph (a) indicates that further action is proposed with respect to the case, within 28 days of the furnishing of that report, furnish to the court a written report stating—

(i) what progress (if any) has been made with respect to that action; and

(ii) when that action is likely to be completed; and

(c) where the report furnished pursuant to paragraph (a) indicates that further action is proposed with respect to the case, on the completion of that action, furnish to the court a written report stating whether that action has resolved that matter, and, if so, how that matter has been resolved.

[60] It will be seen that this section refers specifically to public sector departments and agencies. It also provides the procedure by which the court itself can refer the matter to a care and protection co-ordinator where a judge considers this is warranted.

[61] The s 19 process is more formal and supervision of it is closer and more prescriptive. We accept that this section is designed for use by state agencies. The procedural requirements in subs (1A) reflect this. But ss 15 and 19 should

not be mutually exclusive. A key purpose of the Act is to protect tamariki from harm.[17] The Act's multiple reporting pathways should be construed liberally so as to be consistent with that purpose. There is no reason to read s 15 as if employees of MSD or MoE do not fit the description "any person". On the contrary, this is good reason to construe the phrase as applying to such employees if that would better provide for the safety of tamariki. We think it would. We conclude therefore that both ss 15 and 19 may be used by MSD and MoE employees to report to OT or the police any concerns they may have for the safety of tamariki.

[62] The other relevant provision is s 66. As it was prior to 1 July 2019, the section allowed OT or the police to require the disclosure of information from government

[17] Oranga Tamariki Act, s 4(1)(b)(i).

departments and agencies.[18] But (significantly in terms of this appeal) no such information may be used for criminal investigation purposes or in relation to proceedings other than those under the OTA.[19]

[63] Although not strictly relevant for the purposes of the information exchanges at issue in this appeal, it is to be noted that as of 1 July 2019, a comprehensive inter-agency information sharing regime was enacted in the form of ss 65A–66Q. It may well be that this new regime raises different issues insofar as the overlap between the function of the courts and MSD and MoE is concerned, but they do not call for resolution in this appeal.

[64] The important point is that s 66 and the new provisions create clear statutory duties to share information. They are fundamentally different from the looser procedure in s 15, upon which MSD and MoE rely. It is to be noted that there have been two attempts to make reporting mandatory, both of which were unsuccessful. The first version of the Children and Young Persons Bill 1986 imposed a duty to report on some classes of persons.[20] They included police, teachers, social workers, caregivers and others likely to come into close contact with families showing signs of having been abused.[21] This proposal was dropped as a result of select committee submissions suggesting that

mandatory reporting would be ineffective as a protection. The evidence was that in mandatory reporting regimes elsewhere, abusers simply denied tamariki access to those persons with a duty to report. This would have reduced the efficacy of the reporting regime and could have exposed tamariki to greater danger.[22] A second attempt to make reporting mandatory in 1993 also failed after it triggered an Attorney-General's s 7 report[23] and was dropped after the select committee stage.[24]

[65] In the current appeal, however, the orders made by Ellis J do not purport to override any s 66 duties because the information sharing for which leave is required

18 Section 66(1).
19 Section 66(2) (now s 66(3)).
20 Children and Young Persons Bill 1987 (97–1), cl 17(2).
21 Clause 17(1).
22 (2 May 1989) 497 NZPD 10318.
23 New Zealand Bill of Rights Act 1990, s 7.
24 See Children, Young Persons, and their Families Amendment Bill 1993 (269–2).

is not subject to any duty to share under that section. First, the orders expressly permit the free flow of information without leave between OT, MSD and MoE for child safety purposes. Secondly, while the police could theoretically require MSD or MoE to provide information under s 66, this will not occur in practice. Here, the police are clear that their purpose is criminal investigation. Such use is expressly prohibited by s 66.

[66] We turn now to the PA, described in its long title as an Act to "promote and protect individual privacy". Section 6 of the Act provides for a long list of IPPs which are modelled on the eight basic principles of national application contained in the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, adopted by OECD member countries in September 1980.[25] The IPPs are broadly stated and subject to significant exceptions. They are not rules. The relevant principle in this case is IPP 11, and the relevant exceptions are as follows:

> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
>
> …

(e) that non-compliance is necessary—

(i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or

…

(f) that the disclosure of the information is necessary to prevent or lessen a serious threat (as defined in section 2(1)) to—

(i) public health or public safety; or

(ii) the life or health of the individual concerned or another individual…

[67] Under s 66(1) of the PA, an action by an agency will amount to an interference with an individual's privacy if an IPP is breached and the individual in relation to whom the breach occurred suffers harm as a result. Any complaints alleging a breach of an IPP may be made to the Privacy Commissioner under pt 8 of the Act. If a

[25] Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) at [3.2].

complaint cannot be settled, the matter maybe referred to the Director of Human Rights Proceedings[26] who independently decides whether it should be pursued in the Human Rights Review Tribunal.[27]

[68] It may be noted that IPP 11 is not cast as a duty of disclosure in particular circumstances. Rather, there is a broad duty *not* to disclose unless it can be demonstrated that noncompliance with the duty is, among other things, necessary for the particular purposes outlined in (e) and (f).

[69] In summary, then, with the exception of s 66 of the OTA, the relevant legislation creates opportunities for information sharing, but no duty to that effect.

The Court's inherent powers

[70] In his oft quoted statement, Master Jacob described the Court's inherent power as:[28]

> …that which enables [the Court] to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.
>
> (Footnotes omitted.)

[71] It is, Jacob said:[29]

> …the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[72] This restatement has been widely adopted both here and elsewhere.[30] Marcelo Rodriguez Ferrere helpfully identifies three principles that are reflected in various ways and with varying emphases in the courts of New Zealand, Canada, the United Kingdom and Singapore: They are as follows:[31]

(a) The court's inherent power to intervene to protect the due administration of justice may only be exercised where it is necessary.

(b) Its ultimate aim is to ensure that justice is done between the parties and so the rights and responsibilities of all involved or affected must be balanced.

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26 Privacy Act 1993, s 77(2).

27 Section 82(2).

28 IH Jacob "The Inherent Jurisdiction of the Court" [1970] 23 CLP 23 at 27–28.

29 At 51.

30 In New Zealand, see *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) at 682 and *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18 at [16]; in Canada, see *R v Caron* 2011 SCC 5, [2011] 1 SCR 78 at [24]; and in the United Kingdom, see *Grobbelaar v NewsGroup News Papers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024 at 3037.

(c) The power may not contravene legislative intent, but may be ousted only by explicit language or by necessary implication.

[73] The Crown quite properly accepts that the High Court has the power to control the way in which parties in proceedings before it deal with information disclosed in those proceedings provided this is necessary to do justice between them according to law, but not otherwise. "Necessary" will always mean reasonably necessary in all of the circumstances.[32]

[74] There is no explicit ouster in this case of the Court's inherent power to control disclosure where necessary to do justice according to law. Section 66 probably does exclude the Court's power by necessary implication because it creates a duty of disclosure, but as we have said, there is no inconsistency with that section here.

[75] The Crown argues that, by necessary implication, s 15 also ousts the Court's power. It submits that the Court cannot take away the "right" of MSD and MoE to make a s 15 report; to do so would limit an otherwise unconditional power vested in those agencies by Parliament.

[76] We do not agree. In the context of historic abuse cases, MSD and MoE's power to share information for child safety and law and order purposes overlaps with the High Court's power to prevent disclosure where necessary for the safety or

31 Ferrere, above n 11, at 132.
32 *Ash v Buxted Poultry Ltd* 27 November 1989 (QB); see also *UMCI Ltd v Tokio Marine and Fire Insurance Co (Singapore) Pte Ltd* [2006] SGHC 142 at [92].

wellbeing of claimants in proceedings before it. If it is possible to read these powers together, then that construction is to be preferred. In our view, such a construction is available and there is no necessary implication of ouster. The Court's inherent powers need not be displaced to achieve the purpose of s 15, which is to safeguard tamariki.

Rather, what is required is a process whereby a case-by-case assessment can be made as to whether the interests that are to be protected by MSD's powers should be given primacy over the interests that must be protected by the Court's powers. In other words, this is not, by necessary implication, an all or nothing game. At the crossover between these statutory and common law interests, it cannot be beyond the wit of the law to provide a formal transparent process to allow the assessment to be made.

[77] The PA does not take matters further. It is true, of course, that the exceptions noted in respect of IPP 11 permit the kind of information sharing covered by s 15, but they do not impose a duty on MSD or MoE in that regard. They are merely exceptions to a principle of non-disclosure. They provide no assistance in circumstances where, as here, the decision to disclose or not to disclose information involves the potential of significant harm to individuals on either side of the equation. Privacy will be most valuable where the loss of it exposes its owner to harm. On the other hand, privacy will be far less valuable if surrendering it will prevent harm to others, without presenting any risk to its owner. The important question is who must make the assessment.

[78] We are unable to agree that the effect of s 15 and the PA is to place responsibility for weighing the competing interests in the hands of the reporting agencies. That is to suggest that the responsibility for deciding what must be done to achieve the due administration of justice according to law is for MSD or MoE. Such an approach would, we venture, be unconstitutional without clear parliamentary language. The needs of the administration of justice are best determined by judges in transparent judicial proceedings in which parties are heard and proper reasons given, rather than by officials whose only procedural duty (if any) is to consult.

[79] Finally, we do not consider that s 16 of the OTA affects the position. It will be recalled that this provision protects reporters from civil, criminal or disciplinary liability for making any report. It was argued that this shield must have meant that the

courts had no continuing role in inter-agency information sharing. The reporters in these appeals are public sector agencies and/or employees exercising public authority. Whether or not there is potential exposure to liability of one form or another is beside the point. We are confident that such agencies and employees will comply with an order of the High Court. And if they do not, they may be subject to a declaration that they have breached an order with which it is their duty to comply.

[80] The complaint procedure in pt 8 of the PA does not exclude the Court's powers either. There is no particular reason to conclude that the creation of a special process for vindication of privacy rights impliedly extinguishes other available legal avenues. It will be recalled that the decision to commence proceedings under the PA is for the Director of Human Rights Proceedings, not the individual asserting privacy. We should not lightly remove an individual's right to pursue their own remedy in their own name.

[81] In addition, the fact that a statute empowers an individual or agency to share information does not necessarily mean that other interests become irrelevant, or that other powers to protect them and procedures for their vindication are thereby excluded. There are many circumstances in which a statutory authorisation to do an act is insufficient without more. Often, multiple authorisations will be required to achieve a single objective under statutes with different foci: for example, a building consent under the Building Act 2004 will sometimes be insufficient authority to erect a structure in the absence of a land use consent under the Resource Management Act 1991. These separate authorisations are not in competition. They are cumulative. In the same way, if the Court's inherent power is not excluded by necessary implication, then the interests that power is designed to protect may, in some circumstances, require the reporter to obtain a separate permission to that contained in s 15. This additional requirement should not be seen as frustrating the purpose of s 15, but as ensuring that those who take advantage of it do not inadvertently cause harm to others.

[82] We conclude that the High Court's inherent power to control the use of information disclosed in its proceedings is not ousted by either the OTA or the PA.

Identifying and balancing the interests involved

[83] The evidence filed made it clear that there are important interests deserving of protection on both sides of this proceeding. On the side of MSD and MoE, the safety of tamariki currently in care will be an issue wherever the alleged perpetrators remain in at-risk roles. Further, dealing with them and the allegations against them will inevitably give rise to employment issues in one form or another. It would seem to us these will be impossible to avoid. And, in many cases, the allegations made by claimants involve criminal offences. It is in the interests of all that such offences should be investigated by independent prosecutors, tried and, if proved, then punished. There needs to be a very good reason for the law not to take its usual course in that regard.

[84] On the other side, we are satisfied that some claimants genuinely fear for their safety because their abusers are, or are associated with, violent aggressive men; or because they are exposed to danger in prison as they may be seen as "narks". Some claimants wish to protect their privacy for the sake of their mental wellbeing, or they feel ashamed to be the victims (for example) of sexual abuse and do not want their secret to be published more than is necessary to obtain a remedy.

[85] Mr Rishworth is right that the Court's inherent power is not at large. It is not for the Court to simply do what it thinks is the right thing out of sympathy for vulnerable claimants in a manner unconnected to the machinery of adjudication.[33] Generally speaking, the test of necessity will require courts to impose such controls on information use as may be reasonably necessary on a case-by-case basis. In this case, the High Court imposed a blanket prohibition without leave. Mr Rishworth argued that, by definition, a blanket prohibition cannot have taken proper account of the interests of tamariki in care or the needs of law enforcement in individual cases.

[86] The question is still whether a blanket prohibition is necessary to protect the interests of vulnerable litigants in the context of their litigation. We are of the view that it

is. Historical abuse claims filed in the High Court are being managed as a group. There are a lot of them. The potential impact of an inadvertent disclosure may well

[33] For an example of this, see *Gillespie v Attorney-General of Manitoba* 2000 MBCA 1,(2000) 144 CCC (3d) 193.

be very significant in terms of the safety and wellbeing of particular claimants. This may be especially so where there are multiple claims by numerous claimants against a single alleged abuser. This is therefore one of the few situations where a broad triage procedure is a useful and practical way of ensuring that transparent decisions are able to be made case by case without mistakes that lead to serious potential consequences.

[87] We accept the Crown's submission that speed is important in light of the potential risks to tamariki. But with haste comes the risk that mistakes will be made by large interconnected bureaucracies. In fact, as Ms Sacha Lee Thorby accepts in her evidence, disclosures have already been made without consultation with the relevant claimant, contrary to internal procedural requirements. We consider Ellis J was right to suggest what is imposed by the order is an extra layer of protection: a prohibition in form to ensure a proper substantive assessment can be duly and safely made case by case as and when required. It would frankly have been better if the parties had agreed a protocol whereby they undertook the triaging themselves, but they seem unable to do so. That is why the leave requirement is "necessary".

[88] That said, the process should be fast. Applications for leave should not require undue formality and should be dealt with on the papers before a duty judge with a quick turnaround once papers are in. The Court is familiar with the need for expedited processes. It regularly deals with applications for search and surveillance warrants and applications on notice for interim orders. These can be turned around very quickly if circumstances require it. Applications for leave to share information can be dealt with in like fashion. We acknowledge that it may sometimes be difficult to track down complainants or to get instructions from them because they are in prison. Relevant agencies and/or the Court may wish to impress upon the Department of Corrections how important the obtaining of

instructions in this context is. If the Court is convinced it is necessary on the evidence, applications may be made without notice.

Conclusions on issues raised

[89] To summarise, the answers to the agreed issues listed at [15] above are as follows:

(a) The appropriate appeal standard is that for appeals of exercises of discretion. The principles in *May v May* apply.

(b) Both ss 15 and 19 of the OTA are available to MSD and MoE for the purposes of reporting concerns about the well-being of a child to OT or the police.

(c) To the extent the non-disclosure order prevents disclosure under ss 15, 17 and 18 of the OTA, the order does not exceed the Court's inherent powers. That there is overlap between the requirements of the Court's orders and the permissions in the statutory schemes of the OTA and PA does not mean the Court's power has been ousted; permissions may be cumulative.

(d) The making of the order was an appropriate exercise of the Court's inherent power in this case. In particular:

(i) The order was not overly broad given the circumstances of this case.

(ii) It properly accounts for the safety of tamariki currently in care and education.

(iii) The Court did not err in relying on the plaintiffs' legitimate expectation of privacy and/or confidentiality because it did not use

the term in its public law sense.

(iv) The rationale for distinguishing between information sharing amongst MSD, OT and MoE (where no leave is required) and disclosure to other agencies and individuals (where leave is required) was to avoid overriding the statutory duty that s 66 imposed on MSD and MoE to provide information to OT for the purposes in that section.

Result

[90] The applications to adduce further evidence are granted.

[91] The appeal is dismissed.

[92] The appellant must pay the respondent costs for a standard appeal on a band A basis with usual disbursements. We certify for two counsel.

[93] Costs in the High Court are to be dealt with in that Court.

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