IN THE ROYAL COMMISSION OF INQUIRY INTO HISTORICAL ABUSE IN STATE CARE

UNDER	The Inquiries Act 2013
AND	
IN THE MATTER OF	To inquire into and report upon responses by institutions to instances and allegations of Historical Abuse in State Care between 1950 and 2000.

AMENDED BRIEF OF EVIDENCE OF SONJA COOPER AND AMANDA HILL ON BEHALF OF COOPER LEGAL FOR REDRESS HEARING

Dated: 31 January 2020

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AMENDED BRIEF OF EVIDENCE OF SONJA COOPER AND AMANDA HILL ON BEHALF OF COOPER LEGAL FOR REDRESS HEARING

Preamble

1. Thank you for the opportunity to be heard on the critical issue of State redress processes. This is an issue Cooper Legal has extensive experience with, both within the context of the State's approach to litigation and the ever-evolving out-of-court resolution processes.

2. In this brief of evidence, we will expand on the evidence we gave in the Contextual Hearing (heard in October and November 2019), to address the following issues:

    a) How State mechanisms such the Courts and Legal Aid played a role in the claims processes;

    b) Settlement processes both past and present, and why they are not fit for purpose;

    c) The role of our human rights law – both national and international – in progressing the civil claims; and

    d) What we see as the way forward for the claims process as part of a larger truth and reconciliation process.

3. We intend to address this evidence through a combination of case studies prepared by this firm and by Counsel to Assist the Royal Commission, and directly in our brief of evidence.

4. In this brief of evidence, we intend to talk about the issues following, focusing on the issues that have created significant barriers to survivors of State abuse being able to obtain redress and compensation, both in the courts and in the ADR processes as a consequence:

    a) Barriers to the claims being dealt with in the courts, due to common law and statutory obstacles, including difficulties in establishing an appropriate duty of care, breach of any such duty, causation, surmounting the Limitation Act barrier, the barriers to compensation caused by our Accident Compensation legislation and pleadings issues created by the Crown Proceedings Act – Chapter 1;

    b) Impediments to progressing the claims caused by funding issues, including Crown agencies taking active steps to push forward court hearings in the absence of legal aid funding - Chapter 2;

c) The initial refusal on the part of the Crown Health Financing Agency ("CHFA") to engage in alternative dispute resolution processes, requiring the claims to be filed in court, with the resulting litigation during which the Crown Health Financing Agency endeavoured to strike out the claims – Chapter 3;

d) Issues, generally, with the Crown redress processes including: their lack of independence; the lack of any transparency around processes, the lack of accountability; the variability of the processes and ensuing settlements; and the delays, typically, in achieving settlement discussed throughout our evidence.

e) With regards the Ministry of Social Development ("MSD") processes, identifying the fundamental flaws with the processes and the strategies we were forced to adopt to try and counter those flaws – Chapter 4;

f) Again, with regards to the MSD processes, identifying general and client-specific barriers to settlement which Cooper Legal has encountered during the claims process – Chapter 5;

g) Issues with the Ministry of Education settlement process including (again): lack of transparency; lack of accountability; considerable delays in achieving outcomes; difficulties with the process, and the low payments of compensation – Chapter 6;

h) Issues with the Ministry of Health settlement process, including (again) the lack of transparency and very low compensation – Chapter 7;

i) Strategies employed by the Crown to defend the claims, including: opposing name suppression orders for claimants and witnesses; disclosing information from the claims to Police and perpetrators; forcing clients to be examined by experts; using private investigators in an unlawful manner; failing to act as a Model Litigant; and failing to adopt any meaningful changes to litigation strategies that cause trauma and wear down claimants – Chapter 8;

j) Identifying the role of human rights instruments and how we have, and will continue to, rely on those instruments and the legislation enshrining those instruments to enforce claimant rights – Chapter 9;

k) Comparing the levels of compensation available between the various State processes, as well as comparing settlements made to other State claimants and to international claimants

with similar claims to show how poorly State survivors have fared – Chapter 10; and

l) Drawing our conclusions together and providing some potential solutions.

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GLOSSARY OF ACRONYMS

Acronym	Definition
2PA	Two Path Approach
ACC	Accident Compensation Corporation
ADR	Alternative Disputes Resolution
AP	Accelerated Process. The name given to the earlier iterations of the Two Path Approach
BORA	New Zealand Bill of Rights Act 1990
CHFA	Crown Health Financing Agency
CMC	Case Management Conference
CPA	Crown Proceedings Act
DSW	Department of Social Welfare
ECT	Electro-convulsive Therapy
FTP	Fast Track Process
HRRT	Human Rights Review Tribunal
HTO	High Tariff Offender
IDCCR Act	Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003
JSC	Judicial Settlement Conference
LA	Legal Aid
LARP	Legal Aid Review Panel. The appeal body in existence prior to 1 August 2011. It was replaced by the Legal Aid Tribunal when the Legal Services Act 2011 was enacted
LAS	Legal Aid Services. The successor agency to the Legal Services Agency after the Legal Services Act 2011 came in to force

LAT	Legal Aid Tribunal. The review body for legal aid decisions after 1 August 2011 pursuant to the Legal Services Act 2011
LSA	Legal Services Agency. The predecessor agency to Legal Aid Services
MOE	Ministry of Education
MOH	Ministry of Health
MSD	Ministry of Social Development
OIA	Official Information Act 1982
OPC	Office of the Privacy Commissioner
OT	Oranga Tamariki

CHAPTER ONE: LITIGATION AND THE LEGAL BARRIERS TO CLAIMS

- Duty of Care
- Causation
- Negligence
- Crown Proceedings Act 1950
- Limitation
- ACC

CHAPTER 1: LITIGATION AND THE LEGAL BARRIERS TO CLAIMS

5. In this chapter, we address our experiences with access to justice through the civil courts in New Zealand.

6. In this section we cover the following issues: identifying the scope of any "duty of care", vicarious liability, non-delegable duties, fiduciary duties, and causation issues. We also cover defences brought by state defendants, particularly reliance on the Limitation Act, which is a defensive choice, as well as the bar created in the accident compensation legislation.

Preliminary barriers to establishing a claim

7. It remains the case that very few cases in New Zealand, whether against the State or non-State parties have yet proceeded to a full trial. The *White* case, referred to in the Contextual Hearing and in our evidence below, was the last trial of this nature.[1] Because of that, there have been few cases in New Zealand addressing key issues, including the scope of any "duty of care", "vicarious liability", non-delegable duties, fiduciary duties and causation issues. Nevertheless, as will be seen below, these issues continue to cause barriers for New Zealand plaintiffs.

Duty of care

8. New Zealand courts accept that a duty of care arises once a child "comes to notice" as being at risk, or when a child is placed in care.[2] In *White*, it was found that the Department was on notice that both boys were at risk of serious harm or neglect.[3] The High Court held that a duty to inquire would attract only nominal damages unless the duty required the Department to commence proceedings. It is not clear why this is the case. The Court refused to recognise such a duty. The Court of Appeal declined to interfere with that decision, albeit it recognised that further duties may have been imposed on the Department.[4]

9. New Zealand courts also recognise that the State will owe a duty of care if it has accepted responsibility for a child's care, even if no steps have been taken to formalise custody or guardianship.[5]

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[1] There have been more recent trials against the Armed Services.

[2] *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA); *B v Attorney-General* [2003] All ER (D) 281; (2003) 22 FRNZ 1044 (PC); [2004] 3 NZLR 145; *White v Attorney-General* HC Wellington CIV-1999-485 [28 November 2007]; *White v Attorney-General* [2010] NZCA 139.

[3] *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007], [359].

[4] *White v Attorney-General* [2010] NZCA 139, [177], [185], [190].

[5] *S v Attorney-General* (2002) FRNZ 39 (HC); (2002) NZFLR 295; (2002) 22 FRNZ 39 (HC); *S v Attorney-General* [2003] 3 NZLR 450 (CA).

Vicarious liability

10. The scope of vicarious liability has also created barriers. While the State has been held vicariously liable for the negligence of sexual (and physical) abuse perpetrated by foster parents (through characterising the role of foster parents as a special type of agency),[6] the State has not been vicariously liable for abuse perpetrated on State Wards by abusive parents into whose care they have been returned.[7]

11. MSD has a statutory immunity against liability for torts perpetrated by a child in care on a claimant, unless the act or omission is within that child's employment or authority.[8] What this means is that MSD routinely denies liability for serious physical and/or sexual assaults perpetrated by children in care on others in care.[9] This immunity does not apply to other State agencies, including MOE, MOH, or organisations like Stand, but it would apply to NGOs into whose care children have been placed.

Non-delegable duties

12. Although non-delegable duties should apply to these claims, the New Zealand courts have so far rejected liability based on non-delegable duties of care.

13. The conceptual possibility of this duty was acknowledged in *S v Attorney-General,*[10] where Justice Tipping described the performance of the duties owed to a child as being delegable, while responsibility for improper performance was not.[11] In *White*, however, the Court of Appeal refused to entertain the notion of a non-delegable duty, on the basis that such a duty added nothing to a vicarious liability cause of action.[12]

14. This finding is open to criticism. A child who is a State Ward becomes the responsibility of the State. The rights of the parents are subsumed. For that reason, liability should arise if State Wards are subsequently

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6 *S v Attorney-General* [2003] 3 NZLR 450 (CA), [68]

7 *White v Attorney-General* [2010] NZCA 139, [210] –[211]. It is noted, however, that this may be open to reconsideration by an appellate court if the allegation is of physical and/or sexual assaults by parents.

8 S394 Oranga Tamariki Act.

9 Although it is acknowledged that under the Fast Track Process, MSD did provide compensation for serious sexual assaults perpetrated by children on other children in care.

10 *S v Attorney-General* [2003] 3 NZLR 450 (CA).

11 *S v Attorney-General* [2003] 3 NZLR 450 (CA) at [113].

12 *White v Attorney-General* [2010] NZCA 139 at [212].

abused by the very parents from whom they were removed in the first place.[13]

Fiduciary duty

15. Another cause of action we typically plead is that the State owed children in care a fiduciary duty to keep them safe, among other obligations, and that the duty was breached in various ways. At first blush, one would assume that this cause of action would not present too many obstacles, particularly for a child placed under the guardianship of the State. Unfortunately, however, this action has also been unsuccessful so far in claims against the State.

16. In the only case where we strongly argued this issue, *S v Attorney-General*[14], the Court of Appeal found that the alleged breaches, namely failures by the Department to act in the claimant's best interests, were really no more than alleged breaches of a duty of care.[15] Specifically, the Court of Appeal accepted that the Department was attempting to act in what it believed to be the best interests of the claimant, it was in no way disloyal to the claimant, nor did it act in bad faith or dishonestly.[16]

17. The effect of this decision is that while a fiduciary duty is owed to children in care, it will be almost impossible to prove a breach of that duty.

State liability for third parties

18. In the Contextual Hearing, we raised our concern about the liability of the State, more generally, for abuse of children placed by the State into the care of NGOs. This has been a matter of fact for many children in care, particularly since the implementation of the Oranga Tamariki Act in 1989. NGOs are specifically recognised as care providers under that legislation.[17] In addition, as already stated, NGOs enjoy the same immunities for torts of other residents as does the State.[18]

19. This issue has arisen in claims we have taken for clients who were placed on programmes, including the Whakapakari Programme and Moerangi Treks,[19] along with residential placements like Youthlink Family Trust, or the Heretaunga Maori Executive.[20] Both in court

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13 David Neild, 'Vicarious Liability and the Employment Rationale' (2013) 44 *Victoria University of Wellington Law Revue* 707, 721.

14 *S v Attorney-General* [2003] 3 NZLR 450 (CA).

15 *S v Attorney-General* [2003] 3 NZLR 450 (CA), [77].

16 *S v Attorney-General* [2003] 3 NZLR 450 (CA), [77] and [79].

17 S396 Oranga Tamariki Act 1989.

18 S394 Oranga Tamariki Act 1989.

19 Programmes we referred to in the Contextual Hearing at which many clients suffered abuse.

20 Again, we referred to these placements in our Contextual Hearing evidence.

documents and in settlement processes, MSD has disavowed liability for any abuse occurring in such placements, on the basis that the contractual relationships were in the nature of "contracts for services". This has occurred even though most clients have been the subject of some status with the Department, including being in the Department's custody and/or subject to a guardianship order.

20. Our view is that this position is not legally tenable, particularly given the decision of the Court of Appeal in *S v Attorney-General*[21] as to vicarious liability. Nevertheless, this has been relied on by MSD, particularly in the Fast Track Process which we discuss later in our evidence, to deny, completely, any liability for abuse occurring in such placements. We observe that many clients of this firm accepted offers made to them, based on this legally questionable position. As usual, there has been no independent framework to challenge MSD as to this position, which MSD has taken advantage of.

21. We hope to have judicial findings about this issue when the trial scheduled to start in August 2020 takes place. Our perspective is that MSD is either vicariously liable for wrongful acts or omissions by those into whose care children have been placed, or alternatively, there is a non-delegable duty owed to children placed in care, which is one MSD is not legally permitted to delegate and so will be liable for any wrongdoing.

Causation

22. Another obstacle for New Zealand claimants in succeeding through the courts has been establishing causation, in other words that the abuse and/or neglect they have suffered in care has caused them harm which attracts compensation. Again, we have been surprised at the hurdles we have faced in establishing compensation.

23. In the *S v Attorney-General* case,[22] causation was not an issue. Possibly, this is because S was in the care of his abusive foster parents, almost from birth and remained there until he was in his teens. Accordingly, there could be no question about the link between the abuse he had suffered as a child in care and his subsequent psychological damage.

White v Attorney-General (HC)

24. In the *White* case, at both levels, causation proved to be an insurmountable barrier. At High Court level, the Court did not specifically deal with causation, having found that the Limitation Act

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21 *S v Attorney-General* [2003] 3 NZLR 450 (CA).

22 *S v Attorney-General* [2002] NZFLR 295 HC and *S v Attorney-General* [2003] 3 NZLR 450 (CA).

and ACC legislation barred any compensation.[23] However, earlier in the decision, the High Court found that the older brother's experiences at Epuni, in his teenage years, did not have a "material causal connection" to his later psychological difficulties.[24] In our view, surprisingly, the High Court considered, first, that it was "likely" there was a genetic contribution to the older brother's difficulties and secondly that his difficulties were substantially, if not overwhelmingly, the result of abuse he had suffered in the family home.[25]

25. In the case of the younger brother, the High Court relied on the psychiatric evidence from experts called by both sides to find that it was impossible to separate the early effects of parental neglect and abuse from the subsequent violence and emotional neglect and abuse suffered both in the father's care and at Epuni and Hokio Beach.[26]

26. Much to our surprise, the High Court accepted evidence brought by the Crown that the sexual abuse suffered by the younger brother was only a minor contributor, if at all, to his current difficulties.[27] This was in the face of the clear difficulty the plaintiff experienced, in the witness box, recounting the sexual abuse.

White v Attorney-General (CA)

27. The Court of Appeal adopted the findings of the High Court[28].

28. We had argued that other jurisdictions, including the United Kingdom and Australia, have developed causation tests specifically for child abuse cases, recognising the difficulty in establishing causation. Neither the High Court, nor the Court of Appeal engaged with those arguments, instead referring to the usual causation test, developed in commercial cases, of requiring that the tortious conduct be a "material and substantial" cause of the damage suffered.[29]

29. Causation issues continued to be insurmountable barriers in other cases of teens subjected to sexual and other abuse.[30]

Our proposed solution

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23 *W v Attorney-General* HC Wellington CP42/97, 3 October 2002, [459].

24 *W v Attorney-General* HC Wellington CP42/97, 3 October 2002 at [434].

25 *W v Attorney-General* HC Wellington CP42/97, 3 October 2002 at [434].

26 *W v Attorney-General* HC Wellington CP42/97, 3 October 2002 at [429].

27 *W v Attorney-General* HC Wellington CP42/97, 3 October 2002 at [430].

28 *White v Attorney-General* [2010] NZCA 139 at [192] – [197].

29 We refer to the UK cases of *McGhee v National Coal Board* [1973] 1 WLR 1, *C v Flintshire County Council* [2007] EWCA CIV 302, *Fairchild v Glenharen Funeral Services Ltd* [2002] 3 All ER (HL) - cited In *ACC v Ambros* [2007] NZCA 304. We also refer to the Australian case of *SB v New South Wales* [2004] VSC 514.

30 *P v Attorney-General* HC Wellington CIV 2016-485-874 [2010] NZHC 959 (16 June 2010) at [284] and *AB v Attorney-General* HC WN CIV 2006-485-2304 [22 February 2011] at [381] and [391].

30. At the end of this paper we will propose that legislation is passed to create a purpose-built statute dealing specifically with claims of this nature. That statute will address the following issues:

a) Imposing a duty of care on the State and at least those who are contracted to the State to provide services for which they are strictly reliable;

b) Reversing the burden of proof to the defendant in establishing any breach of that duty; and

c) Reversing the burden of proof onto the defendant in establishing causation.

Crown Proceedings Act 1950

31. The Crown Proceedings Act 1950 ("CPA") provides the mechanism by which the Crown is sued in the same way as private individuals and held liable for the torts of its employees. Further, without the CPA, the Crown would not be obliged to discover documents in civil cases.

32. The CPA currently prevents claims against the Crown in tort for direct negligence. Such claims are often best suited to abuse claims, where a wrongdoer may not be able to be identified, or where there are multiple, contributing wrongdoers in the government organisation. Claims in direct negligence can be brought against other bodies – but not against the Crown. This places survivors seeking redress at a disadvantage.

33. The CPA is a statute of considerable constitutional significance. However, it is outdated, convoluted and no longer fit for purpose. This was identified in a comprehensive report by the Law Commission issued in December 2015[31]. In particular, the Law Commission noted:

> …It is an important part of the rule of law that citizens ought to be able to obtain legal redress when the Government has breached those citizens' legal rights and, in appropriate circumstances, to receive compensation and other remedies. This is recognised by section 27(3) of the New Zealand Bill of Rights Act 1990 (NZBORA), which provides:
>
> > Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.
>
> […]

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31 *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings,* Law Commission of New Zealand, 14 December 2015.

> It is because of its importance that the Crown Proceedings Act now needs to be updated. The Act does not reflect the concerns of contemporary New Zealand or the way in which New Zealand is now governed. The Public Service went through large-scale changes in recent decades, while the 1950 Act changed little to reflect them….
>
> The [CPA] is also somewhat confusing and convoluted. For example, in most cases, a plaintiff attempting to sue the Crown in tort must first establish that an employee of the Crown has committed a tort. This requirement creates significant difficulties when it is alleged that the Crown or a Government Department as a whole has breached its obligations (systemic negligence). The way in which the 1950 Act was drafted means that, in some areas, it has also not kept up to date with changes in Court procedure.[32]

34. The Law Commission noted that, currently, someone who wants to sue the Crown in tort must fit the case into one of the categories prescribed in section 3 of the CPA. This is different from other types of claims, including contract. The Law Commission explained it as follows:

> The [CPA] effectively establishes a bar against suing the Crown directly in tort with the exception of the very limited classes of claims available under sections 6(1)(b), 6(1)(c) and 6(2). This bar is felt most sharply in the case of negligence claims but applies equally to other torts. The Crown can only be held vicariously liable in tort for the acts and omissions of Crown employees. Consequently, in order to sue the Crown in negligence, a potential claimant must identify a particular Crown employee and allege that he or she has committed a tort. However, if no particular Crown employee has committed a tort or it is alleged that the Government Department as a whole has failed or it is claimed that a number of Government Departments have collectively failed, a person harmed (in circumstances where there would otherwise be legal redress) may be left without any redress against the Crown.[33]

35. The Law Commission report went on to note that several employee immunities provisions in the CPA and other statutes gave immunity to Crown employees, and so also immunised the Crown. The Law Commission noted that:

> Immunity for the Crown may not be justified where it leaves a person who has been harmed no remedy in tort.[34]

36. The Law Commission set out good reasons (in our view) for allowing the courts to recognise that, in appropriate cases, the Crown could be held directly liable in tort. In particular, it noted:

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[32] Law Commission report, [2.3] – [2.6], pages 12-13.

[33] Law Commission report, [3.7] – [3.8], p17

[34] Law Commission report, [3.9], p17

a) Direct liability is conceptually cleaner and more consistent with the way in which the Crown is held accountable for its conduct (including the conduct of employees);

b) Proceedings against the Crown will be simplified, as the Crown would be in the same position as other corporate entities which might potentially be sued directly; and

c) Direct liability might remove the potential for injustice that might arise when no Crown servant can be said to have committed a tort as long as the Court would otherwise find that the Crown would be legally liable.

37. Another important reason for making a claim in direct negligence available to claimants, is the availability of exemplary damages. The main purpose of exemplary (or "punitive") damages is to punish the defendant. These may be awarded when compensatory damages are inadequate to achieve this. Of course, in New Zealand, compensatory damages are sometimes limited by the ACC scheme. More importantly in this context, the decision in *Couch v Attorney-General* cast doubt on the availability of exemplary damages in a claim for vicarious liability in New Zealand.[35]

38. It could be argued that a claim in direct liability would increase the likelihood of a successful claim for exemplary damages. This would mean that the claimant would receive meaningful damages, especially where the ACC scheme denies them compensatory damages, and the actions of the Crown are deserving of punishment.

39. As part of its report, the Law Commission provided a draft of a new Crown Proceedings Bill. The Law Commission recommended that Parliament enact the draft Bill, noting that it did not expand the scope of Crown liability, but rather recognised that the Crown could be sued, and can sue, in the same way as others could. The Law Commission stated that it provided a mechanism through which existing obligations could be enforced and did not alter the essential framework for civil proceedings against the Crown. However, the draft Bill was considerably simpler than the CPA and more in line with the realities of our Government and court systems.

40. The Government response to the Law Commission report was to reject it. In particular, the Government rejected the Law Commission's recommendation for direct liability of the Crown. No other action has been taken since that time.

41. The Government's rejection of the Law Commission's report has meant that this matter has stagnated. Parties have to work within

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35 *Couch v Attorney-General* (No 2) [2010] 3 NZLR 149.

legislation which is not fit for purpose, and people who have a legitimate grievance against the Crown cannot seek a remedy if they are unable to identify a Crown employee to "hang their hat on" in terms of vicarious liability.

42. Many of our clients were the victims of systemic negligence: wholesale systems failure at many levels of Government. Often, they are not able to identify a specific individual who may have caused them harm, either because that person is not known, or a number of people have contributed to the wrongdoing. A claim in direct negligence may be an appropriate vehicle through which to seek a remedy.

Our proposed solution

43. Cooper Legal's proposed solution to this barrier is simple: implement the draft Bill provided by the Law Commission to simplify and modernise the law of negligence in respect of the Crown. The proposed draft Bill would provide an adequate vehicle for claims, while giving sufficient protection to the Crown, because a person would still need to make out a cause of action in the usual way. Implementation of the draft Bill would also ensure that the CPA is consistent with the New Zealand Bill of Rights Act.

Barriers created by the Limitation Act 1950

44. It remains the position that the Limitation Act 1950 applies to most claims brought by survivors of historic child abuse. This is because most claims are brought in tort, relying on: negligence, assault and battery, vicarious liability and breaches of non-delegable duties. For those who were in care after 1 January 2011, the Limitation Act 2010 applies.[36]

45. Section 4(1)(a) applies to most tort claims and provides a period of six years to bring a claim from the date the cause of action accrued. Section 4 does not prevent any plaintiff from bringing a claim, but it provides a defendant with a defence **if they choose to invoke it**.[37]

46. For intentional torts[38], which are actionable whether damage has been suffered or not, the cause of action arises when the wrongful act is committed. Where torts are actionable only on proof of damage, such as negligence, the cause of action accrues from the date of damage.[39] In personal injury cases, particularly those involving child

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[36] Note, however, pursuant to s59(2) of the *Limitation Act 2010,* parties can agree that the 2010 Act applies to events preceding the Act.

[37] The defendant may do this either by pleading the defence, or by taking steps to have the action dismissed as frivolous, vexatious and/or and abuse of process.

[38] Intentional torts include assault and/or battery and false imprisonment causes of action.

[39] *Limitation Act 1950,* s4(7).

abuse, it has been held that damage and its cause should be discoverable before a cause of action can accrue.

47. There is an additional barrier for survivors of child abuse. Section 4(7) provides that actions in respect of bodily injury must be brought within two years of the date on which the cause of action accrued, unless the intended defendant consents to it being brought within six years of that date. After giving notice, a plaintiff may apply for leave to bring the action at any time within six years from the date when the cause of action accrued. It is up to the courts to decide whether it is just to grant leave. [40]

48. The Limitation Act 2010 made several key changes to the Limitation Act 1950. First, a long-stop provision was introduced.[41] That provides that no claim may be brought for either five years (ending on the close of 31 December 2015) or 15 years after the date of the act or omission on which the action is based - whichever ends last.[42] Second, s23C provides discretion to extend the limitation period in child sexual abuse cases, or in non-sexual child abuse cases where the perpetrator includes: a step-parent; or legal guardian of the claimant; or a person who was a close relative or close associate of a parent, step-parent or legal guardian.[43] The term "close associate" is not defined.

49. Time may also be extended under the Limitation Act 1950 if:

    a) The claimant is under a disability at the time the cause of action accrued;[44] or

    b) The defendant fraudulently concealed information which prevented the claimant from discovering the cause of action.[45]

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[40] In particular, the court must consider whether the delay was caused by mistake of fact or law, or any other reasonable cause, or whether the intended defendant is materially prejudiced by the delay. It is up to the defendant to prove the claim is out of time: *Humphrey v Fairweather* [1993] 3 NZLR 91.

[41] *Limitation Act 1950,* s23B.

[42] *Limitation Act 1950*, s23B(3). This is subject to part 2 of the Act, which covers extension of the limitation period in cases of disability or fraud.

[43] *Limitation Act 1950,* s 23C(2)(a) and (b). Andrew Beck has commented in his article, 'The New Law of Limitation' [2010] *New Zealand Law Journal* 337, 338: "The court is able to give relief in [historic abuse] claims despite the new longstop period in the Act. However, in order to get to the exercise of this discretion, it will still be necessary to establish one of the existing grounds for extending the ordinary limitation period." It is observed that these sections have not yet been tested and so their operation is unclear. The observation is also made that the legislation on which these provisions were based (that is the New South Wales and Victoria limitation statutes), have since been repealed, with limitation periods having been removed in child abuse cases.

[44] *Limitation Act 1950,* ss2 and 24. What this means is that time will only accrue when a claimant had reasonably discovered the elements of the claim, pursuant to s4(7).

[45] *Limitation Act 1950,* s28.

50. A person is deemed to be under a disability while they are an infant (under the age of 20) or of unsound mind.[46] Time will continue to run even if a claimant suffers a disability after the cause of action has accrued. Section 28 provides that in cases of fraud, concealment, or mistake, the period of limitation does not run until the plaintiff discovered it or could with reasonable diligence have discovered it. Such cases will cover a person sexually abusing a child but concealing the abusive nature of the conduct, for example.[47]

51. Case law in New Zealand dates from the mid-1990s. Through to the mid-2000s, the case law developed mainly in favour of survivors of child abuse.[48] Subsequently, however, New Zealand plaintiffs faced an ever-higher threshold in surmounting limitation defences. Certainly from 2006 onwards, limitation decisions have been invariably determined against survivors, particularly where they were in the care of the State.[49]

Reasonable discoverability

52. Case law in terms of reasonable discoverability was initially positive for claimants, but then narrowed in scope. The early cases reflected a more subjective approach, with judges recognising that claimants needed to understand more than just the symptoms of damage and the identity of the defendant, before the cause of action accrued. From the mid-2000s, however, reasonable discoverability has been limited to sexual abuse cases, and the courts have adopted an increasingly objective approach, in which a claimant requires only a relatively superficial understanding of damage before time begins to run.

53. This is perhaps best illustrated by the claims against the State with which this firm was involved.

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46 Section 2(3) of the *Limitation Act 1950* states that a person shall be conclusively presumed to be of unsound mind while detained under any provision of the *Mental Health (Compulsory Assessment and Treatment) Act 1992.* Otherwise, the term "unsound mind" is not defined. We note that under the Limitation Act 2010, the time starts to run from the age of 18.

47 *S v G* [1995] 3 NZLR 681 (CA).

48 Refer to the discussion by Andrew Beck, where he described the earlier case law. "All of a sudden, the door was opened to a number of potential plaintiffs whose claims in relation to allegations of historic abuse had previously been viewed as untenable by virtue of the statutory limitation provisions … However the Indian Summer was not to last." Andrew Beck, 'Litigation with Andrew Beck: Limitation and Historic Abuse' (2010) *New Zealand Law Journal* 257.

49 Moving further into the mid-to-late-2000s, New Zealand plaintiffs faced an ever-higher threshold in surmounting limitation defences. One commentator, Andrew Beck described it in the following terms: "Even accepting the significance that greater scrutiny of evidence may have played, it is difficult to avoid the impression that there is not the same willingness as there once was on the part of the courts to become fully involved in the tackling of the enormous problem inherent in attaching some accountability to what is generally regarded as abusive conduct that took place under the supervision of institutions in the past." Andrew Beck, 'Litigation with Andrew Beck: Limitation and Historic Abuse' (2010) *New Zealand Law Journal* 257, 259. Further, in a case decided in December 2015, *GB v WLS* [2015] NZHC 3176 [11 December 2015], the High Court stated it could exercise an inherent jurisdiction to dismiss claims on the basis of delay, in addition to the powers under the *Limitation Act 1950*.

54. The first case of significance was *W v Attorney-General* [50] in which the appellant, W, alleged sexual abuse by a foster parent between 1970 and 1972 (W was aged 11–13). In 1984/1985, W took steps to make a claim for accident compensation. In 1991, W undertook some informal counselling with a nun, then, in 1992, W wrote a book about her experiences as a child in foster care. In 1996, W read a magazine article about someone else making a claim for sexual abuse. W alleged that this was the first time she had made the link between her own abuse and the damage she had suffered. In 1997, W applied for leave to bring her claim, with supporting psychiatric evidence. W's psychiatrist concluded she was suffering from two major psychiatric disorders, namely PTSD and borderline personality disorder. W was also suffering from an alcohol-related disorder and cocaine dependence.

55. In granting W leave to proceed, the Court of Appeal held that courts should closely consider the reports of psychiatrists and "pay due deference to their expertise and experience", refraining from "making positive and confident findings",[51] particularly where evidence is untested.

56. The Court of Appeal acknowledged that victims suffer from a multitude of psychological disorders and consequential problems, which inhibit them from appreciating that their present condition is the product of their childhood abuse. The Court of Appeal acknowledged that the connection is often not understood until triggered by some event in adulthood — often therapy, although there was no reason it should be restricted to therapy.[52]

57. In this case, the Court found there to be "no public interest in protecting perpetrators of sexual abuse from the consequences of their actions".[53] This was not, however, so strong where the intended defendant was not the abuser.[54]

58. The Court of Appeal concluded that the first step was to determine when the intending plaintiff actually made the link. If it was contended that the link ought reasonably to have been made earlier, a second step arose which involved an examination of the circumstances of the intending plaintiff and asking whether the link should have been made any earlier and, if so, when.[55]

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50 *W v Attorney-General* [1999] 2 NZLR 709 (CA).

51 *W v Attorney-General* [1999] 2 NZLR 709 (CA), [36], [38], [40].

52 *W v Attorney-General* [1999] 2 NZLR 709 (CA), [71].

53 *W v Attorney-General* [1999] 2 NZLR 709 (CA), [79].

54 *W v Attorney-General* [1999] 2 NZLR 709 (CA), [79].

55 *W v Attorney-General* [1999] 2 NZLR 709 (CA), [111].

S v Attorney-General[56]

59. This case came before a five-court bench of the Court of Appeal, following a trial in the High Court. S was the victim of child abuse, including physical, psychological and sexual abuse, while in the care of foster parents from when he was a baby. [57] Once S had finished school, he attended university but dropped out. He had a patchy employment record and was a heavy drinker. He married and divorced within a year. He then held continuous employment between 1991 and 1995. In 1993, S attended his foster mother's funeral, and he then started to remember facts about his childhood. In 1995, S confronted his foster father and son about their abuse of him. He consulted lawyers but did not take action until 1996. In April 1996, S started counselling. In September 1996, S issued proceedings.[58] S was assessed by a psychiatrist who diagnosed him with PTSD, excessive alcohol consumption, depression, avoidance of childhood memories and flashbacks, along with inadequate personal relationships and poor employment.

60. The High Court found that it was not until early 1995 that S had made the link between the abuse he had suffered as a child and his psychiatric disabilities. After his foster mother's funeral, as S's focus for the first time turned to the events of his childhood, his mental health deteriorated. He had several episodes of depression and a lengthy period off work. The expert's evidence was accepted that S did not understand there was a link between his adult problems and his subsequent PTSD and depression until he began counselling. It was also accepted that the PTSD had prevented S making the connection and, indeed, had dominated his adult life.[59] This finding was upheld.

61. Importantly, in this decision, the High Court also held that S was not in a position to assess the link between the Department's actions and his circumstances until he had obtained most of his departmental file in February/March 1994.[60]

62. The defendant did not appeal from this finding.

W v Attorney-General[61]

63. It is relevant to refer to this case, albeit briefly. In this case, heard at the same time as *S v Attorney-General* above, the Court of Appeal

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56 *S v Attorney-General* [2003] 3 NZLR 450 (CA).

57 *S v Attorney-General* [2003] 3 NZLR 450 (CA), [4]–[15].

58 *S v Attorney-General* [2003] 3 NZLR 450 (CA), [18].

59 *S v Attorney-General* [2003] 3 NZLR 450 (CA), [37]–[38].

60 *S v Attorney-General* [2003] 3 NZLR 450 (CA), [36]. The High Court judge held that a "sophisticated appreciation of the link between Social Welfare's involvement and his abuse was required".

61 *W v Attorney-General* (Court of Appeal, CA 227/02, 15 July 2003, Blanchard J, unreported), following the substantive trial *W v Attorney-General* [1999] 2 NZLR 709.

accepted the trial judge's conclusion that W had not discovered the link between the abuse and her mental injury until after her interviews with the psychiatrist who prepared the expert report for the proceedings (between September and November 1996).[62]

64. The Court of Appeal accepted the psychiatric evidence that most child abuse victims will remember the abuse, although they may try (consciously or subconsciously) to blot out their memory. However, the Court found that remembering the abuse is not the same as linking it to the dysfunction it is causing in the present life of the victim. [63]

The changing approach to limitation

65. Arguably the first case to illustrate a changing approach by New Zealand courts to Limitation Act issues is the case *White v Attorney-General*.[64]

White v Attorney-General (HC)

66. The two plaintiffs in this case were brothers. They had been neglected and abused in the care of their parents from birth. Both brothers alleged that, upon being removed from their father and placed into institutional care, they were physically and sexually assaulted by staff members, suffered physical assaults at the hands of other residents with whom they were placed in care and suffered other psychological abuse by staff members.

67. After an eight-week trial, the High Court accepted both plaintiffs had been physically and verbally abused, first by their father and then in residential care. In the case of one of the brothers, the High Court accepted he had been sexually abused by a residential staff member.[65]

68. At High Court level, both failed to surmount the limitation defence. This was in spite of expert evidence which concluded the older brother: had symptoms consistent with PTSD; had episodes of major depressive illness and remained chronically miserable; had major problems with anxiety and anger; and was, in summary, a man with a cluster of psychiatric and psychological difficulties who had bene

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62 *W v Attorney-General* (Court of Appeal, CA 227/02, Blanchard J, 15 July 2003, unreported), [23]–[24].

63 *W v Attorney-General* (Court of Appeal, CA 227/02, Blanchard J, 15 July 2003, unreported), [25].

64 *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007]. This case went to trial, principally because the offers made by the Crown were modest and made only a limited contribution to the legal aid debt. At that time, Legal Aid was pretty inflexible about writing off debt, which would have meant the plaintiffs were left little to nothing of the compensation offered to them.

65 *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007], [122], [218]–[227], [295]–[302], [312].

greatly damaged by his childhood. [66] The experts also agreed that the older brother's capacity to connect past wrongs to his present difficulties was somewhat limited. [67]

69. With regards the younger brother, the expert evidence was that he had: substance abuse disorder; some criteria of personality disorder; and his adult life had been characterised by misery, poor vocational history, insomnia, and circumscribed lifestyle.[68] As with the older brother, the experts agreed that his capacity to recognise the link between past wrongs and his current circumstances was somewhat limited. [69]

70. In the face of those findings, the High Court Judge held that both plaintiffs had connected their present circumstances with their childhood, along with the role of Child Welfare with their care. The finding was that all the records did was assist each plaintiff to learn they might have a claim against Social Welfare.[70]

71. At no time did the High Court consider the necessity for each plaintiff to have understood the wrongs Child Welfare had committed, as opposed to recalling what had happened to them. The High Court did not address the older brother's understanding of the link between his psychiatric disabilities and the abuse he had suffered, as the earlier cases required. In terms of the younger plaintiff, the High Court appeared to confuse recognition of symptoms, with understanding the link between this abuse to psychiatric disability.[71]

72. Unsurprisingly, we appealed this decision. As we explained in the contextual hearing, Legal Aid refused to fund the appeal, which meant we were forced into the position of doing the work without funding. The Crown required that security be paid. Accordingly, it was necessary for us to pay security into the Court of Appeal. It was also necessary for us to fund the compilation and binding of the case on appeal.

White v Attorney-General[72] (CA)

73. Once again, at Court of Appeal, we were unsuccessful. While the Court of Appeal acknowledged that a cause of action accrues only when a plaintiff "realises or ought to reasonably realise that the harm

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66 *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007], [417] – [418].

67 *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007], [423].

68 *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007], [427] – [428].

69 *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007], [431].

70 *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007], [436] – [437] and [443].

71 *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007], [423], [433], [435], [443].

72 *White v Attorney-General* [2010] NZCA 139.

from which [he] is suffering was caused by the defendant's conduct", it did not overturn the High Court decision. The Court of Appeal also upheld the High Court decision that reasonable discoverability does not apply to claims of physical abuse, false imprisonment, or other non-sexual complaints.[73]

74. From a simplistic point of view, the Court of Appeal decision reverted to an objective approach, namely reasonable discoverability would be upheld if there was nothing preventing a plaintiff from linking their past trauma to their current symptoms.[74] With respect, this approach strayed from considering what was reasonable from the point of view of the 2 plaintiffs, it failed to address the distinction between remembering abuse and linking it to dysfunction, and also failed to recognise the importance of accessing records to assess a link between the State's actions (or inactions) and the damage suffered by each plaintiff.

75. Following this decision, we sought leave to appeal the Court of Appeal decision to the Supreme Court. This was the second time we had sought leave to appeal, the first time being when Legal Aid had refused to fund an appeal to the Court of Appeal.

76. At both stages, the Supreme Court dismissed the application for leave. In the first decision, the Supreme Court held that funding issues did not constitute a circumstance permitting the Supreme Court to hear the appeal, in the absence of a decision from the Court of Appeal.[75] In the second decision, the Supreme Court dismissed the application for leave to appeal on the basis that the decisions of the lower courts were essentially based on findings of fact as to the credibility and reliability of the evidence and, while the applicants had undoubtedly undergone regrettable suffering, the Limitation Act operated to preclude them seeking legal redress.[76]

77. It is appropriate, at this point, to refer to an article written by Andrew Beck in response to the Supreme Court's dismissal of the application for leave by the Supreme Court. He observed that while the factual findings may have been fatal, the Court of Appeal had also reached a critical conclusion on the law relating to reasonable discoverability, namely that it applied only to sexual assaults. As Andrew Beck observed, given the uncertainty surrounding the law, and given the restricted interpretation adopted by the Court of Appeal in *White,* this would have been a case that could legitimately have provided the

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73 *White v Attorney-General* [2010] NZCA 139, [102]–[104].

74 *White v Attorney-General* [2010] NZCA 139, [109]-[111] and [125].

75 *White v Attorney-General* [2008] NZSC 64.

76 *W &W v Attorney-General* [2010] NZSC 69, [2].

Supreme Court with an opportunity to clarify the law, given the many cases still in preparation.[77]

78. In the face of the Court of Appeal decision, along with the refusal of the Supreme Court to grant leave, subsequent decisions were invariably decided against plaintiffs – particularly where the State was the defendant.[78]

Disability

79. As with reasonable discoverability, the early cases on disability exhibited an understanding of the impact of child abuse on plaintiffs. Once again, however, this changed with the decision in *White* in subsequent cases against the State.

M v Capital Coast Health Limited[79]

80. This case addressed the review of a decision granting leave to the plaintiff, under the Mental Health Act 1911 and the Limitation Act 1950 to commence proceedings.[80] The plaintiff's case focussed around her admissions to, and confinement at Porirua Mental Hospital between 1954 and 1960.[81] The plaintiff claimed that her admission was improperly arranged and she was wrongly exposed to Electro-convulsive Therapy ("ECT") and insulation therapy as punishment. She also alleged various forms of sexual, physical and mental abuse, including that she was beaten around the genitals with a shoe and was occasionally confined for lengthy periods in a room with no light.[82] The plaintiff claimed that she was left traumatised, insecure, vulnerable, unable to cope and unable to take other than menial work. She claimed she had suffered severe emotional problems, recurring nightmares, difficulties in communicating with others and an inability to concentrate or remember.[83]

81. The plaintiff's case was that she had suffered from a disability that had prevented her from adequately disclosing the facts about her treatment and securing proper legal advice, or from linking her disabling symptoms to past treatment.[84] The plaintiff relied on evidence that she remained under a disability until late 1998 following

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[77] Andrew Beck, 'Litigation with Andrew Beck: Limitation and Historic Abuse' (2010) *New Zealand Law Journal* 257, 260.

[78] *P v Attorney-General* HC Wellington CIV 2006-485-874 [2010] NZHC 959 [16 June 2010], *AB v Attorney-General* HC Wellington CIV 2006-485-874 [2010] NZHC 989 (16 June 2010), *Banks v Attorney-General* [2010] NZAR 264.

[79] *M v Capital Coast Health Ltd* (High Court, Wellington, 25 June 2009, Durie J).

[80] *M v Capital Coast Health Ltd* (High Court, Wellington, 25 June 2009, Durie J), [1].

[81] *M v Capital Coast Health Ltd* (High Court, Wellington, 25 June 2009, Durie J), [2].

[82] *M v Capital Coast Health Ltd* (High Court, Wellington, 25 June 2009, Durie J), [4].

[83] *M v Capital Coast Health Ltd* (High Court, Wellington, 25 June 2009, Durie J), [4].

[84] *M v Capital Coast Health Ltd* (High Court, Wellington, 25 June 2009, Durie J), [33].

counselling and attending "growth and moderation" meetings.[85] The defendants had argued that she had adequate mental capacity by 1992.

82. In this decision, the High Court accepted that the plaintiff had an arguable case that some of her allegations were outside actions reasonably contemplated by the Mental Health Act. Accordingly, the limitation period prescribed in the Mental Health Act did not apply.[86]

83. Justice Durie went on to consider the provisions of the Limitation Act. The Crown had argued that the plaintiff had adequate mental capacity to bring proceedings by 1992, when she applied for ACC for the injuries resulting from the alleged sexual assault in the hospital. The Crown argued, therefore, that the six-year period provided in s4(7) Limitation Act ran from that point and the plaintiff was statute-barred from bringing her claim.[87] Justice Durie stated that it remained open for the plaintiff to argue that the 1992 step was "no more than a response to a discovery that compensation was available for past sexual abuse. It is evidence of a growing ability to assert a stance but arguably, cognitive redevelopment was still embryonic and immature, incapable of making all the linkages required for a larger case".[88] Justice Durie also accepted it was open to the plaintiff to argue that the necessary level of cognitive skill had not been reached until a time in late 1998 which was within the two-year period.[89]

84. Importantly, when we address the later decisions, the High Court accepted that the Court must be wary about deciding matters at the preliminary application stages. He stated it was enough the plaintiff had an arguable case.[90]

S v Attorney-General[91]

85. In terms of disability, the Court of Appeal accepted the expert evidence that S's PTSD was a major barrier to him bringing his claim. The expert witness said that S became "significantly depressed" when he tried to find a way to commence proceedings, accepting his PTSD was a major obstacle in that respect. S was able to overcome the effects of his disorder when he was provided with appropriate psychological and medical support.

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85 *M v Capital Coast Health Ltd* (High Court, Wellington, 25 June 2009, Durie J), [34].
86 *M v Capital Coast Health Ltd* (High Court, Wellington, 25 June 2009, Durie J), [28].
87 *M v Capital Coast Health Ltd* (High Court, Wellington, 25 June 2009, Durie J), [35].
88 *M v Capital Coast Health Ltd* (High Court, Wellington, 25 June 2009, Durie J), [36].
89 *M v Capital Coast Health Ltd* (High Court, Wellington, 25 June 2009, Durie J), [36].
90 *M v Capital Coast Health Ltd* (High Court, Wellington, 25 June 2009, Durie J), [37] and [41].
91 *S v Attorney-General* [2003] 3 NZLR 450 (CA)

86. The Court of Appeal held that the High Court judge had formed the view there was no disability by mistakenly concentrating on skills which S possessed which enabled him to function, albeit somewhat erratically at times, in employment and to pass some exams. The Court of Appeal noted that an abuse victim could function well in areas of their life which did not require them to face the abuse, particularly litigation against someone directly or indirectly responsible for the abuse.[92]

87. Three cases decided in 2007, including the *White* case, reflected a change in the approach taken by the courts to the issue of disability, to the disadvantage of claimants.

K v CHFA[93]

88. This case dealt with a claim by the plaintiff, K, that he had been sodomised by two named nurses at Ngawhatu Hospital between 1967 and February 1982. [94]

89. In this case, the plaintiff not only failed in relation to the Limitation Act defence, but also failed in establishing the facts.[95] With regards the Limitation Act defence of disability, it was accepted the plaintiff had an intellectual disability. The argument had been made that because of that, the plaintiff was at all times under disability, until he issued the proceedings in December 2005.[96]

90. Although the High Court accepted the plaintiff currently satisfied the definition of intellectual disability under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, it was noted he was not subject to that legal status at the time he issued legal proceedings.[97] The expert evidence for the plaintiff was that he could not understand, let alone follow, the progress of a civil claim. This evidence was discounted, on the basis that the psychiatrist called by the Crown gave evidence that the plaintiff was motivated to pursue legal action to obtain justice. The evidence of the psychiatrist called by the Crown, was that the plaintiff was aware of his ability to undertake legal action in the mid-1990s and subsequently in the late 1990s/early 2000s.[98]

91. As was evident in the *White* decisions, the High Court was troubled that the plaintiff could not identify a key event or trigger which enabled

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92 *S v Attorney-General* [2003] 3 NZLR 450 (CA), [44].

93 *K v CHFA* HC Wellington CIV 20005-485-2678 [16 November 2007].

94 *K v CHFA* HC Wellington CIV 20005-485-2678 [16 November 2007], [1] – [2].

95 *K v CHFA* HC Wellington CIV 20005-485-2678 [16 November 2007], [81] – [84].

96 *K v CHFA* HC Wellington CIV 20005-485-2678 [16 November 2007], [87].

97 *K v CHFA* HC Wellington CIV 20005-485-2678 [16 November 2007], [93].

98 *K v CHFA* HC Wellington CIV 20005-485-2678 [16 November 2007], [95].

him to overcome a legal disability in December 2005.[99] The High Court accepted that the plaintiff was "well able" to bring civil proceedings by the mid-1990s. The Court distilled the necessary knowledge to be that a person understood a wrong had been done to him or her for which redress could be sought through the courts.[100] Again, as became evident in subsequent decisions, the High Court took into account that the plaintiff was able to live in the community. He was able to instruct lawyers in criminal and Mental Health Act proceedings.[101] As stated, the Judge dismissed the significance of the fact that the plaintiff was subject to an order under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 ("IDCCR Act") (which means he had a very low IQ), on the grounds that that was not the case when he issued proceedings in December 2005.[102]

92. It is our view that this decision was alarming given that the very definition of intellectual disability in that legislation requires that a person has significant deficits in adaptive functioning, including communication, self-care, social skills, use of community services, self-direction and other issues.[103] In our view, the effect of this decision was to render almost any person capable of instructing a lawyer to bring proceedings, in direct contrast to the findings of the Court of Appeal in *S v Attorney-General*.

J v CHFA[104]

93. This High Court decision by Justice Warwick Gendall was the substantive decision in the case referred to earlier, *M v Capital Coast Limited.* Although the plaintiff established that she was subjected to physical assaults by nurses or nurse aides at Porirua Hospital, and that she witnessed similar assaults on other patients from time to time which subjected her to distress, the Limitation Act bar precluded her from obtaining a remedy.[105]

94. With regards the issue of disability, the High Court found that the trigger for the litigation was being told that the plaintiff could bring a civil claim for the facts she was already well aware of, and had provided the earlier basis for the ACC claim.[106] Specifically, the High Court found that the plaintiff was "undoubtedly" aware of the distress, emotional upset and anxiety she had suffered and any link between

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99 *K v CHFA* HC Wellington CIV 20005-485-2678 [16 November 2007], [96].

100 *K v CHFA* HC Wellington CIV 20005-485-2678 [16 November 2007], [97].

101 *K v CHFA* HC Wellington CIV 20005-485-2678 [16 November 2007], [98] – [99].

102 *K v CHFA* HC Wellington CIV 20005-485-2678 [16 November 2007], [101]. This was a difficult reasoning to follow, given that the definition in that legislation required that the intellectual disability has been from birth.

103 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s7.

104 *J v CHFA* HC Wellington CIV 2000-485-876 [8 February 2008].

105 *J v CHFA* HC Wellington CIV 2000-485-876 [8 February 2008], [613] – [615].

106 *J v CHFA* HC Wellington CIV 2000-485-876 [8 February 2008], [578].

those indicators, at least in November 1992 when she completed the ACC claim form. The plaintiff saw a counsellor who observed that the claim related to physical and sexual abuse occurring at Porirua Hospital. [107]

95. Specifically with regards disability, and contrary to the Court of Appeal decision in *S v Attorney-General*, the High Court relied on the fact that over the last 30 years the plaintiff had led a life which had included the ability to handle ordinary living, and she had been successfully able to conduct her own legal proceedings in relation to the ACC claim. The High Court also took into account that the plaintiff had no psychiatric contact in the last 37 years, had a high IQ, and was a resourceful, determined woman who would battle for her rights. [108]

96. The High Court went on to state that the correct position was that the plaintiff was "well able to bring proceedings".[109] Additionally, the High Court stated that the failure to make the present claim was simply because she chose not to bring proceedings. This was because she believed she was not able to sue.[110]

97. With regards the inability to seek legal advice, the High Court took into account, as already stated, that the plaintiff had already made her own ACC claim, pursued a review of that and won an appeal.[111] The Court also took into account that the plaintiff had been able to disclose her allegations to the counsellor to whom she was referred in late 1992/early 1993.[112]

98. The High Court concluded that the claim had to be filed, at the very latest, by July 1999. As the claim was filed on 20 April 2000, it was out of time and statute-barred.[113]

White v Attorney-General (HC)

99. In terms of disability, the High Court found there had been no event (such as completing therapy) enabling the older brother to commence and conduct his proceedings. The judge found that the older brother had always had capacity to do so.[114] With reference to the younger brother, the High Court again referred to the lack of therapy, as well as the fact that he had been able to get his own files, review them and

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107 *J v CHFA* HC Wellington CIV 2000-485-876 [8 February 2008], [580].
108 *J v CHFA* HC Wellington CIV 2000-485-876 [8 February 2008], [583].
109 *J v CHFA* HC Wellington CIV 2000-485-876 [8 February 2008], [584].
110 *J v CHFA* HC Wellington CIV 2000-485-876 [8 February 2008], [585].
111 *J v CHFA* HC Wellington CIV 2000-485-876 [8 February 2008], [587].
112 *J v CHFA* HC Wellington CIV 2000-485-876 [8 February 2008], [589].
113 *J v CHFA* HC Wellington CIV 2000-485-876 [8 February 2008], [591] – [592].
114 *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007], [423], [433], [435].

instruct lawyers. Accordingly, at the High Court level, it was found that the younger brother, too, had always had capacity to bring a claim.[115]

White v Attorney-General (CA)

100. In the appeal from this decision, the Court of Appeal acknowledged that a trigger for the lifting of disability is not necessary, but went on to say that whether or not there has been such a "lifting of disability" is a relevant piece of evidence for the court to consider.[116]

101. Contrary to earlier decisions, the Court of Appeal accepted that the older brother was not under disability on the facts. This was because the older brother had given evidence at trial and had handled taking the current claim without changing his avoidant behaviour. Both courts specifically took into account the older brother's ability to take Family Court proceedings (which did not require him to confront his abuse) and the fact there was no trigger ending the disability.[117] With the younger brother, reliance was placed on there being no trigger ending the disability. In addition, the Court relied on credibility issues around the limitation evidence referred to by the High Court.[118]

102. As with reasonable discoverability cases, disability decisions following on from the High Court decision in *White* were invariably against plaintiffs. Increasingly, the courts referred to the lack of there being any key event or trigger enabling the particular plaintiff to overcome any legal disability, the ability to engage in other proceedings (unrelated to the abuse), along with earlier medical records which had not made any psychiatric or psychological diagnosis.[119]

103. We compare the approach of the courts to claims against the State with claims against perpetrators. This is perhaps best illustrated by *Jay v Jay,*[120] where a victim of childhood sexual abuse at the hands of an uncle was successful in claiming she was under a disability. This was in circumstances where there was no consideration of whether she could bring a claim from age 20 and within a background of: counselling from 2005; confronting the abuser in 2007; lodging a claim with ACC in 2008; and consulting lawyers in December 2007 and

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115 *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007], [440], [443].

116 *White v Attorney-General* [2010] NZCA 139, [35], [38] and [41].

117 *White v Attorney-General* [2010] NZCA 139, [58] – [60].

118 *White v Attorney-General* [2010] NZCA 139, [75]-[81].

119 *K v Crown Health Financing Agency* [2007] NZHC 1267 [16 November 2007], *J v Crown Health Financing Agency* [2008] NZHC 81 [8 February 2008], *AB v Attorney-General* HC WN CIV 2006-485-2304 [22 February 2001], *DH v Attorney-General* [2008] NZHC GRO-B [6 October 2008], *BA v Attorney-General* HC Wellington CIV GRO-B [8 October 2008] and *Banks v Attorney-General* [2010] NZAR 264.

120 *Jay v Jay* [2015] NZAR 861.

again in July 2008.[121] In this case the Court of Appeal accepted the plaintiff was under a disability until her claim was filed in 2009.[122]

104. The obvious question to be asked is whether, given the outcome of this case, a different standard is applied where the State is the defendant?

105. In the Contextual Hearing we referred to the decision of the then Legal Services Agency to implement a withdrawal of aid process from 2008 onwards. We deal with that litigation later on in this brief of evidence.

106. What is important about the legal aid cases is that they imposed further glosses on limitation tests. For example, the courts increasingly took into account assessments undertaken during periods of imprisonment, which did not identify the need for psychiatric intervention and/or medication. They also took into account factors such as: entering into relationships; periods of employment; the ability to give instructions to lawyers (in criminal matters); and surviving in the community without committing offences or taking drugs. Further, the ability to hold down several jobs, study and even hold a driver's license were held to be incompatible with disability.[123]

107. In one case, the High Court expressly rejected the observations of the five-bench Court of Appeal in *S v Attorney-General* to the effect that a person suffering under a disability can function well in areas of their life that do not require them to face the abuse, stating that such observations had been made almost seven years earlier, and "experience with historic abuse claims [had] expanded considerably in the interim".[124]

108. In other High Court cases, it was held that a much higher standard of evidence would be required of plaintiffs to support disability (and discoverability) arguments.[125]

Exercise of discretion - delay

109. In the face of earlier Court of Appeal decisions that applications under s4(7) should be decided without prejudice to limitation issues, unless the intended claim was **undoubtedly** statute-barred, cases following *White v Attorney-General* also dismissed claims on the grounds of

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121 *Jay v Jay* [2015] NZAR 861 at [11] – [13].

122 *Jay v Jay* [2015] NZAR 861 at [99].

123 *Legal Services Agency v W* HC WN CIV 2009-485-002191 [21 April 2001] [25] – [28] and [46] and *JMM v Legal Aid Services Agency* HC WN CIV 2010-485-1306 [14 April 2011], [106], [155] – [156], [183].

124 *Legal Services Agency* v W HC WN CIV 2009-485-002191 [21 April 2010], [26].

125 *Legal Services Agency v LAE* HC WN CIV 2009-404-3399 [6 August 2009], [89] and *Legal Services Agency v* GRO-B HC WN CIV GRO-B [22 December 2010], [15].

delay. This became another barrier for plaintiffs in pursuing claims against the State.[126]

DH v Attorney-General[127]

110. This was another case where the Crown contested the Limitation Act at a preliminary hearing. The plaintiff, Mr DH was a victim of physical and sexual abuse by other boys who were resident with him in two homes run by the Department of Social Welfare, some thirty years earlier.[128]

111. Mr DH filed proceedings in June 2006. The High Court accepted that the plaintiff needed to establish an arguable case.[129] The High Court went on to consider whether, even if there was an arguable case, the proceedings should be allowed to continue.[130] Although the plaintiff called expert evidence which supported a diagnosis of Post-traumatic Stress Disorder[131] and it was unclear when the plaintiff's disability ceased,[132] the Court accepted the contradictory material put before the court, not being evidence of an expert nature, comprising material from the plaintiff's ACC records, psychiatric and psychological assessments, the plaintiff's history of participating in custody proceedings in the Family Court, and applying for access to his own records.[133]

112. Consistent with decisions we have referred to under the disability section, the High Court took into account evidence of dealings between DH and the Family Court, as well as his dealing with ACC (which did not relate to the abuse he suffered in care).[134] Importantly, with regards the exercise of discretion, the High Court relied on there being no evidence as to why the delay arose, noting that the delay was only six months. [135] The High Court acknowledged that no specific prejudice had been claimed to have arisen in the period of the six months delay, nor was there any evidence of specific prejudice.[136] The Court took into account that although some allegations were serious, others were not, stating that court proceedings were not

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126 *BA v Attorney-General* HC Wellington CIV GRO-B [8 October 2008], [60] and *DH v Attorney-General* [2008] NZHC GRO-B 6 October 2008] [88] and *Legal Services Agency v W* HC WN CIV 2009-485-002191 [21 April 2010], [17].

127 *DH v Attorney-General* HC WN CIV [6 October 2008]

128 *DH v Attorney-General* HC WN CIV [6 October 2008], [1].

129 *DH v Attorney-General* HC WN CIV [6 October 2008], [7].

130 *DH v Attorney-General* HC WN CIV [6 October 2008], [8].

131 *DH v Attorney-General* HC WN CIV [6 October 2008], [25].

132 *DH v Attorney-General* HC WN CIV [6 October 2008], [28].

133 *DH v Attorney-General* HC WN CIV [6 October 2008], [30].

134 *DH v Attorney-General* HC WN CIV [6 October 2008], [40].

135 *DH v Attorney-General* HC WN CIV [6 October 2008], [54].

136 *DH v Attorney-General* HC WN CIV [6 October 2008], [56].

GRO-B

"vehicles for inquiries into the *mores* of a different era".[137] The High Court also held that the Limitation Act limits were there for good reason and so declined to grant leave.[138]

BA v Attorney-General[139]

113. This was another case where MSD pursued a preliminary Limitation Act hearing.

114. Mr BA, who at the time of the hearing was 44, had been in DSW care from age 8 to 15. [140] Mr BA had filed proceedings, making allegations of physical assaults by staff and other residents, being psychologically abused and witnessing violence at home, and being molested in a shower at home.[141]

115. Mr BA said he was under disability until June 2004. He accepted it still took him more than two years to file his claim.[142] The defendant said it was not arguable Mr BA had been under a disability and, in any event, even if the claim had been filed within sufficient time for the Court to let him carry on, the Court should not exercise its discretion to do so.[143]

116. The plaintiff filed two affidavits, including attaching information from admissions to a psychiatric unit. In addition, the plaintiff called expert psychiatric evidence.[144]

117. Although the expert evidence was that the plaintiff had been, at times, significantly impaired by a combination of substance abuse, alcohol dependence, often severe anxiety problems and substantial impact on day-to-day functioning, the expert evidence also stated that the intensity of the symptoms had fluctuated over time.[145]

118. In this case, the Crown called evidence from its own expert, who disagreed there was an arguable case the plaintiff was under disability.[146] The conclusion of the Crown's expert was that the plaintiff's profile reflected a cluster of situational factors or drivers, rather than a psychiatric disorder.[147]

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137 *DH v Attorney-General* HC WN CIV GRO-B [6 October 2008], [59].
138 *DH v Attorney-General* HC WN CIV [6 October 2008], [60] – [64].
139 *BA v Attorney-General* HC WN CIV [8October 2008].
140 *BA v Attorney-General* HC WN CIV [8October 2008], [1].
141 *BA v Attorney-General* HC WN CIV [8October 2008], [2].
142 *BA v Attorney-General* HC WN CIV [8October 2008], [6].
143 *BA v Attorney-General* HC WN CIV [8October 2008], [7].
144 *BA v Attorney-General* HC WN CIV [8October 2008], [28] and [28].
145 *BA v Attorney-General* HC WN CIV [8October 2008], [30].
146 *BA v Attorney-General* HC WN CIV [8October 2008], [31].
147 *BA v Attorney-General* HC WN CIV [8October 2008], [33].

119. As with the previous case, there was no evidence of specific prejudice, nor was there specific evidence directed to the reasons for the delay in filing.[148]

120. Ultimately, as with the previous case, the High Court considered there was no arguable case. Although it was acknowledged that the plaintiff's expert suggested there was an arguable case, and that a further opportunity to examine the plaintiff could assist, the High Court made a firm decision that the plaintiff had not proved disability.[149]

121. Again, as with the previous case, the High Court found that a delay of nearly 18 months in filing the claim from the most favourable date of the disability ending was "very significant". Although the High Court accepted that most of the prejudice had already occurred, it went on to state the prejudice was not the only criteria to be taken into account.[150] The High Court also considered that the allegations did not merit subjecting a defendant to trial 30 years after they occurred, relying on the same reasoning as in the previous decision.[151]

Conclusion regarding Limitation Act 1950

122. As illustrated above, the Limitation Act has become a powerful tool in the arsenal of the State to deny victims of state abuse any remedy through the courts. We repeat that a defendant has a choice about whether to rely on the limitation defence. The Crown has unapologetically relied on its defences under the Limitation Act as part of its defence strategy.

123. In current litigation tracking towards trial in August 2020, MSD and MOE have, so we learned very recently, not yet made their decision about whether to pursue limitation as a preliminary issue. Whether the limitation defence is pursued at trial also remains to be seen, although given that Cabinet has recently re-affirmed the Crown strategy of relying on such defences, this seems likely.[152]

124. There have been practical implications arising out of the "hardening" position of the High Court, particularly around the quality of evidence required to address limitation issues. It is now necessary for experts to review extensive material for each plaintiff. This includes not only the records relating to their time in care, but records pertaining to their education, periods of incarceration, and all medical and/or psychological records, employment records and any other relevant

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148 *BA v Attorney-General* HC WN CIV GRO-B [8October 2008], [54].
149 *BA v Attorney-General* HC WN CIV [8October 2008], [78].
150 *BA v Attorney-General* HC WN CIV [8October 2008], [84].
151 *BA v Attorney-General* HC WN CIV [8October 2008], [90].
152 Review of Strategy for the Resolution of Historic Claims, 17 December 2019 at 4.3 and 54.4.

records to address Limitation Act issues. The requirement to read these records has significantly increased the cost of reports. Typically, these reports now cost between $5,000 - $10,000. Further, because of the time required to review the records (and assess each plaintiff), there are few psychiatrists (or psychologists) available and willing to undertake this exercise. This is yet another hurdle for plaintiffs to overcome.

125. It should be mentioned in this part of the evidence, that MSD entered into an agreement with this firm in May 2011 to suspend the operation of the Limitation Act while we work to resolve claims in the out-of-court process MSD has in place. The genesis of this agreement is uncertain, but possibly reflects the fact that we were, by then, complaining to the Human Rights Commission in New Zealand and the United Nations about the State's approach to the historic child abuse claims, which we have referred to in the contextual hearing.

126. While the May 2011 agreement (and its addendum agreement referring to the 2010 legislation), means Cooper Legal is not now required to file all claims in the High Court, its legal effect remains unclear. This is particularly because the Crown has not yet waived a limitation defence for any claim once it commences on a trial track.

127. Although Cooper Legal has endeavoured to negotiate a similar agreement with the Ministry of Education (MOE), which negotiation process has extended for nearly nine years to date, no such agreement has been finalised. Cooper Legal has been told, as at 18 October 2018[153] that MSD, MOE and Oranga Tamariki intend to enter into one agreement addressing limitation issues. To date, however, not even a draft agreement has materialised. For that reason, we continue to file all claims where MOE is a party to the proceedings. We also continue to file all claims for clients who can still surmount a Limitation Act defence. This significantly increases our workload, particularly given the large number of younger clients who are now instructing the firm, as well as the ever-growing number of clients who are instructing us with MOE claims.

A potential solution

128. Cooper Legal proposes two potential solutions.

129. First, the State should commit to waiving any reliance on its limitation defences in claims of this nature.

130. This is not our preferred option. Such a waiver is liable to be rescinded at any time, particularly where the political will is to defend the Crown against liability.

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153 Letter from Crown Law to Cooper Legal, 18 October 2018.

131. The second option, which is our preference, is that New Zealand adopts the approach of Scotland and some Australian states to abolish the application of limitation provisions in child abuse cases (which in our view should cover physical, sexual and psychological abuse). This should apply to all historic child abuse claims. In Australia, the legislation provides a residual discretion for the courts to strike out a proceeding on grounds that the delay in bringing a claim means that a fair trial is no longer possible for a defendant. We are cautious about having such a residual discretion in New Zealand, particularly given the decisions referred to above, where the New Zealand courts have relied on even short delays to dismiss claims.

ACC Bar

132. In contrast to other Commonwealth jurisdictions, claims for damages for personal injury are covered by our Accident Compensation Scheme. The effect of this is that all claims for compensatory damages, which includes all forms of monetary award intended to compensate for personal injury, are barred from 1 April 1974 onwards. This applies whether the action is based on tort, contract, equity or statute.[154] The legislation does not prevent a plaintiff bringing proceedings for exemplary, or punitive damages.[155]

133. We addressed the barriers created by ACC in our brief of evidence for the Contextual Hearing.[156] The cases make it clear that the ACC bar does not apply to events occurring prior to 1 April 1974, with the possible exception of sexual assaults due to legislative amendments following the success of *S v Attorney-General* in the Court of Appeal.[157]

134. The significance of the ACC bar and its influence on court decisions, particularly, has been evident in the litigation we have engaged in.

135. For example, at trial level, both *S v Attorney-General*[158] and *W v Attorney-General*[159] succeeded in surmounting the limitation defences and in establishing breaches of duties of care owed by the State. Nevertheless, both claims failed because of the perceived barrier of the ACC legislation.

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154 *Accident Compensation Act 2001*, s317.

155 *Accident Compensation Act 2001*, s319.

156 *Brief of evidence of Sonja Cooper and Amanda Hill on Behalf of Cooper Legal,* [165] – [170].

157 In May 2005 the legislation was amended to extend cover for those who had suffered sexual abuse before 1974 if the claimant had received treatment. Refer to the Injury Prevention, Rehabilitation and Compensation Amendment Act (NO.2) 2005 and subsequent legislation.

158 *S v Attorney-General* [2002] NZFLR 295 HC.

159 *W v Attorney-General* HC Wellington CP42/97, 3 October 2002.

136. It was not until both appeals were heard at Court of Appeal level that those findings were overturned, on the basis that for both plaintiffs the abuse had occurred prior to the implementation of the ACC legislation on 1 April 1974, meaning that the ACC legislation did not apply.[160] Because of that, the two cases were sent back to the High Court for the purposes of determining compensation. Both claims were ultimately settled in the absence of a hearing to determine compensation.

137. In the *White* case we argued that while physical assaults after 1 Aril 1974 were prima facie covered by Accident Compensation, any injury required evidence of "damage or hurt". In the absence of such evidence the legislation should not be applied. We also argued that the injuries suffered by the two plaintiffs were 'continuous process injuries', in other words, the damage was cumulative, and therefore not compensable under the 1972 Act.[161]

138. At High Court level, this argument was dismissed on the basis that the physical assaults were discrete injuries, occurring from time to time and differing in kind and degree.[162] The Court of Appeal agreed with this approach.[163] At Court of Appeal level, we also argued about the unfairness of the ACC legislation precluding a claim for compensatory damages, particularly when a claimant had not recognised the right to claim Accident Compensation at the time of the injury, and was precluded from doing so by subsequent legislation.[164] While the Court of Appeal accepted cover had lapsed, it stated that s317 is in clear and unambiguous terms. There can be no claim for common law damages. Accordingly, regardless of fairness, the ACC legislation barred the right to seek damages.[165]

A potential solution

139. It is appropriate to ask during the course of this Royal Commission, whether ACC should still be a barrier to compensation, when the claimant is a victim of abuse? One potential option is to permit victims of abuse (and perhaps other categories of claimants presently covered by ACC) to bring civil claims for compensation. Any award of compensation could be offset against any claim to compensation under the ACC legislation. In that way, a claimant does not "double-dip".

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161 *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007], [449].

162 *White v Attorney-General* HC Wellington CIV 1999-485-85 [28 November 2007], [450].

163 *White v Attorney-General* [2010] NZCA 139, [145] – [146] Components of the claim were not covered by ACC.

164 *White v Attorney-General* [2010] NZCA 139, [153] – [161].

165 *White v Attorney-General* [2010] NZCA 139, [161].

140. If the ACC legislation is to continue to apply in claims of this nature, then the legislation should be extended to cover the longer-term psychological impacts of not just sexual abuse, but physical and psychological abuse. Medical and/or psychological literature now recognises that all forms of abuse can cause long-term psychological and/or psychological damage. For that reason, there is no solid policy basis for singling out cover for sexual abuse retrospectively, when the same does not apply to other forms of abuse.

141. Again, if the ACC legislation is to remain in place, then the statutory barriers to making claims should be removed. In other words, there should be no timeframe required for lodging a claim, provided there is a reasonable evidential basis to establish a claimant was in State care. We also believe that lump sums should be reintroduced to reflect what would be available through the courts.

142. Because of our concerns about the restrictions of ACC, we say, finally, that the ACC legislation should be amended so it does not apply to **any** abuse occurring before 1 April 1974 which is when the first ACC Act was implemented. The present legislation, which purports to cover sexual abuse occurring at any time, is unfair to those wishing to bring a claim.

143. We make further suggestions about how the ACC legislation might be dealt with in the context of these claims, at the conclusion of our evidence.

CHAPTER 2

FUNDING THE CLAIMS

- Access to legal aid / cost of litigation
- The inequality of arms
- The withdrawal of legal aid
- The judicial response to the withdrawal of legal aid

Access to legal aid / cost of litigation

144. It is a sad reflection of the low socio-economic status of our client group, that the vast majority are eligible for funding through the State scheme managed by the now Legal Aid Services (Legal Aid), formerly the Legal Services Agency (LSA). For ease of reference, we will use the term "Legal Aid" to refer to both entities. The very low thresholds set for eligibility mean that most people who are engaged in full-time employment, even at the lowest pay rates, may not be eligible for legal aid. It has been acknowledged both by Parliament and the judiciary that there is a vast difference between being eligible for legal aid and, for those who are not eligible, being able to pay a lawyer.

145. For our handful of private clients who are not eligible for legal aid, we are realistic about their ability to fund a claim. Generally speaking, we ask that our private clients pay a small deposit, and then we do not invoice them until the claim is resolved. Our agreement with MSD in respect of privately funded clients means that the client's costs are covered by the settlement with the Ministry, meaning the client is not disadvantaged by their ineligibility for legal aid. In necessary cases, we keep our private hourly rates at the same level as Legal Aid rates, in fairness to those clients.

146. It is also difficult to explain to clients that, should they obtain a job, we have to tell Legal Aid this and they may lose their eligibility for funding. This gives rise to considerable anxiety amongst our client group and may prove a disincentive for them to seek work.

147. We observe that Legal Aid now sits within the Ministry of Justice and its offices are in the same building as Crown Law. From time to time, we have been concerned about the conflict position Legal Aid is in, as a State agency, having to make decisions about claims made against another State agency. Criminal lawyers share our concerns. We have been repeatedly told that Legal Aid scrutinises potential claims against the State more rigorously than other claims, which is another potential barrier to funding being granted and/or continued. As Providers we have to certify "prospects of success" every time we ask for a new stream of funding. While we now have protocols in place to cover much of the work we undertake, that scrutiny becomes very intense each time we start tracking a claim towards trial, or propose a different course of action.

148. While Cooper Legal currently has a very positive and strong relationship with Legal Aid, the labour-intensive methods of billing and seeking funding, together with policy decisions by Legal Aid, mean that we are necessarily distracted from progressing client work due to the requirements and obligations of being legal aid providers.

149. An example of this is six-monthly billing. Prior to the implementation of the Legal Services Act 2011, Cooper Legal only invoiced for those files on which we were doing substantive work. Claims which were waiting "in the queue" were not invoiced. When the Act and its Regulations were initially implemented, we were required to invoice on every file initially every 3 months. The Regulations were later amended (Legal Services Amendment Regulations 2012), to require invoices every six months, at least in part because Legal Aid became overwhelmed when we complied with the request and it had to deal with hundreds of invoices every 3 months.

150. Given the size of the client group, six-monthly invoicing is still a substantial undertaking. Invoices need to be prepared, approved and sent for every client, regardless of whether substantive work has been done on the file, on a cyclical basis. If a client "falls through the gaps" and is billed outside of the six-monthly requirement, we are required to make submissions as to why our invoice should be paid. This wave of invoices is then paid, often only reflecting several units of time. The process is repeated each month, depending on when a file was last billed. Many of these invoices are for less than $30, reflecting the minimal, actual work that has taken place. These tasks, while necessary for a check and balance, do take substantial time and effort away from our substantive legal work.

The Withdrawal of Legal Aid

151. By the time the *White* decision and the two psychiatric hospital decisions[166] were issued, there were hundreds of claims waiting in the wings. Virtually all claimants were in receipt of legal aid. These losses cast a shadow over the other claims.

152. On 17 January 2008[167], Legal Aid decided to reconsider the availability of legal aid. Legal Aid issued a letter directing that we would only be paid for work up until the end of December 2007, and all other applications for funding were suspended until its analysis of the historic abuse judgments was completed. This occurred against a background of discussions with MSD about a settlement process for the claims against it[168]. The timeline for the development of the ADR Process is discussed in Chapter 4.

153. The scale of the task meant that the withdrawal of aid process would consume the bulk of our time for several years. During that time, the number of new instructions Cooper Legal received did not abate. However, there were no other lawyers doing this work we could refer

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166 *J & K* respectively.

167 Letter from the LSA to Cooper Legal, 17 January 2008.

168 Letter from Cooper Legal to LSA (re MSD ADR process), 17 January 2008.

survivors to. Even if there were other lawyers, they would have struck the same issues with Legal Aid.

154. In April 2008, Legal Aid commenced a formal process of the withdrawal of legal aid for the claimant group (then numbering over 800), by requiring that Cooper Legal and Johnston Lawrence provide submissions in relation to each client's file. The submissions were to focus on the concerns arising from the litigation, primarily the Limitation Act defence, the effect of the ACC scheme, the prospects of damages being awarded and the issue of causation.

155. This task was undertaken. An analysis for each client was prepared and provided to Legal Aid. An example of the analysis undertaken is included in the bundle of documents accompanying this brief of evidence. It was on the basis of these analyses that Legal Aid made decisions about the future funding of each individual case. The decisions were based on advice from solicitors utilised by Legal Aid as "specialist advisors".

156. If Legal Aid made a decision to withdraw legal aid, both the relevant client and Cooper Legal were advised of the decision in writing. Those decisions were typically reviewed and appealed to the Legal Aid Review Panel ('LARP')[169]. The LARP was under-resourced and struggled to cope with the sudden, enormous increase in applications before it. This resulted in further delays. When the first LARP decisions were delivered in May 2009, all decisions of the Agency to withdraw funding were reversed. LARP suggested to Legal Aid that it reconsider the withdrawal of aid process.

LSA v LAE & Ors.

157. Instead of reconsidering its decisions, Legal Aid appealed every decision of the LARP to the High Court. The first appeal was heard by Justice Dobson in July 2009 and is referred to in subsequent decisions as *LSA v LAE & Ors*. [170]

158. Justice Dobson noted that Legal Aid had reached decisions in respect of 191 cases and had withdrawn aid in all but 28 of them. There were 105 cases working their way through the appeal process to the LARP, with "an apparent pattern of such appeals being upheld and therefore resulting in the reinstatement of Legal Aid for the claimants involved". Determination of the appeals had been accorded urgency, because fixtures for two of the substantive claims had been set down for hearing.

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169 The Legal Services Act 2011 changed this body to the Legal Aid Tribunal, or LAT.

170 The case is reported as *Legal Services Agency v R* (2009) 20 PRNZ 423.

159. The issue for the Court was how an evaluation of the "prospects of success" of a proceeding should be carried out. Justice Dobson traversed the factual and legal outcomes in the four cases: *K, White & Anor* and *J v Crown Health Financing Agency*. Justice Dobson also considered the decisions in *DH* and *BA*[171].

160. At [117] of the decision, Justice Dobson found that Legal Aid's decision in respect of another legally aided person's claim to having a relevant disability, was not adequately reasoned[172]. Because of the critical importance of a finding that the Limitation Act defence is likely not to be overcome, the inadequacy raised the prospect that the analogy with the decided cases was unreasoned, in the sense of not being justified by comparison of the relevant facts. At [121] Justice Dobson stated (inter alia):

> I would not expect a reasonable self-funded litigant to discontinue such proceedings if his advisor's analysis did no more than advert to a consistent series of failures in other historic abuse cases. Such a notional litigant would reasonably expect an analysis of why failures in those cases rendered the prospects in his or her own care materially worse than they had previously been perceived.

161. Justice Dobson held that there were grounds for LARP's decision that Legal Aid's decision was manifestly unreasonable in view of its purported application of the outcome in decided cases to the prospects of success in Mr R's case, without demonstrating a reasoned analysis of the extent of relevant factual similarities or differences. Justice Dobson also found errors by the LARP. Legal Aid was directed to reconsider the extent of legal aid provided for responding to its proposal to withdraw legal aid from Mr R. In respect of the other appeals, Justice Dobson also directed reconsideration by the LARP of the reviews of the decisions by Legal Aid. It was also to reconsider the extent of legal aid paid to providers for responding to Legal Aid's proposal to withdraw legal aid from those claimants.

Legal Services Agency v W

162. The next decision in the High Court was *Legal Services Agency v W*[173]. In that case, Wild J noted that Legal Aid's submissions on appeal posed six questions, but he focused on whether the LARP had erred in holding that Legal Aid could not withdraw legal aid in an arguable case.

163. Justice Wild noted that some 940 historic abuse claimants had been granted legal aid, and some 80 applications for legal aid for similar

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171 *DH v Attorney-General* HC WN CIV GRO-B 6 October 2008, Simon France J; *BA v Attorney-General* HC WN GRO-B, 8 October 2008. These decisions are addressed in more depth in the section relating to Limitation Act defences.

172 This was Mr R, who was in the process of bringing a claim against the Armed Forces.

173 *Legal Services Agency v W* (2010) 20 PRNZ 721.

claims awaited decisions. Of the 940 original grants, approximately 845 claims were still being pursued. He noted that the average legal aid cost for the four historic abuse claims per case was $356,500. The total costs for the four unsuccessful claimants was $1,426,125. As will be seen, these figures pale into insignificance next to the expenditure of Crown Law and its counsel.

164. Justice Wild noted that Legal Aid had reassessed its grant of legal aid in 200 of the cases - with 127 cases, including *W's* case, having legal aid withdrawn. Only 30 cases had their legal aid continued and limited grants of legal aid, generally to fund psychiatric evidence, were made in 43 cases. 218 historic abuse cases were working their way through the LARP process.

165. Justice Wild noted that the legal aid of W had been withdrawn, although that proceeding had been heard before Justice Miller and was pending a decision. The second plaintiff in this decision was *B,* who had claims against both MSD and the Salvation Army. A psychiatric opinion had been obtained for Mr B, which attracted criticism by both the LSA and Justice Wild. Mr B, whose leave hearing had been pushed on for hearing at a time when he did not have legal aid, will be discussed in more detail below[174].

166. The decision by Justice Wild was focused on whether, and how, Legal Aid could rely on psychiatric evidence to determine whether a claim had prospects of success. Legal Aid criticised the analyses of psychiatric evidence provided by Cooper Legal, saying that we had not addressed how the evidential problems in the four unsuccessful cases were overcome in *W's* case. In turn the LARP was critical of Legal Aid, noting that it had listed the similarities between *W's* case and the decided cases. The LARP pointed out that Legal Aid had failed to relate those similarities to the reasons why the limitation defence succeeded in the four decided cases. The LARP itself undertook that task. It pointed out that the expert evidence for *W* and *B* was unchallenged and the factual and evidential basis on which opinions were given could not be doubted. Justice Wild differed from both Legal Aid and the LARP about the analysis which was required. At [47] Justice Wild stated:

> I reiterate that this type of analysis was not carried out by either the LSA or the LARP. It is the sort of scrutiny that is required. Had it carried it out, I do not consider that the LSA could reasonably could have assessed *W's* prospects of success in overcoming the Limitation defence as so low that the continuation of Legal Aid was not justified.

167. Justice Wild noted that he had confirmed with Justice Dobson what had been envisaged in the earlier decision when the issue was

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[174] Refer to the analysis of *LRB v Attorney-General* in the next section.

referred back to Legal Aid/LARP, and set out, at [54] what he described as a pragmatic but fair procedure. In short, this was:

a) The LARP should seek submissions from the legal aid applicants to explain why their claim had different and better prospects of success justifying legal aid to the decided cases; and

b) The LARP will then afford Legal Aid the opportunity to respond to the applicants' further submissions, and in so responding the LARP was not to confine Legal Aid to the reasoning behind or content of its decision to with withdraw aid, but to have a full opportunity to respond and explain why it adhered to its decision to withdraw legal aid.

The GRO-B *Decision*

168. There was a further appeal to the High Court about applications for legal aid being declined outright by Legal Aid. This was the decision in *Legal Services Agency v* GRO-B *& Ors*[175]*.* The appeal was brought by Legal Aid itself, after the LARP overturned its decisions to decline aid, and instead substituted its own decision to grant aid on an interim basis, for the specific purpose of obtaining a psychiatric report.

169. In the decision, Justice Williams attempted to find a balance between the amount of information an applicant was required to provide to Legal Aid in order to obtain a grant of Legal Aid, and the requirement for Legal Aid not to be overly prescriptive in its requirements, or to require so much from an applicant to make it impossible for them to get a grant of aid. In respect of two of the four applications, Justice Williams determined that the appeal by Legal Aid should succeed, because insufficient information had been given. In respect of two other applicants, Justice Williams held that the appeal should be dismissed, because more detailed information had become available and provided to the LARP.

170. In making his decision, Justice Williams stated at [63]:

> …It does not seem consistent with the purpose of the Act to cut off access to justice without further inquiry when prima facie evidence exists to support both injury and disability. That, in my view, is to place an unfair burden on counsel to subsidise to an unreasonable level, the Legal Aid scheme.

171. In an ideal world, an interim grant to obtain a psychiatric report and further information would be a workable solution. However, the realities of the situation were very different. For example:

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175 *Legal Services Agency v* GRO-B *& Ors* HC Wellington CIV GRO-B, 22 December 2010.

a) There were only two or three psychiatrists in the country who were willing or able to provide such reports;

b) To do a report, a psychiatrist required a full record of the applicant's life, including their Social Welfare records, Corrections records, mental health records and ACC records to be provided to them;

c) The number of psychiatrists who were willing to provide the reports shrank when the requirement to travel to a client in remote areas was imposed; and

d) Enormous delays in obtaining records, which will be addressed below, meant that it could be up to a year before Social Welfare records could be made to available to a psychiatrist. In the meantime, time under the Limitation Act was "ticking" and could not be stopped.

172. By this time, it was taking up to two years for an application for legal aid to be granted.

The Decision in JMM

173. The matters which had been referred back to Legal Aid by Justice Dobson in *LAE* had returned to the High Court in *JMM v Legal Services Agency*[176]. In this decision, Justice Dobson dealt with seven appeals from the LARP on the continued availability of legal aid for historic abuse claims. The claimants challenged the decisions of LARP on both procedural and substantive grounds.

174. As an example of the timeframes involved by this point, Justice Dobson noted that the appeal on behalf of the claimant JMM had been heard on 7 and 8 February 2011. JMM had been granted legal aid for the preparation of a psychiatric report, but no psychiatric report had been prepared. On the state of the information that was available, Legal Aid treated the circumstances of this claimant as sufficiently similar to those in the decided cases, leading to a view that *JMM* would not be able to avoid the limitation defence, so that the continuation of aid could no longer be justified. LARP's decision was issued in June 2010, nearly two years after the application for review was lodged.

175. In JMM's case, the LARP had upheld the decision to withdraw her legal aid. Justice Dobson described the Panel's approach to this point as an "intuitive hunch": [67]. Justice Dobson found that to take such an approach was an error of law. As to Legal Aid's decision, Justice Dobson noted that it contained less analysis of the individual

176 *JMM v Legal Services Agency* HC WN CIV-2010-485-1306 [14 April 2011].

circumstances of the claimant than was undertaken in all others of the present batch of appeals. Virtually all the 9 July 2008 letter conveying the decision to withdraw aid was in generic terms.

176. Justice Dobson went on to find multiple errors by both LARP and Legal Aid in the way in which it conducted an analysis of whether prospects of success existed for the individual claimants. Where the Court directed reconsideration it also directed there would be a partial reinstatement of aid, limited solely to funding for Cooper Legal to prepare submissions in support of the continuation of grants previously made.

JMM on appeal

177. Justice Dobson's decision was appealed to the Court of Appeal[177]. This appeal centred on the meaning of "prospects of success" as set out in the Legal Services Act 2000. It also addressed the level of analysis required in considering withdrawal. The Court of Appeal held (inter alia) that:

a) The words "prospects of success" should speak for themselves, requiring evaluation of the phrase in the particular case and were not to be applied in a rigid or formalistic way. The nature of the exercise was highly fact dependent;

b) Individual assessment of each litigant was required and whether or not their prospects of success were sufficient to justify the grant of Legal Aid; and

c) The essence of reasons for the decision was to be set out in the notification to the claimant and sufficient detail was required to enable a litigant to decide whether to exercise either reconsideration or review rights as a means of challenging the decision.

178. The Court of Appeal held that Justice Dobson had erred by restricting the Panel to consideration of the contents of the withdrawal letter. That approach was inconsistent with the legislation. The Court of Appeal responded to the questions put to it by the parties and dismissed the appeals.

179. In doing so, the Court of Appeal nevertheless also expressly approved the possibility of funding to settle claims out of court. This meant that Legal Aid had to consider funding settlement processes.

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[177] *JMM v Legal Services Agency,* cited as *Meredith v Legal Services Agency* [2012] NZCA 573.

The High Court's response to the withdrawal of aid process

180. In full knowledge of the withdrawal of aid process, MSD (through Crown Law) was urging the High Court to press on with setting down the cases for hearings, particularly to test the limitation defence. This was despite the complete lack of any specific prejudice to MSD.

W v Attorney-General[178]

181. This issue was first addressed by the Wellington High Court in the case *W v Attorney General* when Cooper Legal applied to amend timetabling directions due to the withdrawal of W's legal aid. Justice MacKenzie stated, inter alia, that difficulties over a grant of legal aid were not a valid reason for failure to comply with timetable directions.[179] Justice MacKenzie went on to say that a lawyer had responsibilities to the Court and the client which were not contingent on the availability of legal aid.[180] Unless a lawyer had been excused by the Court, steps must be taken in a timely way to ensure timetabling directions can be complied with.[181]

182. That decision caused considerable concern. Sonja Cooper asked for an opinion from the New Zealand Law Society, which the firm subsequently received, confirming that a lawyer has no duty to undertake work for free and that a lawyer has a right to withdraw in circumstances where a client has no ability to pay.

183. Subsequently, based on that advice, the firm applied for special leave to appeal Justice MacKenzie's decision. Justice MacKenzie refused to grant special leave appeal on the basis that duties of counsel did not constitute exceptional circumstances to justify an interlocutory appeal.[182] In addition, on application by the Crown, a costs award was made against Mr W, who at that stage did not have legal aid.[183]

184. Throughout 2009, as legal aid continued to be withdrawn, we continued to appeal the withdrawal of funding decisions and Crown Law, on behalf of MSD, continued to push on hearings. The next case in which this issue arose is referred to next.

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178 *W v Attorney-General* HC WN CIV 2006-485-874 [17 December 2008].
179 *W v Attorney-General* HC WN CIV 2006-485-874 [17 December 2008] at [7].
180 *W v Attorney-General* HC WN CIV 2006-485-874 [17 December 2008] at [9].
181 *W v Attorney-General* HC WN CIV 2006-485-874 [17 December 2008] Ibid.
182 *W v Attorney-General* HC WN CIV 2006-485-874 [6 March 2009] at [7].
183 *W v Attorney-General* HC WN CIV 2006-485-874 [6 March 2009] at [11].

KB v Attorney-General[184]

185. Mr KB was another client where the Crown sought an interlocutory hearing on the Limitation Act defence. Initially, a fixture was scheduled to take place on 16 and 17 March 2009. However, MSD's expert evidence was significantly delayed, so the proceeding had to be allocated a new fixture date of 28 September 2009.

186. In the intervening period, Legal Aid withdrew Mr KB's legal aid and we appealed that decision. On 2 July 2009 we advised the High Court of this and asked that the leave hearing scheduled for September be vacated. The Crown opposed the adjournment, despite identifying no specific prejudice and having recently obtained a six-month adjournment itself because its case was not ready. Justice Dobson refused to adjourn the fixture date, relying on the decision in *W v Attorney-General* above.

187. On 15 September 2009, in the absence of a decision regarding funding, Cooper Legal applied for an order that we were no longer solicitors on the record. Mr KB was kept aware of the ongoing legal aid difficulties throughout this period and had consented to this, although he had written a powerful letter which Cooper Legal put before the Court about how distressed he was at the thought of having to represent himself if we could not act.

188. In his reserved decision, Justice Dobson refused the application to withdraw. On this occasion, however, he did grant the application for adjournment of the fixture, saying that he was persuaded, in this particular case, that a further adjournment was justified as being preferable to accepting withdrawal of the firm as solicitor on the record.[185]

189. Once again, the High Court distinguished the obligations of a lawyer to their client, as opposed to the Court.[186] The Court stated there would be circumstances in which the Court would not be prepared to relieve a solicitor of their obligations to the Court, at least until other steps had been taken. [187]

190. Having made that statement, the High Court recognised that the historic abuse cases were all beset with a degree of legal complexity and had their own intricacies on the facts. In the circumstances of the particular case, the High Court accepted that it was not appropriate to

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184 *KB v Attorney-General* HC WN CIV 2007-485-698 [17 July 2009].

185 *KB v Attorney-General* HC WN CIV 2007-485-698 [17 July 2009] at [26].

186 *KB v Attorney-General* HC WN CIV 2007-485-698 [17 July 2009] at [8].

187 *KB v Attorney-General* HC WN CIV 2007-485-698 [17 July 2009] at [10].

require Cooper Legal to prepare for and advance an application for leave to proceed on an unfunded basis.[188]

LRB v Attorney-General

191. We next refer to the case of *LRB v Attorney-General*[189] which perhaps best reflects the conduct of Crown Law, acting on behalf of MSD, as well as the response of the High Court to the withdrawal of aid process.

192. On 25 June 2009, knowing that LRB's matter was to be set down for a leave hearing, Legal Aid withdrew legal aid. An application to review this decision was filed with the LARP on 9 July 2009. On 2 July 2009 Cooper Legal sought an adjournment of the allocated hearing date. The Crown opposed that application, again in the absence of any specific prejudice.

193. Initially, we were given a short adjournment by Justice Dobson. Due to significant delays on the part of Legal Aid in providing its submissions, the LARP was unable to make a decision.

194. The position faced by Cooper Legal was fully explained to the High Court and Crown Law in a memorandum dated 10 November 2009. An adjournment was sought. Crown Law, on behalf of MSD, opposed the hearing being adjourned. Further, Justice Miller directed that counsel should attend the High Court on 18 November 2009 to discuss the request for an adjournment.

195. Although there had been no application made by Cooper Legal to withdraw as solicitor on the record, Justice Miller dealt with the matter on such a basis that such an application had been made. During the hearing, Justice Miller indicated his preliminary view that the firm was not entitled to withdraw. He also refused the application for adjournment, directing the firm to file submissions – fully appreciating that the firm had no funding.

196. Once again, the High Court stated that withdrawal was incompatible with the obligations of an officer of the court.[190] Cooper Legal was directed to represent LRB on 2 December. The decision stated, however, that it might still be unreasonable to deny an adjournment in all the circumstances. Specifically, it was acknowledged that the firm was in a difficult position and there was nothing to suggest the firm was responsible for delays in having aid reinstated.[191] Once again, however, the High Court referred to the decision of *W v Attorney-*

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188 *KB v Attorney-General* HC WN CIV 2007-485-698 [17 July 2009] at [11].

189 *LRB v Attorney-General* HC WN CIV 2008-485-1541 [19 November 2009].

190 *LRB v Attorney-General* HC WN CIV 2008-485-1541 [19 November 2009] at [13].

191 *LRB v Attorney-General* HC WN CIV 2008-485-1541 [19 November 2009] at [14].

General, above, namely that difficulties over the grant of legal aid were not a sufficient reason for failure to comply with timetabled directions.[192]

197. During this period, we were in regular contact with LRB about what was happening. LRB accepted that Cooper Legal could not be expected to prepare for and attend a significant High Court hearing which would affect his legal rights, perhaps permanently, without funding. Ultimately, LRB instructed us that he intended to represent himself in the proceedings. He signed a notice changing representation from Cooper Legal to himself.

198. In subsequent directions from the High Court, in the face of this, Cooper Legal was declined the opportunity to withdraw as solicitors on the record and was directed to file submissions and be ready to argue the leave application on 2 December 2009.

199. At the end of the day, LRB's legal aid was reinstated at the end of 30 November 2009. Cooper Legal was woefully under-prepared for the leave hearing, as we had been unable to obtain any reply evidence from LRB or our expert psychiatrist in the absence of funding. This was recognised by Justice Young in his minute dated 2 December 2009.[193]

200. On the day of this hearing, a complaint was made by Justice Young against Sonja Cooper in relation to this proceeding. As name suppression orders remain in place, it is sufficient to say that the disciplinary process took until February 2014 to be finalised. The complaint was dismissed and the NZLS was required to pay significant costs to Cooper Legal as a consequence.

201. We have referred to these cases, because they are a further illustration of the way in which the Crown (here we refer to Legal Aid, Crown Law and MSD) has acted to the disadvantage of our legally aided clients. As the High Court itself observed, these cases are complex, require expert evidence and potentially distinguish a claimant's legal rights. Further, the claimants are particularly vulnerable, often have little to no education and could not be expected to deal with the cases without legal representation.

202. In those circumstances, it was repugnant to Cooper Legal that we were being forced to withdraw as lawyers for these clients, not only because of the Crown's conduct, but also as a consequence of the High Court's decisions about our obligations. We do not know how many clients were forced to abandon their claims as a result of Cooper

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192 *LRB v Attorney-General* HC WN CIV 2008-485-1541 [19 November 2009] at [15].

193 *LRB v Attorney-General* HC WN CIV 2008-485-1541 [2 December 2009].

Legal having to withdraw, as for most clients we tried to avoid having to withdraw.

203. As a concluding statement for this part of our evidence, we observe that to this date we have not heard of any other law firm, or indeed any individual practitioner, who has been routinely required by any court in New Zealand to undertake significant work in the absence of any funding.

Funding issues between 2008 and 2009

204. We have already referred to the withdrawal of legal aid process and the litigation arising from that.

205. As we outline in Chapter 4, during 2007 we were pressing MSD to consider a process to settle claims outside of court. Cooper Legal first wrote to Legal Aid on 21 December 2007 to advise that Cooper Legal, MSD and Crown Law were in discussions about an ADR process to potentially resolve the claims against MSD.

206. On 17 January 2008, ironically the same day on which we received the letter from Legal Aid telling us to "stop work", Cooper Legal wrote again to Legal Aid advising that we had received a letter directly from MSD in relation to a possible ADR process to address individual claims.[194] That letter enclosed correspondence from MSD and our response to that letter.

207. On 6 March 2008[195], Cooper Legal again wrote to Legal Aid confirming telephone advice that Cooper Legal staff had met with officials from MSD, and Una Jagose from Crown Law, to reach agreement on an ADR process for dealing with the Social Welfare claims. The letter provided advice to Legal Aid about the process that had been agreed, including agreeing to trial the process with four clients whose evidence had been accepted as being credible during the *White* trial. Cooper Legal also advised Legal Aid that there was a possibility of engaging in an ADR process for clients with CHFA claims as well.

208. Cooper Legal finally received a written response from Legal Aid on 7 March 2008.[196] The letter agreed it was a positive development. Cooper Legal was asked to send funding requests for the four Social Welfare clients who would pilot the proposed process. In that letter, Legal Aid acknowledged receiving a large number of applications for funding in respect of clients who were said to be entering the ADR process. That letter asked for quite detailed information, including:

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194 Letter from Cooper Legal to Legal Aid, dated 15 January 2008, with enclosures.

195 Letter from Cooper Legal to Legal Aid, dated 6 March 2008.

196 Letter from David Howden, Legal Aid, dated 7 March 2008.

what anticipated outcomes would be sought from the ADR process; what was our estimate as to the range of financial settlements that would be received; and confirmation that each claim had been specifically accepted by the Crown for the ADR process before aid would be granted. In that regard, Legal Aid required sighting a copy of the relevant acceptance letter from the Crown Law or MSD before funding would be granted.

209. It is fair to say we were frustrated by this letter. We responded in a letter dated 27 June 2008. We attempted to provide helpful information, while noting our considerable dismay at the length of time it had taken for Legal Aid to write the letter. We also complained that the letter was a further signal of Legal Aid's intention to close down all of the historic abuse claims, without providing any avenues for the client group to seek redress and/or have the ability to access legal representation.

210. On 10 July 2008, Legal Aid through David Howden replied.[197] In that letter, Legal Aid stated that it did not accept ADR was an automatic substitute for the litigation process. The letter repeated that Legal Aid would require some "evidence" that the Crown had accepted a particular claim as suitable for ADR before substantive funding would be provided. As expected, Legal Aid refuted the allegation that it was intending to "close down" all of the historic abuse claims. It stated that it had made a principled decision, based on the "uniformly negative outcomes" from the cases that had proceeded to trial.

211. Not surprisingly, we expressed our dismay at that approach in our reply letter dated 17 July 2008.[198] We noted, in that letter, that Legal Aid was putting up more and more obstacles to funding work for the client group. We noted that the Legal Services Act clearly contemplated that funding could be provided for private mediation. We also repeated that we had been filing proceedings to protect each plaintiff's position under the Limitation Act and also to bring pressure on the Government to settle the claims outside of court. We expressed our frustration that Legal Aid was now requiring evidence that the Crown had accepted a particular claim as "suitable for ADR" before substantive aid would be granted. We also expressed our frustration that Legal Aid was requiring that the Crown would have acknowledged that abuse had occurred, and that limitation and causation issues would not be raised in order to stop the resolution process. We noted that the very nature of the claims meant that the Crown would typically settle on a basis of maintaining that there was no liability and that the settlement payments were typically "ex gratia" payments to reflect that.

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[197] Letter from David Howden, Legal Aid to Cooper Legal, dated 10 July 2008.

[198] Letter from Cooper Legal to Legal Aid, dated 17 July 2008.

212. Cooper Legal expressed its view that it was unlikely Legal Aid would require any other counsel to prove that the other party had acknowledged liability, before funding would be provided for ADR purposes. We indicated that there may need to be further litigation over Legal Aid's refusal to fund ADR.

213. We did not have any further substantive correspondence from Legal Aid until a letter dated 6 November 2008, again from David Howden.[199] In that letter, Legal Aid stated that it would require a new application for funding on the basis that ADR was a new process that was not part of the currently legally aided court proceedings. It insisted that it would require a letter from Crown Law, or the relevant agency, confirming that the particular claimant had been accepted into an ADR Process. Legal Aid continued to insist it would require confirmation, in writing, that the Crown had "waived" its rights to its available defences. In addition, we were required to give details of the form of ADR to be utilised and why legal representation was provided. We were also required to give advice as to what would happen to the existing court proceedings during the ADR Process.

214. There was, then, further discussion about the issues. On 5 February 2009, Cooper Legal wrote to Legal Aid about settlement issues.[200] At that stage, Crown Law had advised us that there had been a telephone call between David Howden and Una Jagose on 27 January 2009. Correspondence from Crown Law invited Legal Aid to attend a meeting with Crown Law to discuss "possible approaches to settling claims where there is a costs factor associated with the claim's funding arrangements".[201] Cooper Legal advised Legal Aid that this firm would not attend a meeting of that nature for reasons we had already explained.

215. On 9 February 2009, Legal Aid replied to the letter from Cooper Legal Aid.[202] David Howden stated that his telephone call to Una Jagose was a "courtesy call only" and was made to record the fact that Legal Aid was not adverse to attending a meeting with Crown Law. By the time of the letter, Legal Aid confirmed there had been no further developments with regard to a proposed meeting with the Crown.

216. Funding issues continued through 2009 and 2010. It is fair to say we were very absorbed with the litigation about funding, while continuing to try and substantively progress work for our clients in very difficult financial and staff circumstances.

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199 Letter from David Howden, Legal Aid to Cooper Legal, dated 6 November 2008.

200 Letter from Cooper Legal to David Howden, Legal Aid, dated 5 February 2009.

201 Letter Crown Law to LSA (historic claims), 4 February 2009.

202 Letter from David Howden, Legal Aid to Cooper Legal, dated 9 February 2009.

Interactions between State agencies following the withdrawal of aid process

217. By 2011, we had become aware that Legal Aid was engaging in direct communications with our defendants, notably MSD and the Crown Health Financing Agency ("CHFA"). These communications occurred without our knowledge and certainly without our consent. At no point did Legal Aid, acknowledge, or appear to even consider the very real conflict position it placed itself in, by engaging in such communications.

218. When we became aware of these communications, we forwarded letters to Legal Aid, CHFA and MSD under the Official Information Act requiring that disclosure be made of all and any such communications, including meeting notes, regarding the work undertaken by this firm on behalf of those who had suffered abuse in State care. The outcome of those Official Information Act requests is, perhaps, best reflected in an Issue Paper we prepared in August 2011. In that paper, we raised concerns about two broad issues, first the handling of the proposed psychiatric hospital claims, particularly the settlement process, and secondly the handling of the DSW process.

219. With regards the psychiatric hospital claims, we expressed our concern that the OIA material showed that CHFA had advised Legal Aid of proposed psychiatric hospital settlements for every legally aided client on 6 November 2010. A subsequent conversation had occurred in December 2010, which was subsequently referred to in the correspondence between Legal Aid and Cooper Legal.[203] We addressed our concern that Cooper Legal was only advised of the settlement process, some eight months later, on 21 June 2011.

220. The cases above demonstrate that, in spite of being aware of the proposed settlements, Legal Aid continued to fight for the withdrawal of funding for psychiatric hospital clients. Legal Aid gave no indication of its knowledge in its submissions to the LARP or the High Court and the Court of Appeal in subsequent affidavit evidence provided to support Legal Aid's position.

221. We expressed a concern, based on the material we received, that the State agencies, including Legal Aid, were taking a coordinated approach to the historic abuse claims being dealt with outside of the courts. We were concerned about this because we had no evidence, at that point in time, that the claims could be satisfactorily resolved without oversight of the courts.

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[203] Letter from David Howden, Senior National Specialist Adviser, to Cooper Legal, 13 September 2011.

222. We next referred to the DSW claims. We expressed our concerns that Legal Aid, being the major funder of the plaintiffs, had engaged in extensive communications and meetings with MSD, Crown Law, the Ministry of Justice, CHFA and other organisations from time to time. The information provided to us reflected that the meetings had been to negotiate a financially viable strategy for dealing with the historic abuse claims.

223. By the time of the Issue Paper Legal Aid was only funding new DSW claims to go through MSD's then Care Claims and Resolution Team ("CCRT") process and only with limited legal representation. Legal Aid was resisting any attempt by Cooper Legal to keep the door open on the possibility of judicial involvement, whether through JSCs, trials or otherwise.

224. We observed that Legal Aid had been endeavouring to find a way to force all DSW clients through the CCRT process. MSD was aware of this course of action as far back as March 2010. Legal Aid was, by then, referring to the availability of the CCRT process in letters sent, or copied, to Cooper Legal clients. This information was included in letters withdrawing legal aid, and in submissions to the LARP that were copied to the clients. Although Cooper Legal repeatedly protested about this approach in persuading clients to go through the CCRT process, without legal representation, this did not deter Legal Aid.

225. We also came to understand that Legal Aid had obtained an opinion from Crown Law as to whether it could provide advice directly to our clients. We ascertained that the opinion was equivocal. Cooper Legal had previously objected to Legal Aid instructing Crown Law in relation to a LARP appeal to the High Court, because of the obvious conflict of interest this invoked (with Crown Law acting for the defendants). In this context, however, Crown Law had not been deterred from providing an opinion.

226. The Official Information Act material showed us that Legal Aid had obtained a second opinion from an undisclosed external source, which we never received. In response to that opinion, Legal Aid had then written to every legally aided DSW client advising of the availability of the out-of-court process, including information that lawyers were not required.[204] As we stated, this was legal advice that Legal Aid should not properly have offered, particularly in light of our contrary opinion of the CCRT process. At around the same time as Legal Aid refused to grant aid for litigation and began promoting CCRT, MSD decided not to agree to any further Judicial Settlement Conferences ("JSCs"). In part, this was (ostensibly) in response to the funding issues. We surmised, however, that it was more likely to be

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[204] Letter from the Legal Service Agency to Cooper Legal, 21 April 2011.

part of a coordinated approach to taking the DSW claims out of the court.

227. We recorded our concern, at that time, that the offers made through MSD's CCRT process appeared to be becoming more inflexible. This has continued. To this day, we remain uncertain about the role of the Ministry of Justice (and the courts) in the context of these communications.

Funding issues from 2011

228. As will be evident from the information above, by May 2011 Cooper Legal had signed the agreement with MSD to suspend the operation of the Limitation Act while both parties engaged in a process to settle DSW claims out of court. By the end of 2011 we had started to settle a reasonable number of claims. By the end of 2011 we had settled approximately 100 claims, receiving over $3 million which we paid to clients and to satisfy their debts to Legal Aid.

229. We have already referred to the fact that, by the end of 2010 Legal Aid was aware that CHFA intended to make settlement offers to claimants with a psychiatric hospital claim.

230. In the face of that information, our relationship with Legal Aid did not improve. If anything, it went through a period of further deterioration.

231. On 1 February 2011, Legal Aid authorised the conduct of a Special Audit of Sonja Cooper, as a high volume, high cost provider of services to Legal Aid.[205] We refer to this, because we believed that this was part of a strategy on the part of State agencies, to remove Cooper Legal as the sole provider of legal services to this client group. It was also a further diversion from us being able to carry out work for our clients.

232. The audit was conducted by Mai Chen and lawyers from her firm. Notice of the Special Audit was given while Sonja Cooper was overseas, a fact that would have been known to staff at Legal Aid. It is not intended to provide a detailed analysis of the Special Audit process, or its outcome. It is sufficient to say that the audit process was harrowing for Sonja Cooper, the firm's Practice Manager and the senior lawyers of the firm. Cooper Legal was required to provide significant volumes of information, often at very short notice. Much of that information went well beyond audits of specific client files and included a detailed analysis of special arrangements between Cooper Legal and Legal Aid which had been in place for many years (including the preparation of "global invoices" for our larger client

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[205] Memorandum from Jan Matthews, Manager Provider Services to Sally Babington, Manager Service Delivery, LSA, 1 February 2011.

groups, the sending of newsletters as a means of communication to the clients and the use of contractors in the early days to assist with interviews).

233. On 1 June 2011 Chen Palmer sent the Special Audit report to Legal Aid. It was not until 30 September 2011 that Cooper Legal was sent a copy of the report, which identified specific issues Cooper Legal was required to respond to, many of which were issues Cooper Legal and Legal Aid had expressly reached agreement about in terms of practice.

234. The firm was required to instruct Robert Lithgow QC to assist with our response. Ultimately, the Special Audit process was completed on 22 August 2012, 1.5 years after the audit process had commenced. After completion of the investigation, Legal Aid found that all the concerns raised by the Special Audit were not substantiated.[206]

235. In the meantime, Cooper Legal continued to be frustrated by the funding decisions made by Legal Aid.

236. During this period, Legal Aid took various steps, including: reducing levels of funding we had previously been granted to undertake tranches of work, delaying its responses to applications for funding, amendments to grant and payment of invoices, reducing payments of multiple invoices on the grounds that we had over-worked files, and refusing to pay global invoices for work we had done on behalf of the entire client group.

237. We repeatedly wrote to Legal Aid expressing our concerns about the difficulties we were facing in obtaining funding and being paid properly for the work we were undertaking to settle our clients' claims.[207] Ultimately, as with the Special Audit, we were forced to engage counsel. Andrew Butler from Russell McVeagh was instructed and engaged in communications with Legal Aid in September 2012 to raise express concerns about the relationship between Cooper Legal and Legal Aid.

238. In recognition that the relationship between Cooper Legal and Legal Aid had significantly deteriorated, Legal Aid proposed that we enter into a mediation process, in a letter dated 11 June 2012.[208] In a subsequent letter it was agreed that the purpose of mediation would be to rebuild the relationship and address specific issues which were causing ongoing difficulties.

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206 Letter of Legal Aid Services to Cooper Legal, 22 August 2012.

207 We have included selected correspondence between Cooper Legal and Legal Aid between 18 April 2011 and 25 September 2012.

208 Letter from Michelle McCreadie, Legal Aid, to Cooper Legal dated 11 June 2012.

239. In our letter to the then Legal Services Commissioner dated 28 June 2012[209], we observed that Cooper Legal had been in constant direct opposition to Legal Aid. We noted that the mass withdrawal of aid, and subsequent appeals processes had been fraught, acrimonious and had caused a not inconsiderable amount of personal distress for all staff at Cooper Legal. We acknowledged, at that time, that we felt a certain degree of antipathy towards Legal Aid and its staff.

240. After sending our 28 June 2012 letter, we received a letter from Legal Aid dated 27 June 2012[210] which we received on 6 July 2012 addressing our questions about what mediation would address.

241. By the time of our letter, Legal Aid owed Cooper Legal over $550,000, which did not include disputed invoices. This was in the face of Cooper Legal having closed off most of the psychiatric hospital files and settling increasing numbers of MSD claims. We refer to this because financial difficulties were another barrier to us being able to carry on work for our clients.

242. It took several months to arrange mediation which ultimately took place in about November 2012. This was a challenging process which occurred across 2 meetings but enabled both parties to start rebuilding the relationship so that Cooper Legal could continue our work on behalf of our clients.

243. Following mediation, we had regular meetings, for some time, with the then Director of Legal Aid Services, Michele McCreadie. On occasions, the National Specialist Advisor, David Howden, attended the meetings. Later meetings were held with different personnel, until Frances Blyth was appointed by Legal Aid as a Provider Consultant to liaise between Cooper Legal and Legal Aid. We understand that Frances Blyth held the same position with a number of other firms, particularly Treaty firms providing legal aid services.

244. We wish to acknowledge the value of the role Frances Blyth performed in assisting with building the good working relationship we now have with Legal Aid. Through Frances, Cooper Legal was able to agree on funding protocols that are still in place today to cover various steps of our work. Perhaps, for the first time, Legal Aid understood that much of the work Cooper Legal undertakes is driven by the State agencies, in the main, including the courts.

Inequality of arms

245. In media coverage and other reports about the historic claims, there is often a (negative) focus on the fact that the claimants are almost

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209 Letter from Cooper Legal to the Legal Services Commissioner dated 28 June 2012.

210 Letter from Legal Aid to Cooper Legal dated 27 June 2012.

always legally aided. In some quarters, the fact that people are aided by the State to bring claims against the State should not be permitted. It is fair to describe that some politicians have a very grudging view of Legal Aid.

246. This focus on legal aid obscures the fact that it pales in significance to the Crown costs of pursuing and defending litigation. Those costs should also be assessed in light of the compensation eventually paid to individual claimants. Official Information Act and Parliamentary questions revealed the costs associated with four plaintiffs, often subsumed under the description of the Whakapakari Litigation. The New Zealand Herald published the figures on 25 March 2017.[211] The article noted that of the four claimants, the matters had been in court for 12 years. MSD had spent $1,065,585 on private counsel and paid $369,000 (which is a consolidated sum) to the four victims. MSD had also contributed $369,159 to the claimants' legal costs, with Legal Aid writing off $184,590.

247. The breakdown of the four litigants shows the figures more clearly. They are referred to at different parts of our brief of evidence.

248. The legal aid costs for M were $81,853.40. M settled for $70,000 in compensation, together with a contribution to his legal aid debt and a further $20,000 payable for additional psychiatric or psychological treatment that may not be publicly available. The wellness payment, as it was termed, was available only on proof of invoice.

249. Z received compensation of $67,500 together with a $20,000 wellness fund on proof of invoice for tattoo removal, suitable counselling not otherwise publicly funded, and/or the cost of an educational programme from an approved provider. As with M, MSD would also make a substantial contribution to his legal aid debt.

250. T received compensation of $60,000, together with a further contribution of $2,000 towards access to suitable counselling or psychological service "relating to the subject matter of the claims and which is not otherwise publicly funded". As with the other claimants, T also received a contribution to his legal aid debt.

251. Y, the final claimant in this group, received compensation of $80,000, together with a wellness payment of $20,000 for tattoo removal, suitable counselling or psychological services not otherwise publicly funded, and/or the cost of an educational programme from an approved provider. He also received a contribution to his legal aid debt.

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[211] New Zealand Herald, "Government spends $1M fighting abuse case – and loses", 25 March 2017.

252. As is so often the case with litigation, the cost and time of the litigation far exercise far exceeded the final outcome.

253. Another case that demonstrates the high Crown costs of defending litigation in comparison to the outcome for the client, is *X v Attorney-General & Anor.*[212] This case had been moving towards a trial, but the Crown had raised a number of interlocutory applications, and there had also been hearings about name suppression, which are dealt with in Chapter 8 of our evidence. We requested the Crown costs on this file in OIA requests dated 2 March 2015 and, to update the information, 11 July 2016.

254. We received the first response under the OIA from Crown Law on 1 April 2016.[213]

255. For the period January 2015 to 20 February 2016, the total amount paid by MSD in legal fees was:

    a) $330,809.15 to Crown Law; and

    b) $285,821.10 to external counsel including the QC instructed by Crown Law, external counsel and Meredith Connell. It was also noted that MSD had paid a lawyer who was advising the person who had been convicted of sexually abusing X. This was to advise the abuser on how to appeal his conviction, which he subsequently did.

256. This information was updated on 4 August 2016.[214] By that time, for the period to 30 June 2016, MSD had paid Crown Law $336,365.15. The external counsel had been paid $351,251.70.

257. In contrast, in an email from Sonja Cooper to Legal Aid, the funding for the entire period covered by X's legal aid grant (since 2010) was approximately 23% of that amount[215] – around $305,000 for a much longer period of time.

258. When X eventually settled his claim, he received $60,000 in compensation from MSD, and $20,000 in compensation from an NGO. Both defendants contributed towards a payment of costs to Mr X.

259. Of course, the litigation over the years for the entire claims group has been expensive as well. Between 1 December 2006 and 31 March

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212 CIV-2010-485-2352 *X v Attorney-General & Anor & YFT.*

213 Letter from Crown Law to Cooper Legal (costs) 1 April 2016.

214 OIA response from Crown Law to Cooper Legal (costs) 4 August 2016.

215 Email from Cooper Legal to Legal Aid (*X v Attorney-General)* 8 August 2016.

2015, MSD spent $5,689,306 on legal fees for the Crown Law Office and external legal counsel with respect to all historic claims.[216]

[216] Letter from MSD to Mike Wesley-Smith, 21 July 2015.

CHAPTER 3

- **Psychiatric Hospital Claims: pre-Ministry of Health**

The psychiatric hospital claims

260. At the Contextual Hearing, we spoke about the growth of the psychiatric hospital claims, which we commenced in 2002. As we explained in our evidence, our hope was for the Crown to implement an Inquiry/settlement process, similar to that which had been implemented for the adolescents at Lake Alice Hospital. In June 2003, we formally approached the Minister of Health asking for a public Inquiry and the establishment of a settlement process in relation to our claimants who had been in other psychiatric hospitals throughout New Zealand.

261. As we have explained, unfortunately for this larger group, an entirely different position was taken - based (as we understand it) on the advice of Crown Law. First, in late 2003, Crown Law advised that the preliminary view was that the claims should be defended. Discussions then progressed between us (including Johnston Lawrence) and Crown Law on methods for progressing the claims through ADR Processes. Largely because of the Crown's complete unwillingness to implement a meaningful redress and compensation process, little progress was made.

262. In the absence of a process to resolve the claims out of court, we started filing claims in the High Court, in order to protect the claimants' positions with regards the Limitation Act.

263. As we have explained in the Contextual Hearing, in March 2005 the Crown applied to the High Court to strike out all of the psychiatric hospital claims on the grounds that the claimants had not applied for leave pursuant to s6 of the relevant Mental Health legislation, and did not have leave to proceed under the Limitation Act 1950.

264. We have already explained that the relevant legislation contained immunity provisions, which protected persons from civil claims if they were acting in pursuance or intended pursuance of that legislation, unless they had acted in bad faith and/or negligently. Where bad faith and/or negligence could be established, a claimant could apply to the court for leave to proceed, within six months of the alleged act taking place. The historic nature of the claims meant that this was not open to the claimants.

265. At first instance, the Crown argued that the claims were a nullity, because none of the plaintiffs had obtained leave to proceed.

266. The Crown argued that all day to day acts of those working in the hospitals were prima facie covered by the immunity in the legislation. As a concession, the Crown accepted that certain sexual assaults could never be protected by the immunity, including rape, indecencies between males, and sodomy. The Crown vigorously argued that

allegations of punishments should be interpreted as disciplinary acts which were protected by the immunity in the legislation.

GRO-B-P *v Residual Health Management Unit*[217]

267. The first decision in this litigation was issued by Associate Judge Abbott on 23 June 2006. The Associate Judge accepted much of the Crown's argument and struck out many allegations, including allegations: about the failure to institute and maintain adequate systems within the hospital; all allegations in the nature of punishments; allegations of allowing patients to beat up other patients; staff watching patients engage in sexual acts; inadequate supervision of patients; requiring plaintiffs to clean or work without pay; failing to provide schooling; witnessing the beating of other patients; and denial of medical treatment.[218]

268. It should be noted that these findings applied only to committed patients, as the Associate Judge found that the treatment and care of informal patients was by private arrangement, meaning there was no statutory duty to provide treatment or care and so any acts were not pursuant to the Mental Health legislation.[219]

269. The effect of the decision, for committed patients, was that the only aspects of the claims left for determination were allegations of sexual assaults by staff and physical assaults involving acts of punching, kicking, using objects as weapons and encouraging fights between patients.[220]

270. The decision did not address the Crown's application for strike out based on the Limitation Act 1950. This issue was dealt with in a separate decision of Associate Judge Gendall.[221] In that decision, the Associate Judge declined to strike out the claims on Limitation Act grounds, reasoning that the High Court Rules did not require plaintiffs to plead in response to the limitation defence raised by the defendant in their statements of claims.[222] The Crown sought a review of both decisions. We reviewed the decision of Associate Judge Abbott.

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217 GRO-B-P *v Residual Health Management Unit* HC WN CIV 2003-485-1625 [23 June 2006].
218 GRO-B-P *v Residual Health Management Unit* HC WN CIV 2003-485-1625 [23 June 2006] at [64].
219 GRO-B-P *v Residual Health Management Unit* HC WN CIV 2003-485-1625 [23 June 2006] at [63].
220 GRO-B-P *v Residual Health Management Unit* HC WN CIV 2003-485-1625 [23 June 2006] at [64].
221 GRO-B-P *v Residual Health Management Unit* HC WN CIV 2003-485-1625 [27 January 2006].
222 GRO-B-P *v Residual Health Management Unit* HC WN CIV 2003-485-1625 [23 June 2006] at [44].

GRO-B-P *v Crown Health Financing Agency (review of Associate Judges' decisions)*[223]

271. Our review focussed on the decision of Associate Judge Abbott striking out most parts of the claims brought by the plaintiffs. The Crown argued that the Associate Judge had not gone far enough and the rest of the pleadings (save serious sexual assaults) should also have been struck out.[224]

272. At the same time, the Crown sought a review of the decision of Associate Judge Gendall refusing to strike out the claims on the basis of the Limitation Act defence.[225] The review was heard by Justice Simon France.

273. In this decision, the High Court held that the immunity applied to acts done to informal patients, as well as committed patients.[226] Having said that, the Court held that the leave requirement did not apply to claims under the 1911 Act. Further, the onus was on the Crown to show that the claims must fall within the leave requirement.[227]

274. The effect of this decision was that allegations of punishment would not be struck out. Even more so, allegations of assault would not be struck out as it could not be shown, at a preliminary stage, that such conduct necessarily came within the immunity.[228]

275. As with the earlier decision, the Court struck out allegations concerning assaults by other patients, allowing smoking and allowing the plaintiffs to observe misconduct to, or by other patients.[229]

276. With regards the Limitation Act issue, the Court held that all the claims should have been struck out on the basis the limitation defence could not be answered. However, the Court accepted this had been overtaken by subsequent directions of the High Court.[230]

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223 GRO-B-P *v Crown Health Financing Agency* HC WN CIV 2003-485-1625 [19 December 2006].
224 GRO-B-P *v Crown Health Financing Agency* HC WN CIV 2003-485-1625 [19 December 2006] at [6].
225 GRO-B-P *v Crown Health Financing Agency* HC WN CIV 2003-485-1625 [19 December 2006] at [7].
226 GRO-B-P *v Crown Health Financing Agency* HC WN CIV 2003-485-1625 [19 December 2006] at [106].
227 GRO-B-P *v Crown Health Financing Agency* HC WN CIV 2003-485-1625 [19 December 2006], Ibid.
228 GRO-B-P *v Crown Health Financing Agency* HC WN CIV 2003-485-1625 [19 December 2006] at [107].
229 GRO-B-P *v Crown Health Financing Agency* HC WN CIV 2003-485-1625 [19 December 2006] at [108].
230 GRO-B-P *v Crown Health Financing Agency* HC WN CIV 2003-485-1625 [19 December 2006] at [1235] - [126].

Crown Health Financing Agency v P[231]

277. Both the Crown and the claimants applied for leave to appeal the High Court decision. The main issues to be determined were whether the immunity provisions applied equally to committed patients as informal patients, particularly after 1 April 1972 when significant amendments were made to the Mental Health Act 1969. Other issues related to the correct approach to strike-out where leave had not been obtained under the respective Mental Health Acts prior to commencing proceedings.[232]

278. The Court of Appeal confirmed the High Court decision that the leave and immunity provisions covered all informal patients.[233] The Court of Appeal imposed a two-stage test. First, in deciding whether leave was required, the actions of staff were to be assessed. Any accompanying words, the circumstances in which they allegedly occurred, and any motivation needed to be examined. Specifically, the Court of Appeal held that acts in pursuance of the legislation would not include acts or omissions that would constitute an offence under the legislation. The second question was to ask whether the acts or omissions could be in intended pursuance of the legislation. This required an assessment of whether a person could honestly, even if mistakenly, believe that acts or omission related to committal, the running of the institution, or to the care and treatment of patients, including control or protection.[234]

279. In terms of the limitation defence, the Court of Appeal held that if the Crown considered in respect of any relevant proceedings that leave should be applied for, then the Crown should apply to have the question of leave dealt with as a preliminary issue and/or to strike out the pleadings. In that case, normal strike out principles would apply.[235]

280. Although the Court of Appeal decision was unanimous, Justice Hammond was the only Court of Appeal Judge to consider the issue of whether the immunity applied to informal patients in any depth. Preferring the Crown's submissions, Justice Hammond stated that an informal patient's perceptions and judgements of what was happening to him or her may be as impaired as those of a detained patient. Further, informal patients may be inclined to make potentially

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231 *Crown Health Financing Agency v P* [2008] NZCA362: [2009] 2 NZLR 149 (2008) 27 FRNZ 863 (16 September 2008).

232 *Crown Health Financing Agency v P* [2008] NZCA362: [2009] 2 NZLR 149 (2008) 27 FRNZ 863 (16 September 2008) at [117]-[119].

233 *Crown Health Financing Agency v P* [2008] NZCA362: [2009] 2 NZLR 149 (2008) 27 FRNZ 863 (16 September 2008) at [77].

234 *Crown Health Financing Agency v P* [2008] NZCA362: [2009] 2 NZLR 149 (2008) 27 FRNZ 863 (16 September 2008) at [62].

235 *Crown Health Financing Agency v P* [2008] NZCA362: [2009] 2 NZLR 149 (2008) 27 FRNZ 863 (16 September 2008) at [78].

unsubstantiated allegations against medical staff.[236] Within that context, he held that if the legislature did not want the immunity provisions to extend to informal patients, then the legislation would have stated that.[237]

281. Justice Hammond also stated that if it had been the intention of the legislature that the immunity protection did not extend to informal patients, that would have been an incentive to mental health professionals to commit patients rather than treat them informally.[238] He went on to state that the only difference between committed and informal patients was that informal patients were at the hospital by choice. That was not a logical reason to draw a distinction in relation to the protection available to staff.[239]

B v Crown Health Financing Agency[240]

282. The final chapter of this litigation was the hearing of our appeal to the Supreme Court, which by that time was limited to whether the immunity in the Mental Health legislation applied to patients admitted for treatment informally.[241]

283. At Supreme Court level we were finally successful in arguing that the immunity provisions did not apply to informal patients after 1 April 1972.[242] The impact of this was significant. Most of the claimants we were acting for had been admitted as informal patients (because many were adolescents during their time in psychiatric hospital care). This meant that for all but a few of the psychiatric hospital claimant group, large proportions of their claims were no longer struck out. Even for committed patients, the impact of the Court of Appeal decision required the courts to examine each case individually, to decide whether the conduct was protected by the immunity provisions or not. For the first time in this litigation, the Crown Health Financing Agency was in the position of dealing with well over 300 claims.

284. Although the Crown was in a position of having to engage, as we explained in the Contextual Hearing, by the time of the Supreme Court

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236 *Crown Health Financing Agency v P* [2008] NZCA362: [2009] 2 NZLR 149 (2008) 27 FRNZ 863 (16 September 2008) at [143].

237 *Crown Health Financing Agency v P* [2008] NZCA362: [2009] 2 NZLR 149 (2008) 27 FRNZ 863 (16 September 2008), Ibid.

238 *Crown Health Financing Agency v P* [2008] NZCA362: [2009] 2 NZLR 149 (2008) 27 FRNZ 863 (16 September 2008(at [144].

239 *Crown Health Financing Agency v P* [2008] NZCA362: [2009] 2 NZLR 149 (2008) 27 FRNZ 863 (16 September 2008) at [144].

240 *B v Crown Health Financing Agency* [2009] NZSC 97: [2010] 1 NZLR 338: (2008) 27 FRNZ829 (17 September 2009).

241 *B v Crown Health Financing Agency* [2009] NZSC 97: [2010] 1 NZLR 338: (2008) 27 FRNZ829 (17 September 2009) at [4].

242 *B v Crown Health Financing Agency* [2009] NZSC 97: [2010] 1 NZLR 338: (2008) 27 FRNZ829 (17 September 2009). at [74].

decisions, two psychiatric claims had gone to trial.[243] Both claims had failed, yet again, due to the limitation defence succeeding.

The changing position of the CHFA

285. By April 2010, Crown Law advised the High Court at a Case Management Conference (CMC) before Justice Miller, for the first time, that it would not oppose Judicial Settlement Conferences (JSCs) being allocated as a means of resolving the psychiatric hospital claims without the necessity for trials.[244]

286. Cooper Legal attended only one JSC in the first half of 2011 for a client who had a joint claim against MSD and CHFA. From recall, Johnston Lawrence attended two JSCs for clients with claims against CHFA. Our recollection is that the JSC was an unsatisfactory process and did not result in an agreement at the time. It took several months of further negotiations for a settlement to be concluded.

287. Justice Miller held another significant CMC on 7 June 2011. Present at that CMC were representatives from Cooper Legal, Crown Law and Legal Aid, represented by Francis Cooke QC, who was directed to attend by Justice Miller. We speak more about this further in our evidence. Justice Miller encouraged CHFA to participate in a process for settling claims and encouraged Legal Aid to find an appropriate model for funding the necessary representation. In the meantime, Justice Miller recognised that JSCs might still be required in some cases.[245]

288. This CMC was beneficial to the claimant group, particularly because it reflected a change in attitude of the Court and was a message to the Crown from the High Court that it should be looking to settle claims and Cooper Legal should be funded to assist with this.

Psychiatric Hospital Claims: Settlement processes

289. Shortly after that CMC, on 20 June 2011, we received a letter from Crown Law on behalf of CHFA. In that letter, we were advised, out of the blue, that CHFA was in the process of preparing to make settlement offers to every plaintiff, which would include a modest *ex gratia* payment, along with a written apology and payment of any debt owing to Legal Aid. The purpose of the offer would be to allow the plaintiffs to finish their claims with an acknowledgment of their time in psychiatric hospital care and no debt owing for their legal expenses.

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243 GRO-B-K *v Crown Health Financing Agency* HC WN CIV GRO-B [16 November 2007] and *J v CHFA* HC WN CIV 2000-485-876 [8 February 2008].

244 This was at a Case Management Conference before Justice Miller on 15 April 2010.

245 Minute of Miler J, 8 June 2011.

At that stage it was hoped such an offer would be made before the end of the month, or sooner.[246]

290. We communicated this development to Legal Aid in a letter dated 30 June 2011.[247] By that stage, Katie Ross and Sonja Cooper had attended a meeting with the Chief Executive Officer of CHFA and the CHFA manager of the claims to discuss the offers. CHFA had originally intended to offer each client the same settlement sum. After discussion with us, CHFA agreed to potentially revise that decision to provide a band of offers on receipt of information from this firm (and Johnston Lawrence). We agreed, to that end, to provide information to CHFA identifying three categories of claims and the clients we identified as falling within those three categories – depending on the seriousness of their allegations, the age at which they were in psychiatric care and the length of time they were in a hospital/hospitals. We stated that this new position should now inform all funding decisions, including grants of legal aid and, more particularly, the withdrawal of legal aid.

291. At that early point, CHFA intended to make offers only to clients whose claims had already been filed in the High Court. Due to funding constraints, Cooper Legal had a number of clients whose claims had not been filed. We were looking at ways of addressing that issue, including obtaining limited funding to potentially file those claims.

292. By that stage, Roger Chapman had retired from Johnston Lawrence. Accordingly, the majority of psychiatric hospital claims from Johnston Lawrence were transferred to us to deal with as well. We were keen to engage with Legal Aid to arrange for funding to familiarise ourselves with the Johnston Lawrence files and engage with funding to settle the claims.

293. As we have already referred to, we did not know, at that stage, that Legal Aid had received telephone advice in November 2010 and again on 9 December 2010, in telephone calls from CHFA to Legal Aid, that CHFA was seeking the Minister's approval to make a global settlement offer to all existing psychiatric claimants.[248] The purpose of the second phone call, so it appears, was to ensure that the offers reached the individual claimants in the form they were presented. This information was not communicated to Cooper Legal by Legal Aid until many months later. Further, Legal Aid continued to withdraw funding during this period, including continuing to pursue the withdrawal of funding through LARP and the courts.

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246 Letter from Una Jagose to Cooper Legal, 20 June 2011.

247 Letter from Cooper Legal to Legal Aid, 30 June 2011.

248 Letter from David Howden, Senior National Specialist Adviser to Cooper Legal, 13 September 2011.

294. In a joint memorandum dated 28 June 2011, Crown Law and Cooper Legal communicated to the High Court that CHFA was soon to make a settlement offer to each plaintiff in respect of a hospital run by the Crown. For that reason, it was agreed that no further substantive steps would be taken in relation to the psychiatric hospital claims to enable the settlement process to progress. It was agreed, at the same time, that there would be no further JSCs for the DSW claims.[249]

295. Ultimately, we reached agreement with CHFA that the settlement process would comprise five groups of claimants, including those whose claims had had to be discontinued due to the withdrawal of aid process, and the ultimate decision of the Supreme Court. We were required to track down, as best as possible, former clients whose files had been closed for those reasons. By that stage, a number of clients had died. They were not covered by the settlement process. This exercise required considerable work by Cooper Legal (with assistance from Lisa McKeown at Johnston Lawrence).

296. Funding issues, which continued to be problematic during 2011, arose. As a consequence, there were many communications between Cooper Legal and Legal Aid. Following that, were several meetings involving Cooper Legal, Johnston Lawrence, Legal Aid, CHFA and Crown Law.

297. Not surprisingly, CHFA wanted certainty about its contribution to the legal aid debt owing. To advance matters, at a meeting on 22 September 2011, it was agreed that Legal Aid could talk directly to CHFA about what contribution would be required by Legal Aid to the legal aid debt. It was further agreed that Legal Aid would write to Cooper Legal about any additional costs (which had been refused by Legal Aid) and how those costs would be treated.

298. Funding issues continued.[250] During that period, we were informed that Legal Aid had at least one meeting with CHFA officials, if not more, in order to reach agreement on the fixing of the CHFA contribution to legal aid costs.[251]

299. The bundle of correspondence shows that our funding issues with Legal Aid continued right through the settlement process. In particular, Legal Aid constantly changed arrangements, making it difficult for Cooper Legal to have any certainty about whether we would be paid for the work required to undertake our legal obligations for clients in the process of settling claims. Because of our problems with funding to deal with the former Johnston Lawrence clients, ultimately CHFA

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249 Joint memorandum dated 28 June 2011.

250 We have included selected correspondence between 2 September 2011 and 14 March 2012 to illustrate this.

251 For example, refer to the letter from David Howden to Cooper Legal, 21 October 2011, which is included in the selected correspondence.

negotiated a direct arrangement with Cooper Legal to pay the fees for that client group, so that we could settle the 42-odd claims for that group.

300. CHFA made its formal offer to each claimant in January 2012. The offer comprised, in each case:

- an ex gratia payment to each claimant ranging between $2,500 (for those who had been forced to discontinue their claims) through to $18,000 at the top level; and

- payment of each claimant's legal aid and/or private fee debt; and a letter of apology.

301. As we stated in the Contextual Hearing, these offers were modest sums compared with other settlements, including those paid to claimants with DSW claims and, more particularly, compared with those who had received settlements from the Ministry of Health for abuse suffered in the Lake Alice Adolescent Unit, which we refer to later in this evidence. The payment of legal fees by CHFA was a significant achievement because, due to the Crown's approach to the claims, the legal fees had escalated and in a reasonable number of cases, were significant.

302. Our recollection is that the vast majority of the claimant group was satisfied with the outcome. For a significant number, the most important part of the settlement package was the letter of apology, as previously they had not had any acknowledgment that anything had been wrong with their treatment in psychiatric hospital care. We acknowledge that some clients, particularly those who had received settlement payments under other processes (including under the Lake Alice process which we refer to later in our evidence), felt that the payment in no way reflected the severity of the abuse they had been subjected to, mainly as adolescents in adult psychiatric hospitals. However, they, like so many of our clients, felt forced to accept the offers made to them, not only because of the length of time it had taken to reach any resolution of the claims, but also because of the potential cost implications (complicated by the withdrawal of aid process), that was still a very real factor.

303. By the end of the process, we had settled some 320 claims for clients of this firm, as well as former clients of Johnston Lawrence. A small handful of clients, mainly from Johnston Lawrence, refused to accept the offers made to them. To this day, we have no knowledge as to whether their claims ultimately settled.

CHAPTER 4

DSW CLAIMS: SETTLEMENT PROCESSES

- **Changing processes**
- **“Stuck” Claims and the Intractable Claims Process**
- **Rule 10.15 hearings**
- **The lead up to the Fast Track Process**
- **The Fast Track Process**
- **The lead up to MSD’s new process**
- **MSD’s new process**
- **The role of Oranga Tamariki**
- **Appendix A: The Claim of GGH**

DSW Claims: ADR Processes

304. Since its inception, the settlement process with MSD has been deeply flawed, changeable, and beset with delays.

305. Although we were forced to file the claims against MSD, we continued to advocate for an out-of-court process. We arranged for MSD to meet with a small number of our clients so that MSD could hear what clients wanted to resolve their claims and how the resolution process might be undertaken out of court.[252] On 12 September 2007 we sent an email to Crown Law, attaching a paper setting out a proposed ADR Process for dealing with these claims.[253] On 4 October 2007 we wrote to MSD seeking confirmation MSD would look at an out-of-court settlement process for the claims.[254]

306. In or around May 2007, MSD established an investigative unit, which it said was separate from Child, Youth and Family to examine claims.[255] On 10 May 2007, we wrote to MSD, saying we were concerned about how genuine MSD's intentions were in wishing to meet with our three clients, because their meetings had not occurred. We were concerned that the meetings were more about appearance than any desire to settle the claims.[256]

307. MSD responded to us on 20 December 2007.[257] The writer, Garth Young, wrote that:

> …we collectively need a way to move forward and to meet the needs of individual claimants as fairly and as promptly as possible.

308. Mr Young recorded that since May 2007, MSD had met with a small number of Cooper Legal's clients and they looked forward to advancing the claims as soon as possible. Mr Young proposed an alternative process for individuals to participate in, whether they had a filed claim or not, in order to determine whether their claim or grievance might be settled. The process was as follows:

    a) A claimant would meet with representatives of MSD to discuss their claim and the actions they wished MSD to take in respect of their claim;

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252 Letter MSD to Cooper Legal (client meetings), 12 March 2007, client names redacted; Letter MSD to Cooper Legal (client meetings), 5 April 2007, client names redacted.

253 Email from Cooper Legal to Crown Law, dated 12 September 2007.

254 Letter from Cooper Legal to MSD, dated 4 October 2007.

255 Press release, MSD, "Ministry will do the right thing in respect of historic claimants", 9 May 2007.

256 Letter Cooper Legal to MSD (DSW cases), 10 May 2007.

257 Letter to Cooper Legal from MSD, 20 December 2007.

b) MSD would work with the claimant, and counsellors required, to identify the current needs that they and/or families might have and to facilitate access to existing services;

c) If a client considered that MSD had any information or documents which the claimant did not have and which were relevant to their claim, they could request that material before proceeding with a meeting;

d) Following the meeting, MSD would investigate the claim and determine, as far as possible, the facts and how MSD would respond to the claim;

e) MSD would then respond to Cooper Legal, with a written summary of its investigation findings with proposals on how it considered the matters could be progressed;

f) The summary report would be without prejudice only if it included a settlement offer; and

g) MSD anticipated a subsequent meeting with the client and/or counsel to discuss the report and any issues arising and explore if and how a claim might be resolved.

309. The next day, Cooper Legal received a letter from Crown Law, responding to our email of 12 September, setting out a proposal for an ADR Process.[258] The letter advised of the establishment of what would become the Confidential Listening and Assistance Service ("CLAS"), which was similar in design to the Confidential Forum for psychiatric hospital patients. Crown Law noted that the Ministry of Social Development was not authorised to develop a completely alternative process for a number of claims where compensation was sought. The Government had instructed MSD that, while individual ADR will be a desirable option in some cases, it would not establish an alternative process to process claims. Where claims were filed, ADR options would be considered in each instance. Having said that, Crown Law went on to set out a proposal by MSD for the settlement of claims. It summarised the process already set out by Garth Young in his letter of the day before.

310. In response to Cooper Legal's proposed ADR Process, Crown Law identified three aspects that MSD did not agree to: the use of a panel on all claims, the lack of opportunity for staff or caregivers accused of assaults to respond to the allegations or have their evidence considered by the same person who was also hearing the plaintiff's evidence, and the requirement that material was provided in the process on a "without prejudice" basis, and could not be relied on in any court proceeding that followed. Importantly, Crown Law stated

[258] Letter from Crown Law to Cooper Legal, 21 December 2007.

that engagement in an ADR Process would not stop any Limitation Act time from running and MSD accepted that some claimants involved in the process who had not already filed claims may wish to file claims during the process. We responded to Crown Law on the same day, 21 December 2007.

311. On 14 January 2008,[259] Sonja Cooper responded to Garth Young at MSD. Sonja Cooper acknowledged that we had received a letter from Crown Law the day after Mr Young's letter, and we enclosed a copy of our response to Crown Law. There was one matter on which the parties disagreed, and that was the issue of whether any discussions would proceed on an open or "without prejudice" basis. We wanted to resolve that issue as soon as possible. We noted there were two clients for whom we were waiting for a response from MSD, and we noted that how MSD approached those two cases "will very much inform our view as to the bona fides of the Ministry in terms of resolving other clients' claims".

312. Several days later, we wrote to Legal Aid, advising Legal Aid of the progress in the ADR negotiations. We stated that it was a positive step and we hoped that it would increasingly start settling claims in the large client group.

313. It was not all plain sailing. By October 2008, we were unhappy at the way MSD was assessing claims. We were also unhappy at the level of compensation being offered to our clients.[260] Inevitably, Crown Law disagreed with us and we exchanged a number of letters about our views of MSD's processes.[261] Many of our concerns set out in those letters are the same concerns we have today.

314. As we have already stated, by April 2010, Crown Law advised the High Court at a CMC, for the first time, that it would not oppose JSCs being allocated as a means of resolving the claims without the necessity for trials.[262] At that CMC, Justice Miller observed that the Court was dealing with claims for people who had suffered harm under the care of the State. He observed that, to date, the limitation defences had held up, but that should not be an impediment to the parties trying to progress resolution of the claims.

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259 Letter from Cooper Legal to MSD (ADR Process) 14 January 2008.

260 Letter Cooper Legal to Crown Law (ADR meetings), 30 October 2008.

261 Letter Crown Law to Cooper Legal (meetings with plaintiffs), 11 December 2008; Letter Cooper Legal to Crown Law (meetings with plaintiffs), 15 December 2008; Letter Crown Law to Cooper Legal (MSD settlement process), 8 June 2009 [note this letter can not be found]; and letter Cooper Legal to Crown Law (MSD settlement process), 15 June 2009.

262 This was at a Case Management Conference before Justice Miller on 15 April 2010.

315. From that time on, matters that had been allocated for trials were set down for JSCs to address the possibility of settlement, prior to allocated fixture dates.[263] DSW claims started to settle.

316. We have also referred to the second CMC convened by Justice Miller on 7 June 2011. Justice Miller observed that the progress of the cases was being substantially affected by the existence of the large number of legal aid disputes. For that reason, Justice Miller sought to encourage all parties to settle on a protocol to identify and then bring on cases for trial and settle cases outside of court that should be settled. Specifically, Justice Miller directed that a further CMC would be held in December to address whether the parties had agreed on a protocol to explore settlement of cases outside of court. In the meantime, Justice Miller recognised that JSCs might still be required in some cases.[264]

317. This CMC was beneficial to the claimant group, particularly because it reflected a change in attitude of the Court and was a message to the Crown from the High Court that it should be looking to settle claims and Cooper Legal should be funded to assist with this.

318. In May 2011 MSD and Cooper Legal had signed the agreement to "stop time" under the Limitation Act for claims settling out of Court[265]. Legal aid was reinstated to claimants for this purpose.

319. When the settlement process first started, there were a series of meetings between MSD and Cooper Legal, often attended by Legal Aid representatives as well, to make sure we were all on the same page. A team within MSD, initially called the Care Claims Resolution Team ("CCRT") arranged to meet with each claimant, with a lawyer from Cooper Legal present, and to review their records. Because legal aid funding was slow to be re-established, there were not many claims in the very beginning[266].

320. For a short time, the meetings between the CCRT, survivors and Cooper Legal went reasonably well. However, the process rapidly became unmanageable as the claimant group grew. The process was also hampered by the delays in obtaining records for each client.

321. Notes from one of the meetings from November 2011, set out a timeline for what was called the old process, and then the "new five-step process".

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263 Minute of Miller J, 15 July 2010.

264 Minute of Miler J, 8 June 2011.

265 May 2011 Limitation Agreement between MSD and Cooper Legal.

266 Letter Crown Law to Cooper Legal (judicial settlement conferences in October and November 2011), 20 June 2011.

322. The new five-step process agreed between the parties was as follows:
   a) The full personal file of the client would be requested;

   b) Within one calendar month of the file arriving at Cooper Legal, a settlement offer was to be made to Crown Law, setting out the matters considered central to the claim, the amount claimed and the reason the settlement amount was considered appropriate;

   c) Within 8 weeks of receipt of settlement letter, MSD/Crown Law was to respond setting out its position. This could mean, at first instance, the request for a meeting so MSD officials could meet with the client and hear their story. If no meeting was considered necessary, this would mean the substantive response was to be made within 8 weeks;

   d) If a meeting took place, within one calendar month of the meeting, MSD and Crown Law was to follow through with a substantive response to the settlement offer by the plaintiff; and

   e) Cooper Legal would then respond with acceptance to the offer or note further steps to be taken.[267]

323. Not long after this process was introduced, meetings were phased out altogether. By 2013, virtually all claims were being dealt with by exchange of documents, with no face-to-face contact between our clients and MSD.

324. Of course, MSD continued to meet with unrepresented clients. It quickly became apparent to us that non-represented claimants were being progressed much more quickly than those people who elected to instruct a lawyer. This was denied by MSD for a very long time, but was eventually borne out in email correspondence with MSD in December 2017.[268] We raised our concern that MSD was already considering claims for people who had approached MSD directly as recently as May 2015, when we were still waiting for responses to claims for clients whose claims were made considerably earlier than that. We asked MSD to investigate it. In MSD's response, it was noted:

> We are not sure, as significant analysis would be required to determine this, exactly what has led to this disparity. However, one aspect is that until recently claims were categorised as either historic (pre 1993) or contemporary (1993 – 2007) and were managed and assessed by two different teams. We are now dealing with all the claims in one team and plan to take steps to address the disparity in allocation timeframes as quickly as possible. We will be maintaining a close focus on this issue to ensure that in future claims are allocated for assessment as fairly as

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[267] Meeting notes and draft documents from 25 November 2011, noting these are from a without prejudice meeting between Cooper Legal and Crown Law.

[268] Email chain between Cooper Legal and MSD, 13 – 19 December 2017, client name redacted.

possible irrespective of whether they are represented or have come to us directly or what time period they cover.

325. Because we had no visibility over people who went to MSD directly, we only ever had anecdotal evidence that their claims were dealt with more quickly. Having MSD confirm that this had occurred made us very angry on behalf of our clients. So many of our clients contacted us asking for updates and asking why their claims were taking so long. We have always been clear that, whether or not people choose to use a lawyer, MSD should deal with claims in the order that they come to MSD. We felt that people were being punished for instructing a lawyer, and this, combined with MSD frontline staff regularly telling our clients that they did not need to use a lawyer, made us feel that MSD was encouraging clients to stop instructing lawyers and deal with MSD directly. Of course, it should always be a client's decision about whether they use a lawyer, but to suggest their claim would be dealt more quickly if they did not, was coercive, especially for such a vulnerable client group.

326. Because lawyers from Cooper Legal had had the opportunity to interview clients before they met with the CCRT, we were able to help them present their whole experience to the CCRT. This was not the case for people who met with the CCRT and instructed Cooper Legal later in time. Often, we have seen interview transcripts from their meetings, where clients were cut off before they fully described their experiences or were told that they did not need to go into any detail of traumatic events.

327. Often, we read about, or heard, CCRT members, who were often senior social workers, indicate to clients that they accepted abuse had occurred, sometimes even apologising for their experiences. Further down the track, this often created distress and frustration to our clients and to Cooper Legal because later assessors at MSD either did not accept the allegation because insufficient information had been given during the interview, or, relied on a lack of documentary evidence to reject the allegation. An example of this kind of behaviour can be seen in the case of PC[269]. We wrote to Crown Law more generally about this in June 2013.[270]

328. Delay has been and continues to be an ongoing issue with the MSD process. We deal with the particular issue of records delays later in our evidence.

329. There are so many contributors to the delays in the settlement process with MSD, that it is difficult to marshal them into a single list.

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269 Letter from Cooper Legal to Crown Law (re PC), 9 April 2013, without prejudice except as to costs.

270 Letter from Cooper Legal to Crown Law (DSW claims – acceptance of allegations), 6 June 2013.

We have already dealt with the issues with records above, but other contributing factors include:

a) Rapid changes in process;

b) The increasing complexity of claims, particularly claims for people who were in care after 1989;

c) The introduction, and then failure of, processes designed to help with "stuck" claims, where the parties could not resolve key issues. This included the use of limited fact hearings and the introduction of the Intractable Process, which are addressed further below;

d) Policy decisions by MSD, in particular a policy where it elected not to settle with people it categorised as High Tariff Offenders, and the way it dealt with claims by people who later died, which are addressed further below;

e) Claims being caught between two processes, such as people who rejected offers under the Fast Track Process, and who were overlooked or not prioritised as a result; and

f) The involvement of the Ministry of Education as a second defendant, and the effect that that had on an individual claim.

330. In every single process implemented by MSD, our concerns regarding the transparency and thoroughness of the investigations have remained the same. This is especially so, considering that the Historic Claims Team ("HCT") has been and continues to be tasked with assessing its own Ministry's liability.

331. The advisors within the HCT have all been social workers for CYFS and/or its predecessor agencies at some point. They are drawn from the pool of social workers that have worked within the service line. MSD's way of managing this conflict has been to leave it up to the social workers to determine whether there might be a potential conflict and for them to then declare it. Given the gravity of the issues being considered and the fact of the social workers' experience irrespective of the quality of the social workers, it is a real concern to Cooper Legal that social workers are in charge of the MSD process. More recently, members of MSD's legal team have taken a greater role, but this does not make the process more transparent or more independent. Indeed, our view is that the addition of lawyers has made the process more inaccessible and based on legal propositions that are often flawed and self-serving.

332. As we have said, the HCT process has always been beset with significant delays which has caused further harm to clients. Even

before the FTP, we were regularly complaining about the delays in resolving claims. That has not abated. Currently, MSD takes about 4 years to respond to a claim.

333. The settlement offers made by the HCT, in cases where the allegations of abuse were accepted, were and continue to be low. Compensation ranges from around $1,150 to $80,000. Before the FTP, the average settlement offer made to a client was around $20,000.[271] We deal with the issue of compensation further on in our evidence.

334. One of the challenges with the settlement processes has been the lack of any independent avenues for settling disagreements about the settlement amount offered, or any other legal or factual disputes, other than a full court hearing. We have addressed some of the ways we have tried to resolve this, below. The lack of any review or appeal process outside of MSD limits the options available to our clients if they are made an inadequate settlement offer, or no settlement at all, and further exacerbates the power imbalance that exists between our clients and the Crown.

335. The three themes of transparency, accountability and independence are central to our complaints about the settlement processes with MSD, and indeed all the other Crown entities. In short:

a) None of the MSD settlement processes have been transparent, because MSD has routinely withheld information about how it assesses claims, what information it refers to when assessing claims, and the guidelines around assessing the quantum of a settlement offer;

b) The process is not accountable, because it is run inside the same department which has perpetrated the abuse, without any external or independent review facilities[272]. Further, with the Limitation Act 1950 on its side, MSD can largely be satisfied that it can resort to that defence if a claimant attempts to pursue matters in a court setting; and

c) The claims process is not independent. As set out in relation to accountability, MSD has a conflicting duty to protect its staff members and its reputation and is more likely to act in its own interests, rather than the interests of claimants. It also acts within the budget it is granted by the Minister of Social Development and the government of the day and is vulnerable to changes in political will and changing Government fiscal priorities. The lack

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271 Letter from MSD to Mike Wesley-Smith dated 21 July 2015, p4.

272 In July 2011, we were advised by MSD that there was no documented formula or set of criteria by which compensation was calculated: Email chain, MSD and Cooper Legal (CCRT question), 26 July 2011.

of independence means that the lack of transparency and accountability will endure.

"Stuck Claims": Rule 10.15 hearings and the Intractable Claims Process

336. The increasing number of "stuck" claims encouraged Cooper Legal and MSD to find ways to resolve them[273]. It was agreed between Cooper Legal and MSD that an independent, fact-finding process was required.

337. On 21 November 2013, Cooper Legal and MSD agreed the final terms of reference for an independent fact-finding process, usually referred to as the Intractable Claims Process.[274]

338. Fairways Resolution was contracted to provide these services in a reasonably formal way. An enormous amount of work went into finding adjudicators, who had sufficient skill and mana to carry out the work. Correspondence with Fairways Resolution reflects that Judge Vivienne Ullrich and Justice Ron Young both agreed to become adjudicators in the process.

339. The Intractable Claims Process, like every other settlement process for these claims, was affected by delays on the part of MSD. It was not until March 2015 that MSD agreed to the Judges' fees and Fairways Resolution was able to progress to the first hearing, which would be for Ms CC and her sister JB.[275] The final shape of the Intractable Claims Process reflected that four or five hearings would be held each year to determine stuck claims.

340. By early 2015, we were even more concerned about the number of claims which were stuck – in other words, there were one or more factual matters upon which Cooper Legal and MSD could not agree, which meant that the claim could not settle. These were usually significant factual matters, such as whether particular sexual abuse had occurred.

341. On 2 July 2015, MSD wrote to Cooper Legal[276] setting out a pre-requisite for the Intractable Claims Process which had not been envisaged by the terms of reference – that a claim was only intractable once it had been through a Judicial Settlement Conference. There were some clear problems with this approach:

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273 Letter Crown Law to Cooper Legal (model for progressing Intractable Claims), 3 September 2013, without prejudice.

274 Intractable Claims Process terms of reference, 21 November 2013, without prejudice.

275 Email from Fairways Resolution to Cooper Legal, 20 March 2015, without prejudice.

276 Letter from Crown Law to Cooper Legal, 2 July 2015, without prejudice.

a) Not all intractable claims had been filed in the Court, which was required before a JSC could be held; and

b) The history of these claims settling at JSC was not good, and where the parties had reached an entrenched position in terms of the facts, there was no precedent for MSD to shift on factual matters at any JSC we had been involved with.

342. Cooper Legal wrote to Crown Law with these concerns on 6 July 2015.[277] The letter set out recent examples of JSCs which had not resulted in a settlement, as well as other correspondence about stuck claims which could not be resolved at JSCs. Specifically, in relation to the Intractable Claims Process and the Ministry's new position, we observed:

> …The two processes are the complete antithesis of each other. A JSC is premised on the basis that the parties are willing to move in their respective positions, to achieve a settlement. The Intractable Claims Process, on the other hand, is premised on the basis that the parties are "stuck" on factual issues and need an independent fact-finder to determine those issues.
>
> In virtually all of the cases that are now "stuck", the central issues in dispute are factual disputes. We have been advised at the last two JSCs that your respective clients (the Ministry of Education and the Ministry of Social Development) place no weight on a plaintiff's allegations. Further, and of deep concern, your clients place no weight on "similar fact" evidence either. That being the case, the only proper forum for factual disputes to be resolved is through the Intractable Claims Process.

343. We expressed our concern that, having appointed two Judges to be fact-finders in this process, MSD was placing further obstacles in the way of actually using the process.

344. For the next two months, we had nothing but silence from Crown Law and MSD.

345. On 21 August 2015[278], MSD unilaterally brought the Intractable Claims Process to an end, before it even heard a single case. Rupert Ablett-Hampson, the Chief Legal Advisor at MSD, emailed us to advise that MSD would write to us about the Intractable Claims Process, but: "the issue at this stage is not so much whether the Ministry will sign the indemnity, rather whether the Ministry wishes to continue with the Intractable Claims Process. We are now able to see the full extent of the process and the resource commitment involved in preparing for and undertaking one of these hearings."

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277 Letter from Cooper Legal to Crown Law, 6 July 2015, without prejudice.

278 Email from Rupert Ablett-Hampson at MSD to Cooper Legal, 21 August 2015, without prejudice.

346. This came as an enormous shock to us, and to the clients who prepared briefs of evidence in advance of the first hearing. Just that day, we had made submissions in the High Court about how the Intractable Claims Process could provide a remedy to stuck claims. We were now left without a process altogether.

347. On 28 August 2015[279], MSD provided us with written notice that it was unilaterally withdrawing from the Intractable Claims Process. Mr Ablett-Hampson wrote:

> The Ministry declines to participate in the Intractable Claims Process. The Ministry does however remain open to alternative forms of resolving claims and avoiding litigation. The Ministry believe [sic] that the Fast Track Process will be an effective means of resolution. Judicial Settlement Conferences have also shown themselves to be a successful means of achieving settlement.

348. After nearly two years of work, MSD never engaged in the process at all. In addition, its assurance that the Fast Track Process would deal with these claims never came to fruition. All people who had received and rejected an offer by MSD were excluded from the Fast Track Process. This meant everyone who was considered to have a "stuck" claim was excluded from that process, because they had already received and rejected an offer.

Applications for "mini" hearings under Rule 10.15

349. Several of the stuck claims were for clients who had been at Campbell Park, a residential school for boys with intellectual disabilities or behavioural problems. To try and find a way through the stalemate, we applied for a limited hearing for several of the Campbell Park group, together with one other stuck claim which related to Kohitere. We thought if the Court could determine the factual matters we were stuck on, we could find a way to settle the claims.

350. This application was made under High Court Rule 10.15, which provides that the High Court may make orders for the decision of any question separately from any other question, for, at, or after any trial or further trial in the proceeding and the formulation of the question for decision.

351. We made the applications for a limited hearing on 27 May 2016.[280]

352. For each of the clients involved in this application, we identified specific allegations that the parties could not agree on, and which

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279 Letter from MSD to Cooper Legal, regarding Intractable Claims Process, 28 August 2015.

280 An example of this application is CIV-2004-285-0743 *GGH v Attorney-General*, Interlocutory application by plaintiff on notice for orders for a hearing on separate questions of fact, 27 May 2016, together with the memorandum of counsel for the plaintiff in support of the interlocutory application of the same date.

were barriers to settlement. We wanted the Court to hold a mini-hearing to determine whether the allegations were likely to have occurred. We noted that the wording of High Court Rule 10.15 was very broad and could include something like this. We also argued that taking this approach would give effect to High Court Rule 10.12, which provided that the objective of the High Court Rules was to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application. We noted that all other ADR options for these claims had been exhausted.

353. We made an application for a limited hearing for three claimants who had been at Campbell Park: GGH, PC and MLA. All of their claims had stalled. We note:

a) GGH had rejected an offer, and was excluded from the Fast Track Process;

b) PC had rejected an offer, and was also excluded from the Fast Track Process; and

c) MLA's claim was originally brought against MSD, but the defendant was later changed to MOE. His claim is addressed in more detail in Chapter 6 (MOE claims).

354. There were also two other plaintiffs for whom we applied for a limited hearing: BW and PM.

355. BW was a younger client, who had been in a particular CYFS Family Home. Another client, of a similar age who had been there at the same time, had already had his allegations rejected. We tried to have BW's claim dealt with under the Intractable Claims Process, but of course that process was not available. We wanted the Court to look specifically at BW's allegations about the identified Family Home.[281]

356. The situation of PM was different again. PM's claim had been filed since 2004. He alleged significant physical and psychological abuse at both Epuni and Kohitere. When MSD made an offer to settle his claim, it denied significant allegations made by PM, which substantially affected the amount of compensation he was offered. Because of this, PM rejected MSD's offer. A JSC had been scheduled for May 2013 but was abandoned. Shortly after that, an application for a limited fact hearing under Rule 10.15 had been filed. The application was due to be heard before Joseph Williams J on 21

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[281] CIV-2008-485-2140 *BW v Attorney-General*, Interlocutory application on notice by plaintiff for a hearing pursuant to Rule 10.15; CIV-2008-485-2140 *BW v Attorney-General*, Memorandum of counsel for the plaintiff in support of interlocutory application; CIV-2008-485-2140 *BW v Attorney-General*, Affidavit of Kerryanne Mai in support of interlocutory application by plaintiff for a hearing pursuant to High Court Rule 10.15, all dated 27 May 2016.

August 2013. Justice Williams adjourned the hearing and in a subsequent Minute dated 23 August 2013, His Honour directed:

> The plaintiffs' application for a r 10.15 hearing is adjourned by consent for one month to give the parties an opportunity to discuss building into the ADR Process a place for an independent fact-finder.
>
> If progress is not made, the plaintiffs' application will be heard.

357. As a result of Justice Williams' direction, the parties began work on the Intractable Claims Process. PM was one of the people who intended to have their claim heard in that process, but of course that never eventuated. Because of this, and because of PM's exclusion from the Fast Track Process, we revived the Rule 10.15 application which was still sitting in the Court.[282]

358. A further affidavit was also filed on behalf of the applicants on 29 November 2016, outlining why the Intractable Claims Process had failed.[283]

359. Our applications were due to be heard on 7 December 2016, and both parties filed submissions in advance of the hearing.[284]

360. When we appeared before Justice Ellis on 7 December 2016, we had extensive discussions about what we were trying to achieve by seeking a limited hearing on the issues of fact. We explained how all other avenues to settlement had been cut off, and in particular, explained how the Intractable Claims Process had never gone ahead. We acknowledged that the application was unusual, but we also strongly said that, without any other option, this was the best way forward for these particular claimants. We also discussed the merits of a full trial on these issues, particularly in relation to claims about Campbell Park School.

361. Justice Ellis issued a Minute the same day.[285] Her Honour adjourned the application and noted:

> … I do not intend to comment on the merits of the applications in this Minute, although they are undoubtedly unusual. It is clear, however, that steps need to be taken that facilitate the resolution (one way or another) of these claims. There are two obvious options in that regard. One is to reach an out of court settlement and it is

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[282] CIV-2004-485-744 *PM v Attorney-General,* updating memorandum in support of interlocutory application for a hearing pursuant to Rule 10.15, 27 May 2016.

[283] CIV-2008-485-2179 *PM & Others*, Affidavit of Rochelle June Harrow in support of interlocutory applications for a hearing pursuant to Rule 10.15, 29 November 2016.

[284] CIV-2008-485-2179 *PC et al v Attorney-General,* synopsis of submissions for the plaintiffs, 1 December 2016; defendant's submissions in opposition to application for Rule 10.15 hearing, 5 December 2016.

[285] CIV-2004-485-744 *PM & Others v Attorney-General,* Minute of Ellis J, 7 December 2016.

> that outcome at which the r 10.15 applications are, rightly or wrongly, aimed. The other is to put some or all of the claims on the trial track and to make directions accordingly.

362. Justice Ellis recorded that whichever course was pursued, it was apparent that formal discovery would first be required. It was agreed that before determining the applications for a limited hearing, discovery would be conducted and the parties would consider at least some of the intractable cases going to trial. We were directed to advise which of the five claims, either separately or in a group, were most suitable for a trial in the last quarter of 2017 or early 2018, and what discovery was required.

363. We subsequently settled on a Campbell Park trial, and after some reflection, a further claimant, ABM, was added to the trial group. This was so the claimants covered each decade of Campbell Park School's operation. We hoped that any findings out of the trial could be applied to people who had been there in similar timeframes to the plaintiffs. Later, MLA settled his claim with MOE after a JSC.

364. At this point in time, all of the other claims in the Campbell Park group had only ever been progressed against MSD. We provide more detail about the reasons for this in Chapter 6, where we deal with the MOE claims.

365. On 22 June 2016, Crown Law wrote to us in respect of GGH and PC. The Crown Lawyer stated:

> The claims of [GGH] and [PC] relate in part to alleged events while the plaintiffs were admitted to Campbell Park School/Otekaike. The Ministry of Education was responsible for this school.
>
> The statements of claim for these plaintiffs name the defendant (relevantly) as the Attorney-General on behalf of the Department of Social Welfare. We note that amended pleadings will be required in due course identifying that the Attorney-General is also a defendant in relation to the Ministry of Education[286].

366. By that time, the proceedings for GGH had been on foot for 12 years, and PC for 8 years. This was the first time Crown Law had identified that the Ministry of Education could also be a defendant. We had to amend each statement of claim to include the Ministry of Education as a second defendant, and then we got discovery from the Ministry of Education as well.

367. The joining of MOE to these proceedings had both advantages and disadvantages. We note:

    a) The discovery received from MOE was extremely valuable in strengthening each plaintiff's claim;

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[286] Letter from Crown Law to Cooper Legal regarding GGH and PC, 22 June 2016.

b) Limitation Act issues arose in respect of the Ministry of Education, because, due to the understanding of our office and the claimants that MSD ran Campbell Park School, the claim against MOE could be held to be out of time, because it had been joined so much later;

c) It later transpired that involving MOE would seriously delay resolution of the claims, because MOE did not have a proper process in place to investigate claims; and

d) This would be one of the reasons why Crown Law raised what we have called the "Indivisible Crown" argument several years later. We will return to this further, below.

The lead-up to the Fast Track Process

368. The concept of the Fast Track Process ("FTP") was clearly being considered towards the end of 2013 by MSD, in order to address the growing number of claims that remained unresolved.

369. On 18 October 2013, Katie Ross and Sonja Cooper met with MSD officials, including David Shanks (then Deputy Chief Executive), Allison McDonald and Garth Young (by then, Chief Analyst, Historic Claims). At the meeting, we were advised that MSD had been considering the process to address the growing backlog of claims and settle them more quickly. This was called the Accelerated Process ("AP"). Later, the entire process became known as the Two-Path Approach, or 2PA, to reflect that a client had the option of either the Fast Track or the full investigation. We were advised that the process would require a less detailed and a more presumptive approach to the allegations. MSD advised us that we would be in control of categorising our clients into a number of bands or categories of abuse, which would have associated settlement amounts.

370. At the outset, we flagged a range of concerns, including that the process was not adequately funded. We explain this further on in this brief of evidence. Nevertheless, we agreed to cooperate with MSD, as it seemed in the best interests of a significant number of our clients to do so. At that point in time, Cooper Legal had some 180 outstanding offers that had not yet been addressed by MSD.

371. On the same day of the meeting, David Shanks wrote to Cooper Legal. He enclosed a bound document which included statistics from previous settlements and a draft "flowchart" of the proposed settlement package, including an estimate of the total compensation

payable under the AP and a draft of the categories.[287] For the first time, it became obvious to Cooper Legal that MSD was already reasonably well-advanced in its preparation of the implementation of the AP. Its intention, then, was to have at least two-thirds of the outstanding claims settled under this process by June 2014.

372. In the meantime, a significant amount of work was undertaken by Cooper Legal staff. We held a number of staff meetings and the claims were analysed. We proposed a system with more categories, as well as more distinct definitions of abuse that would fall within each category, using the Crimes Act as a guide to categorising the severity of different types of sexual abuse, particularly, to better reflect the variations in, and complexities of the abuse suffered by our claimant group.

373. Further meetings took place in November and December 2013. At the November meeting, it was agreed that Cooper Legal would assess 150 claims and determine the category each would fall into within the categories set out in the draft flowchart.[288] Prior to the December meeting, David Shanks confirmed that the AP would be an opt-in process for Cooper Legal clients, advising that those who did not want their claims assessed in this way would continue to have their claims assessed under the current process. By that stage, we had proposed our own AP categorisation, which MSD was reviewing.[289] We were advised that MSD intended to make offers direct to clients on 1 March 2014.[290]

374. In the December meeting, considerable discussion centred around whether social work practice failures would be included in the AP categories. We observed that if practice failures were included, more clients would be included in the AP, although the process would be somewhat more complex.

375. Meetings continued in 2014. In a meeting on 16 January 2014, we pointed out, very strongly, that the fiscal envelope sought and obtained by MSD was based on incorrect information and therefore was likely to be insufficient. In particular, we pointed out that because the fiscal envelope was based on past settlements in which many of the more serious allegations were rejected, there would be insufficient funding for a process in which allegations were to be accepted, subject to basic fact checks.

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287 Letter and attachments from David Shanks, MSD, to Cooper Legal regarding the Accelerated Process, dated 18 October 2013.

288 Draft agenda for meeting between Cooper Legal and MSD, 26 November 2013.

289 Accelerated Process categorisation proposal by Cooper Legal, December 2013.

290 Letter from MSD to Cooper Legal, 3 December 2013.

376. At this meeting, for the first time, we were advised that MSD was likely to make an offer to every client, rather than require them to specifically "opt-in". We were concerned about this, stating that impecunious clients were likely to accept offers that would not be reasonable.

377. On 17 January 2014, MSD provided us with a revised draft of the AP categories and the fiscal envelope for the AP, based on MSD's incorrect prediction of the spread of clients over the categories.[291] This spread was a bottom-heavy bell curve, with very few claimants at the higher end. Under the categories then proposed by MSD, a number of claimants were to receive nothing at all.

378. The data provided by MSD did not reflect the expected spread Cooper Legal had predicted. Specifically, Cooper Legal had identified significantly more clients in the higher categories.

379. Following further discussions about these issues, Cooper Legal undertook a test assessment of just over 180 claims. That test confirmed that the spread of categories would be significantly different than that predicted by MSD. Accordingly, on 21 February 2014, Sonja Cooper wrote to MSD attaching the firm's analysis of where the assessed claims would fall, based on the proposed categories.[292] Only two categories matched MSD's figures, namely the top category (category 1) and one of the lower categories (category 4).

380. There was a further meeting following that letter on 28 February 2014. At this meeting, we discussed the constraints of the fiscal envelope. Attendees from MSD set out, for the first time, that there might be a need to moderate or scale the categories and once this was done apply the dollar terms. Cooper Legal said this was an unacceptable approach. The MSD representatives referred to the need for "trade-offs", confirming that the fiscal envelope for the AP was fixed and the rest of the funds available were to be used for the ordinary process.

381. In March 2014 MSD stated it would undertake its own testing of the draft AP categories against the same cohort of clients as Cooper Legal.[293] This process was undertaken.

382. In June 2014, Cooper Legal was advised that MSD's results were very similar to those generated by Cooper Legal, with more clients in the top levels than MSD had sought funding for.[294] We were told that MSD needed to go back to the Steering Group overseeing the work and the relevant Ministers.

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291 Revised draft of AP categories, MSD, 17 January 2014.

292 Letter from Cooper Legal to MSD regarding AP, 21 February 2014.

293 Letter from MSD to Cooper Legal regarding AP, 10 March 2014.

294 Email from Rupert Ablett-Hampson, MSD, to Cooper Legal regarding AP, 3 June 2014.

383. In spite of our requests for a further meeting, nothing eventuated. Instead, on 25 July 2014 MSD presented us with the process.[295] At that stage, we were informed that categorisation would be undertaken by this firm. The process would cover all clients for whom Privacy Act requests had been made up to, and including 28 February 2014, but excluding Whakapakari claims. There would be a brief fact check. Categorisation would be subject to the boundaries of the specified fiscal envelope. MSD would continue to meet any legal aid debt as part of the settlement. We were specifically advised that, in order to fit the offers within the fiscal envelope, some claimants would need to receive offers in a category which was not the category that we (or MSD) would want to place them into. We were told this was a "pragmatic and balanced approach to resolving the claims".

384. We were very concerned. On 30 July 2014, Sonja Cooper requested further information and advised that Cooper Legal would not be signing any agreement in relation to the proposed AP, until our concerns were addressed.[296]

385. On 5 August 2014, Cooper Legal was sent a draft agreement, reflecting MSD's terms for the proposed AP.[297] This was reviewed by Cooper Legal staff and a number of problems were identified. These problems included the fact that the process no longer appeared to be an opt-in process but would be rolled out for over 500 clients of Cooper Legal. We also raised concerns about the inadequacy of the fiscal envelope, the inadequate category descriptions, as well as MSD's proposed fact-checking exercise. We specifically raised concerns that clients with Bill of Rights Act claims appeared to be covered by the AP process, with no allowance being made for that.[298]

386. We were deeply concerned about the category definitions, about which there had been much discussion. We observed that the category definitions had not changed at all and we were "back to basics" despite the progress we thought had been made at earlier meetings.

387. In the face of our objections, by letter dated 19 September 2014, we were told that MSD would be proceeding to implement its process.[299]

388. There were subsequent communications between Cooper Legal and MSD. The parties were unable to reach agreement. By the end of 2014 it was agreed that discussions would continue in 2015, as there were still aspects of the process which had not been resolved.

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295 Letter from MSD to Cooper Legal, regarding two-path settlement process, 25 July 2014.

296 Letter from Cooper Legal to MSD regarding 2PA, 30 July 2014.

297 Email from Rupert Ablett-Hampson, MSD, to Cooper Legal regarding 2PA, 5 August 2014.

298 Letter from Cooper Legal to MSD regarding 2PA, 11 August 2014.

299 Letter from MSD to Cooper Legal regarding 2PA, 19 September 2014.

389. On 18 December 2014 Cooper Legal wrote to Minister Anne Tolley raising concerns about MSD's delays in responding to the claims brought by Cooper Legal clients.[300] We referred to the AP, which we called a Settlement Process, stating that the process was flawed in fundamental ways and it was significantly under-funded.

390. On 9 February 2015, without any prior warning to Cooper Legal, the then Minister Anne Tolley stated, during a radio interview, that MSD would be announcing a new process to fast-track claims in two months' time. Cooper Legal immediately wrote to MSD, expressing our concern at this announcement, particularly as we had still not reached agreement about the AP.[301] Further communications ensued.

391. On 7 May 2015, MSD advised Cooper Legal that a public announcement was being made that morning, namely that MSD was implementing a two-path approach (accelerated and non-accelerated), for all claimants with claims brought to MSD prior to 31 December 2014.[302] A press release from Anne Tolley was attached. In fact, Ms Tolley was being interviewed by Radio New Zealand, at the same time this letter was emailed through to Cooper Legal.

392. On 8 May 2015, Cooper Legal sent an Official Information Act request to MSD and the Minister's Office, asking that Cooper Legal be provided with all information relevant to the FTP. It is fair to say that MSD resisted providing this firm with information, including asking us to narrow our request because of the number of documents held. These communications continued between May and August 2015.

393. On 28 August 2015, MSD provided a small amount of material in response to the Official Information Act request. Information about the categories had been heavily redacted, making the categorisation impossible to decipher.[303]

394. In light of that, Cooper Legal engaged in further communications with MSD, asking questions about the information provided by it.[304] Communications between MSD and Cooper Legal continued between August[305] and November 2015. Cooper Legal also made an urgent

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300 Letter from Cooper Legal to Minister Tolley, 18 December 2014.

301 Letter from Cooper Legal to MSD regarding 2PA, 19 February 2015.

302 Letter from MSD to Cooper Legal regarding 2PA, 7 May 2015.

303 OIA Response from MSD (2PA), 28 August 2015.

304 Letter from Cooper Legal to MSD re FTP, 31 August 2015; and

305 Letter from MSD to Cooper Legal re FTP 17 September 2015. See also ongoing correspondence about the operation of the FTP between Cooper Legal and MSD up until the filing of the judicial review proceeding.

complaint to the Office of the Ombudsmen about the FTP approach.[306]

395. We were so concerned by the flawed approach of the FTP that we also wrote to the Special Rapporteur on Torture on 1 October 2015.[307] We wrote that we were concerned that the implementation of the Two Path Approach (the name given to the two options of either the full investigation or the FTP) was contrary to the obligations of the New Zealand Government and in particular MSD, under the United Nations Convention Against Torture. In particular, the 2PA did not provide an impartial investigation and examination into allegations of torture, and it did not provide victims with fair and adequate compensation.[308]

396. Frustrated by the continued lack of cooperation on the part of MSD, Cooper Legal issued judicial review proceedings on 9 October 2015[309]. In the statement of claim, Cooper Legal sought a declaration that MSD's decision to implement the FTP was invalid. We asked that the FTP be quashed or set aside. We also asked for an order that MSD adequately consult with Cooper Legal in order to implement a process that was workable and that all parties agreed could be implemented.

397. It was not until we received the Crown's evidence, that we realised the FTP MSD was implementing was different, again, from that which had been discussed with us in our earlier meetings.

398. In particular, we were alarmed to see that the FTP would no longer include: those whose claims were already under assessment; those who had a sibling whose claim had previously been settled; and those who had previously rejected or failed to respond to a settlement offer.[310] This was significant, given the unilateral withdrawal from the Intractable Claims Process described in this evidence.

399. For the first time, we received fulsome information about the categories, including the range of payments and the descriptors for each category.[311] We were also provided information about the "moderation process" that had been discussed in earlier meetings.[312]

400. Using this information, in February – March 2016 we reviewed the claims of each client who appeared to be eligible for an FTP offer to

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306 Letter from Cooper Legal to the Office of the Ombudsman (2PA), 21 September 2015.

307 Letter from Cooper Legal to Special Rapporteur on Torture, 1 October 2015.

308 Letter by Cooper Legal to the Special Rapporteur on torture, 1 October 2015.

309 Statement of claim, 9 October 2015 and affidavit of Kerryanne Mai in support of application for judicial review

310 Affidavit of Ines Gessler. Affirmed 14 December 2015, para [12.2].

311 Affidavit of Ines Gessler. Affirmed 14 December 2015, para [12.3].

312 Affidavit of Ines Gessler. Affirmed 14 December 2015, para [22]-[30].

determine whether they should opt out of the FTP, and if not, what level of compensation they could expect. After an analysis of the facts of their claim as against MSD's categories, we then wrote to each client covered by the 2PA to advise them to either opt out of the FTP, or to remain within the process. Many clients took our advice and opted out of the FTP. They were mostly our younger clients, who had additional claims under the New Zealand Bill of Rights Act 1990, and clients who had claims heavily based on practice failures.

401. Assessing the claims in this way was a difficult task, when we did not have complete information about the FTP, and processes like the moderation conducted by MSD meant that the results may not match up with our advice. We also did not know how MSD would treat any particular scenario – for example, whether unlawful use of a Secure Unit would be treated as a false imprisonment, or as a practice failure. This remains a contentious issue today.

402. The judicial review was heard by Justice Gendall on 9 May 2016. Justice Gendall had been involved with the claims for many years through his management of the psychiatric hospital claims as an Associate Judge.

403. We received the decision of the High Court on 3 June 2016.[313]

404. In short, the High Court held that the FTP was not reviewable by the Court. Particularly, the High Court found that the decisions made by the Executive about the FTP were non-justiciable because they related to management of the legal claims and the resource allocation required to resolve the claims.[314] This was in spite of the fact that MSD acknowledged that it had not sought sufficient funding for the process and that the Minister had not been told that MSD's calculations were flawed.

405. Once again, the claimants were left without a legal remedy in respect of an unfair process.

Fast Track Process: Implementation

406. With the judicial review concluded, MSD moved quickly to implement the FTP for our clients. This was confirmed in a letter from MSD dated 20 July 2016.[315] This letter noted that offers would also be prepared for people who had opted out of the FTP, in order to preserve the moderation process that MSD was using. We thought this was coercive and bullying, because it went against the direct wishes of the claimants involved.

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313 *XY v Attorney-General* [2016] NZHC 1196 [3 June 2016].

314 *XY v Attorney-General* [2016] NZHC 1196 [3 June 2016] at [38]-[39].

315 Letter from Crown Law to Cooper Legal dated 20 July 2016 regarding Fast Track offers.

407. Once we had received instructions from clients as to whether they wanted to be a part of the 2PA, we communicated their instructions to MSD.

408. On 8 September 2016, we received notification from MSD that offers would be made to our clients under the FTP by Friday 16 September 2016, while Sonja Cooper was in Geneva attending the United Nations review of New Zealand's compliance with UNCROC.[316] In this letter, MSD changed its position in several respects:

    a) It decided not to exclude claimants who had a sibling whose claim had been previously settled through the full investigation;

    b) FTP offers would not be made to High Tariff Offenders ("HTO"). This policy is dealt with in Chapter 5 of our evidence. MSD stated that it was still in the process of finalising its position, but HTO claims had been assessed and moderated to enable offers being made once the policy had been finalised;

    c) Claimants who had separate proceedings before a Court tracking to trial against another entity, but which related in whole or part to the same facts, would not receive an FTP offer.[317]

409. MSD's letter attached a schedule of claims where FTP offers would be made. There were 262 names on that schedule. It also attached a second schedule of names for whom FTP offers would not be made for the reasons set out above. There were approximately 56 names on that list.

410. On 16 September 2016, late on a Friday afternoon, MSD hand-delivered 262 individual offers of settlement to our office. We immediately set about the task of analysing each offer and providing our advice to the individual clients. For an office which usually dealt with five or six offers at any time, it was an enormous undertaking.

411. It took us most of October and November 2016 to send out our advice to clients. In the course of our work, we identified a group of clients who had previously been on the list to get an FTP offer, but who were not there any longer, as well as some new names on the list. We were also able to identify a tranche of clients who had received unusually low offers under the FTP.

412. As we had said all along, there were several key issues with the offers made under the FTP. They were:

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316 Letter from Crown Law to Cooper Legal re FTP, 8 September 2016,

317 This largely related to the plaintiffs in the *Anderson v Hawke* litigation.

a) The level of compensation in the offers had been moderated to fit within a bell curve, which reflected insufficient funding. On the whole, most offers were lower by at least one category than we expected them to be;

b) Practice failures were not taken into account under the FTP. This meant that there was no additional compensation for serious social work failures, such as the failure to respond to a complaint of abuse or returning a young person to an abusive placement after a complaint had been made (or substantiated). There was nothing in the compensation to acknowledge the further abuse which occurred as a result of the failure, which was a significant aggravating factor;

c) The categories of compensation did not make any provision for additional compensation for breaches of the Bill of Rights Act 1990. This disadvantaged people who were in care after October 1990. It seemed terribly unfair that MSD would not take any account of such a fundamental human rights document, even when there were clear breaches of our clients' rights under the Bill of Rights Act; and

d) The FTP offers reflected MSD's position that it was not liable for section 396 providers. This meant that many people who had been at Whakapakari, Moerangi Treks or Youthlink Family Trust received offers of $5,000, because MSD said it was not liable for the things that happened to them in those programmes, even though MSD approved and controlled the programmes and had legal responsibility for the child or young person while they were in the care of the s396 provider. While we strongly advised those clients not to accept such low offers, several of them chose to accept the settlements – and regretted the decision later.

413. The top payment under the FTP was $50,000. Only a very small number of people received offers of that amount. In contrast, there were a very large number of offers between $5,000 and $12,000.

414. The FTP produced inequities amongst the claimant group. This was despite MSD's statement, which has changed little over the years, that it seeks to be consistent in the way that it treats claims against it.

415. The treatment of claims by younger people who had been in section 396 programmes presents the starkest contrast. In 2014/2015, we had been proceeding towards a trial for three plaintiffs who had all been in a range of placements, but who had a placement at Whakapakari as a common denominator. There was a great deal of documentary evidence about Whakapakari, and complaints had been made to CYFS about the programme as early as 1994. MSD allowed

the programme to continue until 2004, despite there being no discernible improvement in the conditions or staffing at the programme. Most young people placed at Whakapakari were either in the custody of the Director-General of CYFS pursuant to Family Court orders or were sent there under supervision with activity orders made by the Youth Court.

416. The four plaintiffs who were being tracked to a trial all settled their claims for between $60,000 and $90,000, together with a contribution to their legal costs.

417. As we have said, some clients who had been in the same situations as the trial plaintiffs, received offers of $5,000 in full and final settlement of their entire claim from MSD under the FTP. Some were so desperate for money, that they accepted those offers against our strong and repeated advice not to do so.

418. The FTP was a "one-off" process, designed to reduce the backlog of claims at MSD. It did nothing to fix the broken settlement process in place for the hundreds of other people who were not eligible for an FTP offer. As will be addressed below, it has also created further problems for people who rejected FTP offers and elected to have their claims investigated under MSD's full process.

419. Because of the immense delays in settling claims, we had lost contact with some clients who had been made FTP offers. We did our best to locate them, but a small number could not be found. In March 2017, MSD also tried to locate the remaining people, and sent us a letter saying that if they could not be found, MSD would apply to have their filed claim discontinued.[318] We were very unhappy about this and made that clear to Crown Law. In the end, it never eventuated.

Settlement of claims for people who did not settle under the FTP

420. A considerable number of people (nearly 100) either opted out of the FTP or rejected the offer made to them under the FTP. There were two other groups of survivors who would be dealt with together with these people: those affected by the HTO policy, and those who had FTP offers withheld because they were involved in litigation about their time in care.[319] There was also a group of people who had expected to receive an FTP offer, but were excluded from the 2PA because they had already been made an offer and had rejected it.

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[318] Letter from Crown Law to Cooper Legal, outstanding offers from the 2PA, 30 March 2017, without prejudice save as to costs.

[319] The latter group were six people who were actively pursuing litigation against the Manager of a care facility, and the care facility itself, and whose claims against MSD were not settled under after the litigation had concluded. Although that litigation concluded through settlement, it is referred to extensively throughout our evidence as the *Anderson v Hawke* litigation.

This was the case for clients like GGH, for whom we have done a case study.

421. Because the FTP was designed to deal with the oldest outstanding claims, it was our expectation that this group of people would be given priority in the full investigation process.

422. What we found, however, is that settlement of these claims became extremely problematic.

423. To demonstrate the number of people caught by this group, it is useful to refer to a table sent to us by MSD on 12 March 2018[320]. This was a list of claims lodged with MSD prior to 2015, in date order. It did not include anyone who had accepted an offer under the FTP, although some would later receive offers when the HTO policy (discussed in more detail in Chapter 5 below) was overturned. There are 119 names on the list, and the earliest claim there was lodged with the Ministry on 15 April 2004.[321] Many of the claims were listed as "allocated", meaning that they had been allocated to an investigator to be progressed. Our previous experiences with MSD led us to believe that allocating a claim meant that investigation would shortly follow. For this group, that was not the case.

424. The early allocation of claims gave claimants an unrealistic expectation of when MSD would respond to their claim. These expectations were increased by MSD often setting a timeframe for a response, but then not meeting its own self-imposed deadlines. Examples of this are traversed in other parts of this evidence, but by 2019, MSD was no longer providing timeframes, because it was unable to meet any that it had previously set. We had also developed a practice of warning our clients that MSD was unlikely to meet any timeframes it had previously set.

425. It became clear to us that MSD had prioritised several other activities over these oldest claims:

    a) An exercise in consultation with Maori, in response to the Waitangi Tribunal proceedings filed in 2017, and its engagement programme with Maori which resulted in some proposed changes to MSD's settlement process; and

    b) Adoption of a new settlement process, which occupied a great deal of MSD's time and which has overtaken the full investigation process being used on the older claims. MSD

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320 Email from Christy Corlett, lawyer from MSD attaching table of open claims, 12 March 2018, without prejudice.

321 See case study for GGH.

was also settling claims for people who were not legally represented, and this appeared to take precedence over legally represented people.

426. We repeatedly expressed our concern about the delays in dealing with what became known as the "FTP washup group". One of the stipulations by MSD for its new process, was that claims which had already been allocated for investigation would be dealt with under the old full investigation process. While we were comfortable with that, our expectation that these claims would receive priority was not met.

427. On 22 August 2019, we wrote to MSD about the FTP washup group. We were concerned that MSD was so focused on its new process, that it was overlooking these clients.[322] We noted that, of the original list provided by MSD in March 2018, around 41 people on the list still had open claims with MSD.[323] We wrote that we were highlighting these people because it appeared that MSD had forgotten about them and moved on to its new process. We asked that MSD outline for us, in some detail, how the claims were being dealt with and when we could expect a response. We noted that several people, such as ASC and CG, were promised responses by MSD a long time ago, but nothing had eventuated.

428. We received a response from MSD on 4 September 2019.[324] MSD's representative stated:

> We acknowledge that we haven't been able to progress these offers as quickly as we might have liked to, but please be assured that we have not forgotten these cases and they are being progressed as well as those being considered under the new process. For most of the group you have indicated, we have substantially completed their assessments and we are in the final stages of finalising our response. These stages include considering payment, drafting response letters, obtaining advice from the MSD legal team and Crown Law and obtaining sign-off from our Deputy Chief Executive.

429. We have continued to raise concerns that these claims, some of them well over a decade old, are not given the full focus and resourcing of MSD that they should have. We understand that there is now a separate team dealing with the FTP wash-up group, alongside other claims being progressed through MSD's new process. In our view, the wash-up group should receive priority, and not run parallel to other claims.

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322 Letter from Cooper Legal to MSD regarding FTP washup group, 22 August 2019, without prejudice.

323 At the time of preparing this brief of evidence, offers had been made for several people in that smaller group, but only two have accepted the offer made to them.

324 Email from Vanessa Withy, MSD, to Cooper Legal on 4 September 2019, without prejudice.

430. While only a few of the FTP wash-up group have received offers of settlement from MSD, the offers have been very problematic. It is useful to review how badly the full investigation process treated (and continues to treat) these claims, before we address MSD's new process.

Examples of ongoing issues with MSD "full investigation" process

431. The following are examples of consistent issues we experience in dealing with MSD through the claims process:

a) MSD consistently denies allegations made by male clients particularly, about being assaulted in residences due to a lack of appropriate supervision, on the grounds that there is no evidence showing a lack of supervision, or that staff members condoned the allegations made by the claimant.[325]

b) MSD refuses to accept that detentions in the Secure Unit without appropriate legal status comprise false imprisonments, often labelling such detentions as practice failures which effectively minimise any compensation.[326]

c) MSD routinely denies that children were placed in the Secure Unit, on the basis there is no evidence of such placement.[327]

d) MSD will not accept allegations of initiation beatings by other residents, staff endorsement of the 'no narking' policy, or the use of alcohol or drugs at residences on the basis of there being no evidence and/or staff would not have tolerated that conduct.[328]

432. MSD's reasons often change, although offers remain the same. For example, in relation to GCT, MSD initially denied liability for GCT's placement in the Secure Unit at Lookout Point pursuant to a s11 agreement, on the grounds that the s11 agreement provided some form of legal status authorising his detention.[329] In the response to our letter refuting this, MSD stated that although GCT was lawfully detained within Lookout Point, it was a practice failure to place him in Secure while he was under a s11 agreement.[330] In a more recent letter, MSD claimed that a s11 agreement gave the same powers as if GCT was subject to a guardianship order, which included the power

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325 Without prejudice save as to costs offer from MSD to GCT dated 14 August 2018, para 6 and 26.

326 Without prejudice save as to costs offer from MSD to GCT dated 14 August 2018, paras 11 – 12.

327 Without prejudice save as to costs offer from MSD to GCT dated 14 August 2018, para 19.

328 Without prejudice save as to costs offer from MSD to GCT dated 14 August 2018, para 27.

329 Without prejudice save as to costs offer from MSD to GCT dated 14 August 2018, para 11.

330 Without prejudice save as to costs offer from Crown Law (MSD) to GCT dated 27 September 2019, paras 14-16.

to place GCT. On that basis, MSD argued that GCT could be lawfully placed in any residence, including Secure.[331]

433. MSD then said that because GCT was lawfully detained, the subsequent time spent in Secure was not a false imprisonment but was a practice failure (although how it was a practice failure is not explained).[332]

434. We observe, in that regard, that a circular was sent to all residence managers in February 2017 by the then Director-General, stating that a legal opinion had been obtained from a QC to the effect that the legislation did not authorise the detention of children in Secure who were subject to s11 agreements. Residence managers were directed that no children under such agreements should be placed in Secure. GCT was placed in Secure after that circular. We have challenged Crown Law and MSD to explain why the QC's opinion is wrong.[333] To date we have received no response.

435. It is our view, in any event, that this analysis is legally flawed. While a guardianship order may have provided sufficient authority to place a child in a residence, a s11 agreement is quite a different context and did not provide such authority, not only because it was a voluntary arrangement, but also because it could be revoked at any time. In our view, this is directly analogous to the informal patients' issue we faced with the MOH claims. The point of this, however, is to reflect how MSD will constantly shift in its positions to maintain a legally untenable decision affecting quantum and settlement.

436. The case of TW is another example of the unsatisfactory way in which MSD processes claims.

437. For example, MSD did not accept an allegation that it failed to provide social work input to TW and his family between 1975 and 1981. We had said TW first came to notice in March 1978, not 1975. We observed that the social worker had prepared a report, stating that TW's family and home background was poor, and that TW was not supervised. MSD did not accept that the report indicated some social work support should have been provided.

438. We also referred to correspondence with DSW in relation to TW needing protection from "frequently unprovoked violence" by TW's mother's de-facto partner. In response to that notification, DSW did nothing. It continued to do nothing when TW again came to notice in

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331 Without prejudice save as to costs offer from Crown Law (MSD) to GCT dated 19 December 2019, para 13.

332 Without prejudice save as to costs offer from Crown Law (MSD) to GCT dated 19 December 2019, paras 15 – 16.

333 Email from Sonja Cooper to Crown Law dated 19 December 2019.

July 1981, even though his school asked DSW to find TW a new home.

439. In the face of that information, MSD rejected that there was information which was "sufficiently serious" to justify intervention. MSD also stated that it was sufficient (and appropriate) to refer TW and his family to other services (including the police and an Alcohol and Drug service), rejecting our contention that only DSW had the statutory power (and resources) to provide the broad support and monitoring that was obviously required. We strike findings of this nature regularly.

440. We next refer to the findings in relation to a named Family Home. MSD did not accept that TW was inadequately supervised by the caregivers, resulting in solvent abuse. The response to this allegation was simply that the Family Home caregivers provided reasonable supervision to TW and it was "unlikely that solvent abuse would have been tolerated at the Family Home".[334] We had records showing that there had been complaints about the caregivers which had been provided in relation to another client. After referring to this information, MSD accepted, for the purposes of settlement, that TW was inadequately supervised at the Family Home[335] and offered an additional $1,000 to reflect that acknowledgment, along with its acknowledgment that there had been a lack of supervision following TW returning home to his mother.[336] It is difficult to understand why TW was offered just $1,000 more.

441. Perhaps the most astonishing findings in the offer letter to TW relate to Epuni Boys' Home, which has been the subject of litigation in the *White* trial, as well as adverse comment during the sentencing of Mr Chambers, who sexually abused boys there. For example, MSD did not accept an allegation that TW was inappropriately deloused by a female staff member, on the grounds that it was standard practice for both female and male staff to assist residents with delousing.[337] We note this, because in other offer letters MSD has accepted it was inappropriate for female staff to undertake showering duties which we considered was directly analogous.[338]

442. MSD also did not accept that TW was locked in Secure for 24 hours a day at Epuni, other than to have a shower. This was on the basis

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334 Without prejudice save as to costs letter from Crown Law to Cooper Legal dated 20 December 2018, para 12.

335 Without prejudice save as to costs letter from Crown Law to Cooper Legal dated 7 October 2019.

336 Without prejudice save as to costs letter from Crown Law to Cooper Legal dated 7 October 2019, para 3.

337 Without prejudice save as to costs letter from Crown Law to Cooper Legal dated 20 December 2018, para 13.

338 This was MSD's position in relation to the claim of CRT in June 2011.

that the Epuni Secure practices of 1984 were "highly structured" although no evidence was provided of this, merely an assertion on the part of MSD that there was no evidence that his time in Secure contravened policy. [339]

443. We also highlight that although MSD accepted TW received an initiation beating due to a lack of supervision by staff, it did not accept that staff failed to intervene in fights between residents. This was on the grounds that there was insufficient evidence available to support the allegations and that staffing levels would have been sufficient to prevent events rising to the level of an assault. In the face of the earlier acknowledgement about lack of supervision, this was surprising and conflicting. For the same reason, MSD did not accept that games of "bull-rush" were opportunities for TW to be assaulted by other residents, this time on the basis there was no evidence to support his purported involvement was not voluntary.[340]

444. Next, with regards Epuni, MSD did not accept that TW was held down in a van on one occasion, and in the showers on another occasion, by residents who seriously sexually assaulted him. MSD did not accept the allegations on the basis there was "insufficient evidence" to support either of the claims. MSD went on to state that it was "unlikely" that more than one child would have been in a shower at any one time in Secure.[341] No evidence was provided to support this.

445. Given the findings in *White* and the comments made by the sentencing judge for Mr Chambers, the statements by MSD about the adequacy of supervision, or otherwise, are nothing short of astonishing. We also referred to a report provided in discovery, during the exact time TW was at Epuni, which stated that Epuni had been very unsettled during a period he was there, because a large group of ex-boys had been re-admitted, who were extremely disruptive and who had ruled "Mafia style. The same report referred to the fact that there had been staff absences, along with insufficient staff on a long-standing basis.

446. In response to that, MSD relied on the *White* case, referring to evidence of a staff member who said that violence among boys was covert at Epuni, because staff would not have tolerated it. This statement, however, failed to refer to the findings made in that case, in which it was found that staff often failed to intervene in, or allowed

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339 Without prejudice save as to costs letter from Crown Law to Cooper Legal dated 20 December 2018, para 15.

340 Without prejudice save as to costs letter from Crown Law to Cooper Legal (re TW) dated 20 December 2018, para 15.

341 Without prejudice save as to costs letter from Crown Law to Cooper Legal (re TW) dated 20 December 2018, para 20.

fights to occur.[342] Having already pointed out to MSD the findings in *White*, this response was not only self-serving, but also wrong.

447. Further, in response to our challenge about there being inadequate staff, MSD responded that evidence of inadequate staffing levels did not provide enough of an evidential basis to support the allegation that TW was sexually abused by other residents.[343] Again, this rather flies in the face of the earlier assertions that staffing levels would have been sufficient to prevent fights.

448. This response demonstrates the lack of a principled approach on the part of MSD and the way it will refuse to engage with Cooper Legal about matters brought to its attention. The outcome of this is that MSD artificially deflates offers made to clients, maintaining a position that is neither supported by its own evidence, including reference material available to it, nor supported by legal decisions which bind it. If anything, it is an indicator that MSD should not be dealing with claims itself. These examples, and the other examples to be discussed in this letter, should do so.

449. We next refer to the case of WW. Mr WW has been a client of Cooper Legal since February 2004. His claim was filed in the High Court in 2007, but due to the withdrawal of aid process, his offer letter was not completed until October 2013. WW was at Epuni Boys' Home, Hokio Beach School and a Family Home. He was at Epuni and Hokio during the exact timeframe that the *White* trial covered.

450. WW was caught by the High Tariff Offender ("HTO") policy, described in Chapter 5 of our evidence, which meant he did not receive an offer under the FTP. When his offer did come through, much to our surprise, it was for just $5,000.[344] Our assessment was that WW should have received between $20,000 and $30,000 under the FTP. Accordingly, accepting our advice, WW instructed us to reject that offer and have his claim assessed through the MSD full process.

451. A response to the offer was finally received on 2 October 2019, at which time WW was offered $16,000.[345]

452. In making its offer, MSD accepted that WW likely received physical and verbal abuse from staff at Epuni during one admission and likely witnessed staff physically assaulting other residents. WW was likely physically and verbally abused by staff at Hokio, WW was not

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342 *White v Attorney-General* HC Wellington CIV-1999-485 [28 November 2007], [220] and [225].

343 Without prejudice save as to costs letter from Crown Law to Cooper Legal (re TW) dated 7 October 2019, para 23.

344 Without prejudice save as to costs letter from Crown Law to Cooper Legal (re WW) dated 28 February 2018.

345 Without prejudice save as to costs letter from Crown Law to Cooper Legal (re WW) dated 2 October 2019, para 3.

provided with schooling for three weeks following one admission to Epuni, there was insufficient social work contact during a placement, there was insufficient social work contact during 1980 and a lack of appropriate social work follow-up.

453. Once again, we concentrate on those reasonably surprising aspects of the claim that have not been accepted by MSD.

454. First, MSD acknowledged there was a "no narking" culture at Epuni, however suggested that because WW had contact with his social worker and family during this period, there were other channels for reporting abuse and accordingly MSD did not accept the allegation that the culture prevented him from reporting abuse.[346] With respect to MSD this demonstrates a complete failure to understand the impact of the no narking culture which still pervades residences to this day.

455. In contrast to TW, MSD did not accept that WW received an initiation beating. This was first because the wings where this was alleged to have happened were incorrectly named (these were actually at Hokio), and, secondly on the grounds he did not complain of an initiation beating, and thirdly there was no record of staff shortages during the 1986 period.[347]

456. In the same way, MSD stated there was no evidence available that WW was involved in fights at Epuni, or that staff failed to break up fights. In this letter, express reference was made to a staff member's evidence in *White*, as well as the evidence we have referred to in relation to TW, namely that violence between residents was covert and that senior staff and housemasters would not have tolerated it. [348] MSD's reliance on the evidence of that particular staff member is rather ironic, given that Justice Miller found that that staff member had assaulted one of the plaintiffs in *White.* We also refer, again, to the findings made by Justice Miller, which flew in the face of the staff member's evidence.

457. We also complained that WW had been admitted through the Secure Unit as a matter of course, which Justice Miller had found was a breach of duty in the *White* trial.[349] MSD took the position that being admitted through Secure was acceptable practice for absconders and boys involved in criminal offending. Without any reference to evidence, MSD also stated that boys were required to exercise for two hours each day and books, games and art materials were provided, as well as a three-day school-work plan. For that reason, it rejected

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346 Without prejudice save as to costs letter from Crown Law to Cooper Legal (re WW) dated 2 October 2019, para 11.

347 Without prejudice save as to costs letter from Crown Law to Cooper Legal (re WW) dated 2 October 2019, para 13.

348 Without prejudice save as to costs letter from Crown Law to Cooper Legal (re WW) dated 2 October 2019, para 14.

that allegation.[350] We repeat that WW was at Epuni at the exact same timeframe as the *White* brothers. Accordingly, this finding flies in the face of that decision and, yet again, reflects an approach which is to minimise liability.

458. Lastly, in relation to WW, we refer to the findings in relation to Hokio. As with Epuni, MSD refused to accept that WW received an initiation beating from other residents there, on the grounds that while the *White* case had found that such beatings did take place, violence between boys was covert.[351] Again, this rather flew in the face of the findings in the *White* trial including that staff knew of initiations, that Kingpins existed and that the violence among boys was **mostly** covert.[352] Of particular concern, MSD did not accept that WW witnessed physical abuse by staff to other residents at Hokio, on the grounds there was no evidence to support this allegation.[353] In addition, MSD did not accept that WW witnessed physical and sexual abuse between other residents, on the grounds there was no information to suggest that staff were aware that this was happening and took no action. [354]

459. Given the findings by Justice Miller in the *White* trial, this assertion by MSD was again surprising. Justice Miller specifically made findings identifying two staff members who had punched the plaintiff on one occasion and two others who had kicked or hit him during PT.[355] Further, in the *White* decision, Justice Miller specifically found that Kingpins were sometimes encouraged by some staff to enforce discipline and that staff members had observed fights in which senior boys disciplined others, and staff encouraged Kingpins to discipline others, leading to bullying among the boys.[356]

460. The selective reliance on the *White* decision, in our view, reflects very poorly on MSD. In our view, as already stated, it demonstrates why MSD should not be in a position to determine its own liability for transgressions by its staff members. It also indicates the need for there to be independence around determining factual and legal disputes.

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350 Without prejudice save as to costs letter from Crown Law to Cooper Legal (re WW) dated 2 October 2019, para 16.

351 Without prejudice save as to costs letter from Crown Law to Cooper Legal (re WW) dated 2 October 2019, para 20.

352 *White v Attorney-General* HC Wellington CIV-1999-485 [28 November 2007], [295] and [297].

353 Without prejudice save as to costs letter from Crown Law to Cooper Legal (re WW) dated 2 October 2019, para 22.

354 Without prejudice save as to costs letter from Crown Law to Cooper Legal (re WW) dated 2 October 2019, para 24.

355 *White v Attorney-General* HC Wellington CIV-1999-485 [28 November 2007], [295] and [301].

356 *White v Attorney-General* HC Wellington CIV-1999-485 [28 November 2007], [295] and [298].

461. Finally, we refer to the case of JW, who died during the lengthy process of waiting to settle his claim. JW instructed the firm in December 2005. His claim was filed in the High Court in 2008. Claim documents were ultimately sent to Crown Law in September 2014.

462. The complaints in this case were around a failure to intervene when Child Welfare were aware there was serious domestic violence in the Family Home and that the children were being neglected. This included the children being returned to their mother in the absence of any evidence the mother had improved. More particularly, however, JW complained about a foster home placement, where he stated he was regularly physically assaulted by the foster mother and her children. In addition, he was forced to do frequent work, although he was a child.

463. Under the FTP, JW was offered $12,000.[357] Our advice was to reject that offer, as pour view was JW should have received a minimum of $30,000, taking into account his allegations of abuse. JW accepted our advice.

464. After a lengthy delay, we finally received MSD's response in April 2019.[358] By that time, JW had died. The offer made to JW was $5,000, in which MSD acknowledged only that: Child Welfare failed to make its own inquiries and assessment when concerns first arose about JW's family in September 1966; the social worker did not visit the foster home as regularly as was required and did not speak with JW at crucial times; and JW was not consulted prior to being enrolled in Correspondence Education; and there was insufficient investigation and monitoring in the lead-up to the decision to discharge JW from care.[359]

465. We refer, particularly, to the refusal to accept the allegations of physical assaults in the foster home placement. MSD accepted that the foster mother "may have used physical discipline on occasion which was permissible within social work policy of the day".[360] The letter then stated there was no evidence of physical assaults. This was on the grounds that JW was mostly well-behaved and the foster mother reported no concerns with his behaviour. Similarly, MSD did not accept that JW was assaulted by the foster mother's children, due to insufficient supporting information.[361]

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357 Letter from Crown Law to Cooper Legal dated 16 September 2016, para 2, without prejudice.

358 Without prejudice save as to costs letter from Crown Law to Cooper Legal (JW) dated 29 April 2019.

359 Without prejudice save as to costs letter from Crown Law to Cooper Legal (JW) dated 29 April 2019, para 6.

360 Without prejudice save as to costs letter from Crown Law to Cooper Legal (JW) dated 29 April 2019, para 15.

361 Without prejudice save as to costs letter from Crown Law to Cooper Legal (JW) dated 29 April 2019, para 16.

466. Having made this finding, MSD also accepted that the social worker failed to visit and failed to speak with JW as regularly as was required by policy. MSD acknowledged there were crucial times where the social worker should have made a point of speaking with JW (which may have elicited a disclosure of the physical assaults). MSD acknowledged this was a practice failing.[362]

467. We remain particularly troubled by the fact that MSD has relied on its own failure to visit the placement, speak with JW directly and/or take notes, to deny there was any physical abuse by the foster mother.

468. This is yet another reason why MSD should not investigate its own claims.

Case example: Staff member John Ngatai

469. An example of MSD's changing processes relates to how it has dealt with allegations against a staff member called John Ngatai. Mr Ngatai was employed as a staff member at Epuni, Weymouth and Arbour House for a period of some 15 years. He died on 16 April 1991.

470. Since we began this work, there have been a large number of allegations against John Ngatai, primarily of physical and sexual abuse of boys in his care. These were not accepted by MSD for a very long time. MSD's position was that Mr Ngatai was dead and "could not defend himself". In February 2013, Cooper Legal and MSD engaged in a Judicial Settlement Conference in relation to our client SNF. In support of SNF's claim, 7 clients provided statements about abuse they had suffered from Mr Ngatai. MSD did not accept those allegations. Several claims were settled without any compensation for the abuse the claimants had suffered from Mr Ngatai.

471. In October 2017, MSD appeared to accept that John Ngatai had perpetrated sexual abuse on a client for the first time. This was in relation to a claim by IVP. Since that time, MSD has accepted allegations of sexual abuse by Mr Ngatai in relation to two other clients, PLS and SMN. We have never discovered what caused MSD to change its position. However, it has never revisited the claims by people in relation to Mr Ngatai, where MSD refused to accept the allegations. We wrote to MSD and Crown Law about this on 12 March 2019.[363]

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362 Without prejudice save as to costs letter from Crown Law to Cooper Legal (JW) dated 29 April 2019, para 21.

363 Letter from Cooper Legal to Crown Law/MSD (John Ngatai) 12 March 2019, without prejudice save as to costs letter.

472. MSD responded on 8 August 2019.[364] We were advised that MSD was unable to provide a substantive response to our question, because it raised "wider issues that MSD is in the process of considering". MSD wrote that it would be discussing this with relevant Crown agencies as part of its commitment to the principles guiding how the Government would engage with the Royal Commission, which included "being joined up".

473. We have not had any further substantive response from MSD on the topic of John Ngatai.

The Lead Up to MSD's "New" Process - 2018

Engagement with Maori / Administrative Failures and Changes of Process

469. Throughout 2018, MSD held a number of hui which were designed to improve its engagement with Maori, in particular. MSD also held consultation meetings with various professionals, including Cooper Legal. The feedback we provided reflected many of the concerns we set out in this evidence: that the settlement process was not transparent, independent, or accountable.

470. Because we want claims to settle, and settle well, we have always been willing to engage in MSD's consultation for changes and improvements to the settlement process. We have tried very hard not to be cynical about proposed changes, which we have often seen before, and which have usually failed. We encouraged a number of past and present clients to attend MSD's hui, because we wanted the Historic Claims Team to hear from the people who were the most affected by their processes.

471. After the hui had concluded, there was quite a long silence on the issue. MSD representatives indicated to us in meetings that they were very focused on making the process safer for Māori, but we did not see any substantive changes.

472. While this was happening, we were faced with another change of process, this time brought about by shortcomings in MSD's ability to administer the claims.

473. In March 2018, MSD sent us letters, addressed to our individual clients, providing information about the upcoming Royal Commission. As we processed the letters, it became clear that MSD had not prepared letters for close to two-thirds of the firm's

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[364] Letter from MSD to Cooper Legal (John Ngatai) 8 August 2019, without prejudice save as to costs.

current clients. At that stage, there were no letters for 559 people. We wrote to MSD about this on 13 March 2018.[365] We noted that MSD should have been on notice of those claims because we had made requests for records to MSD, and in each request we had noted that we had been instructed to bring a claim for historic abuse by the individual. We attached a schedule of the clients that MSD had not sent letters for, so that MSD could rectify the mistake. We noted that it was important for MSD to have a complete client list, firstly because it was important for our clients, but also important from a broader perspective in terms of MSD's resourcing, budgeting and reporting responsibilities.

474. MSD responded on 3 April 2019.[366] MSD stated that the 559 clients we had identified were registered as Privacy Act requests, rather than claims. MSD said that our requests for information had not complied with their expectations, and so claims had not been lodged. Attached to the MSD letter was a form that MSD wanted us to use, to register all claims. It acted effectively as a triage on claims because MSD wanted to complete an initial assessment of a claim based on the information in it.

475. This letter set out a different approach to the one we had been taking since the implementation of the Limitation Act Agreement with MSD in 2011. We were suddenly faced with having to complete a claim registration form for every single one of our 559 clients whose claims had not been 'registered' by MSD, and for every new client.

476. We protested that MSD was seeking to unilaterally alter the process we had agreed upon at a meeting with MSD on 27 May 2014, by which we requested client records and advised MSD that we had been instructed to bring a claim because the client alleged abuse in care.[367]

477. Before we agreed to fill in the forms, we wanted an assurance that MSD would not assess claims based on the limited information in them. MSD responded on 11 April 2018. We were told that MSD would not assess a claim based on the information in the form and suggested a meeting to resolve our concerns. That meeting occurred on 24 April 2018. We subsequently received a written outline of the topics discussed, on 27 April 2018.[368]

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365 Letter from Cooper Legal to MSD (claim registration) 13 March 2018.

366 Letter from MSD to Cooper Legal (claim registration) 3 April 2018.

367 Letter from Cooper Legal to MSD (claim registration) 6 April 2018.

368 Letter from MSD to Cooper Legal, 27 April 2018.

478. The letter from MSD set out information about the intended hui, discussed above, and also the claim registration forms. MSD agreed to consider the issue of whether the limitation clock had been stopped by information requests, as we had said, and also noted our concerns around the Privacy Statement attached to the claim registration form.[369]

479. We received a further letter about this from MSD on 16 May 2018.[370] From that point, MSD would require a claim registration form for each new claim. It addressed our concerns about the Privacy Statement, which would eventually balloon into the disclosure applications and a subsequent decision by the Court of Appeal, about which organisations MSD could give client information to. MSD said that time would only stop under the Limitation Act when it received a claim registration form. However, for the 559 clients who had been missed, MSD agreed that time would stop for them from the date we sent an information request. However, we still had to complete the forms for the 559 clients.

480. This was another example of a constantly changing process, which required us to be reactive, rather than proactive, and often undertake substantial tasks for administrative purposes. This all detracted from our ability to progress claims, particularly as the backlog of claimants grew. For a small firm, completing 559 claim registration forms in a short space of time was an immense challenge. Like everything else, we did it, but it took away from the most valuable work – progressing the claims of our clients. We agreed to this approach, and since that time, we have completed a claim registration form for every client after we have interviewed them.

481. In completing the claim registration forms for that high number of people, we identified a list of people who had had letters of offer sent to MSD or Crown Law, but who did not receive a letter from MSD about the Royal Commission. This gave rise to a concern that they had been left off MSD's list.[371] In its response, MSD advised that it had received letters of offer for all those clients, except for two.

482. It was really concerning to us that there were a large number of clients who weren't on MSD's database, and two for whom letters of offer had been lost altogether.[372] For that reason, we now send

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369 This was first sent to us in the letter from MSD to Cooper Legal, dated 3 April 2018.

370 Letter from MSD to Cooper Legal (claim registration) 16 May 2018.

371 Letter from Cooper Legal to MSD, 5 June 2018.

372 Email from MSD to Cooper Legal, 6 June 2018.

a letter at the end of each month confirming the offer letters we have sent and on what date.

483. On 26 October 2018, we attended a meeting with MSD representatives about the outcomes of the consultation process. At the meeting, we were handed a document which contained MSD's summary of the consultation topics, and MSD's feedback to the topics.[373] There were several valuable themes which came out of the consultation process, but the feedback provided by MSD did not necessarily reflect its actions to date. The document also indicated that MSD was planning to introduce a new settlement process.

484. One issue coming through was that claimants found the process clinical and impersonal. It was seen as an information-gathering process and the assessors were not seen as interested in the story of the claimant, nor did they appreciate that it could be the first time a claimant's story had been told. Claimants felt vulnerable and exposed after the assessment and were left to deal with the aftermath themselves. In its feedback, MSD recorded that it would investigate a recruitment and training process that would allow MSD to build a lay workforce to carry out appropriate aspects of the claims process, such as identifying service providers and community organisations which could assist claimants. MSD would also investigate pastoral care roles that encompassed support workers or facilitators to help with the process and investigate a wraparound service/one stop shop model. MSD would look at a recruitment strategy that built diversity into its workforce and would also look at things like alternative locations for interviews.

485. As previously noted, legally represented clients do not regularly meet with MSD, and so it is difficult for us to establish whether these changes have been put in place. While counselling has been offered to a small number of clients, and several have sought counselling from MSD, to date, none has been provided. In particular, MSD has noted that it is difficult to provide counselling to people in prison but has not sought to rectify this in any way, disadvantaging those people who are incarcerated.

486. The consultation process suggested a whole whanau approach to claims, particularly in circumstances where more than one whanau member was taken into care, and where the whanau wish to take a group approach to lodging and settling a claim. MSD undertook to investigate the idea of a group application model, similar to that used in Canada. It agreed to seek guidance

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373 *Consultation process on the Historic Claims Resolution Process: Ministry of Social Development response to feedback,* October 2018.

from its legal team on the feasibility of a group application mechanism. However, the new process introduced by MSD does not make any provision for a whole whanau approach.

487. The consultation report also touched on the financial component of settlements. MSD's own report noted that claimants felt the financial aspect was inadequate and did not reflect the abuse and neglect that they had suffered. They also felt that the apology letter was standardised and did not acknowledge their personal experiences. The consultation document strongly recommended that there should be transparency about the settlement quantum, and there was particular concern about a sliding scale for the amount of abuse suffered. A relativity clause approach was recommended, and this was something supported by Cooper Legal. The consultation report suggested there should be more transparency around the method used to quantify financial recognition.

488. In response, MSD agreed to investigate including whanau reconnection as part of the wraparound service with the claims process. It also agreed to seek guidance on how to ensure transparency around the method used to quantify financial recognition, "whilst managing the risks". Further, MSD stated:

> Any decision on using a relativity clause model is an all of Crown issue and therefore outside of the remit of the Claims Resolution Team or MSD.

489. The consultation report specifically noted that the professionals thought the process needed to be more transparent and consistent. The professionals recorded that a published rule book would be useful and enable all stakeholders to be working off the same page and know what to expect.

490. In the consultation report, MSD wrote that the Claims Resolution Team would prepare business process documentation and a Policy in Practice guide for the new process to guide staff in its implementation.

491. The team said it would "seek guidance from legal whether and how this should be published". It was this document that later became the subject of an Ombudsman's complaint, because all of the material relating to how quantum of a settlement was established, was redacted. This is dealt with in more detail, below.

492. MSD's feedback document noted the views of many professionals and some claimants were that an independent claims body should be established. It was noted that "this model

will undoubtably be promoted through the Royal Commission Inquiry [sic]". In response, MSD's feedback recorded: "Any decision on the establishment of an independent claims body is outside the remit of the Claims Resolution Team or MSD. The Royal Commission Inquiry [sic] is likely the right forum to discuss and consider this issue."

493. Another issue raised during the consultation process was the narrow scope of settlement. Claimants and the professional group believed the scope of settlement was too narrow, and should factor in emotional abuse, cultural disconnection, and the consequences of injuries. MSD agreed to investigate the inclusion of cultural or whanau reconnection services as part of a wraparound service for claimants[374]. It noted that any decision regarding the scope of assessment and settlement is outside the remit of the claims resolution team or MSD.

494. The consultation document recorded that claimants supported the idea of accepting claims lodged posthumously and considered the issue needed to be reconsidered as recommended by the Ombudsman. MSD simply noted that feedback and said it would review its position, "taking into account all relevant considerations". We note the position of MSD in relation to deceased claimants is still at odds with the Ombudsman's recommendations, and this is dealt with in Chapter 5 of our evidence.

Implementation of MSD's "New" Process - 2019

495. While we were very engaged in the consultation process with MSD, we were concerned at the indication in the document that a new process was up and running. Although we had had some conversations with MSD about that, we had not been told anything about a new process being implemented.

496. On 3 April 2019, we were sent a letter by the Historic Claims Team, with a brochure attached advertising a new settlement process.[375] MSD recorded that there had been four main points to come out of the consultation process, which were:

    a) The process needed to recognise the individual needs of the claimant, both personal and cultural;

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374 Despite this, MSD's new process makes no provision for investigating emotional abuse, and none of our clients have been offered whanau reconnection services to date.

375 Letter from MSD to Cooper Legal, 3 April 2019.

b) The harm caused by abuse in State Care has life-long impacts, completion takes time and often requires more than just money;

c) Communication from MSD's Historic Claims Team throughout the claims process is key; and

d) There is universal support for streamlining the process for assessment.

497. There was no mention in the letter about the concerns relating to the transparency of the process, or the adequacy of financial settlement. We also did not agree that there was universal support for streamlining the process for assessment. In fact, we did not even know what this really meant. The letter from MSD then stated:

> We have now begun to introduce the new process (beginning the new streamlined assessments) and will continue to introduce more features of this improved process over the next four years. Going forward, you will begin to receive offers under our new assessment process for all of your clients who have not previously received an offer. These will continue to be assessed in date order. For any clients that have previously rejected an offer (including a Two Path Approach offer) these will continue to be assessed using our full assessment process.

498. Broadly, the steps in the new process introduced by MSD were:

a) Cooper Legal would provide information to MSD about a person's claim, and the matters we wanted MSD to investigate and assess;

b) When it came time for the claim to be allocated, MSD would "check in" with us, to ensure that it had all material before it that the claimant wished to present, or that we thought was important before the assessment began;

c) MSD would then assess the claim (noting that there was always the option of the claimant meeting with MSD);

d) MSD would provide us with an outcome of the assessment for us to review with the client;

e) From there, a review could be requested, or the client could accept the offer.

499. The letter attached the brochures produced by MSD about the claims process.[376] The brochures contained a flowchart but

[376] MSD claim brochures, April 2019.

provided little substantive information about the changes to the process. It also did not identify any differences that a legally represented claimant may experience during the process. However, we had immediate concerns about aspects of the process as set out in the brochures, including:

a) The assessment would confirm a claimant's involvement with State Care, including if the State was legally responsible for them for the time period their claim covered. The assessor would review a claimant's personal file, but a full review of other relevant records would not be carried out for every concern they raised. The brochures recorded that "some concerns may require a more detailed assessment";

b) After this limited assessment, a claimant would be given "general feedback gathered from reviewing your file" and at the same meeting, MSD officials could discuss a payment offer with the claimant;

c) If a claimant rejected the offer, they then had an option of a review. No information was given about what the review would entail, or who would do it. A review could entail a further offer of settlement which could be higher or lower than the original offer;

d) The brochures also provided that MSD could refer information to the police for any criminal conduct.

500. The brochures gave no information about how quantum would be assessed, or any of the wraparound services that MSD had agreed to investigate. There was no information about breaches of the Bill of Rights Act, practice failures, or any independent review of the process.

501. At that stage, we were deeply concerned by what we could see in the brochures, and very unclear about when the process would be implemented, and who it would apply to.

502. While reviewing the brochures on MSD's website, we also located a document which had been prepared in March 2019 by MSD, and uploaded to its website in April 2019 under the OIA ("Historic Claims Business Process Document").[377] This gave us much more information about the new process, but all of the material about how the different allegations would be treated for the purposes of assessment, and what quantum would be applied to them, was redacted. There was enough in this

377 *MSD Historic Claims Business Process and Guidance,* MSD, March 2019.

document, however, to increase our concerns about the robustness of MSD's new approach.

503. On 5 April 2019, we wrote to MSD, setting out a series of questions and concerns raised by the process.[378]

504. We were alarmed to discover that MSD had introduced the new process on 1 November 2018, but we had only been advised of the process implementation in April 2019. The letter then went on to make a large number of requests for further information and clarification about the process. Among a series of questions, we wanted, in particular, to know:

a) What had happened for our clients between 1 November 2018 and the letter from MSD dated 3 April 2019;

b) How joint claims involving the Ministry of Education would be dealt with under the new process;

c) How allegations of abuse occurring both prior to and after 2008 would be dealt with, in relation to the involvement of Oranga Tamariki;

d) How meetings were envisaged to run for legally represented clients who were already some years into the process;

e) The nature of support and counselling available through the process;

f) The evidential test used by MSD during the assessment, noting that MSD's website provided that assessments would be carried out "without investigating fully each of the claimant's concerns". We asked whether this would mean, similar to the FTP, that a claimant's allegations would be accepted provided that the records showed they were in the placement and had legal status with MSD at the time;

g) How much detail would be required for an allegation to be accepted, and what kind of concerns would not be investigated by MSD;

h) What categories of assessment or guidance had been provided to assessors which would provide a level of transparency and certainty during the assessment process;

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[378] Letter from Cooper Legal to MSD about MSD's new process, 5 April 2019.

i) Whether any moderation of the compensation amounts would take place;

j) What information would be available to an assessor about the staff members who had been convicted of abuse or accepted as abusers by MSD previously, or institutional material about different placements, to ensure that they had all relevant information;

k) What information would be given to an assessor about the nature and scope of breaches or practice failures, such as how prolonged use of time out rooms would be treated, or how the use of the island known as Alcatraz on the Whakapakari Programme would be characterised;

l) Whether the New Zealand Bill of Rights Act 1990 would be taken into account for claims arising after 1990, and how that would happen;

m) How allegations from section 396 programmes would be addressed;

n) Whether the "results" phase of the Ministry's process meant a second meeting with a claimant, and whether that was mandatory;

o) The nature and detail involved in the feedback given, and whether this would be different for legally represented claimants;

p) The nature of the review, including what had been referred to as the "Consistency Panel" and whether they would be different to the assessor;

q) Whether a review was available after a full and final settlement was entered into;

r) Whether the Ombudsman had consented to review claim decisions, as suggested in MSD's brochure;

s) How MSD would deal with disclosure given the ongoing litigation around that issue in the High Court;

t) Finally, we requested an unredacted version of the Business Process document under the Official Information Act.

505. On 10 April 2019, MSD declined our request for provision of the unredacted parts of the material under the OIA, saying it was

entitled to redact the information under section 9(2)(j) and 9(2)(k) of the OIA in order to avoid prejudice to MSD's position in negotiations, and to "prevent improper gain or advantage".[379]

506. On 15 April 2019, we made a complaint to the Ombudsman about the redactions in the MSD Business Process document.[380] The complaint was brought by PH, a client of the firm who agreed to be a representative complainant for the large number of people who are affected by the process changes. We also made the complaint on our own behalf, because the redactions make it impossible for us to effectively do our jobs. The letter set out the history, in a brief form, of the settlement processes. We complained that MSD should not be able to withhold information under section 9(2)(j) of the OIA, because the withheld information did not relate to a "negotiation" and even if it did, there was no prejudice or disadvantage in the release of the information. We said that it was in the public interest, and in the interests of a transparent process, to make the information available. The information was key to showing how claims were assessed, what information was taken into account, and what quantum was assigned to particular claims. We also said there was an increased need for transparency where MSD was investigating itself as part of the settlement process.

507. Further, we complained that section 9(2)(k) could not apply to allow MSD to withhold information. MSD was effectively saying that, if it released that information, our clients would provide false information to increase the amount of compensation they could obtain. Effectively, MSD was starting from a position where it said claimants could not be trusted and would lie about their experiences to gain money. We pointed out that:

    a) Both Cooper Legal and MSD had robust processes in place to ensure claims could be verified;

    b) There was an advantage to claimants and the lawyers in being able to see how claims are assessed and what quantum would be available, but that was not an improper advantage. It was standard for parties to processes such as these to work to transparent guidelines;

    c) Cases where claimants exaggerate or falsify their claims were extremely rare. A current turn-around on claims of 4-5 years meant that a claimant would have to be extremely long-sighted to falsify a claim and remain consistent in their account over a number of years; and

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379 Letter from MSD to Cooper Legal regarding OIA, 10 April 2019.

380 Letter from Cooper Legal to the Ombudsman regarding MSD process, 15 April 2019.

d) The public interest in a transparent process outweighed any incidents of impropriety by individuals in a process dealing with several thousand claims.

508. We asked for urgency on our complaint, because MSD was already using the document to assess claims.

509. We received a substantive response from MSD to our questions on 23 April 2019.[381] MSD advised (among other things) that:

a) The changes made to date had been internal and had not affected our clients. However, MSD also said that it was now in a position to make offers under the new process. MSD went on to say that it had been working on an assessment under the new process for four identified clients, which seemed to conflict with the earlier statement that the process was not yet underway;

b) All claims which had been partially assessed as at 1 November 2018 would not be eligible for the new claims assessment and would continue to be assessed using the full assessment model;

c) After those claims were dealt with, the full assessment model would be phased out and the new claims assessment would apply to all claims;

d) MSD was unable to answer our questions about how the process would apply to joint claims involving MOE and Oranga Tamariki;

e) Meetings with MSD were optional for claimants;

f) Allegations would be "taken into account" for the purposes of settlement, but allegations would not be accepted or denied in the way that they had been previously;

g) What the Ministry characterised as "less serious allegations" would be treated in a similar way to the FTP. For what it called "more serious allegations" there was an additional level of checking and a more detailed assessment. We note that the definition of a more serious allegation is one of the matters redacted in MSD's Business document;

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381 Letter from MSD to Cooper Legal, regarding MSD process, 23 April 2019.

h) More serious allegations would require a more detailed assessment and more detail from the claimant. The new assessment process did not fully investigate all allegations, but all concerns would be assessed to determine whether they could be "taken into account for the purposes of settlement";

i) The assessors would use a categorisation framework in the same way as they had done under the FTP. MSD assured us that there were quality assurance processes and peer review processes in place, but this was the information which was redacted from its document;

j) Payments would not be moderated in the way FTP offers were, but as part of the quality assurance process in the Consistency Panel stage, some payments would be adjusted to ensure consistency;

k) Institutional files and other material outside of a claimant's personal file would be considered only in respect of more serious allegations, or if a claimant rejected their initial offer and a more detailed assessment was undertaken;

l) MSD would consider the applicability of the Bill of Rights Act and breaches would be taken into account in the consideration of the proposed payment. Again, this information was redacted and so we were unable to establish how this would happen;

m) The Consistency Panel was made up of managers, team leaders, senior specialists and a lawyer from the MSD legal team. It would not include the original assessor and all payment recommendations under the new process would be endorsed by the Consistency Panel;

n) A review would be tailored to the individual claim and would be dependent on the nature of the claimant's concerns about the original assessment. A review was only available if a claimant did not accept the initial offer.

510. Following on from MSD's letter, we met with MSD representatives on 14 May 2019. The key things that arose out of that meeting included:

a) That the people who would meet with claimants were in a different team to the people who would be doing the assessments. Once the assessor had completed their work, it would be shifted back to the "frontline" person to communicate the results to the claimant. We were

concerned that this would mean the person communicating the claim would have limited understanding or information, and would not be able to meet the claimant's expectations because the general feedback would be insufficient to reflect the assessor's work;

b) During the meeting we had considerable frustration with how factual allegations would be treated. MSD consistently refused to say it would accept or decline allegations, only that it would "take them into account". We wanted to understand what that meant in practice, whether it was a wholesale acceptance of what had happened, or whether, in a very murky way, everything would be grouped together, and quantum assigned on the basis of a less than clear resolution;

c) MSD declined to tell us the threshold being applied as to whether something is a serious allegation or not. This was one of the matters that, by that time, was before the Ombudsman;

d) MSD officials characterised their intended outcome as learning from the claims, and wanting to understand them, but also not fully investigating the claims. We pointed out that this impacted on the integrity of the process, because it did not provide a meaningful acknowledgement to the claimant. We were frustrated at the disconnect between MSD's process, which seemed to be a "stand back and guess" process, and its assertion that it wanted to learn from the mistakes for the care of future children. If the first step wasn't done properly, we could not see how anything could be learnt at all. We were concerned that MSD would not say what it was accountable for, and so it could be accountable for nothing at all. We also noted that MSD's process meant it would be hard for us to assess whether it had assessed the claim correctly;

e) MSD officials repeatedly said that payments were informed by past payments and would be consistent with those. When we asked whether it had included FTP payments in the assessment of what was an average payment, the team was not clear. We pointed out that inclusion of the FTP payments, which were distorted by moderation and included $5,000 payments for section 396 placements, would distort the idea of consistency that MSD was striving for;

f) When we asked about claims which straddled the MSD and Oranga Tamariki responsibilities, we were told that there was active conversation with Oranga Tamariki at the

moment. When we asked if Oranga Tamariki had a process for resolving claims, we were told that it did not, and the claims were stalled for the meantime;

g) As with the issue of Oranga Tamariki, we were also unable to get answers about how deceased clients would be treated, how whanau groups would be treated, and how MOE claims would be treated. These were all the subject of "conversations" between different Government departments;

h) We identified that the feedback meetings were done by the contact people, and not the assessors, so they could have no ownership of the decision;

i) In terms of a timeframe, MSD asserted that the actual assessment, which currently took six weeks, would be reduced down to one week. In other words, MSD asserted that the new process would be six times faster than the current one. We could not see how this would occur, with two meetings involved, a review process and a Consistency Panel which would be rapidly overrun.

511. Despite this process being underway, MSD did not have a lot of answers to our questions and described it as a fluid situation. It was hard to see how there could be any integrity in a process, when there were more questions than answers.

512. We received some answers to our questions in an email from MSD on 28 May 2019.[382] MSD acknowledged the complaint we had made to the Ombudsman, and indicated it was reviewing the information it could provide to us. We had asked whether data was drawn from the FTP settlements when assessing whether settlement amounts contained in the new process were consistent with past practice. MSD's representative indicated that the Ministry was looking into this. We found it odd that this was not something that could be answered straight away. The email also addressed things like the availability of counselling, but because the guidelines about the assessment had been redacted, there was very little in the way of answers in MSD's response. There were also no solid answers about how MSD would interact with other agencies.

513. We received further answers about the data relied on by MSD on 17 June 2019.[383] MSD said that because of offers under the Fast Track were moderated both up and down "this has meant that

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382 Email from MSD to Cooper Legal (new claims process, 28 May 2019.

383 Email from MSD to Cooper Legal (new claims process), 17 June 2019.

the distribution of payments used in the review of our assessment process were not affected by whether an offer was made after undergoing a full assessment or a 2PA assessment". However, we have never had a payment under the Fast Track Process moderated upwards – only downwards. We continue to be concerned that this has skewed MSD's data.

514. On 6 August 2019, a representative from the Ombudsman's Office advised that the Ministry had provided its substantive response to the Ombudsman, and representatives from the Ombudsman's Office had met with MSD's representatives. MSD had identified some additional information it considered it could release to us. On 12 August 2019, we responded to the Ombudsman's Office, confirming that additional information from the Ministry had been received, but the key information was still redacted, and so the complaint would be pursued.[384]

515. On 5 December 2019, we were advised that the Ombudsman had formed a provisional view on our complaint.[385] The Ombudsman had sought comment from MSD before responding to us. At the date of providing this brief of evidence, the complaint remains outstanding.

MSD's new process in practice

516. As we have noted above, in its letter dated 23 April 2019, MSD advised that four clients were being assessed under the new process. Of those four, at the date of preparing this brief of evidence, three offers had been received. Two relate to plaintiffs being tracked towards a trial and will not be addressed here. The third related to Mr D, and is useful to refer to the settlement offer made by MSD to him to demonstrate how the new process operated.

517. Mr D instructed us in mid-2014. Claim documents, in the form of a letter of offer, had been sent to MSD in September 2017. Mr D had poor health, and we sought MSD's agreement to have his claim prioritised, because we were concerned that he was going to pass away.

518. On 10 June 2019, MSD contacted us by email. It asked us to confirm that all relevant information that Mr D wanted investigated was in the letter of offer we had prepared for him. This was the first part of the process outlined by MSD.[386]

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384 Email chain, Ombudsman's Office and Cooper Legal, 6-12 August 2019.

385 Letter from Ombudsman to Cooper Legal, 5 December 2019, regarding MSD process.

386 Email from MSD to Cooper Legal, 10 June 2019.

519. We received an offer of settlement from MSD for Mr D in September 2019.[387]

520. The letter attached a list of the allegations identified from Mr D's claim documents prepared by us, which MSD had investigated. This was referred to as Appendix A. In the body of the letter, MSD set out, in a generalised way, Mr D's allegations. The letter from MSD then stated:

> The Ministry's consideration of these matters has not involved testing the evidence or reaching a conclusion on whether the allegations are proven. However, we have been able to take into account all of your allegations when considering the payment below except for the allegations noted in Appendix B of this letter.

521. In other words, there was no clear statement from MSD about the things it agreed had happened to Mr D. To determine what the offer was based on, we had to subtract the allegations set out in Appendix B, from the allegations in Appendix A. Rather than appearing to accept responsibility for the things that had happened to Mr D, the structure of the letter indicated that MSD was entirely focused on the things it could deny. It was silent on any positive acceptance of responsibility towards Mr D. As we had predicted, the low level of transparency about the offer made it difficult for us to advise Mr D about whether it was appropriate. In the end, he accepted the offer and his file has since been closed.

522. The two other offers received in that first tranche were both rejected, as they were very low. Even though MSD accepted allegations of sexual abuse by a staff member in a section 396 programme in relation to at least one of those claims, the quantum did not reflect what has previously been paid to a person who has experienced multiple, violent rapes as a child in care, particularly when the claim was subject to the New Zealand Bill of Rights Act.

The role of Oranga Tamariki

523. After the creation of Oranga Tamariki/Ministry for Children, we were advised that Oranga Tamariki would assess all claims for abuse in care which occurred after 1 January 2008. We were initially very unclear about why that date had been selected, given that Oranga Tamariki had not existed in 2008. From a legal perspective, it would be difficult for us to bring a claim against Oranga Tamariki for abuse for that time period. In our view,

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[387] Without prejudice except as to costs settlement offer, MSD to Cooper Legal for Mr D, 3 September 2019.

before 1 April 2017, the only proper defendant for claims of abuse in care was MSD.

524. The Oranga Tamariki Act 1989 made provision for a complaints mechanism to be established, and for that mechanism to apply to any act or omission that occurred on or after 1 January 2008.[388] However, by mid-2018, when we began to discuss these claims with MSD, the provisions relating to the complaints mechanism were not yet in force. They came into force on 1 July 2019. Schedule 1AA, section 6 of the Oranga Tamariki Act 1989 provides for the 1 January 2008 date. That was inserted on 14 July 2017, by section 138 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

525. At the time we were told by MSD that Oranga Tamariki would deal with claims for this time period, we protested, firstly because the provisions were not yet in force, secondly because Oranga Tamariki had no known claims process, and lastly, because the provisions only referred to a complaints process, which appeared to us to be an informal process designed to deal with matters outside of the court. We were concerned that people who engaged with Oranga Tamariki's complaints process may prejudice any formal claims under the Limitation Act, while Oranga Tamariki dealt with the matter informally.

526. Despite our concerns, we were willing to engage with Oranga Tamariki to help it build a transparent and accountable mechanism for resolving claims against it.

527. On 6 March 2018, Crown Law wrote to us about claims which included allegations relating to events after 1 January 2008. MSD sought the plaintiffs' consent to refer those claims to Oranga Tamariki.[389] On 16 March 2018, we responded to Crown Law's email about these claims being transferred to Oranga Tamariki. We set out a series of questions we wanted answered before we advised our clients to agree to the transfer of the claims.[390] We never received a satisfactory response to these questions.

528. On 7 June 2018, we attended a meeting with Oranga Tamariki representatives from the Safety of Children in Care Unit. They wanted to talk to us about what a redress process might look like for Oranga Tamariki. We raised our concerns about the January

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388 Inserted by the Children, Young Persons, And Their Families (Oranga Tamariki) Legislation Act 2017.

389 Email chain between Crown Law and Cooper Legal (Allegations post 1 January 2008), 9 November 2017 -16 March 2018.

390 Email chain between Crown Law and Cooper Legal (Allegations post 1 January 2008), 9 November 2017 -16 March 2018.

2008 date, but agreed that that issue would be dealt with in a separate meeting. We then went on to have a detailed and productive conversation with the Oranga Tamariki team. Oranga Tamariki produced meeting notes from that meeting, which showed that our primary advice really was that the redress scheme needed to be independent from the agency the claim has been brought against.[391]

529. As time passed, it became clear that Oranga Tamariki's efforts to establish a redress process were going either very slowly or had stalled completely. We had no communication from Oranga Tamariki about the setting up of a redress process. We continued to maintain that MSD should be the entity investigating all claims before Oranga Tamariki was created.

530. Somewhat ironically, about 18 months after we had first expressed this view, MSD and Oranga Tamariki conceded that that was the proper approach. This was done by way of an email to us on 7 October 2019.[392] On the same day, we had met with representatives from both MSD and Oranga Tamariki. We were assured that clients who had been transferred to Oranga Tamariki would be transferred back, and "slotted in" to the "queue" with no disadvantage to them.

531. This was immensely frustrating, and another issue that detracted from a meaningful discussion about the merits of the claims. It also reflected that different parts of the government seem unable to work together.

532. At the same meeting with MSD and Oranga Tamariki, we were told about the issues of records management and storage as between MSD and Oranga Tamariki, especially when it came to responding to Official Information Act requests. Records were held by both Ministries, meaning requests under the OIA "bounced" between them.

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391 Minutes of a meeting between Cooper Legal and Oranga Tamariki, 7 June 2018.

392 Email from MSD to Cooper Legal, "Improving the experience for claimants of abuse and neglect in State care", 7 October 2019.

APPENDIX A

CASE STUDY: GGH

533. GGH was born on GRO-B 1942 and he is now 77 years old.

534. In early 1954, GGH was admitted to Otekaike Special School for Boys ("Otekaike") under section 127 of the Education Act 1914. He remained there until December 1959. He was 16 years old when he left Otekaike. Otekaike was later known as Campbell Park School.

535. GGH was born into a difficult home environment. He was assessed as having a low IQ. His records noted that he was regularly incontinent from about the age of five years old and had behavioural problems.

536. GGH's admission was approved by the Superintendent of the Child Welfare Division.

Physical and sexual abuse

537. GGH suffered sexual abuse by several different staff members and other boys at Otekaike. The passage of time means that he has used different names for the staff members, but they are often close enough to establish who they were. The full details of GGH's allegations about Otekaike are set out in his third amended statement of claim.[393] He also saw staff members raping other boys at Otekaike, and he was able to name the boys and the staff members. GGH was also sexually abused by other boys.

538. GGH described being regularly beaten by the GRO-B of Otekaike, Mr O. He also described being locked in a small room whenever he ran away or staff thought he was going to try to run away.

539. GGH also described having his hair pulled and being kicked by staff members. Another staff member, Mr P, threw stones at him and taunted him.

Records

540. GGH's records regularly reported that he was difficult to control and described him as unstable. It also confirmed he was placed in a room being used as a Secure Unit. GGH's records also regularly refer to his inability to control his bowels. After 1958, GGH's records note him being involved in a series of "homosexual incidents".

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393 CIV-2004-485-743 *GGH v The Attorney-General v Anor* Third Amended Statement of Claim dated 15 December 2017.

541. These were strong indicators that GGH was suffering sexual abuse at Otekaike. GGH's records noted, again, in 1959, that he had been involved in separate incidents of homosexual behaviour with other boys. GGH recalls this as being sexual abuse by other boys.

542. Eventually, GGH's parents asked Child Welfare to return him home.

543. After Otekaike, GGH led a transient life. He was picked up multiple times by the Police and Child Welfare, who often returned him to the care of his parents. He also spent time in Templeton Hospital and Lake Alice, where he suffered further abuse. In 1971, GGH's records note that he told Dr Leeks at Lake Alice Hospital that he had learned homosexual practices at Campbell Park. Nobody followed that up.

Effects

544. As a result of his experiences, GGH has poor mental health. He has difficulties with trust, poor self-esteem and self-worth and persistent memories of his time at Otekaike. He left Otekaike with little education and has not been able to work since the early 1980s.

Bringing a claim

545. GGH contacted Sonja Cooper in 2002, initially about his psychiatric hospital experiences. Frequently, GGH became frustrated at the process and at completing paperwork, and discontinued the claim. He would pick it up again a few days later. In 2003, GGH's claims were expanded beyond his psychiatric care claim to a claim against MSD about his time at Otekaike. Proceedings were filed in 2004. As well as these claims, Cooper Legal wrote to a Catholic Order about abuse GGH had experienced at a Catholic school.

546. In April 2004, GGH met with representatives from the Catholic Order. They apologised to him and paid him $25,000 in compensation, as well as paying his legal costs.[394]

547. GGH's claims remained filed in Court while the psychiatric hospital litigation continued, as well as the litigation about the withdrawal of aid. GGH regularly became frustrated, and was often abusive, because he could not understand why the claims were so delayed.

548. On 26 April 2012, GGH settled his claim about Lake Alice with the Ministry of Health.[395] GGH was paid $4,000 for his experiences in Lake Alice. It was referred to as a "wellness payment". In the same year, Cooper Legal wrote to Crown Law to settle GGH's claim against MSD.

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394 GGH Settlement Agreement with Sisters of St Joseph of Nazareth Trust Board, 18 June 2004.

395 GGH Settlement Agreement with Ministry of Health, 26 April 2012.

549. It was nearly two years before Crown Law responded to our letter. That happened in June 2014,[396] ten years after the claim was filed.

550. In its response, MSD minimised GGH's experience. For example, in response to his allegation of being flogged by the GRO-B of Otekaike, MSD described it as punishing him in a way that was "outside the policy and practice of the time". MSD used the same phrase for things like kicking and pulling GGH's hair. While it accepted the physical abuse, MSD did not accept any responsibility for the sexual abuse GGH suffered at Otekaike. It made him a reasonably low offer of settlement, which he rejected.

551. Cooper Legal had hoped to include GGH's claim in the Accelerated Process, which was being discussed with MSD at that time. If that process was applied, GGH would have received a much higher offer and it was likely his claim would settle. In the meantime, a counter-offer was made for GGH, and MSD responded in early 2015. It rejected all of the reasons for a higher offer of compensation, even though it said some of GGH's records were still being collected.

552. We decided that GGH's claim was a "stuck" claim and proposed that it was dealt with through the Intractable Claims Process. Around the same time, Cooper Legal obtained an opinion from Dr Bridgit Mirfin-Veitch from the Donald Beazley Institute about boys like GGH who had been in Otekaike. The opinion focused on the likelihood of sexual abuse and sexual behaviour happening at Otekaike.

553. MSD later declined to include GGH's claim under the Fast Track Process, because he had already been made an offer and rejected it.

554. In May 2016 Cooper Legal applied for GGH and several other people to have a mini-hearing about Otekaike under Rule 10.15 of the High Court Rules. This is dealt with elsewhere in our evidence. As we have outlined, Crown Law took the position that MOE had to be joined as a second defendant. His pleadings were amended.[397]

555. Once discovery was obtained from MOE, GGH's proceedings were updated again on the basis of the new information[398].

556. The discovery also included the names of staff members which were very close to the names remembered by GGH. The documents also reflected how some staff had resigned from Otekaike or been disciplined for poor behaviour. Settlement negotiations continued.

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396 Letter from Crown Law to Cooper Legal, 26 June 2014. This letter is without prejudice except as to costs.

397 CIV-2004-485-743 *GGH v Attorney-General & Anor,* Second Amended Statement of Claim, 3 February 2017.

398 Third Amended Statement of Claim, referred to above.

557. Because GGH's health began to decline, Cooper Legal prepared an affidavit for him to swear about his claim, so that his estate could continue it on if he died.

558. In April 2019, MSD and MOE responded to Cooper Legal's latest offer of settlement. The Ministries stepped back from some allegations which they had earlier accepted, but made a small increase to the offer of settlement.

Judicial Settlement Conference

559. A JSC was scheduled for GGH's claim. Because of the history of having JSCs with no shift in compensation, Cooper Legal tried to get MSD and MOE to indicate that they were willing to actually engage in good faith settlement. MSD and MOE made an offer of settlement a week before the JSC. When the JSC was held, the Ministries refused to shift on its offer of settlement. When the JSC was held, the Ministries refused to shift on its offer of settlement. The JSC was effectively a waste of time.

560. On 17 June 2019, we wrote to Crown Law, asking that GGH and a group of other clients with "stuck" claims were assessed under the same framework as the FTP[399]. In September 2019, Crown Law refused.[400]

Current Situation

561. GGH's claim has not settled. GGH has met with the assessor from MOE, but we do not hold out great hope that this will change much at all. As GGH grows older, we are increasingly concerned that he will die before his claim is resolved.

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399 Letter Cooper Legal to Crown Law (Claims excluded from FTP) 17 June 2019 Without Prejudice

400 Letter Crown Law to Cooper Legal (Claims excluded from FTP) 2 September 2019 Without Prejudice.

CHAPTER 5

BARRIERS TO SETTLEMENT (MSD)

- **High Tariff Offenders Policy**
- **Records issues**
- **Privacy breaches and the HRRT litigation**
- **Deceased and at-risk claimants**
- **The “Indivisible Crown” argument**

High Tariff Offenders Policy

562. As the Royal Commission will be aware, some survivors of abuse in care have gone on to commit offences. Indeed, research shows that there is a correlation between placement in Social Welfare/CYFS care and adult criminality. In 2016-2017, 87% of young offenders (or 86% of males and 92% of females) aged 14 to 16 years, had prior care and protection involvement with Oranga Tamariki.[401]

563. In July 2010, the fact that a high-profile prisoner was taking a civil claim for abuse he suffered in State care became part of a media narrative, which included statements from organisations such as the Sensible Sentencing Trust, that people who commit crimes should not be entitled to receive compensation for past wrongs.[402]

564. Unfortunately, this narrative carried weight with the government of the day. On 28 March 2013, Crown Law wrote to us about a number of clients, but also raised its concerns about settling claims with plaintiffs who had murder convictions.[403] In its letter, Crown Law stated:

> A small number of claims filed against the Ministry are by people who have been convicted of murder, some of whom continue to serve prison sentences for their convictions. Clearly their claims need to be addressed and resolved.
>
> However, when considering the making of potential settlement payments to people who have been convicted of murder, the Crown needs to consider the feelings of the victims' families. Indeed, the wider community may regard it as morally unconscionable that individuals convicted of murder are paid money by the State that they can use without limit. Accordingly, the Ministry wanted to raise this issue with you in the hope that it might be discussed with a view to identifying potential settlement options that allows the Crown to balance the need to right the wrongs done to any such person whilst the Ministry had custodial responsibility for them, while at the same time recognising the concerns of the community.

565. Subsequently, Cooper Legal met with MSD and Crown Law representatives. We communicated our strong view that survivors of State care were victims first and foremost, and to treat those convicted of murder differently would be unconscionable, especially when some of them had some of the most horrific stories of abuse in care. We pointed out to MSD that these people were serving sentences of imprisonment for their crimes, and to withhold settlement, or place limitations on settlement, of their civil claims against the State would be considered by us to be double punishment.

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401 *Youth Justice Indicators Summary Report: April 2018* (Ministry of Justice, Wellington, 2018)

402 New Zealand Herald article: "Murderer sues for compensation", 11 July 2010.

403 Letter from Crown Law to Cooper Legal, 28 March 2013, note this is a without prejudice letter.

566. Despite our best efforts, we could get no further information about MSD's intentions towards this cohort of clients, and we could not obtain a copy of any policy document or process that MSD intended to use to effect settlements paid to these claimants.

567. On 23 May 2014, we made a complaint to the Ombudsman on behalf of three clients who would potentially be affected by what had become known as the "High End Offenders" policy.[404] The basis of the complaint was that MSD had failed to take steps to make an offer of settlement to these three claimants. In relation to one, Mr B, we outlined how he had made repeated direct contact with an MSD representative, asking him to resolve his claim. The representative repeatedly told Mr B, from September 2010, that his claim would be settled within a few months to a month, and then, two years later, again that it would be settled within the next couple of months. That had not occurred. Cooper Legal further complained that we had received no further information about the policy, because the Ministry had continued to say that the policy was still being considered, as was a possible expansion of the policy beyond those persons with a murder conviction. This had left our clients in a state of limbo.

568. The Ombudsman responded to the complaint on 15 August 2014. We were advised that MSD had confirmed that a decision on these claims was pending sign-off of a new policy called the "High Tariff Offender Policy" ("HTO Policy"). The Ombudsman undertook an investigation into Cooper Legal's complaint. [405]

569. The Ombudsman's investigation took over two years. Like many of our complaints to the Ombudsman, it became stuck in a backlog at the Ombudsman's Office. However, we received a final response from the Ombudsman on 14 June 2016.[406] By that time, one of the three complainants had withdrawn. The Ombudsman found that MSD had acted unreasonably in:

a) Failing to take steps to progress the implementation of the policy;

b) In the absence of a policy becoming operational, failing to communicate to the complainants the status of their claims and the fact of the proposed policy; and

c) Misleading Mr B as to the status of his claim and likely timeframe for settlement.

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404 Complaint to the Ombudsman by Cooper Legal, 23 May 2014.

405 Letter from the Ombudsman to Cooper Legal regarding High End Offenders, 15 August 2014.

406 Letter from Ombudsman to Cooper Legal, regarding HTO policy, 14 June 2016.

570. The Ombudsman set out his opinion to MSD, noting that the policy had been in development now for some five years, during which time no resolution had been allowed on any claims to which it could apply. In the case of Mr B, his claim having been ready for settlement for almost as long, the delay was unreasonable. The Ombudsman noted in particular:

> While I accept that the Ministry is dependent on provision of the Minister's approval, I have been provided scant evidence to suggest concern within the Ministry at the time taken, and no communications or internal documents suggested that an expedient solution be found. There is no documentation regarding the operational components of the policy, proposed implementation, or reports subsequent to that of 30 June 2014.
>
> Mr W's statement of claim was filed more than nine years ago, Mr B's nearly nine years ago… this delay had been detrimental to the claimants…
>
> …this situation has been exacerbated by the Ministry's failure to communicate its intentions to the claimants, knowing that the delay would be indeterminate in the outcome of material relevance to how they might choose to pursue their claim.

571. The Ombudsman went on to heavily criticise MSD's failure to account for the significant period of time during which it knew these claims would not be resolved but failed to advise Cooper Legal or the claimants directly.

572. The Ombudsman's report shifted MSD from a position of suspended animation, to one of seeking to implement the High Tariff Offender policy. Alongside this, MSD agreed to apologise to Mr B for misleading him.

573. Despite this, it would be another three years or so before the claims would be resolved.[407]

574. As the number of people potentially affected by the HTO policy grew, the Ministry developed and introduced the Fast Track Process, referred to above. When we an application for judicial review of aspects of the Fast Track Process (which is dealt with elsewhere in this brief of evidence), the response we received from MSD, and the affidavits filed with the Court, were silent on the issue of the HTO policy.[408]

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[407] Mr B's settlement documents were signed In November 2018.

[408] Affidavit of Ines Gessler on behalf of respondent in **GRO-B-XY** *v The Attorney-General*, affirmed 14 December 2015.

575. On 8 September 2016, we were formally notified by MSD of the names of people who would receive a Fast Track offer.[409] At paragraph 3.2 of the letter, MSD advised:

> Fast Track offers will not be made to High Tariff Offenders (those claimants who are serving sentences of more than 10 years or preventive detention). Those High Tariff Offenders listed in Schedule 2 have been identified as such based on information available to the Ministry to date. As you know, the Ministry has been considering how best to address claims brought against the Ministry by people who have been convicted of serious offences. The Ministry is still in the process of finalising its position and therefore in the meantime will not be making Fast Track offers to this group. However, High Tariff Offenders have been assessed and moderated to enable to the possibility of offers being made once the policy has been finalised. Any such offers would likely have conditions or restrictions on them.

576. Subsequently, as we have explained, MSD made settlement offers to clients whose claims had been sent to MSD prior to 31 December 2014. A large group of our clients were excluded by the HTO Policy. Obviously, people who had been sentenced to something other than murder were now caught by the policy – people who had been sentenced for sexual offending, aggravated robberies and so on. In addition, we could see that MSD did not have good information on which to base its assessment. MSD made offers to a number of people who were caught by the categorisation of "High Tariff Offender". We realised that MSD did not have information-sharing agreements with other parts of the Public Service which could give it consistent and reliable information. We strongly suspected that MSD's information was reliant on publicly available information on the internet, combined with any material available from its own records. We had no qualms about settling claims for people who had "flown under the radar" and had received offers under the FTP and we did so, repeatedly.

577. We note that we had been able to settle claims for High Tariff Offenders whose substantive settlement offers were excluded under the Fast Track Process, for breach of their privacy. The HTO policy had not been applied to compensation for delays in providing records to survivors. For some, we had also settled their claim against CHFA.

578. In December 2016, we received information about the HTO policy under the Official Information Act.[410]. We wrote to the Ombudsman with further information about the HTO policy on 21 December 2016.[411]

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409 Letter from Crown Law to Cooper Legal, 8 September 2016.

410 OIA response regarding HTO policy, 2 December 2016.

411 Letter from Cooper Legal to Ombudsman regarding HTO policy, 21 December 2016.

579. As a result of MSD's exclusion of these people from the Fast Track offers, we refreshed our complaint to the Ombudsman on 21 February 2017.[412] The Ombudsman responded on 3 March 2017, agreeing to re-open the investigation.[413]

580. In June 2017, we met with a representative from the Ombudsman's Office. We learned that MSD intended to introduce legislation that would impact any compensation payable to High Tariff Offenders. The content, scope, or timeframe for this legislation was unknown.

581. A change of government in 2017 gave us hope that the HTO policy may not be enforced. On 4 December 2017, we wrote to the new Minister of Social Development asking her to overturn the High Tariff Offenders policy.[414]

582. On 23 February 2018, we were advised that the Minister of Social Development and the Minister of Corrections had decided not to enforce the High Tariff Offenders policy, and that Minister Sepuloni had directed MSD to lift the suspension in place for settling claims by people affected by the policy.[415]

583. We were enormously relieved by this. Shortly after receiving this letter, we received Fast Track offers for those claimants who had been waiting for one.

584. On 14 October 2018, we made a further OIA request about the settlement of historic claims for High Tariff Offenders. MSD's response on 6 December 2018 showed how close we had come to having the HTO policy enforced through legislation, but also that it was MSD itself that advised Cabinet the policy was unworkable.[416] It would still take a very long time to settle the outstanding claims by people who had been categorised as HTOs, but after nearly five years, we were on our way.

Access to records

585. The records created about a person in the care of the State are integral, not only to making a claim, but to assisting a person to understand what happened to them, when it happened, why it happened and who was responsible for it happening. Records provide

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412 Letter from Cooper Legal to The Office of the Ombudsman regarding HTO policy, 21 February 2017.

413 Letter from the Ombudsman to Cooper Legal regarding HTO policy, 3 March 2017.

414 Letter from Cooper Legal to The Honourable Carmel Sepuloni, regarding High Tariff Offenders policy, 4 December 2017.

415 Letter from Honourable Carmel Sepuloni to Cooper Legal, 23 February 2018.

416 Response by MSD to OIA (HTO policy), 6 December 2018.

information about a person's legal status, which can alter the duties and obligations a State agency has towards them. Records also often substantiate or corroborate allegations made by a survivor.

586. In terms of records, the State holds the balance of power and uses a number of tools to provide inadequate information to claimants about their own lives. This includes:

a) Delays in providing records;

b) Excessive redaction of records;

c) Withholding key information, such as complaints about assaults by staff members, on separate files, when these are relevant to a claimant's claim. Even when an individual made a complaint, the complaint was not recorded on that person's individual file, but on a separate file;

d) Not providing relevant records from institutional material; and

e) Misplacing records.

587. These issues will be dealt with below.

588. Records disclose such things as:

a) Significant practice failures;

b) The names of known abusers (or rosters to establish when alleged abusers were present in an institution);

c) Investigations into claims made at the time the abuse occurred;

d) Complaints about staff, although as we have noted above, these are often kept on files which are never released to claimants;

e) What was known by the State about a family;

f) How the State responded to notifications of concern (or whether it responded at all);

g) Indicators of emotional or physical distress such as absconding, bed-wetting, offending and so on;

h) Whether a child or young person was going to school;

i) Whether resources were provided such as financial support, counselling and so on;

j) The types of placements a person was in, during what timeframes;

k) Geography issues, such as whether someone was living far away from their whanau and whether they had contact with their siblings;

l) Reasons for decisions made by social workers;

m) Foster arrangements;

n) Placements in Secure Units without legislative authority or in other situations that give rise to false imprisonment claims and a range of other matters; and

o) The legal or informal status of a person during their time 'under notice' and/or in care.

589. In relation to records from psychiatric institutions, the records also often reflect whether ECT was administered, patients being punished by being kept in their pyjamas, whether, and how often, the painful Paraldehyde and similar injections were given, whether a patient was placed in seclusion and so on.

590. It is important to understand how records are structured by MSD, in particular. There are several different types of records, including:

a) A survivor's personal file. These were records created once an individual child or vulnerable adult had individual legal status, such as being placed on legal supervision or under Court orders. Matters about members of the survivor's family, caregivers and other people are not included on the personal file;

b) A family file. This was a file that covered both parents and the children of a family, often while the family was under preventive supervision or some other status while they lived together. The family file often contained information about all of the siblings, and the parents, including allegations of abuse against parents. When a survivor receives their family file, large swathes of it are redacted, purportedly to protect the privacy of their siblings, parents and other people;

c) Institutional records. These are records which are not placed on a survivor's personal file. They include daily diaries, Secure Unit logs, correspondence between staff members and the Principal, and the Principal and Head Office, statistics and information about the institution generally, including schooling, corporal punishment records and so on;

d) Staff files. These are files for individual staff members employed by the Director-General of Social Welfare and their predecessors and successors, or alternatively the Director-General of Education. The staff files included when they started work, where they worked, any time spent at different institutions, complaints against a staff member, reports on the staff member's activities and so on. Any disciplinary matters about the staff member are held on staff files and were not copied to the personal files of an individual survivor, even when they had complained about that particular staff member; and

e) For claimants in care from the 1990s onwards, a record commonly referred to as CYRAS was in use, which was a running record, often incomplete and with unreliable dates, which holds a great deal of information about a child or young person in care. CYRAS was not the only record, but it is the most useful central document, as long as social workers have used it properly and were diligent in entering material. Alongside CYRAS are a number of other files, some of them kept in relation to specific residences, and others relating to Youth Justice or Care and Protection social work matters.

Destruction of Records

591. We are aware that Archives New Zealand implemented a General Disposal Authority which was in force between 1 October 2005 and 6 June 2013.[417] The appraisal report covering the development of the three General Disposal Authorities ("GDA") identified that many staff records from the State Sector were not required to be retained. On page 7 of the report, the working group recommended that personnel files of senior managers in the State Sector should be permanently retained as it was at that level that accountability to Ministers, Cabinet and Parliament occurred. This material included summaries of their employment histories, the personnel files of Chief Executive Officers or equivalents, personnel files of corporate level second tier managers, personnel files of staff who receive significant honours and/or distinctions and employee index cards should be retained. The paper goes on to say that records recommended for destruction included:

> All other employee personnel files were not recommended for retention, including those for staff dismissed for serious misconduct or major criminal offences.
>
> Where major criminal offences have occurred, the relevant Court records provide the major evidential documentation.

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[417] Archives New Zealand Appraisal Report: General Disposal Authorities covering Human Resources, Personnel, Financial & Accounting records In the State Sector.

592. On page 9 of the appraisal report, the consultative group considered the value of records dealing with individual staff grievances, disputes and dismissals. It was decided to recommend the destruction of records covering staff grievances, disputes, discrimination complaints, disciplinary matters and dismissals, as:

> …major precedent cases will be on public record in the proceedings of bodies like the employment tribunal, employment relations authority, employment Court and other relevant statutory authorities.

593. It is not known whether MSD destroyed records in accordance with the GDA, as we are aware that compliance with the GDA is not mandatory. However, the guidelines in the GDA do not reflect the reality of record keeping during the period many claims arose, or the practises of staff members at the time.

594. For example, most, if not all, staff members accused of the abuse of children were not at the level of management that would be captured by the retention order in the GDA.

595. Secondly, in our experience, complaints about staff members which were brought to the attention of the Director-General or his second in command were not adequately recorded or were minimised to the extent that the full picture of the allegations was not captured in what was often a single letter.

596. There is also the sad fact that many staff members accused of physical or sexual abuse never faced charges. As we have covered previously for the Royal Commission, several staff members were permitted to shift to another institution, or to quietly resign. There was a wide-spread belief that children were unreliable witnesses, upon which criminal proceedings could not rely. It followed that many criminal actions by staff members never went to court.

597. Even when staff members were charged, the very serious nature of their offending was often not represented in the charges they ultimately faced and were found guilty of. Examples of this can be found in the convictions of Alan Moncrieff-Wright and Michael Ansell, who were referred to in the Contextual Hearing. Further, in those cases, no court record of their behaviour was retained on any file. Only their conviction/s stood, and it was often not accompanied by any other information.

598. Turning to disciplinary matters and complaints, it is the reality of our current times, and has been for a number of years, that many grievances raised by staff are dealt with on a ‘without prejudice’ basis and resolved through settlement rather than litigation. The cases that make it to a formal setting such as the Employment Court do not

capture the totality or the seriousness of the issues arising in the care setting over the previous five decades.

599. While it is not known whether MSD destroyed any documents under the GDA, it has clearly destroyed documents prior to the implementation of the GDA. In his brief of evidence for the *White* trial, MSD senior staff member Garth Young stated[418]:

> I would expect there to be a staff member or personnel file for each permanent Child Welfare or Department of Social Welfare staff member that would confirm their date of appointment to various positions and whether or not they were subject to any performance or disciplinary matters. Such files for some ex-staff relevant to these proceedings have been readily found, whereas there is no trace of such files for other staff members from similar time periods and locations. I understand that in October 1999 when CYF became a Department in its own right many of the old closed records were retained in the custody and control of the parent organisation, the Ministry of Social Development. Some of these files, including old Human Resource personnel/staff files were subsequently destroyed.
>
> Of the 28 staff members named by the plaintiffs or by their similar fact witnesses, personnel files can be found for only six of them, as detailed in appendix C…

600. It is noteworthy that by 1999, the *White* proceedings, as well as other claims were on foot against MSD. Destruction of records in the face of those claims placed the claimants, including the *White* plaintiffs, at a significant disadvantage.[419]

Records released under the Privacy Act: Delay and excessive redaction

601. After the issues with Legal Aid were resolved, and Cooper Legal began engaging with MSD under the ADR Process, Cooper Legal was almost immediately hindered in its work by problems with records. It was taking a very long time to receive records from MSD, and records which were received, were heavily redacted, to the extent that they were unreadable. This happened with almost every client for whom Cooper Legal received records in 2011-2014. It again resurfaced as a major issue in 2016 and continues to be a major issue.

602. It is not intended to set out an extensive review of the Privacy Act requirements MSD operates under, in this brief. However, several key things are noted:

a) MSD is required to make a decision about whether documents will be released within 20 working days after the day on which

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418 *White & Anor v Attorney-General*: Brief of evidence of Garth Earnest Young.

419 On 1 May 2017, MSD responded to an OIA request about records destruction, setting out Its history of record destruction.

the request was received, and advise the individual of the decision (section 40); and

b) If an extension of time is required given the amount of information, or if consultation with other agencies is required, to only extend that period of time for a reasonable period, and to provide notice of the extension within 20 working days after the day on which the request is received (section 41); and

c) Where deletion of information from documents is required, because there is good reason for withholding some of the information contained in the document, a copy of the document with the information removed should be provided, with the reason for withholding the information and the grounds in support of that reason if the individual so requests (section 43); and

d) Where an agency holds personal information in a way that can be readily retrieved, the individual is entitled to have access to that information (Privacy Principle 6(1)); and

e) Provide information within a reasonable period of time.

603. Because of the delays in receiving records from MSD, Cooper Legal made a complaint, initially on behalf of 6 clients, to the Office of the Privacy Commissioner ("OPC"). The complaint was made on 10 April 2013 ("TD complaint").[420] In the body of the complaint, it was noted that we had regularly met with MSD officials about our concerns in relation to the delay in providing records. Of the 6 complainants, we noted:

a) TD's records were requested on 24 July 2012, and no response was received from MSD until the request was prioritised on 9 April 2013 and no records had been received at the date of the complaint;

b) Records from PS were requested on 9 June 2012, no response to the request was received until 22 August 2012 and no records had been received;

c) ZM's records were requested on 11 October 2012, and the request was not responded to until 10 January 2013, with no records received at the date of the complaint;

d) ZM's records were requested on 7 August 2012 and a response from the Ministry received on 22 August 2012, but no records had been received to date;

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[420] Privacy Act complaint for TD and others, 10 April 2013.

e) TH's records were requested on 20 June 2012, and the request did not get a response until 22 August 2012. No records had been received;

f) KH's records were requested on 8 March 2012 and no records had been received, despite ongoing correspondence with MSD about those records.

604. The experiences of those 6 clients were demonstrative of the wider client group.

605. In response to the complaint on behalf of TD and others, the OPC's team met with MSD representatives and reported to Cooper Legal on 25 October 2013.[421] The OPC reported:

> The Ministry acknowledges that it has a backlog of requests to process and has explained to me how this situation has occurred. It appears that prior to information requests being centralised, the team dealing with historic claims were given little direction. The Ministry says that regrettably there was no oversight into how that team was performing or the volume of its workload. When a new manager was appointed to the team the backlog was discovered and immediate steps were taken to address it.
>
> [...]
> Due to the current backlog, it is clear to us that the Ministry is currently not able to meet its obligations under the Privacy Act in responding to requests for historic information. It is unable to make a decision on what information will be released until a file has been reviewed, and depending on the size of the file this review can take weeks, if not longer, to complete.
>
> However, I am satisfied that the Ministry is addressing the issue and is doing all it can to reduce the backlog and get responses out as soon as it is able…
>
> I accept that your clients will still experience a delay in getting access to their information which is why we have found the Ministry is in breach of the Privacy Act. I am still waiting for the Ministry's comments with regard to your settlement proposal and will advise you of that as soon as I receive it.

606. As can be intimated from the OPC's letter, Cooper Legal had sought compensation for the 6 clients who had been waiting for their information. On 17 December 2013, the OPC wrote to Cooper Legal again, advising that MSD had not yet provided substantive comments on the settlement proposal.[422]

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421 Letter from Privacy Commissioner, re TD and Others, 25 October 2013.

422 Letter from the Privacy Commissioner re TD and Others, 17 December 2013.

607. It became apparent that, not only was MSD delaying decisions about information releases, and the information itself, it was now delaying its responses to complaints about these issues.

608. On 17 February 2014, Cooper Legal made a further complaint to the OPC about delays in providing records to our clients. The complaint was on behalf of clients whose records had taken six months or longer to be provided to Cooper Legal. The complaint was on behalf of 61 clients whose surnames began with the letters A through to M, and Cooper Legal indicated that a second complaint would follow shortly with the remaining complainants.

609. From this point, this complaint will be called “delay complaint one”.[423]

610. A second Privacy Act complaint, on behalf of a further 34 clients, was made on 18 February 2014 (“delay complaint two”).[424]

611. The OPC was proactive in responding to the complaints, seeking a meeting with MSD. In its correspondence with Cooper Legal, the OPC expressed concern at the significant issues within MSD in meeting its statutory obligations.[425]

612. MSD’s response to these complaints was to offer to meet with Cooper Legal again, but there were no substantive changes to the systems involved, and no different approach was proposed by the Ministry. MSD continued to say that it was doing its best with the resources it had. That was not good enough for our clients, some of whom passed away during the period of delay.

613. Cooper Legal made a further Privacy Act complaint on behalf of another 25 clients for delay on 20 May 2014 (“delay complaint three”).[426]

614. Around the same time, the OPC wrote to us on 22 May 2014 determining there was a breach of the Privacy Act in relation to the complaint by TD and five other clients. The Privacy Commissioner noted:

> This file has highlighted concerns with the Ministry’s ability to respond to information requests which is clearly a systemic issue within the Ministry.

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423 Privacy Act complaint form ("delay complaint one"), 17 February 2014.

424 Privacy Act complaint form ("delay complaint two"), 18 February 2014.

425 Letter from the Privacy Commissioner, 18 March 2014.

426 Privacy Act complaint form ("delay complaint three"), 20 May 2014.

615. Because the OPC had been unable to facilitate settlement, the complaint was referred to the Director of Human Rights Proceedings.[427]

616. MSD continued to delay its responses to these complaints. The delay was confirmed in a letter from the OPC in June 2014.[428]

617. At this time, we met with MSD and Archives New Zealand about a memorandum of understanding to facilitate access to historic records. We had a number of meetings and started work on a Memorandum of Understanding. We never finalised an agreement because the restrictions placed on us by MSD were impossible to work with.

618. On 21 July 2014, the OPC declined to investigate delay complaint three, on the basis that Cooper Legal had met with the Ministry to try to organise a Memorandum of Understanding to allow easier access to records, and the fact that Cooper Legal and MSD had agreed a timetable for the provision of records for the 25 clients. The OPC also decided not to investigate delay complaint three because the initial complaint on behalf of TD had been referred to the Director for Human Rights Proceedings. The OPC believed the Ministry's response would address the issue of delay.[429] Cooper Legal did not agree with this approach.[430]

619. The complaint by TD and five others about the delay in receiving their records, was referred to the Director of Human Rights Proceedings. With the assistance of that Office, in December 2014 the six claims were settled with compensation of $5,000 each, although with no contribution to the costs incurred in making the complaint.[431]

620. In subsequent correspondence about the mass delay complaints, the OPC set out the view that MSD had had a systemic issue which it had taken steps to address. On that basis, it would not pursue an investigation of the outstanding complaints. As part of its response on 27 August 2014, the OPC stated:

> We understand that all historic claims are to be resolved by the end of 2020 and the Ministry's modelling suggests that its current process will meet that demand.[432]

621. Subsequently, Cooper Legal and the OPC engaged in correspondence about this issue. Cooper Legal maintained that the systemic issue had **not** been addressed, and that the Privacy

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427 Letter from the Privacy Commissioner regarding TD's complaint, 22 May 2014.

428 Letter from the Privacy Commissioner 18 June 2014.

429 Letter from the Privacy Commissioner regarding delay complaint three, 21 July 2014.

430 Letter from Cooper Legal to Office of the Privacy Commissioner, 23 July 2014.

431 Without prejudice letter from MSD to OHRP, 19 December 2014.

432 Letter from Privacy Commissioner to Cooper Legal, 27 August 2014.

Commissioner should pursue an investigation. This was resisted by the OPC.[433]

622. We decided to push the matter, and file proceedings in the Human Rights Review Tribunal ("HRRT"). To do that, we obtained a certificate of investigation from the OPC on behalf of the large group of clients identified in the delay complaints. We obtained the certificate of investigation on 9 March 2015, and we filed proceedings in the HRRT on 10 April 2015.[434]

Delay in providing records: HRRT

623. The claim filed in the HRRT was initially on behalf of 93 individual clients, with one, Mr A, being the nominal named plaintiff. The 93 clients reflected the combined complainants from delay complaints one and two.[435] The transient nature of our client group meant that we could not contact some clients to confirm their ongoing engagement with the HRRT process. Over the course of time, the complainant group shrank to 63 people.

624. The HRRT required us to identify, on an individualised basis, the following issues:

a) The length of the delay complained of by the individual;

b) Whether the requirement to make a decision on the request and communicate it to the complainant had been complied with by MSD;

c) The effect of the delay; and

d) The harm or damage the complainant says was caused by the delay.

625. To do this, we prepared individual statements for each of the 63 engaged complainants.

626. Doing these statements was exceptionally time-consuming. These claims were administered separately from the clients' substantive claims against MSD, and each statement had to be signed by the complainant, with documents showing the delay, and any distress experienced by the client, had to be attached to each statement. Two lawyers at Cooper Legal produced 63 statements in a reasonably short period of time. With the immense backlog in the HRRT, which is

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433 Correspondence between Cooper Legal and Office of the Privacy Commissioner on 27 August 2014, 11 September 2014, 27 November 2014, 3 December 2014, 24 December 2014 and 27 January 2015.

434 Letter from OPC and Certificate of Investigation regarding delay complaints.

435 HRRT GRO-B-A *& Ors v Ministry of Social Development,* Statement of Claim.

a matter of public record, the prospect of litigating the matter was not palatable to either the HRRT, MSD, or us. A hearing involving 63 individual statements was virtually unmanageable. However, we pressed on, because we believed that the interference with the privacy of these clients had to have a remedy.

627. The proceeding gave rise to initial settlement offers from MSD in June 2016, where the clients were separated out into bands reflecting the amount of delay, and any additional breaches, and deductions for perceived lack of mitigation by the individual claimant.[436] It is fair to say that these were disappointingly low, with a top amount of $3,750. Many clients received a zero offer.

628. The vulnerable socio-economic status of our clients means that some people will often accept an immediate financial offer, even where our strong advice is for them not to do so. Several clients accepted as little as $500 for breach of their privacy. Most of the group accepted our advice not to take the first offer, and to make a counter-offer, which we did.[437]

629. The end result was that clients who engaged in a second round of negotiation did substantially better in terms of compensation, with the top settlement amount being $11,000, together with payment of the individual's legal costs[438]. In most cases, Legal Aid recouped all of the costs on each file.

630. It is important to note that not every client whose privacy was breached received a settlement. Only those who were able to engage with us at that time, and who had been involved in the original complaint to the OPC, were able to receive a settlement. We simply did not have capacity to pursue these kinds of complaints for every single client in the office.

631. It took years for the systemic issues with the provision of records to be somewhat resolved. There was a gradual improvement after 2014, culminating in a situation where MSD was largely complying with its statutory obligations.

632. However, we note with concern that the time MSD is taking to provide information under the Privacy Act is once again increasing. This has come with a spike in instructions throughout 2019, together with the increasing number of young clients, who have a much larger quantity of records than their older counterparts. Despite the best efforts of

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[436] HRRT GRO-B-A & *Ors v Ministry of Social Development* Lt from Crown Law to Cooper Legal with settlement offer spreadsheet, 3 June 2016.

[437] Letters from Cooper Legal to Crown Law, 13 June 2016 and 20 June 2016

[438] Letter from Crown Law to Cooper Legal re HRRT settlement offers, 24 November 2016.

MSD's Privacy and Official Information team, the team is currently about 4 months behind schedule, with that time growing.[439]

633. It is noteworthy that, during the course of the HRRT proceeding, Legal Aid declined to fund any of the cases beyond an initial grant of 8 hours of time per client. This hampered settlement negotiations considerably, as we had to apply to the Legal Aid Tribunal (LAT) to review that decision while we were progressing the substantive proceedings. The LAT reinstated funding, and at the end of the day, our belief that the proceedings had prospects of success was confirmed by the settlement for each client, together with payment to Legal Aid to cover the costs incurred. In almost every case, Legal Aid recouped all of the costs on each file.

Redaction of Privacy Act information

634. At the same time as Cooper Legal was filing complaints about the delays in receiving records, the records which were being received were excessively redacted, making it sometimes impossible to establish even basic facts about a survivor's experiences.

635. In 2011-2012, Cooper Legal repeatedly met with MSD about this, to try to find a way forward. The meetings were unsuccessful, but it was agreed that a complaint would be made to the OPC, using one client's experiences as a "test case" to try to obtain some guidance from the Commissioner on the level of redactions being carried out by MSD.

636. On 9 July 2012, a complaint was made to the OPC in the name of Mr WM, on behalf of clients in a similar position to him.[440] The complaint stated that Garth Young from MSD had agreed with Cooper Legal to use Mr WM's case a case study, to ascertain whether the OPC could assist the parties in providing or obtaining more complete records.

637. In response to WM's complaint, the OPC determined that some information on WM's file had been improperly redacted and requested that MSD release that information to us. The OPC determined that some other information had been appropriately withheld by MSD[441]. As some of the redactions in Mr WM's records were made under the Official Information Act, the OPC referred part of the complaint to the Office of the Ombudsman. The Ombudsman's Office acknowledged this on 4 February 2013.

638. As a result of our ongoing discussions and complaints, MSD changed its position in relation to information released under the Privacy Act in

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439 Email from MSD to Cooper Legal with list of outstanding Privacy Act requests, 9 January 2020.

440 Privacy Act Complaint for WM, 9 July 2012.

441 Letters from OPC to Cooper Legal, 6 September 2012 and 20 November 2012

a letter dated 7 May 2014.[442] MSD advised that all of Cooper Legal's outstanding Privacy Act requests, and all future requests under the Act will be treated as requests to which an exemption under Principle 11 of the Act applied. Specifically, this was disclosure of the information requested was necessary for the conduct of proceedings before any Court or Tribunal. This effectively meant that MSD would release records to us as if they were providing us with discovery. MSD also stated that it would focus on relevance when determining what information to disclose in response to requests under the Official Information Act for historic claims files which contained third party personal information.

639. While this was good news on its face, the records we saw coming through from MSD after this change of approach did not seem to be very different at all. While some files were much more readable, others had just as many redactions as records provided to us before MSD's new approach was implemented.

640. On 24 November 2014, Cooper Legal further engaged with the Ombudsman's Office about redactions in records[443]. It was identified that the redactions included names of caregivers, social workers, family information and major events. The redaction of this information impeded our ability to put together a client's claim documents and piece together what had happened to them. For the claimants, the effect of the redactions was to deny them access to their own history. We also advised that there had been changes since our original complaint to the Ombudsman:

> Since the complaint was made, several things have happened to change the situation:
>
> - Cooper Legal and MSD have since agreed a protocol whereby the documents provided for unfiled claims are treated the same way as if the documents were subject to the Court discovery process. We attach a copy of a letter from MSD setting out this agreement; and
>
> - The High Court has made a blanket discovery order to this effect, on the condition that Cooper Legal does not disclose information that would otherwise be redacted, to our clients.
>
> This obviously changes the parameters of the complaint since it was originally made in 2012. However, Cooper Legal does have outstanding concerns, namely:
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> - MSD does not appear to be adhering to the protocol;
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> - MSD is arbitrary in its redactions, where information is redacted without reason – such as the name of the author of reports

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442 Letter from MSD to Cooper Legal, regarding provision of records, 7 May 2014.

443 Letter from Cooper Legal to the Ombudsman regarding WM's complaint, 24 November 2014.

within the former Social Welfare and the names of staff members and institutions at relevant times; and

- MSD is internally inconsistent in its redactions, where information redacted in one client's records appears in another client's records, totally unredacted. This does appear to defeat the purpose of MSD's approach.

641. We sought guidance from the Ombudsman's Office about whether the full names of staff and caregivers should be provided. We also sought guidance about how family files could be provided, because they often contain information about a family which was not placed on an individual survivor's file. Where many of our claims allege that MSD and its predecessors failed to properly act when our clients were suffering abuse in the home environment, these documents go to our client's claim.[444]

642. The complaint then became embroiled in the extensive delays being experienced by the Ombudsman's Office. On 25 February 2016, we wrote to the Office of the Ombudsman to complain about the fact that it remained unresolved, and that, three years after acknowledging receipt of the complaint, we had not received any substantive response from the Ombudsman.[445] This was despite the parties managing to significantly narrow the scope of the complaint in the meantime.

643. While this was happening, we were also complaining to MSD about its redactions of relevant information in our client files. This related to "family files", which were social work files that related to family situations. These records often told us about abuse which was happening in the home and what was known to social workers, complaints about domestic violence, what happened with the siblings of a claimant and so on. We complained to MSD about this in December 2015. MSD's position was that the Privacy Act prevented the release of personal information about the client's family.[446]

644. In June 2016, MSD provided a less-redacted version of Mr WM's records to the Ombudsman's Office. By that time, we had filed his claim in the Court and obtained discovery, so the exercise was moot. While the less-redacted version was an improvement, we could not see MSD carrying over that behaviour to other records, which was borne out by other records we were receiving at that time. However, we had made progress in terms of the redactions in discovery, and so we began filing more claims in the High Court in order to obtain cleaner records. On 29 June 2016, we advised the Ombudsman's

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444 Letter from Cooper Legal to Office of the Ombudsman 24 November 2014.

445 Letter from Cooper Legal to the Ombudsman, 25 February 2016.

446 Email chain Cooper Legal and MSD (family file redactions) 8 December 2015. We note that this is an ongoing issue.

Office that we would not be pursuing further complaints about redactions, as it simply had not had any real effect.[447]

645. On 29 July 2016, the Ombudsman provided a formal response to WM's complaint.[448] This noted that the Ombudsman had formed a provisional opinion on 16 March 2016 that MSD did not have good reason to rely on section 9(2)(a) of the Official Information Act 1982 to withhold some information. It was that provisional opinion which had triggered MSD to release a less redacted version of WM's records. As we had previously noted to the Ombudsman, we were satisfied that this had resolved WM's complaint, but did not address the wider issues. The Ombudsman noted that the Office was in discussions with MSD about improving MSD's internal guidelines and processes and on that basis, the Ombudsman made no further recommendations. We have not seen any evidence to suggest this improved the material received from MSD.

Redactions in documents received through discovery

646. Where claims have been filed in the High Court on behalf of individual clients, we have the option of obtaining their records, and other information, under discovery orders. This information is much broader than the records provided under the Privacy Act. We have previously sought discovery for cases where:

a) The material provided under the Privacy Act is incomplete or inadequate, and clearly does not match the survivor's recollection;

b) The survivor describes experiences in institutional care which could be the subject of records not held on their personal file, for example, where they had made a complaint about a named staff member;

c) Where a claim is being tracked towards a trial.

647. Most claims filed in the Court are managed under a protocol, where they sit in court to allow settlement discussions to take place. Only selected files are the subject of discovery orders, usually at the request of Cooper Legal.

648. When we began seeking discovery to get records which were in a better state than those released to us under the Privacy Act, we discovered that even discovery records, which are supposed to be provided unredacted, were suffering from serious redactions and

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447 Email from Cooper Legal to Ombudsman regarding WM, 29 June 2016.

448 Letter from the Ombudsman to Cooper Legal regarding WM's complaint, 29 July 2016.

were incomplete. This occurred in almost all records we received under discovery orders.

649. The change from full discovery to redacted discovery came about after December 2013. On 12 December 2013, MSD sent us a letter saying it had decided to redact irrelevant information from discovery in order to more properly follow the rules of discovery. MSD said that if the redactions raised any concerns with us that there was information which we considered to be relevant which had been redacted, then we needed to advise MSD about that.[449]

650. We wrote back to Crown Law on 13 December 2013.[450] We wanted a clear understanding as to what information MSD considered to be irrelevant and would be redacted. We were also concerned that redacting the discovery would create further delays in providing records, and that MSD's proposed approach was completely inconsistent with the Memorandum of Understanding we had been trying to negotiate, which we have referred to above. We warned Crown Law that if MSD continued to take this stance, we would have to take a more formal approach to discovery applications. We ended our letter by saying:

> …we are left with no choice other than that each client's discovery is complete in all respects and that all relevant material has been inspected and discovered before we complete letters of offer. It is self-evident this will only delay the process further. This leaves us in bewilderment as to the motivation behind MSD's new approach – particularly given repeated reports to the Court and to this firm about MSD's limited resources and apparent commitment to speeding up the settlement process.

651. We sent an example of how bad the redactions were to Crown Law on 17 February 2014. We noted that each social worker's name had been redacted, which was clearly relevant information and would not be redacted under the Privacy Act, let alone for discovery. Social worker's recommendations about the child had been redacted in their entirety, and part of sentences had been redacted which meant that the sentence could be missing information we should have. We also seemed to be receiving fewer documents in discovery than we received under the Privacy Act.[451] Our complaints about this gave rise to the decision in *N v Attorney-General,* which is discussed below.

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449 Letter from Crown Law to Cooper Legal regarding discovery, 12 December 2013.

450 Letter from Cooper Legal to Crown Law regarding discovery, 13 December 2013.

451 Email Cooper Legal to Crown Law (discovery issues), 17 February 2014.

N v Attorney-General

652. We made interlocutory applications for orders relating to discovery in relation to three clients: JDE, RN and WA. The key issues in relation to these three clients were:

a) JDE's discovery included documents about a staff member kicking a boy. Both the name of the staff member, and the boy who made a complaint, were redacted. Because JDE had made allegations about that staff member, the documents were relevant to his claim[452];

b) RN's discovery was received in December 2014. Mr RN had very few records, which is why discovery was sought. The affirmation in support of RN's application identified enormous discrepancies between the records received under the Privacy Act, and the discovery copy. Further, the redactions in the discovered copy were inconsistent. Material relating to RN, his siblings, and abuse by his father was redacted[453]; and

c) The application for Mr WA showed that the discovery received for him was markedly different to the discovery received for his brother, when the documents were about the same issue: abuse in their family environment. The affidavit in support of the application for Mr WA attached documents from his discovery, compared to the documents received for his brother, WRA.[454]

653. The response to the applications by MSD was to say that discovery had been provided informally, and that the Ministry's approach had been "co-operative and principled in challenging circumstances". [455] The Ministry maintained that it was permitted to redact information in discovery on the basis of its view of what was relevant to a plaintiff's claim.

654. MSD filed affidavits from one of its representatives in support of its position.[456] The affidavits provided details about the Ministry's discovery process, and the number of claims being managed by the

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452 CIV-2009-485-944 *JDE v Attorney-General* interlocutory application on notice for discovery orders, memorandum of counsel and affidavit of Kerryanne Mai in support of interlocutory application for JDE, 2 July 2015.

453 CIV-2008-485-2041 *RN v Attorney-General* interlocutory application on notice for discovery orders, memorandum of counsel and affidavit of Kerryanne Mai in support of interlocutory application, 2 July 2015.

454 CIV-2010-485-1167 *WA v Attorney-General* Interlocutory application on notice for discovery orders, memorandum of counsel and affidavit of Kerryanne Mai in support of interlocutory application for WA, 2 July 2015

455 Submissions for MSD in relation to applications by RN and Others, 2 February 2016.

456 Affidavits of Cecilia Byrne on behalf of the defendant in opposition to the RN, JDE and WA applications, 24 July 2015.

records team. It also set out MSD's approach to redactions. Each affidavit also addressed the specific concerns held by the plaintiffs.

655. MSD resisted any order which required it to provide unredacted documents to a plaintiff. It maintained that the redactions it had made in the three cases were appropriate and that the information was irrelevant to the pleaded claims. It maintained that it would reconsider redactions if we were able to identify problems with the way it had been done. The challenge for us, of course, was that we could not always tell what information had been redacted, and we were working on the basis of educated guessing. MSD resisted our request that the Court make orders about discovery on the basis of the three case examples.

656. This created a vicious cycle. We were preparing claims on the basis of redacted information from Privacy Act records, and to complete the claims we needed discovery. MSD, on the basis of our incomplete claim documents, was able to say that the discovery could only relate to what we knew, and that the Ministry would not give us other information that it decided was not relevant. It was an impossible situation. MSD stated that it had reviewed and refined its discovery processes to be compliant with the new relevance test for discovery in the High Court Rules. It maintained that the change of approach resulting from its review in December 2013 was principled and transparent.

657. The applications were heard before Justice Rebecca Ellis on 4 February 2016.[457] The decision dealt with all three applications. In the decision, Her Honour noted:

a) Up until the end of 2013, MSD was providing Cooper Legal with the personal and family files without redaction;

b) Between August and October 2013, Cooper Legal had applied for a number of particular discovery orders in relation to other documents, and those applications had been resolved by consent, where the parties agreed that particular information would be disclosed on a counsel-only basis and would not be provided to the plaintiffs directly; and

c) In the context of addressing the discovery applications, and in light of the 2012 amendments to the High Court Rules dealing with discovery, in late 2013 MSD reviewed its disclosure processes and began taking a narrower approach to relevance. It advised Cooper Legal of this on 12 December 2013.

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

658. Justice Ellis identified the core problem with MSD's approach, that there was something of a "Catch 22" aspect to the suggestion that plaintiffs' counsel should explain to MSD why we regarded information we had not seen as relevant. These issues had given rise to a representative application, which were reflected in the applications for the three plaintiffs.

659. Her Honour noted that she had had the opportunity to compare a sample of redacted documents with the original documents provided by MSD. Justice Ellis recorded that the exercise gave her:

> some concern that some of the material redacted is plainly relevant to the claim of the particular plaintiff concerned …absent some clearly articulated and contestable claim for third party confidentiality it is difficult to see how the redactions could be warranted.[458]

660. In the end, Her Honour determined that orders for standard or tailored discovery would not resolve the issue. She directed MSD to provide a set of documents to counsel for the plaintiffs which contained both the redacted version and a clean copy of each of the disputed documents. The clean copies were provided on a strictly counsel to counsel basis.

661. Since the decision in *N v Attorney-General*, those principles have applied to discovery between the parties, usually without too many problems arising. There are challenges on occasions around the use of information in the counsel-only documents, in documents including amended statements of claim, but, on the whole, the directions given by Justice Ellis have allowed the parties to proceed in a principled way which does not disadvantage the plaintiffs. However, this only relates to filed claims – the vast majority are not filed in the Court.

662. It is worth noting that, in recent discussions about discovery in the context of proceedings being tracked towards a trial in August 2020, MSD again indicated that it intended to redact information for relevance. Justice Ellis made it clear that such redactions were not in accordance with the High Court Rules, and MSD has not pursued that position.

Redaction of Court documents

663. Another major issue we have had with records which has impacted on our ability to progress claims was MSD's approach to information relating to Court documents. From 2015, MSD redacted enormous amounts of information, which has been dealt with above. One specific issue was the redaction of all court documents which not only reflected a claimant's legal status with MSD, but also contained valuable information about a client's family, placements and what was known by social workers. As we have explained, legal status is

458 *N v Attorney-General*, ibid [11].

necessary to form the relationship between the young person in care and the State agencies. If we had insufficient information about this, it was difficult to make out a claimant's claim.

664. MSD's approach to Youth Court information was identified in an email from MSD to Cooper Legal on 30 April 2015.[459] MSD's position was that once Youth Court documents were filed they became the property of the Court and it was inappropriate for MSD to disclose them. MSD said that if we wanted them, we had to direct a request to the Youth Court.

665. MSD also redacted all information relating to Family Court and Court documents relating to other Courts. When we challenged this, we received an outline of MSD's policy on 24 December 2015.[460] MSD set out that it did not release court documents to a person under the Privacy Act, because the Privacy Act could then be used by individuals to circumvent the Family Court Rules 2002.

666. Redaction of this core information created and continues to create immense problems for us. We repeatedly file claims in the court to obtain discovery, because the information in the Privacy Act documents do not give us sufficient information to put together a claimant's experiences. This increases a claimant's legal aid debt, and creates further delays. This situation continued, even after the decision in *N v Attorney-General*, which is described above. We continued to challenged MSD's redactions of this information. We told MSD that we would have to continue filing claims if it did not change its practice. We raised this again in relation to the claim of PGD, whose claim we were filing in the High Court to obtain discovery. In response to our questions, and our threat to place this before the OPC, on 8 August 2018, MSD reversed its policy.[461] Crown Law advised:

> … The Ministry advises it has now amended its position on releasing court documents under the Privacy Act. The Ministry no longer considers S7(2) applies to court documents generally. Court documents will be processed and released in accordance with the Privacy Act. Document subject to specific statutory access provisions or subject to restrictive court orders will still be withheld.
>
> The Ministry advises that it will re-process the Privacy Act releases for the claimants listed at paragraphs 18.1-18.3 of your draft memorandum…

667. Since then, MSD has reviewed a large number of information releases it had previously done, and re-released records with the court documents unredacted. This process is ongoing, and we estimate

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459 Email from MSD to Cooper Legal (court document redaction re PAH) 30 April 2015.

460 Email chain, MSD and Cooper Legal (Family Court redactions re KG) 24 December 2015.

461 Email chain between Cooper Legal and Crown Law (court redactions re PGD) August 2018.

there are still hundreds of client files where this exercise is yet to be undertaken. There are considerable delays in MSD providing us with the additional material, which has added to the amount of time people were already waiting to have their records sent to us from MSD. It has also caused further delay in our ability to prepare claimant documents.

Deceased and 'At Risk' Claimants

668. Our clients range in age from 17 to 80 years old. Their health is often affected by the abuse they have suffered (such as head injuries, and the mental trauma of abuse), as well as the negative impacts on their health arising from the damage they experienced (alcohol and drug abuse, poor mental health, low socio-economic status, poor healthcare). While we can only work from anecdotal evidence, it seems that the life expectancy for our clients is lower than average, and we certainly have experienced a higher than average suicide rate amongst our client group. At least five clients have taken their lives during the process of working through the claims process with us.

669. Often, the death of the claimants leaves their family and whanau with many unanswered questions. Their siblings, who may have had quite different experiences from them, often want to know how their lives became quite different (or, sometimes, why they were so similar), or the children want to know why their parent was unavailable, or even abusive towards them. Many are unaware of the years a claimant can wait to have their claim resolved.

670. There are a number of issues relating to deceased claimants arising out of the redress processes. They include:

    a) When, and with what material, MSD will assess a claim brought by someone who has passed away;

    b) The role of whanau in settling the claim of a deceased person;

    c) Funding letters of administration, where necessary, when a claimant dies without a will; and

    d) Wraparound services, and how claims are dealt with, when a person is suicidal, and their claim is pending assessment.

671. As with many aspects of the redress process, delay is a contributing factor to claimants passing away before their claims are resolved. With a turnaround time averaging 4 years, it is not uncommon for a client to discover they are terminally ill and to pass away before MSD responds to their claim. This is even when claims are treated with urgency. A shorter and more streamlined process would mean more claims were resolved while claimants are still alive.

Information taken into account – deceased claimants

672. The Ministry has a long-standing position that a claimant must communicate their concerns to MSD about their time in State care prior to their death, for the claim to continue. We have had serious differences of opinion with the Ministry about what a claimant must do in order to meet that threshold.

673. The most significant example is that of Alva Sammons. Ms Sammons' two sisters, Georgina and Tanya, will be giving evidence at the Redress Hearing and are likely to touch on Alva's situation.

674. All three Sammons sisters had claims against MSD for abuse they suffered in care in the same foster home. All claims have been treated differently. While the details will be dealt with in their individual evidence, Georgina Sammons' claim was settled at a Judicial Settlement Conference, Tanya Sammons' claim remains outstanding after she rejected a Fast Track offer, and Alva Sammons' claim has never been settled.

675. Alva Sammons wrote about her experiences of abuse in care before her death. Her account is also corroborated by her sisters, and the natural daughter of the foster parents involved. However, because Alva never formally approached MSD in the way that it expected, MSD refuses to assess her claim.

676. We complained to the Ombudsman on behalf of Alva Sammons' estate on 1 April 2014.[462]

677. We received regular updates from the Ombudsman, advising that the Office had a backlog of work, but also that MSD repeatedly failed to meet timeframes for providing its response to the Ombudsman. We received the Ombudsman's final report on 14 June 2016.[463] The Ombudsman recorded that the decision of the Ministry to decline to investigate a historic abuse claim made by Georgina Sammons on behalf of Alva was unreasonable. The Ombudsman recorded:

> Alva raised her abuse concerns with the Ministry during her lifetime but was offered no advice about the potential (and indeed, in this instance, likelihood) of the Ministry having some liability for the quality of and failings in Alva's care. It is the Ministry's view that if Alva had made an historic claim during her lifetime that it would have been investigated however Alva was not told that she could make a claim. In my view what constitutes an historic claim has been interpreted too narrowly in these circumstances and Alva's case should not have been excluded from the Historic Claims process.

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462 Complaint to Ombudsman by Cooper Legal (Sammons) 1 April 2014.

463 Letter from Ombudsman to Cooper Legal (Sammons), 14 June 2016.

678. Despite this report, MSD has regularly and repeatedly declined to implement the recommendations of the Ombudsman, or to assess Alva Sammons' case.

679. MSD reiterated its view in an email to Cooper Legal dated 7 November 2019.[464]

680. In other cases, MSD has initially refused to engage with a claim by a person who has subsequently died. One example of this is WC.

681. WC went through a robust interview process with us, and we were due to prepare a settlement offer for him, based on what he had told us, and an analysis of our records and database material. WC was also involved in the claims for delays in receiving the records in the HRRT. He completed a statement about his experiences in care and the delay in receiving records. While this was happening, we were preparing a draft settlement offer for his substantive claim.

682. When it came time to finalise a letter of offer for WC, we lost contact with him. We were later told that he had died suddenly. We sent the settlement offer to MSD, noting WC's passing.

683. MSD initially refused to assess his claim. In contrast to this position, MSD settled the claim filed on his behalf in the HRRT for the delay in receiving his records, knowing he was deceased, without any concerns being raised.

684. This position was later reversed by MSD. This was related to the introduction of the claims registration process, which we have already addressed, and which created a more formal way for claims to be lodged with MSD. We were advised of MSD's change of position in an email from MSD dated 2 July 2018.[465]

Letters of Administration

685. Many of our clients do not have the resources to make a will. Several clients have died intestate, with offers of settlement incomplete, or not yet made. Where claim documents have been provided to MSD, the claim continues in the usual way. However, when a settlement offer is made, we hit further obstacles:

    a) We are often tasked with locating the next of kin of the claimant, which can be a very difficult task;

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464 Email from MSD to Cooper Legal regarding Alva Sammons, 7 November 2019, without prejudice.

465 Email from MSD to Cooper Legal, (deceased claimants), 2 July 2018.

b) Where a person has died intestate and a settlement offer is made which is less than the prescribed amount referred to in section 65 of the Administration Act 1969, the personal representative of the claimant may sign the settlement documents and deal with the settlement funds;

c) However, where the settlement amount is over the prescribed amount, we need to assist our clients to obtain Letters of Administration. This is not an area of expertise for Cooper Legal, and we are reliant on other law firms to do this work for us.

686. An issue arises with the funding for obtaining Letters of Administration in these circumstances. Where a claimant is legally aided, their legal aid grant can be taken over by their next of kin. If that person is not eligible for legal aid, the grant will be withdrawn. If legal aid is continued, then we are granted funding to locate the next of kin, and Legal Aid will grant the disbursements associated with obtaining Letters of Administration. In circumstances where the next of kin of a deceased claimant does not qualify for legal aid, however, the costs of administration are taken out of the settlement funds. This seems to create a disparity, particularly when MSD has refused to fund this work, albeit it was initially agreeable to doing so.

Suicidal and At-Risk Claimants

687. MSD will only prioritise a claim in the "queue" in two circumstances:

a) Where a claimant is terminally ill, and provides evidence of that; or

b) Where a claimant is deemed to be suicidal and is at real risk of taking their life.[466]

688. Unfortunately, what we have found is that even prioritised claims are progressed terribly slowly. For example, in one case, that of JB, who had poor mental health and was suicidal, we advised MSD of this on 16 April 2019. On the same day, MSD agreed to prioritise his claim and allocated him for assessment the next day. MSD indicated that a response would be made available to his claim by the end of June 2019.

689. At the date of this brief of evidence, MSD has still not provided a response to JB's claim.

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[466] Letter from MSD to Cooper Legal (allocation of claims and prioritisation policy), 19 February 2018.

690. Other claimants who were terminally ill, have suffered the same delays. One claimant, GS, signed a settlement agreement shortly before his death. His settlement funds only came into our trust account when he died. Another client, Mr CM, died while his unsigned settlement agreements sat in his letterbox.

691. At times, MSD has prioritised claims for other reasons, such as terminal illness of family members, above clients who have been waiting longer. This occurred when a client rang MSD directly, and we were only told about the prioritisation change later on. This was unfair to clients who had been waiting longer, some of whom were also very unwell.[467]

Proposed solutions

692. Obviously, a speedier process would do a great deal to mitigate the harm done when a claimant dies before their claim is settled. In addition, MSD needs to take a broader view of what information it will base its assessment of a claim on, and not decline to assess claims when it has valid information it can assess claims on, especially for clients who die either before making a formal claim, or before they had provided detailed information about their claim. MSD also needs to provide better wraparound services and counselling to claimants, so that they do not find the claims process as, or more traumatising than the abuse itself.

The "Indivisible Crown" argument

693. In Chapter 4 of our evidence, we talked about the applications we made under Rule 10.15 of the High Court Rules to resolve factual disputes about some Campbell Park claims. This was for GGH, PC and others. We noted that the addition of MOE to their claims initially had some benefits in terms of the information we received, but it also: created Limitation Act issues in respect of the Ministry of Education part of the claim; seriously delayed resolution of the claims due to MOE's lack of process; and would be one of the reasons why Crown Law raised what we have called the "Indivisible Crown" argument.

694. In December 2018 – January 2019, we had been engaged in lengthy correspondence with Crown Law about the resolution of a claim by TK, whose claim against MSD had been filed in 2008, but his claim against MOE in respect of his experiences at a residential special school had been filed in 2015. This had complicated the issue of the Limitation Act, which Crown Law had raised in defence of the claim. We had received a proposal about how to deal with that in respect of

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[467] Letter from Cooper Legal to Crown Law, regarding prioritisation of claims, 24 April 2015. This letter refers to CM, noted above.

TK, which, without any further information, seemed a very strange approach to us.[468]

695. Crown Law's approach to TK's claim made more sense when we received a letter from Crown Law on 12 February 2019, about how the Crown was described as the defendant in historic abuse proceedings.[469]

696. The letter set out a proposal for a different approach to historic claims – not the redress processes or anything that would substantially affect how clients interacted with the various Government Agencies, but how the Crown was named in formal court proceedings. This had been triggered by two things:

a) The establishment of Oranga Tamariki as a separate Ministry. We had taken the view that Oranga Tamariki would eventually be named as a defendant in its own right, for our youngest clients; and

b) The identification of the appropriate defendant for claims which were jointly brought against MOE and MSD, but when one of the defendants needed to be added at a later date.[470]

697. After many years of our practice of joining government departments through the Attorney-General, Crown Law adopted the position that that was now incorrect. Crown Law proposed that the Attorney-General should only be joined once in respect of any part of the State. Crown Law identified different ways in which individual Crown defendants had been named throughout the history of the claims (although we note, every time the name changed, it was a suggestion of the State agency involved). Crown Law referred to the Crown Proceedings Act 1950 as the basis for its position. As we have noted in Chapter 1, the Crown Proceedings Act is outdated and not fit for purpose.

698. Crown Law set out a lengthy legal opinion as to why the only party involved in the historic claims should be the Attorney-General, without identifying which State agency the claim was against. Crown Law did not want the Attorney-General to be named multiple times in respect of different State agencies. Effectively, it was proposed that the Attorney-General represent the Crown as a whole, with more detail

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468 Letter from Crown Law to Cooper Legal regarding TK, 3 December 2018.

469 Letter from Crown Law to Cooper Legal, regarding appropriate Crown defendant, 12 February 2019.

470 This was the case for two clients, KH and RP, who had had claims filed against either MSD or MOE several years ago, but later sought to add the second Government Department as a defendant in the formal proceedings. In each case, the Department which was already named resisted the addition of a second defendant on the basis that joining it would introduce fresh causes of action, which were time-barred under the High Court Rules. This is explored further in relation to joint claims in Chapter 6, MOE redress processes.

about which part of the government had committed the wrongdoing being left for the substantive material in the statement of claim. We nicknamed this the "Indivisible Crown" approach.

699. We acknowledge that this would have resolved problems in relation to the Limitation Act for a small number of clients, usually those with two different proceedings filed against two different government departments, at different times. However, those clients were in the minority, and their claims were already mired in two different redress processes (MSD and MOE). Changing the name on the front of the statement of claim would have had no real effect for the redress processes, although it may have had an effect if the claims went to a trial.

700. For the vast majority of claimants, changing the name of the defendant would have had no real effect on the redress processes, but created additional work for us, and fewer obligations on the Crown. We were frustrated that this was a reasonably academic issue that took more time away from progressing the substantive claims.

701. One of the first things we observed in our response to Crown Law, was that the Crown does not "act" like a single entity. They have different lawyers from the respective Departments, different settlement processes and hold their own records for each claimant. We were unwilling to adopt Crown Law's approach until all of the State agencies were working off the same page. Given the entrenched problems between MOE and MSD that we could see, we did not think that was going to happen any time soon.

702. We sent our response to Crown Law on 19 March 2019.[471] In our response, we identified one of our concerns being that just naming the Attorney-General would limit the Crown's obligations to provide discovery. We also did not think it was useful for claims pleaded under the Bill of Rights Act. In addition, we identified case law at Court of Appeal level, which had already rejected Crown Law's arguments about the "Indivisible Crown". We noted that it was Crown Law which had suggested joining the Attorney-General in respect of MOE to formal proceedings in June 2016. We had been put to the time and expense of doing that, and now Crown Law wanted to change the position again.

703. We made it clear that we could see no real benefit to the bulk of our clients in this approach, and we rejected it. We reiterated this position when the issue arose before Justice Ellis. She indicated an unwillingness to deal with an academic argument when it did not reflect in any changes or benefits to settlement of the claims.

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[471] Letter from Cooper Legal to Crown Law regarding the Crown as defendant and the RP and KH proceedings, 19 March 2019. This is without prejudice correspondence, with client details redacted.

704. Since that time, the position has not been pursued with any enthusiasm by the Crown. It was another issue that detracted from the work we needed to do for our clients.

CHAPTER 6

MOE SETTLEMENT PROCESSES

- **MOE Claims Process**
- **The Liability Landscape**
- **Blurred Lines – MSD and MOE Claims up to 2015**
- **Claims after 2016**
- **Joint Claims**
- **Appendix A: Case study of MLA**
- **Appendix B: MOE Compensation Analysis**

MOE CLAIMS PROCESS

677. The redress scheme run by MOE is characterised by legal and factual complexity, changing legal positions, a lack of transparency, inter-governmental conflict and enormous delay.

678. MOE's redress process was initially set up to address claims of abuse which occurred at Residential Special Schools before 1993. The scope of its redress process excludes many people from engaging with MOE who also have legitimate claims. For example, it excludes people who were at Residential Special Schools after 1993, even though their experiences are the same as those who were in care before 1993. The 1993 deadline is also completely arbitrary and aligns with the Crown's litigation strategy rather than any legislative date.

679. MOE's process is under-resourced and plagued by extensive delays. Like MSD's process, it is not transparent, and the way in which claims are assessed has varied.

680. Compensation offered by MOE is uniformly low. It has routinely offered the same amount of compensation to multiple claimants, regardless of the outcome of its investigations.

681. It is important to note that MSD took responsibility for investigating allegations against MOE for a number of years. We were not aware of this, but we know now that MOE made financial contributions to settlements, including settlements under the Fast Track Process, without taking any active role in the investigation of claims. The investigations and assessments dealt within this chapter are ones done by MOE itself.

682. Increasingly, claims are brought jointly against MSD and MOE, and end up caught between two different processes. This means additional delay and distress for the clients involved. The difficult process of settling joint claims is a result of the inability of MSD and MOE to work together, and also to find agreement over the complex liability associated with joint claims. In this Chapter, we will cover:

    a) the 'liability landscape';

    b) the transitional period between MSD and MOE claims up to 2015;

    c) the MOE process from 2016;

    d) joint claims;

    e) process issues, including:

i. Investigation and process problems
ii. Delay
iii. Lack of a limitation agreement
iv. Low compensation
v. Peripheral issues, including integrated schools.

f) proposed changes.

The Liability Landscape

683. The bulk of MOE claims relate to two types of schools: State schools, and Residential Special Schools. Most of the claimants we are instructed by were placed in Residential Special Schools such as Waimokoia School, Kelston School for the Deaf, McKenzie Residential School and Campbell Park. MOE is also liable for acts by teaching staff at Health Camps, which were situated around the country.[472]

684. There is not the scope in this evidence for a detailed explanation of the liability of MOE, and the variables associated with Residential Special Schools (and the changes to the liability landscape if the school has closed, and indeed, when it closed). Suffice it to say, there are two keys dates for the determination of whether MOE is the proper respondent to an historic claim:

a) 1 April 1972; and

b) 1 October 1989.

685. The second step in the process is an assessment of the legal status of the child at the time they were at the Residential Special School. This is dealt with below.

Child Welfare Division / Department of Education

686. Until 31 March 1972, Child Welfare was a 'Division' of the larger Department of Education. The Superintendent of the Child Welfare Division was answerable to the Director of the Department of Education. Child Welfare administered Residential Special Schools and employed many of the staff who worked in the grounds and the residential part of the schools – at Campbell Park, Child Welfare employed groundsmen, matrons, hostel staff and so on.

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[472] Health Camp claims have their own fraught history. Most claimants were only at Health Camp for a few weeks at a time, and can rarely identify whether an abusive staff member was a member of the hostel staff, or a teacher. The organisation responsible for Health Camps, STAND, has little in the way of funds or legal/investigative resource to deal with claims against it.

687. However, Residential Special Schools were established and governed by the Education Act 1964 and its predecessors, and the Principal and teaching staff were employed by the Director of Education.[473]

688. On 1 April 1972, the Child Welfare Division was split from the Department of Education, to form the Department of Social Welfare. Residential Special Schools remained under the control of the Department of Education.

689. In short, if abuse happened at a Residential Special School before the split, both MSD and MOE could be held liable. Claims for abuse which happened after 1 April 1972 would be directed only to MOE.

690. This is further complicated by the legal position of a claimant with Child Welfare status at the time. A child who was a State Ward could be admitted to a Residential Special School by Child Welfare / DSW – and a claim would be against both Ministries. If a child was not a State Ward, they were usually admitted under s127 of the Education Act1964. In the latter situation, MSD has argued that the claim should be brought wholly against MOE.[474]

691. The scenarios are demonstrated in the below table.

Up to 31 March 1972	No status with Child Welfare, admitted under the Education Act to a Residential Special School	Claim against MOE and MSD
Up to 31 March 1972	Admitted to Residential School as a State Ward or with similar legal status	Joint MOE and MSD claim
1 April 1972 onwards	Admitted to Residential Special School under Education Act, no status with Child Welfare	MOE claim only
1 April 1972	Admitted to Residential Special School under Education Act, State Ward or similar legal status	Joint MSD and MOE claim (fact dependant)

[473] This is based on information received from Crown Law in the proceedings for GGH (see case study). While the information we received related only to Campbell Park, it is a reasonable inference that the same circumstances existed at other Residential Special Schools.

[474] There are a myriad of variables with these scenarios. Children who were not State Wards but who had status with Child Welfare / DSW (such as being under legal supervision, or a section 11 agreement) could have claims against both Ministries. There are also inconsistencies between the remaining sections of the Education Act 1964 and the Education Act 1989 which give rise to complexities about the assumption of liability for a closed Residential Special School.

692. As will be set out below, both Ministries and Cooper Legal have had an evolving understanding of the liability landscape, and for some claims, the proper defendant for specific allegations remains unclear.

693. This has affected claimants' experiences of MOE's redress process in the following ways:

a) Claims initially brought against MSD sat with it for long periods of time before being identified as more appropriately directed to MOE;

b) MOE was not well equipped to investigate and resolve claims (and, we say, is still not well-equipped);

c) For a small group of clients, this has the potential to cause problems with time running under the Limitation Act, especially where MSD has purported to be the correct defendant for claims for several years; and

d) People with joint claims experience very different processes, at different speeds, with different outcomes, for experiences which they view as a 'whole'.

Tomorrow's Schools

694. The Education Act 1989 came into force on 1 October 1989, further complicating matters. From that date, most schools were governed by independent Boards of Trustees which respond to claims arising after that date.

695. However, there are different legal provisions for Residential Special Schools. Enrolment of students at these schools is directed and facilitated by MOE pursuant to s9 of the Education Act 1989. In addition, many of the Board of Trustees members are appointed by MOE, and the Board is effectively the agent of MOE in any case.

696. As stated, our understanding of the legal landscape for claims against MOE has changed over time. Our perception is that this has also been the case for the government agencies involved, which have adopted different positions to the claims since initial discussions in 2007-2008.

Blurred Lines – MSD and MOE Claims up to 2015

697. The above, brief analysis reflects what we know now about the liability landscape for MOE. However, that was not always the case.

698. A short review of the history of our engagement with Crown Law and MOE is relevant to understanding how MOE's redress scheme has come about, and the difficulties facing claimants who try to engage with it.

699. Up until Legal Aid initiated the withdrawal of funding in January 2008[475], we lodged multiple claims with MSD which included allegations of abuse at Residential Special Schools – in particular, Campbell Park and Mt Wellington Residential School.[476] Because the claims were grounded in the legal status of a child with Child Welfare / DSW, we took the position that MSD was liable for the abuse that child had suffered. The governance of Residential Specials Schools was a secondary consideration. While we made information requests to MOE for records, we continued to direct claims to MSD.

700. MSD took no issue with this approach and engaged with us about these claims – in particular, claims about Campbell Park. An example of this is BC, who had been in the custody of DSW for much of his childhood, and who had been placed at Campbell Park after 1 April 1972, where he had suffered serious abuse. His claim was filed in the High Court against MSD in 2006.[477]

701. Like so many others, BC's claim had been disrupted by the withdrawal of legal aid process. However, as we explain in our evidence, after a case management conference before Justice Miller on 15 April 2010, claims which had been tracking towards a trial were progressed to a Judicial Settlement Conference (JSC) instead[478]. This included the claim by BC.

702. BC's claim settled at a JSC in August 2010. MSD never raised the possibility of MOE being a defendant and did not settle on behalf of MOE (as evidenced by the wording of the settlement agreement). If BC's claim had been filed in 2016, rather than 2006, MOE would have been a joint defendant with MSD.

703. Another example is the case of MLA, which was initially brought against MSD. A case study for MLA can be found at the end of this Chapter.[479] Four years after MLA's claim was filed, Crown Law took the position that MOE, not MSD, was the correct defendant. In 2015, MOE was eventually substituted as the defendant, based on our understanding of the liability landscape at the time. MLA's claim settled against MOE in February 2017, 13 years since it began. However, it would be treated differently now.

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475 This is dealt with in Chapter 2.

476 Campbell Park was a Residential Special School situated in the Waitaki Valley which operated between 1908 and 1987. Mt Wellington Residential School was the predecessor to Waimokoia School.

477 CIV-2006-485-1279 *BC v Attorney-General in respect of MSD*

478 We have dealt with this case management conference in relation to the MSD and CHFA claims processes in other chapters. It represented a crucial turning point which allowed claims to begin settling.

479 MLA has provided permission for us to refer to his full file and use his name, but for the purposes of this brief of evidence his identity has been anonymised.

Grouping the claims – Campbell Park and Kelston

704. One of the many attempts by Cooper Legal and MSD to address the growing number of claims was to look at progressing groups with common elements, to see if agreement on facts would help tranches of claims to settle. One such group had Campbell Park as the common denominator. A positive aspect of this approach was that we received unredacted records in relation to Campbell Park in October 2011. [480]

705. Also, in late 2011, Cooper Legal received instructions from two people who had suffered abuse at Kelston School for the Deaf, including James Packer, whose mother will provide evidence to the Royal Commission. Although Kelston was still open, Cooper Legal took the view that MOE was ultimately responsible for running and overseeing Kelston, and the actions of teachers employed there and that claims should therefore be progressed against MOE as the primary defendant. Communications ensued regarding records requests to MOE and Kelston.

706. We know, now, that MOE was using assessors in response to claims by unrepresented individual by mid-2011[481]. However, we had no contact with MOE about its investigation process.

707. On 6 December 2012, Cooper Legal wrote to MSD with a list of "prioritised" clients, for whom offer letters had been sent to MSD up to October 2012, where there appeared to have been no response from MSD.[482] This list included MLA as well as several other clients with Campbell Park claims.

Redirecting Claims to MOE

708. Another example of the confused boundary between MSD and MOE was the claim by CC. this claim about Mt Wellington Residential School had been filed in 2006, against MSD. We thought this was comparable to the Campbell Park claims, and tried to have it assessed under the CCRT process. The proposed CCRT meeting was postponed while the issue of liability was addressed.

709. On 29 January 2013, MSD wrote to Cooper Legal regarding the progress of claims settlement.[483] MSD advised that settlement offers were imminent for five clients, including MLA – the same client Crown Law had said should take his claim against MOE.

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480 Letter from MSD to Cooper legal (re Campbell Park records), 6 October 2011.

481 Letter to MMC from MOE re investigation, 3 November 2011.

482 Email Cooper Legal to MSD, 6 December 2012.

483 Email from MSD to Cooper Legal (claims), 29 January 2013.

710. It is possible that MSD and MOE had reached some kind of agreement by this point, which meant that MSD was investigating or assessing claims on behalf of MOE. MOE certainly did not have the staff or resource that MSD had, severely limiting its ability to deal with the claims. If there was an agreement, it was not known to us. MSD continued to settle claims as though it was the only defendant. From our perspective, this was not a bad thing, as MSD at least had a settlement process and an agreement to 'stop time' under the Limitation Act. MOE did not have either of those things.

711. On 26 February 2013, Cooper Legal wrote to MSD noting our concern that we had not received four of the five responses to settlement offers identified as "imminent" by MSD.[484]. This included MLA and PC, who, Cooper Legal noted, had met with CCRT nine months earlier following an exchange of settlement offers.

712. On 28 March 2013, as a result of a meeting with MOE and MSD representatives, Cooper Legal provided to MOE copies of the letters of offer previously sent to MSD for 27 clients with Campbell Park claims.[485] The parts of the letters which did not relate to Campbell Park were redacted.

713. On 10 April 2013, Crown Law wrote to Cooper Legal about CC. MSD declined to respond to his claim, and Crown Law suggested it was redirected to MOE. We took that step the same day, writing to MOE about CC and two clients who been abused by a teacher at Roxburgh Health Camp School claims.

714. MOE responded on 12 April 2013.[486] MOE reiterated its willingness to enter into discussions with Cooper Legal to resolve filed and non-filed cases outside of the litigation process. MOE advised that broadly speaking, the process was:

a) MOE would retrieve all relevant information and assess that information against the allegations made;

b) MOE would identify the correct respondent, whether that be MOE, the school or some other third party;

c) For claims that MOE considered had merit, where for example there was sufficient evidence to support the allegations made, the ADR Process allowed MOE to acknowledge and/or apologise for harm to the claimant and make a financial payment where it was appropriate;

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484 Email chain between Cooper Legal and MSD, 26 February 2013 – 27 February 2013.

485 Letter from Cooper Legal to MOE providing Campbell Park excerpts, 28 March 2013, without prejudice.

486 Email from MOE to Cooper Legal (MOE claims) 12 April 2013 (without prejudice)

d) MOE was engaging in this process on a "without admission of liability" basis. All discussions and any resulting settlement were on a "without prejudice" basis.

715. During this time, we were corresponding with MOE about claims arising from Kelston School for the Deaf. This will be dealt with in more detail in the evidence relating to James Packer.

716. On 10 July 2013, Cooper Legal and MOE met to discuss the process for managing and responding to the Campbell Park, Kelston, Roxburgh Health Camp School and Mt Wellington Residential School claims. This was a 'without prejudice' meeting and so we can only touch on matters broadly. MOE and Cooper Legal discussed the settlement processes that had been set up by both MSD and MOH, including the agreements with both Ministries that they would contribute to the Legal Aid debt.

717. MOE advised Cooper Legal that it had received a lot of cases and that many of these had come to it direct. For direct claimants, MOE's process included having an appointed assessor meet with the claimant and investigate the claim. The people appointed to be assessors were described as "relatively independent". Previously, a former MOE staff member had been appointed. The assessor being used by MOE was a psychologist who was considered to have the right skills for the role.

718. To us, the process seemed under-resourced and ill-equipped to deal with the potential number of claims.

719. Later in July 2013, Cooper Legal requested records for further clients who it had identified should bring claims against MOE. These claims related primarily to Waimokoia and McKenzie, and included Chassy Duncan and TK, who both already had claims filed against MSD.[487]

720. Cooper Legal, MOE and Legal Aid also continued to have discussions about a fee arrangement between MOE and Legal Aid. This was an important step, because it would be harder to settle claims if compensation which was already low, was subject to further deductions by Legal Aid.

721. On 29 November 2013, MOE and Cooper Legal met again about the MOE claims. Records requests continued to be processed by MOE. Work on the Kelston claims had been paused due to Cooper Legal's work commitments (but settlement offers were sent in June 2014). CC's claim had been sent to an MOE appointed investigator, who was to start work on the file in January 2014.

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[487] Chassy Duncan and TK's experiences will be addressed in relation to joint claims.

722. Cooper Legal and MOE discussed MSD's accelerated process (later referred to as the Two Path Approach, or 2PA). It was projected that the 2PA would cover a lot of Campbell Park claims. MOE representatives appeared to think this would be an expedient way of working through a number of difficult cases.

723. On 27 February 2014, Cooper Legal attended a meeting with CC, Jyotika Sharma and Murray Witheford from MOE to discuss details of CC's allegations. CC's case is demonstrative of how slow the MOE process was.

724. On 17 April 2014, MOE sent Cooper Legal a draft Limitation Act agreement.[488] Communications about this continued for years. At the date of providing this brief of evidence, no Limitation Agreement has been agreed with MOE, and this is addressed in further detail below.

725. In the meantime, on 8 October 2014, MOE wrote to Cooper Legal with a very low settlement offer for CC.[489] The settlement offer stated that in 2013, CC's case had been transferred from MSD to MOE, and MOE had undertaken an assessment of CC's claim. One of the documents relied on was CC's statement of claim. We cannot see from our records that we ever provided this to MOE. We can only conclude that MSD provided the statement of claim to MOE.

726. By 2014, the groups of clients who had been identified as clients with claims against MOE had grown. Between April 2014 and November 2014, Cooper Legal had sent settlement letters to MOE, for about 12 clients with claims about Kelston, Roxburgh and Mt Wellington, as well as Waimokoia (as Mt Wellington came to be known), Van Asch School for the Deaf and McKenzie School.

727. On 30 June 2015, Cooper Legal wrote to MOE, chasing up the three Kelston claims and PB's claim, for which offer letters had been sent to MOE between June 2014 and November 2014.[490]

728. On 7 July 2015, MOE wrote to Cooper Legal in response to the 30 June 2015 letter.[491] MOE reiterated that it had a number of complaints to resolve under its historic claims process. Each case was allocated to an assessor when one became available and once all background information had been gathered to support the investigation process. As much as possible, in order to deal with cases as efficiently as possible and with MOE's capacity, cases dealing with similar or same matters were grouped together for investigation. Notwithstanding this,

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488 Letter from Jyotika Sharma, MOE, to Cooper Legal attaching draft agreement, 17 April 2014, without prejudice.

489 Letter from MOE to Cooper Legal (re CC) 8 October 2014, without prejudice.

490 Email from Cooper Legal to MOE (claims process), 30 June 2015.

491 Letter from MOE to Cooper Legal, 7 July 2015.

the large number of cases received under the process and the historic nature of the cases meant that some delay was inevitable.

729. In a Minute dated 26 August 2015, issued shortly before his retirement, MacKenzie J recommended that the MOE claims be included in the DSW Litigation Group for case management conference purposes. MacKenzie J directed that for those MOE claims in which proceedings were filed by Cooper Legal only to protect time, no further steps would be taken in the proceeding, including the filing of a statement of defence, until further order of the Court.[492]

730. On 1 September 2015, Cooper Legal wrote to the then Disability Commissioner at the Human Rights Commission, Paul Gibson about the Kelston and van Asch claims, seeking his assistance to have the claims acknowledged and resolved by MOE[493].

731. The letter recognised that the allegations made by these clients were not at the most serious end of the scale of abuse suffered by our clients. However, Cooper Legal had come to realise that the abuse suffered by this group of deaf clients had had a more serious effect on them, in comparison to those clients of the firm without a hearing disability who suffered a similar level of abuse. The letter noted that this group of clients was particularly vulnerable because of their disabilities and were extremely wary of dealing with government organisations, and people outside the deaf community in general. The delay in resolving the claims was causing significant distress. For these reasons, Cooper Legal considered that this group would benefit from additional assistance from the Human Rights Commission.

732. On 25 August 2015, Cooper Legal received settlement offers for three clients who were at Roxburgh Health Camp School.[494] Each client was offered $5,000. Two of those clients ultimately accepted those offers, while one remains extant due to loss of contact between the client and Cooper Legal. A further $5,000 offer was made to another Kelston claimant (VW) in December 2005. We talk further about these settlement offers later in this brief. Several other claims relating to Kelston and Van Asch schools remained (and still remain) outstanding.

733. With the negotiations about a Limitation Act agreement with MOE stalled since late 2014, the ongoing delays in resolving MOE claims began to prejudice our clients' positions under the Limitation Act. The longer they had to wait for the MOE investigation to be completed, the bigger the risk that any formal claim would not be able to proceed because they would be out of time. We needed to file claims against

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492 Minute of MacKenzie J, 26 August 2015

493 Letter from Cooper Legal to Disability Commissioner, 1 September 2015.

494 Letter from MOE to Cooper Legal 25 August 2015, without prejudice.

MOE in the High Court, to protect their legal position. This was particularly where we had growing concerns about MOE's process, which was lengthy, unfair and had very poor outcomes.

734. On 22 September 2015, we sought funding from Legal Aid to file a group of claims against MOE.[495] In our letter, we set out:

a) That a small number of settlement offers recently received from MOE had been extremely unsatisfactory. MOE had refused to accept allegations that had not already been proved through previous internal investigations or that were evident from a claimant's records. MOE was also watering down allegations of abuse and using language which minimised our clients' allegations, resulting in a standardised $5,000 offer to a number of clients;

b) We had concerns about the level of proof required by MOE to accept an allegation and that there was no set process for claims with both MOE and MSD as a defendant and claims in that position were being dealt with differently;

c) The Limitation Act remained a live issue for this group of clients, particularly in light of the long-stop provisions inserted by the Limitation Act 2010.

735. Somewhat awkwardly, this letter was sent to Crown Law in error. However, Crown Law then responded to our substantive concerns, defending MOE's process.[496] We were concerned that MOE considered its settlement offers in relation to the Roxbrough Health Camp group to be in line with its findings of "low level abuse", which suggested to us that other claimants who made allegations of physical assaults and false imprisonments could expect similar minimising and similar low settlement offers. Crown Law's response also confirmed that MOE would not enter into a limitation agreement that would include all of our client group, which particularly affected people with claims falling during, or after, 1989.

736. With Legal Aid's agreement, we prepared statements of claim and filed a substantial number of claims against MOE in the latter half of 2015, and the early part of 2016. Yet again, this was time we had to spend protecting our clients' legal positions in addition to progressing their claims.

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[495] Letter from Cooper Legal to Legal Aid, 22 September 2015.

[496] Letter from Crown Law to Cooper Legal regarding MOE process, 28 September 2015

Limitation Act Agreement to Stop Time

737. As we have mentioned, a representative from MOE sent Cooper Legal a first draft of a Limitation Act agreement on 17 April 2014. In our response to MOE's draft, we proposed changes to more carefully define what the "out-of-court" process was, and also to define when time would start. The issue of "notification" of a claim has, at times, been contentious. We took the view that a letter requesting records and notifying MOE that the person alleged abuse in care was sufficient to notify a claim and trigger the agreement. MOE wanted the agreement to be triggered from the date a "letter of offer" was sent to it. There could be a long period of time between those two things, particularly if MOE was slow to produce records. We wanted the earlier time, because this was the most advantageous for our clients.[497]

738. We met with MOE on 5 June 2014 and agreed to put our concerns in writing. We did that on 11 June 2014.[498] In our letter, we identified that there should be consistency between government departments in terms of the scope of any limitation agreement. Our view was that any agreement with MOE should be on the same, or similar terms, as the agreement we have with MSD.

739. MOE responded on 23 July 2014.[499] MOE was resistant to any wording which might include people who were in care after 1989 at a school run by a Board of Trustees. We responded on 30 July 2014, attaching a draft agreement which, we said, reflected the current position with MOE. We said that we hoped to formalise the agreement as soon as possible.[500] Our correspondence with MOE continued, with little agreement.[501]

740. We again corresponded with MOE about this issue in August 2014.[502] We were unable to reach agreement. This was partly because the wording proposed by MOE would mean that some clients were excluded from the agreement.

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497 Letter from Cooper Legal to MOE regarding Limitation Act agreement, 14 May 2014, without prejudice.
498 Letter from Cooper Legal to MOE regarding Limitation Act agreement, 11 June 2014, without prejudice.
499 Letter from MOE to Cooper Legal regarding Limitation Act agreement, 23 July 2014, without prejudice.
500 Letter from Cooper Legal to MOE regarding Limitation Agreement, 30 July 2014, without prejudice.
501 Letter from MOE to Cooper Legal regarding Limitation Act agreement, 18 August 2014, without prejudice.
502 Email correspondence between MOE and Cooper Legal, 18-19 August 2014, without prejudice.

741. On 18 September 2014, we advised MOE that we intended to begin filing more claims in the High Court[503]. On 22 September 2014, MOE confirmed that it would not enter into a Limitation Act agreement on the terms we wanted for our clients[504].

742. The reasons we sought an agreement on the broadest possible terms were twofold:

a) We could see that the claimant group for MOE claims was steadily growing, and neither our office nor MOE was coping with the workload; and

b) We did not think it was fair that some claims would have to be filed, and some would be protected. We wanted people to be able to engage with different parts of the State, on the same terms.

743. The issue was not addressed again until 20 April 2017, when we made fresh attempts to secure an agreement with MOE and provided a draft agreement.[505] Crown Law responded on 12 May 2017.[506] When we responded on 12 June 2017, it looked like we were close to agreement. It was difficult to find wording that covered the various circumstances of our client base (particularly for people who had claims filed against MSD for quite a long time, when MOE should have been a defendant).[507] However, further proposed changes by Crown Law had set the negotiations back by November 2017.[508]

744. Our negotiations with Crown Law continued through most of 2018.[509]

745. In our correspondence, we noted that MOE's definition of a "historic abuse claim" was different to other government departments. MOE's narrow definition of what an historic abuse claim was, excluded people who had been at Waimokoia and McKenzie after 1989, claims about State Schools which occurred before 1 October 1989, or

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503 Letter from Cooper Legal to MOE, 18 September 2014, without prejudice.

504 Letter from MOE to Cooper Legal, 22 September 2014, without prejudice.

505 Letter from Cooper Legal to Crown Law regarding Limitation Act agreement, 20 April 2017, without prejudice.

506 Letter from Crown Law to Cooper Legal regarding Limitation Act agreement, 12 May 2017, Without Prejudice.

507 Letter from Cooper Legal to Crown Law regarding Limitation Act agreement, 14 June 2017 Without Prejudice

508 Email from Crown Law to Cooper Legal regarding Limitation Act agreement, 30 October 2017, without prejudice; Letter from Cooper Legal to Crown Law, 3 November 2017, without prejudice.

509 Letter from Cooper Legal to Crown Law, 19 January 2018: Letter from Crown Law to Cooper Legal 26 January 2018; Letter from Cooper Legal to Crown Law dated 29 March 2018; Letter from Crown Law to Cooper Legal, 12 December 2017. Without Prejudice

schools attached to Health Camps.[510] MOE would only deal with claims arising before 1993.

746. We noted that we had requested information under the Official Information Act, which showed that MOE had resolved only two claims of abuse or neglect at a Residential Special School which occurred on or after 1 January 1993, between 1 January 2010 and 31 December 2017. Both of those claims had been resolved in 2010, but neither of them had received any compensation.[511] We stated:

> Put another way, as at 31 December 2017, no post-1992 Residential School (claim) has been resolved by way of a compensation payment. Further, only two claims have been resolved where the claimant was in a Residential Special School between 1 October 1989 and 31 December 1992.

747. There were long delays by Crown Law in responding to our substantive proposal. On 18 October 2018, we finally received a response from Crown Law.[512] In the letter, Crown Law stated:

> MOE, Oranga Tamariki, the Ministry of Social Development (MSD), and Crown Law have been considering how best to ensure a principled approach to suspending the limitation clock. As you have raised, the current approach of developing individual agreements with separate Ministries is giving rise to inconsistency. The Ministries considered the principled way forward is to consider the development of an approach that applies across all three Ministries. The Ministries also want the approach to apply to both represented and unrepresented claimants.
>
> The Ministries will work together to develop what this approach could look like, and will be in touch with you to consult on it in due course. The Ministries are mindful that some aspects will be technical and will require careful thought and testing.
>
> We understand this change in direction may be frustrating, following the work that has been undertaken on the draft agreement with MOE to date. At the same time, we hope you will agree it is a positive way forward …
>
> We will be in touch as soon as possible with a timeframe for this work, including when you expect to hear from us. The Ministries are mindful of a need for this work to proceed expeditiously.

748. Since that letter, we have not received any fresh proposal for a Limitation Act agreement with either MOE, or the whole of government agreement envisaged by Crown Law. Our email in response expressed our dismay at this news and our lack of optimism that such

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510 Letter from Cooper Legal to Crown Law, 29 March 2018. There were long delays by Crown Law in responding to our substantive proposal.

511 OIA response from MOE, 21 February 2018, referred to in Cooper Legal's letter dated 29 March 2018.

512 Letter from Crown Law to Cooper Legal, regarding MOE, 18 October 2018, without prejudice.

an agreement could be reached[513]. We have continued to file claims against MOE.

2016 Onwards: The MOE Claims Process

749. Meetings with MOE representatives for three Cooper Legal clients took place between June 2016 and July 2016. These were for PB, MD and one Kelston client. During the meeting with PB, MOE's representatives told PB that a response to his claim would be provided within two months at the latest, and earlier if possible. This timeframe, like so many others, was not met. Further delays meant further frustration and distress for the claimants.

750. On 29 July 2016, MOE made a settlement offer to James Packer. Once again, it was for $5,000. We talk further about this settlement offer later in this brief, but we were growing concerned that MOE had developed a standardised approach of offering $5,000 to the Kelston claimants as a matter of course.

751. We have regularly requested information about MOE's settlement process under the Official Information Act. In August 2017, we received information from MOE about the number of claims it had received, and the number it had resolved.[514]

752. We learned from this information that:

a) Between 1 January 2010 and 30 June 2017, MOE had received 75 claims of historic abuse, and resolved 31 of them, with 22 claimants receiving compensation;

b) A total of $293,000 had been paid to claimants with the bulk of settlements being under $10,000.

753. We were surprised by some of this information. It appeared that all of the claims settled within the past one to two years were people who had approached MOE directly.

754. Since 2016, we have been regularly and repeatedly raising our concerns about MOE's settlement processes with MOE and/or Crown Law. In particular, we met with MOE and Crown Law representatives in June 2019. We have outlined our discussions with MOE below in relation to process issues, as we covered many of our concerns in that meeting.

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513 Email Cooper Legal to Crown Law (Limitation Act agreement) 23 October 2018, without prejudice.

514 Letter from MOE (OIA response) 7 August 2017.

Joint claims

755. Throughout 2016 and 2017, we struggled with how to deal with joint claims. These fell into two distinct groups: the Campbell Park claims, which have been addressed in Chapter 5, and claims by clients who were placed in Residential Special Schools, who also suffered abuse in CYFS care. Sometimes, there has been a gap in time between the notification of claims to the different government departments.

756. While there has been confusion about the lines of responsibility as between MSD and MOE, we have always been clear that a plaintiff is entitled to elect their defendant, and if their claim was to be discussed with another Ministry, there had to be transparency about that. On this occasion, MSD wanted to provide information from filed claims against it, to MOE. Sonja Cooper responded on 29 November 2019[515], confirming that we were happy for information to be shared between the Ministries if a plaintiff consented, and further wrote:

> What we have never been happy with is the "joint" approach taken by MSD and MOE to some of the settlement offers, as those offers are typically made by MSD only (and the settlement documentation records that MSD is the only party, typically) and they are lacking in any transparency as to which Ministry is accepting responsibility for which components of a client's claim and what the respective contributions to the settlement offer are.
>
> Given the position taken by the respective Ministries in the Campbell Park litigation, as an example, we would expect that any offer received for a client purporting to address both MSD and MOE claims, should be clear as to which Ministry is accepting responsibility for the separate aspects of a client's claim and how much each party is contribution to the settlement offer. That would make it easier for this firm to provide appropriate advice to the clients about the offers.

757. The experience of a joint claimant is illustrated in the evidence which will be given by Chassy Duncan. The variable outcomes are also demonstrated by the experiences of Kerry Johnson. These claimants have been particularly ill-served by the redress processes of MOE and MSD. Summarising the key aspects from Kerry Johnson and Chassy Duncan, we note:

a) Even after a claim is filed against MOE, no steps are taken by MOE for several years. MOE has said that it will not investigate a claim until a letter of offer is received;

b) Mr Duncan had already met with the CCRT (the precursor to the Historic Claims Team) for his MSD claim in September 2012. He was not asked about his experiences at Waimokoia

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515 Email chain between Cooper Legal and Crown Law (Joint claim disclosure) 28-29 November 2017.

during that meeting. Seven years later, in October 2019, Mr Duncan met with MOE's investigator;

c) The Fast Track Process did not work well for joint claimants. In Mr Duncan's case, the Fast Track offer was made to cover both of his MSD and MOE claims, but it appeared that the offer was made by MSD on the basis of incomplete information from MOE. While MOE was contributing some funds to the settlement offer, it was not clear how much, or what the money was for;

d) More than anything, the settlement process has been incredibly slow and it has been clear to us that MSD and MOE have been unable to work together to resolve them.

758. We requested information from MSD about the treatment of joint claims under the OIA. We received a response on 10 April 2019.[516] This was in the context of a claim by TK against both MSD and MOE. This information showed us that MSD and MOE had been in discussions for years about how to deal with joint claims.

759. We could see that in August 2017, a draft memorandum of understanding between the two Ministries had been prepared. This document reflected that MSD and MOE had been working on joint claims together for some time, but wanted to revisit how that would happen. It referred to an agreement from February 2013 which documented how MSD could access files relating to Residential Special Schools. The agreement expired on 31 December 2016. The memorandum was never finalised, so it is not clear how joint claims have been dealt with since that time.

760. We received further information under the OIA from MSD on 11 April 2019, this time about Campbell Park claims.[517] This showed that a large number of Campbell Park claims had been resolved in 2016/2017. These were likely to be settlements under the Fast Track Process. Most of them had had a contribution of funds from MOE. A total of $984,000 (excluding costs) had been paid, ranging from $5,000 to $50,000.

761. We made the same OIA request to MOE, which gave us further information about the settlement of claims.[518] The range of settlement payments from MOE was between $1,250 to $30,000. MOE had contributed on average 41% towards settlement of the joint claims, but the contribution was solely for allegations relating to Campbell Park.

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516 MSD OIA response regarding TK, 10 April 2019.

517 MSD OIA regarding Campbell Park, 11 April 2019.

518 MOE OIA response about settlement of claims, 11 April 2019.

762. We received an updated set of information from MSD about Campbell Park claims on 15 July 2019.[519] This included additional information which had not been released to us in April 2019.

Joint claims - current

763. A handful of joint claims have been tracked to trial by Cooper Legal against MOE and MSD from 2016. At the time of preparing this evidence, there is no fixed process between the Ministries about how to resolve these claims. The oldest of the joint claims has been on foot since 2004 (GGH).

764. Generally speaking, there are inconsistencies for claimants about when an offer is made by both MOE and MSD, or one of those agencies alone, and also about which Ministry undertakes the assessment of different elements of the claim. This creates further inequity, given the differences between MOE and MSD regarding their approach to assessment of claims.

Process Issues: MOE

765. MOE's process is plagued by extensive delays, which are growing worse. While MOE received claims from as early as 2010, the number of claims being directed to MOE has continued to increase. The claims, which initially related mostly to Campbell Park, now relate to several, different schools. Many of these claims are modern ones, with complex factual and legal issues.

766. On 1 June 2017, we wrote to Crown Law setting out our concerns about the MOE process.[520] In the letter, we:

a) Listed long outstanding claims;

b) Noted that a group of clients had rejected Fast Track offers which also purported to settle their MOE claims;

c) Asked for MOE's reasons as to why it would not investigate SW's claim (which is addressed below);

d) Contrasted the much faster settlement for a non-represented person, who had been prioritised over legally represented clients;

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519 MSD OIA response regarding Campbell Park, 15 July 2019.

520 Letter Cooper Legal to Crown Law (MOE Claims) 1 June 2017 Without Prejudice.

e) Took issue with a number of matters set out in an affidavit provided by an MOE representative to the Waitangi Tribunal;[521] and

f) Set out our concerns about the quantum of compensation offered by MOE.

767. The affidavit referred to in our letter was produced by Dr David Wales for MOE. In his affidavit, he described a process which was quite different to the experience of our claimants.

768. By mid-2019 the MOE claims were mired in delay with no clear way forward. We proposed a meeting with Crown Law and MOE representatives to try and find a way through the backlog, and to figure out what MOE was doing with the claims. The meeting was set for 27 June 2019. In advance of the meeting, we provided MOE with a draft agenda.[522]

769. At that meeting, we were told that a draft "all of government" Limitation Act agreement had been prepared which covered MSD, Oranga Tamariki and MOE and had been circulated to the different government departments. There was no timeframe for when we might expect that to be completed, and we were given the clear message that we had to keep filing MOE claims.

770. At the meeting, it became clear to us that there was a major, but undefined issue between MSD and MOE which was being discussed between the two ministries, and which was impacting on the progress of joint claims. We were also told that MOE was understaffed in terms of assessors which is why there are such lengthy delays. There was no timeframe for when MOE might take on additional staff.

771. We also discussed the fact that, as part of the MOE process, clients are meant to have the option of meeting the assessors, but this had not been offered to all of our clients, particularly the Campbell Park clients. MOE advised that it was prepared to have every client seen by the assessors and there were several clients whose claims were under assessment, who would be offered a meeting.

772. The meeting also confirmed that MOE had no broad overview of the claims against it, because it was assessing claims in groups with common denominators. It had not started assessing any claims relating to McKenzie Residential School.

773. **We told MOE that we had 110 open claims at that point.** We highlighted our ongoing concerns about the investigation process

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521 Wai 2615 and Wai 1247 Affidavit of Dr David Wales, 13 April 2017.

522 MOE meeting draft agenda 20 June 2019.

(referred to below) and said that our clients need transparency and consistency within MOE's process and across the State agencies.

774. We highlighted that when there is a joint claim, we need to know who has made what offer, what facts have been accepted, and by which defendant. We established from what MOE told us that it still sets an almost impossible evidential standard for clients, especially if the client has not met with the assessor, because it relies on records and statements by former staff. MOE is still taking no account of propensity evidence, or supporting evidence from family members. For this reason, we have begun encouraging clients to meet with the MOE assessor. It seems to give clients a better chance of a more reasonable settlement.

Investigation problems

775. As we have just stated, MOE commonly rejects allegations if there is no documentary evidence to support them. Further, MOE does not take into account propensity evidence, which would be considered within a court context. Combined, these factors set an impossible standard for claimants in establishing the truth of their allegations.

776. There are also significant inconsistencies in the approach taken by MOE in assessing claims. For example, MOE has inconsistently taken credibility into account in assessing claims. Further, we have seen instances where records reviewed and relied on by MOE in the assessment for one claim, have not been referred to in the assessment for another, despite the two claims having a significant factual overlap.

Compensation

777. Settlement offers from MOE also vary widely, though typically range from $5,000 to $35,000. Those in the higher range have related to claims of sexual abuse by staff members who have been convicted of sexual abuse against children at the same school identified by the claimant. This is notably GRO-B at Campbell Park and Graeme McCardle at Waimokoia.

778. Those claimants who have received lower-end offers tend to have claims relating to allegations considered less serious by MOE, or where only minimal allegations have actually been accepted by MOE, due to the lack of records. There has also been a tendency by MOE to minimise the seriousness of allegations accepted by it as having occurred – for example, reframing physical assaults by staff members as inappropriate uses of discipline. This inevitably reduces the amount offered by MOE to compensate survivors.

779. **Appendix B** to this Chapter sets out an analysis of settlement offers made by MOE up to the current time. It reflects our concern about

inequities between claimants, and the overall low standard of compensation offered by MOE.

780. Finally, as we explain in chapter 9, claims for abuse after 1990 are subject to the Bill of Rights Act. These include serious claims of sexual abuse, physical abuse and confinement in Time Out rooms, which is a false imprisonment. To date, MOE has not accepted a breach of the Bill of Rights has occurred, even in the most horrific cases.

Grey areas – Closed and Integrated Schools

781. As we have indicated, MOE will not always accept liability for claims, even when it appears to be responsible on the face of the claim. An example of this is the claim for DF.

782. DF lived at Kelston in the 1970s. In December 2016, we sent an outline of DF's claim and an offer of settlement to MOE. MOE indicated that the Board of the Kelston Deaf Education Centre ("KDEC") was responsible for some, or all, of DF's claim. In the absence of an agreement to stop time under the Limitation Act, proceedings were filed against both defendants.

783. Subsequently, the lawyers for KDEC wrote to us, setting out their belief that MOE was wholly responsible for the claim. In the meantime, it looked like MOE had overlooked DF's claim, because we heard nothing further. In May 2019 we were advised that DF has serious health issues, so we asked MOE to urgently address the claim. In July 2019, MOE accepted that KDEC should not be a defendant and suggested it should be removed from the proceedings. We were subsequently told to expect a response to DF's claim by the end of February 2020. The additional work and delay had come to nothing.

784. An example of MOE's approach to the change of liability in 1989 is the claim of SW. SW suffered abuse in two State schools – with some abuse happening before 1989, and some after 1989. We filed proceedings for SW in the High Court against MOE. Initially, MOE refused to assess any part of SW's claim, even though he was clearly at one of the schools before 1989. More recently, MOE has indicated it will investigate the pre-1989 abuse, but has taken no active steps in relation to the claim.

785. Claims relating to integrated schools are also complex. Schools like Hato Petera and Hato Paora were run by Church entities, but after Hato Petera closed, the proper defendant became unclear. Sometimes, where the teachers were employed by MOE and the hostel staff were employed by the Church entity, liability is mixed.

786. These examples demonstrate the difficulty claimants face within the MOE process. It is difficult for claimants to understand what they

perceive to be ‘fine lines’ or shifting boundaries to MOE’s redress process. To a lay-person, abuse at a school should be something they can direct to the Ministry of Education. The complicating factor of Boards of Trustees, which often do not have the resource, expertise, or insurance to respond to claims, often makes claims against individual schools for abuse after 1999 impractical. In addition, where Boards of Trustees are appointed by MOE, MOE should continue to take some responsibility for what happens in those schools.

APPENDIX A

CASE STUDY: MLA

787. MLA instructed Cooper Legal in relation to his experiences of abuse in Social Welfare and psychiatric hospital care in mid-2004. The claim related to his experiences at Campbell Park, between 1976 and 1977, and Porirua Hospital. MLA had been in the care of DSW pursuant to a section 11 agreement before his admission to Campbell Park.

788. MLA's claim was filed against MSD and CHFA in the High Court in March 2006.[523] He alleged physical, sexual and psychological abuse while he was a student at Campbell Park School.

789. MLA has a mild intellectual disability and cannot read or write. He suffers from a range of psychological problems as a result of his childhood experiences. He had a litigation guardian for the course of the litigation.

790. On 26 February 2010, Crown Law wrote to Cooper Legal about MLA's claim[524].

791. Crown Law set out its view that MLA needed to re-plead his claim against MOE, instead of MSD. This was because MLA had been at Campbell Park under s 115 of the Education Act 1964. Crown Law's analysis was that s 115 of the Education Act limited the effect of the section 11 agreement with DSW to the period before MLA was admitted to Campbell Park.

792. Crown Law wrote that social workers had, in fact, maintained contact with MLA's parents and with Campbell Park over the time that he was at Campbell Park. MSD maintained that there were no allegations that MLA or his parents made any complaints about the care he received at Campbell Park. Accordingly, Crown Law considered the claim against MSD to be wholly misconceived.

793. Crown Law stated that if the claim was brought against MOE, it would be able to commence investigation into the allegations.

794. It is worth noting that, like the claim of BC, MLA's claim would be pleaded differently today. It is more than likely that MLA's claim would have been filed jointly against MSD and MOE, to reflect the different roles and responsibilities of each entity.

795. At the time we received Crown Law's letter, the restrictions imposed by Legal Aid were still in force. There was little we could do while we

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523 CIV GRO-B-MLA *v Attorney-General in respect of MSD.*

524 Letter Crown Law to Cooper Legal (re MLA), 26 February 2010.

fought to keep the claims alive. For several years, we maintained the view that MSD was liable to MLA, and continued to progress his claim against it.

796. MLA settled his psychiatric hospital claim against CHFA in May 2012. He received $18,000 in compensation for abuse he had suffered in psychiatric care[525].

797. As we have said, on 29 January 2013, MSD advised that settlement offers were imminent for five clients, including MLA . No mention was made of the earlier letter suggesting the claim was misconceived.

798. On 30 April 2014, 15 months after Cooper Legal was told an offer for MLA was 'imminent', we received a settlement offer from Crown Law.[526] We note:

a) MSD had undertaken a review of MLA's claim. It had relied on records received from MOE, which it had then returned to MOE. MSD intended to request those files from MOE and provide Cooper Legal with the relevant information as soon as possible;

b) Crown Law reiterated its view that MSD was not the proper defendant in MLA's case. However, in order to progress the case, MSD had "collaborated with MOE" to make an offer on behalf of the Crown. Crown Law stated that "the approach in this case should not be relied on as setting a precedent for the settling of other similar cases." The analysis of the claim referred to the Crown, rather than either of the separate Ministries, as accepting or not accepting aspects of MLA's claim;

c) It does not appear from this settlement offer, or from subsequent communications, that MOE was involved at all in the review process.

d) The Crown accepted that MLA had been sexually, physically and verbally abused by other residents while at Campbell Park, based on the Crown's findings that there was inadequate supervision for the period he was a resident. It stated that in terms of quantum, the Crown was only liable for the inadequate supervision, rather than the actions of the other residents. **This failed to recognise there was no statutory immunity for the actions of other children in care, in respect of MOE.** Such an immunity only exists for MSD[527].

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525 MLA, CHFA Memorandum of Settlement and Release 24 May 2012.

526 Without prejudice letter from Crown Law to Cooper Legal (MLA) 30 April 2014

527 Section 394, Oranga Tamariki Act 1989

e) The Crown accepted that MLA was threatened by a staff member and witnessed violence while at Campbell Park but rejected the remaining allegations which it appears had been attributed to MOE;

f) A settlement offer was made by the Crown, based on those aspects of the case that had been accepted. This included: a settlement payment; payment of MLA's legal aid debt; and assistance to help MLA access counselling. The final component of the settlement offer was a letter of apology from MOE. No letter of apology was offered from MSD.

799. MLA rejected the offer of settlement and we made a counter-offer in July 2014. [528] The pleadings, at that time, still identified MSD as the defendant.

800. On 11 December 2014, Crown Law responded to the 18 July 2014 counter-offer.[529] MOE had undertaken a review of the file. MOE had looked at further records, which had yet to be provided to Cooper Legal. Based on those and other records, MOE had concluded that while MLA had been bullied and involved in fights with other residents, those records were not in themselves sufficient as evidence of poor supervision by staff. MOE found that there was no evidence that MLA had been sexually abused or threatened by a staff member. Further, there was no evidence to support a finding that there was inadequate supervision which resulted in a failure by the staff to respond to incidents of physical and sexual abuse. In summary, the letter appeared to conclude that none of MLA's allegations had been accepted by MOE. Even so, MOE said the $12,000 settlement offer was appropriate.

801. This offer, too, was rejected.

802. On 24 March 2015, MOE was formally substituted as the defendant in the proceeding.

803. A JSC for MLA occurred on 23 April 2015. The outcome of the JSC was recorded in a letter from Crown Law to Cooper Legal, dated 24 April 2015.[530] MOE accepted that there were some general concerns about staffing difficulties at Campbell Park that may have placed staff under additional pressure, which may have resulted in bullying and sexual misconduct between boys. However, the records demonstrated a significant involvement with MLA and that he made progress while at Campbell Park. MOE also acknowledged that MLA

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528 Without prejudice letter from Cooper legal to Crown Law (MLA), 18 July 2014.

529 Lt from Crown Law to Cooper Legal (re MLA) 11 December 2014, Without Prejudice.

530 Lt from Crown Law Office to Cooper Legal (re MLA) 24 April 2015, Without Prejudice.

had continuing difficulties at the school as well as prior and subsequent to his time there.

804. MOE considered that $12,000 was appropriate for these issues. MOE offered an additional $2,000, making the final settlement offer $14,000, to recognise process issues in the case, including the involvement of MSD and then the transfer to MOE, which undertook its own review.

805. MLA also rejected this offer. On his behalf, Cooper Legal made an application under R10.15 for a limited hearing on the facts which were in dispute for his claim. The R10.15 applications and subsequent hearing are detailed further in Chapter 4 of our evidence.

806. In February 2017, we filed an amended statement of claim for MLA.[531] His claim, with other Campbell Park claims, was put on a trial track.

807. A week later, MLA had a serious health scare. He became concerned that he would not live to see the outcome of the litigation and asked MOE to re-put the last offer of settlement. Feeling he had no option, MLA accepted the settlement of $14,000, together with a contribution to costs and an apology.

[531] CIV GRO-B-MLA *v Attorney-General in respect of MOE* First Amended Statement of Claim 10 February 2017

APPENDIX B

MOE settlements up to January 2020

Client	Defendant the claim is directed to	Settlement offer
PJB, HC and MP	MOE (Health Camp)	$5,000 each - August 2015 PJB's claim remains extant; HC and MP have settled Allegations by three claimants in relation to Roxburgh Health Camp School in the late 1970s. All three of the claimants alleged: • Physical abuse by Mr and Mrs R; • Verbal abuse by Mrs R; and • Being locked in a cupboard as a form of punishment. MP also alleged: • Sexual assault by Mr R; and • Witnessing Mr R sexually assault another boy. MOE's assessment found: • Between 1975 and 1979, there were a series of complaints about Mr and Mrs R at the Health Camp School. These complaints did not relate to PJB, HC or MP, but "did raise similar issues concerning the use of harsh behaviour management practices such as smacking children, placing children in the storeroom and shouting at children. These practices did not comply with standards of the time. The allegations received media attention and it is reported that 50 children were withdrawn

Client	Defendant the claim is directed to	Settlement offer
		while the investigation was carried out;" • The complaints made were investigated and upheld by the Education Board and the Department of Education. Mr and Mrs R left the school in 1979; • No evidence was found of complaints ever being made or investigated concerning sexual misconduct by Mr R • No personal files for claimant; few records recovered from school; and • "As a gesture of good faith and for the purposes of settlement, the Ministry is prepared to accept the possibility that your clients were subjected to behaviour management practices by Mr and Mrs R that were not consistent [with] policies and practices at the time."
GB	MSD (Campbell Park 1971)	$14,000 – Settled July 2017 MOE apparently not involved in assessment. Accepted bullied by other boys, due to inadequate supervision.
CC	MOE (Mt Wellington Residential School 1966 – 1967)	$7,000 – Settled October 2014 Allegations: • Sexual assaults by named assistant housemaster MOE response: • MOE has been unable to find any records for a staff member named of that name and there were no allegations made or notes on the

Client	Defendant the claim is directed to	Settlement offer
		records of the other children involved; • However, MOE found CC credible. That, coupled with the fact that the Ministry is aware of concerns that there were low levels of staff at Mt Wellington at the time, and concerns about the capability of the housemasters to carry out the tasks required, led MOE to accept the claim; • This offer is on the low side, given the nature of the abuse that has been accepted. However, this may reflect the fact that no 'hard evidence' was found by MOE.
SH	MOE and MSD (Campbell Park and other Social Welfare placements)	$25,000 – settled but no MOE allegations accepted. Allegations accepted: • lack of social worker contact between Jan 1958 and March 1959; • assaulted by other boys at Owairaka, due to inadequate supervision; and • physically and sexually assaulted by staff at Owairaka; physically abused by staff member at Hokio. MOE found it was likely that SH was subjected to bullying by other boys at Campbell Park; however no evidence it occurred due to inadequate supervision so allegation not accepted.
JK	MOE (Roxburgh Health Camp School 1974)	$5,000 – Offer rejected, claim not settled. Allegations: • Locked in wardrobe by Mr R; • Physically assaulted and manhandled by Mr

Client	Defendant the claim is directed to	Settlement offer
		R, while pushing him into wardrobe, sometimes hit him across knuckles with a ruler; • Sexually assaulted by Mr R – fondled his genitals about clothing and asked JK to perform oral sex on him; and • Witnessed Mr R sexually assaulting another boy. MOE's assessment found: • No evidence to conclusively support JK's allegations; but relied on complaints about R; • Accepted being locked in classroom and physical assault: "while the complaints regarding Mr R came after the time [JK] attended Roxburgh, it is possible that the same concerns regarding Mr R's management of children occurred during the time [JK] attended the school"; • Did not accept other allegations. Noted: "given the number of children who attended the school each year, it is thought likely that there would have been some disclosure, either on the residential side or upon a child returning home if Mr R was sexually abusing children".
MLA (see case study)	MOE (Campbell Park)	$14,000 – Settled • $12,000 for allegations accepted. • $2,000 for being "mucked around" with claim going to MSD first and then MOE.

Client	Defendant the claim is directed to	Settlement offer
		What was and was not accepted was unclear, due to MSD and then MOE undertaking a review. Allegations which appear to have been accepted were: • That, at times, MLA was bullied and verbally abused by other residents – unclear whether this included physical assaults; • That MLA was threatened by a staff member; • That MLA witnessed violence perpetrated against other residents; and • That MLA was involved in sexual activity with other residents at Campbell Park – unclear whether this constituted sexual assaults. MOE had found in its investigation: • While there were records of MLA being subjected to bullying and fights with other residents, they were not in themselves sufficient as evidence of poor supervision by staff members; • While MLA was bullied on occasion, there were also a number of recorded incidents of fights with other residents which were, at times, initiated by MLA. The records also made a number of references to good progress made by MLA in his later months at Campbell Park; • There was no evidence that there was inadequate supervision,

Client	Defendant the claim is directed to	Settlement offer
		which resulted in a failure by Campbell Park staff to respond to incidents of physical and/or sexual abuse; • Lack of evidence to support allegations of sexual abuse, being threatened by staff, inadequate medical care.
RP	MSD (Campbell Park)	$6,000 – February 2018, Offer rejected, not settled. MOE apparently not involved in assessment. Allegations of abuse by other boys not accepted as no evidence of inadequate supervision.
SP	MOE (Waimokoia)	$35,000 – Settled May 2018. MOE accepted: • SP was sexually and physically assaulted by Mr McCardle[532]; • SP was sexually and physically assaulted by Mr Wallis[533]; • SP was placed in the Time Out room, in cruel conditions; and • SP was verbally abused by staff members and witnessed physical abuse by staff members against other children, which was psychologically harmful to him.
TW	MOE (Mt Wellington)	$7,000 – Settled July 2018. Accepted: TW was locked in the Time Out room on two occasions and was "likely physically restrained and forced to go to this

[532] At a retrial in August 2010, Graeme McCardle was convicted of multiple charges of sexual and physical abuse of children at Waimokoia in the 1980's.

[533] In 2009, Ian Wallis was brought to trial in relation to multiple charges of sexual abuse against several children at Waimokoia, between 1984 and 1988. The trial was aborted due to Ian Wallis' ill-health. Ian Wallis died in August 2009, before a retrial could be heard.

Client	Defendant the claim is directed to	Settlement offer
		room" – allegation was that he was physically assaulted by staff members, who dragged him face-down, down concrete steps, while taking him to Time Out.
VW and SS	MOE	$5,000 – Settled December 2015 and October 2017, respectively. Kelston – same analysis as James Packer.
MTS	MOE (Waimokoia)	No compensation, payment of costs only – April 2018 Not settled, claim is extant. MOE offered no compensation because MTS identified Mr McCardle as the perpetrator, and MOE said he was not working at Waimokoia at that time. We have sent a counter-offer noting that it is possible Mr McCardle was working at Waimokoia, and also providing as much information as MTS could about the description of the perpetrator, as well as a range of other allegations made by MTS which had not been addressed by MOE. We are waiting for a response from MOE to this counter-offer, made in September 2018.
MD	MOE (Waimokoia post-1993)	$23,000 – Settled February 2019. MD was offered $20,000 in compensation for his abusive experiences, and $3,000 to acknowledge the delay by MOE in responding to his claim. MOE accepted: • MD was regularly physically assaulted by staff members at Waimokoia; • Due to inadequate supervision by staff members, MD was

Client	Defendant the claim is directed to	Settlement offer
		sexually assaulted by other residents; and • MD was frequently placed in the Time Out room, for extended periods beyond the policy requirements at the time. MOE did not accept allegations that MD had been regularly physically assaulted by other residents, and witnessed others being seriously assaulted by staff members, causing him psychological harm.
DD	MOE (Mt Wellington)	$7,000 – Settled June 2019. MOE accepted: • That DD may have been placed in Time Out and the conditions in the Time Out room may have been inadequate; and • Although the delays in responding to DD's claim were similar to those for MD, DD was not offered any additional compensation to recognise the delay. DD and TW's claims are different factually, but received the same settlement offer.
PHX	MSD and MOE (Campbell Park)	$7,000 – Settled March 2018.
DMT	MOE (Campbell Park)	$11,000 – Settled July 2018. Allegations accepted: • Indecent assaults by GRO-B • Physical assaults by staff members; and • Practice failures relating to care.
SWK	MSD and MOE (Campbell Park)	$20,000 – Settled in March 2018.

Client	Defendant the claim is directed to	Settlement offer
		• MOE was not involved in the investigation; • The allegations which were accepted mostly related to DSW institutions and not Campbell Park; and • The settlement covered both Ministries.

CHAPTER 7
MOH SETTLEMENTS

MOH SETTLEMENT PROCESS

808. We have already addressed how we came to settle the claims against CHFA, and the lengthy litigation process required to do so.

809. On 1 July 2012, CHFA was disestablished.[534] The Ministry of Health subsequently assumed responsibility for unsettled complaints about treatment received at psychiatric hospitals operated by the former Area Health Boards. At this time, Cooper Legal had only a handful of "residuary claims", which had not formed a part of the global settlement agreement with CHFA.

810. In August 2012, MOH advised Cooper Legal that it was developing a process for investigating and assessing any historic abuse psychiatric hospital claims which did not form part of the global settlement agreement with CHFA, were not covered by the Lake Alice settlement process and included the handful of "residuary claims" we had remaining at the firm.[535]

811. Cooper Legal requested an update about the residuary claims, in a letter dated 1 October 2012.[536] We set out our concerns that we continued to receive new instructions and that in the meantime, the Limitation Act clock was ticking.

812. On 29 October 2012,[537] MOH advised Cooper Legal that the process for investigating and assessing the complaints had been drafted and advice provided to the Minister of Health about the proposed process. No historic abuse claims would be considered until the new process had been decided.

813. On 16 January 2013,[538] MOH advised Cooper Legal of the confirmed resolution process. MOH would review a claimant's allegations, based on written material about the claimant's experience in psychiatric care and any available records. If satisfied that there was legitimate basis for claim, MOH would then offer an apology and settlement payment on an *ex gratia* basis, up to a maximum of $9,000. The purpose of the payment was to acknowledge a person's experiences, as well as being available to meet the costs of wellness-related services to assist to improve their health or personal circumstances. Any acceptance of the offer would be in full and final settlement of any claim against the Crown for treatment in psychiatric facilities operated by Area Health

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534 New Zealand Public Health and Disability Amendment Act 2012, s 27.

535 Letter from MOH to Cooper Legal, 6 August 2012.

536 Letter from Cooper Legal to MOH regarding MOH residuary claims, 1 October 2012.

537 Letter from Ministry of Health to Cooper Legal, 29 October 2012.

538 Letter from Ministry of Health to Cooper Legal regarding claims process, 16 January 2013.

Boards prior to 1992, although we note that the actual date is 30 June 1993, which is when liability was transferred to the DHBs.[539]

814. Given the time that had passed since the events giving rise to the claims, MOH did not consider that an agreement to suspend the limitation period would serve any purpose. Crown Law had advised MOH that it was not aware of any similar agreement having been reached with CHFA. While this was correct, Crown Law does not appear to have advised MOH that we had been forced to file all the claims against CHFA.

815. On 24 January 2013,[540] MOH wrote to Cooper Legal, in response to a letter we sent on 17 January 2013. We had expressed our concern about the maximum payment of $9,000, which was half of what was available under the former process. We also had concerns about the lack of reference to payment of legal fees and advice from Crown Law about the lack of a limitation agreement with CHFA.

816. MOH advised that the amount payable under the new process reflected the same amounts that were payable to discontinued claimants, as part of the prior settlement process run by CHFA. This was not correct, as those claimants had received only $2,500. MOH also stated that there had been “no cut to the settlement “budget.”” MOH stated that the previous budget to settle the litigated claims was effectively exhausted and no additional appropriation had been made. This meant that the funding available for future resolutions of claims was limited.

817. MOH stated it would consider making a contribution to legal costs, on a discretionary basis. Any contribution was unlikely to exceed $2,000 and would form part of any apology and payment made by the Ministry. Crown Law remained adamant that no limitation agreement had been entered into under the CHFA process.

818. Following those communications, Cooper Legal engaged in further communications with MOH and then Legal Aid in relation to the new process. Although we were very unhappy about the limits of the new process, taking into account our funding constraints, as well as the protracted litigation leading up to settlement of the CHFA claims, we felt that we had little option but to engage with the process, so as to provide at least some compensation for our client group.

819. On 12 June 2013, Cooper Legal communicated with Legal Aid regarding our discussions with MOH about the then eight or so claims we had agreed to put through the new MOH process. We advised Legal Aid that MOH had confirmed it would pay up to $2,000 in legal

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539 Confirmed in email communications between Cooper Legal and MOH on 15 August 2019.

540 Letter from MOH to Cooper Legal regarding MOH psychiatric claims, 24 January 2013.

costs per client. We asked Legal Aid to enter into a discussion with us about write-off of any Legal Aid debt. In particular, we asked whether Legal Aid would agree to a similar write-off as it did with the CHFA claims, amounting to 50% of the debt.[541]

820. On 27 June 2013, Frances Blyth, on behalf of Legal Aid, communicated that Legal Aid had agreed to continue the previous policy of writing off 50% of the legal aid debt for MOH clients. We were asked to set up a meeting with MOH to reach formal agreement about that.[542]

821. In late June 2013, we emailed MOH advising that we had been liaising with Legal Aid about write-off issues for those clients we recommended go through the new MOH process. We asked for a meeting to discuss funding issues, with Legal Aid and MOH, on 8 July 2013.[543]

822. The meeting on 8 July 2013 proceeded. Agreement in principle was reached about funding the MOH claims. From that point on, we were able to engage with the MOH process.

823. We have now engaged with the MOH process for over six years. We feel qualified, therefore, to comment on some of the advantages and disadvantages of that process.

824. Unlike MSD and MOE, MOH generally does not rely on records to prove that abuse happened. This reflects a starting position of belief and means that there is a high success rate for claims. Settlement offers are relatively consistent across claims of a similar nature and can be reviewed. If challenged, MOH will reconsider the claim and, crucially, will compare the claim against previous settlements, to ensure consistency. This has resulted in an improved offer for several clients of this firm, although not in more recent months.

825. The MOH process is also fast – typically, for represented claimants, the whole process is completed within two months. The process for unrepresented claimants, which involves meeting with MOH and allowing time for MOH to request relevant records, takes longer.

826. The MOH will pay up to $18,000 if the claimant produces a psychological or psychiatric report showing that they would be able to overcome the Limitation Act defence and establish causation. We have only rarely been given funding to obtain a report, due to their expense, the lack of experts and the uncertain outcome in terms of

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541 Email chain Cooper Legal and Legal Aid, 12-27 June 2013.

542 Email chain Frances Blyth on behalf of Legal Aid and Cooper Legal, 12-27 June 2013.

543 Email chain Cooper Legal and MOH, 27 June 2013.

whether the report will support causation and overcoming Limitation Act issues.

827. MOH will also revisit a claim to consider additional allegations made by a claimant, even if a claimant has already made a claim and accepted a settlement payment. If warranted, MOH will then offer a top-up payment. A claimant will not receive an additional payment if they have already received the maximum payment, or if the additional allegations are not serious enough to warrant a payment above what was originally offered.

828. Finally, MOH has recently confirmed it will deal with claims in respect of abuse suffered in general medical surgical wards of public hospitals prior to 1993, which is a new avenue not previously known to us.[544]

829. There are flaws to MOH's process. MOH will not consider claims made on behalf of deceased claimants,[545] even if the claims have been made before the client dies. Further, there are transparency issues with MOH's process. In particular, there is little information available about MOH's process in the public space and no information at all on MOH's website.

830. Finally, as we have mentioned, the cap on quantum available is a significant drawback and means that outcomes are often disappointing for survivors, who do not feel that the seriousness of their individual experiences have been adequately recognised. Unfortunately, after years of litigation, the current process, and its limitation on settlement amounts, is all that is available to claimants of abuse in hospital care.

831. The MOH process illustrates the disparity between settlements for abuse in the Lake Alice Child and Adolescent Unit and settlements received for abuse in other psychiatric hospitals. One claimant, Patrick Stevens, received $6,000 for abuse in one psychiatric hospital, and $81,500 for abuse he suffered in the Lake Alice Adolescent Unit. Patrick Stevens was a child in both places. He experienced traumatic events and physical abuse in both places, and sexual abuse in Lake Alice. The gross disparity between the two settlements is difficult to explain to a survivor.

832. The top payment under the MOH process is also lower than the top payment under the MSD or MOE processes.

833. We continue to progress claims for clients who were in psychiatric hospital care, although the client numbers remain reasonably

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544 Email chain Cooper Legal and MOH, 15 August 2019.

545 Email chain Cooper Legal and MOH, 30 January 2017.

small.[546] We suspect that there are still many potential claimants presently residing in intellectual disability facilities, psychiatric hospitals and other step-down placements who have never made a claim because they are unaware of their rights and/or do not have the appropriate supports in place to make a claim.

[546] At present, we are managing around 25 current claims.

CHAPTER 8

CROWN LITIGATION TACTICS

- **Opposing name suppression**
- **Applications under s47 of the Evidence Act 2006**
- **Disclosing plaintiff information to third parties**
- **Medical Examinations**
- **Using private investigators**
- **Model Litigant Obligations**

CHAPTER 8

The tactics of the Crown

834. Pursuing hearings in the absence of legal aid funding is just one of the tactics the Crown has utilised during the course of our representation of those who have been abused in State care.

835. Other tactics include: opposing name suppression orders being granted, particularly for those who have not suffered sexual assaults; referring complaints of sexual assaults, particularly, to the police; contesting admissibility of witness evidence; and requiring claimants to be examined by psychiatrists (for Limitation Act and causation purposes) by experts instructed by the Crown. These have all been tactics used as weapons to delay, limit and defend the claims brought by the claimant group, particularly those with claims against MSD. The undoubted impact of these tactics on claimants is to wear them down, so that they accept the typically modest offers made to them many years down the track.

Name Suppression

836. Name suppression is vitally important for plaintiffs and witnesses in trials relating to historic abuse. While name suppression in the criminal courts is decided in accordance with ss202-204 of the Criminal Procedure Act 2011 (where the identity of complainants in sexual abuse cases is automatically suppressed), name suppression in the civil jurisdiction is completely at the discretion of the Court. While most witnesses in the historic abuse trials over the years had had their identities anonymised in written decisions, there were few reasoned cases – and those cases were to prove conflicting on the test for name suppression in these circumstances.

837. Most people who give evidence in these kinds of cases ask us to seek name suppression for them. This is for three broad reasons:

    a) Giving evidence in open court is extremely traumatic. For people who have already experienced trauma, particularly as children, re-living those experiences in front of an audience produces extreme anxiety, shame and fear. This is exacerbated by the prospect of having their name published in media and on the internet. Research has shown that giving evidence of abuse is extremely re-traumatising for victims. The vulnerability of plaintiffs and witnesses cannot be overstated;

    b) There are often safety issues for people who intend to give evidence of abuse perpetrated on them. The abuse of children is often accompanied with violence and threats of physical harm, either to the child or their family. Even many years later,

a survivor can have a real, rational fear of retaliation from a perpetrator who is identified in their evidence. This is particularly true for people who have been involved in hearings about programmes like Whakapakari and Moerangi Treks, where the abuse is more recent (in the 1990's and 2000's) and where many staff members on these programmes were affiliated with gangs and known for violence. Retribution by gang members is a very real danger for many of these witnesses;

c) The second, but by no means less important, safety issue relates to clients who are (or who are often) in prison. The culture against "narking", or disclosing abuse, which was so prevalent in Social Welfare / CYFS residences, is also strongly prevalent in prisons. Indeed, this culture exists in CYFS residences today, expressed by the Children's Commissioner in a recent report through the phrase "snitches get stitches". Where 40-50% of our client base can be in prison at any given time, potential witnesses are conscious of the physical dangers of being seen as a 'nark'. Even a rumour that a prisoner will give evidence can place a person in danger.

838. For these reasons, name suppression is vital to many of our witnesses, but the Crown and the courts have not historically placed any weight on these issues. Our first experience of issues with name suppression was in relation to the *White* trial. On two separate occasions, both prior to the trial commencing and after the first day of trial, we appealed decisions made by the High Court about name suppression for our witnesses particularly.

White v Attorney-General[547]

839. The first appeal was against the decision of Justice Miller granting interim name suppression to the two brothers, together with some named witnesses, but only until the commencement of trial.

840. We were particularly concerned that Justice Miller had refused to grant name suppression to witnesses giving evidence of physical and psychological abuse, as opposed to evidence of sexual assaults. In advance of the appeal, we obtained affidavit evidence from Ken Clearwater, Victim Support and Dr Justin Barry-Walsh, our expert psychiatrist. The Court of Appeal refused to accept that new evidence, stating that it should have been provided to Justice Miller at the time of the April hearing.[548]

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547 *W v Attorney-General* [2007] NZCA 242 [14 June 2007]

548 *W v Attorney-General* [2007] NZCA 242 [14 June 2007] at [10]-[11].

841. In this decision the Court of Appeal held that cases involving allegations of sexual abuse involve a greater need to protect witnesses from unnecessary intrusion into "intimate, distressing and humiliating details of past conduct for which they were not at fault."[549] The Court of Appeal did not interfere with the decision refusing name suppression for other witnesses.

842. While the Court was sympathetic to our submissions that some witnesses may withdraw assistance, given that the continuation of name suppression was uncertain, the Court of Appeal refused to interfere with Justice Miller's decision that he would review name suppression both at the beginning of trial and then again at the conclusion of trial.[550]

843. The issue of name suppression was again addressed, at the start of the trial. By that stage, we relied on the expert evidence we had obtained for the earlier Court of Appeal hearing to argue that all our witnesses, as victims of assaults (whether sexual or physical) were vulnerable and should be entitled to name suppression, if they asked for that. Justice Miller again refused to grant name suppression to the witnesses of physical assaults. Accordingly, we appealed that decision once again.

844. The Court of Appeal did not issue a written decision. Instead, it indicated that it would grant an interim order suppressing the identifying details of all witnesses called by the plaintiffs, at least until the end of trial. This information was communicated to Justice Miller. After a reasonably terse exchange, Justice Miller granted the interim suppression orders for all witnesses, as well as several witnesses called by the Crown.[551]

845. The issue was next litigated in a Whakapakari trial and a separate trial involving MSD and an NGO which has permanent name suppression.

Y and Z v Attorney-General: Name suppression

846. Mr Y's claim was based on his experiences in the care of CYFS between January 1987 and September 2000. As well as being under the supervision of CYFS while he lived at home, Mr Y was placed in several foster placements and on the Whakapakari Programme, where he experienced serious physical and sexual abuse. Mr Z was in the care of CYFS after December 1985. He was placed in several CYFS Family Homes, as well as Kingslea Residential Centre and at

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549 *W v Attorney-General* [2007] NZCA 242 [14 June 2007] at [17].

550 *W v Attorney-General* [2007] NZCA 242 [14 June 2007] at [23]-[24].

551 As part of the bundle, we have attached relevant part of the evidence from the *White* trial dated 28 June 2007.

Whakapakari. He suffered physical, sexual and psychological abuse in those placements.

847. In early 2015, Cooper Legal was in the process of preparing briefs of evidence for both Mr Y and Mr Z, and for people who would give evidence in support of their claims. The evidence of the fact witnesses related to their own experiences of physical, sexual or psychological abuse.

848. We sought the consent of Crown Law to an order suppressing the names and identifying details of the plaintiffs and their fact witnesses following publication of any decision by the Court. We also wanted to safeguard our clients against potential recrimination from some of the perpetrators named in their evidence. Several witnesses were concerned for their safety, because they had been threatened by specific staff while they were in their care, and/or were aware that the perpetrators were involved in gangs and violence at the time they provided their evidence. MSD advised it would only consent to name suppression for those witnesses who would give evidence of sexual abuse perpetrated on them, while they were in the care of CYFS. This left many witnesses who were giving evidence of physical and psychological abuse exposed to the public eye.

849. We had to make a formal application to the High Court for orders suppressing the names and identifying details of the plaintiffs and their witnesses, because the Crown's position gave rise a serious inequality, where people who would give evidence of physical and psychological abuse, or witnessing sexual abuse, would not have name suppression, and be unduly exposed to media attention and potentially a risk to their personal safety. As well as the trauma which would accompany such exposure, we were also concerned that witnesses would be highly reluctant to give evidence in the absence of name suppression.

850. We made an application for name suppression for identified, individual witnesses who would give evidence in support of Mr Y or Mr Z, or both. The basis of the application was, broadly:

a) The events the witness would be giving evidence about happened when they were children or young people and they would have been entitled to suppression of their details if they had given evidence as a child;

b) The plaintiff or witness was vulnerable because they were a victim of abuse, whether that was physical, sexual or psychological abuse, by virtue of the trauma arising from the abuse perpetrated on them; and

c) The vulnerability of the witness by virtue of their circumstances was important, in particular where there were safety concerns

about the perpetrators of abuse or the fact that the witness was, or had been, a prison inmate.

851. We also noted that many witnesses might not give direct evidence of sexual abuse in their brief of evidence but had suffered sexual abuse during their time in care. Finally, we noted the specific concerns relating to the Whakapakari Programme, where staff members were affiliated with gangs and had made threats to the young people, that if they ever disclosed the abuse they suffered, they would be hunted down and harmed. Several witnesses deposed to still being afraid of the staff members from Whakapakari, as adults.

852. In support of this application, we provided affidavit evidence from a long-standing representative for those who had suffered sexual abuse, Kenneth Clearwater[552], and two expert witnesses, Drs Jane Millichamp[553] and Elizabeth Stanley[554]. Where possible, Cooper Legal had also obtained affidavits from intended witnesses which focused on their safety concerns from members of the Flying Squad (the senior boys at Whakapakari), or staff members from Whakapakari.

853. Before Justice Brown, we argued strongly that prison inmates should be treated as a class of people for the purposes of name suppression, at least in the context of these kinds of cases, because they were rendered vulnerable through the prohibition on "narking" which is well known in the prison system.[555] We also argued that people who gave evidence of physical or psychological abuse were just as vulnerable as those giving evidence of sexual abuse.

854. Justice Brown issued his decision on 28 April 2015.[556] His Honour focused his decision on two categories of witnesses: those who were giving evidence of physical or psychological abuse (but not sexual abuse) and those who were in prison.

855. A great deal of the judgment was occupied by arguments as to the proper threshold of evidence required to displace the presumption of open justice. His Honour reviewed many decisions and held that there must be compelling evidence of circumstances which would justify

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552 CIV-2006-485-2863 *Y & Anor v Attorney-General,* affidavit of Kenneth Clearwater in support of interlocutory application for an order prohibiting publications of the names and other identifying information of the plaintiffs and their witnesses, dated 13 February 2015.

553 CIV-2006-485-2863 *Y & Anor v Attorney-General*, affidavit of Dr Catherine Jane Millichamp in support of application for name suppression for the plaintiffs and their witnesses, dated 11 February 2015.

554 CIV-2006-485-2863 *Y & Anor v Attorney-General*, affidavit of Dr Elizabeth Stanley in support of interlocutory application for name suppression, dated 16 February 2015.

555 Interlocutory application on notice for suppression of names and identifying details of plaintiffs and their witnesses in *Y v Attorney-General* and *Z v Attorney-General.*

556 *Y & Anor v Attorney-General* [2015] NZHC 844.

name suppression. However, His Honour then went on to give very little weight to the expert evidence provided by the plaintiffs.

856. Justice Brown placed heavy reliance on the fact that many of the witnesses had their own claims against the Crown. His Honour stated:

> It is my understanding that no orders for confidentiality or name suppression are in place in those proceedings, one of which has been on foot since 2007 and another since 2010.

857. What was not noted by His Honour is that those proceedings were filed to "stop time" under the Limitation Act and were not being actively tracked towards a trial. This meant that there would be no judgments or decisions issued, and therefore no need for an application for name suppression.

858. Justice Brown declined to make an order for name suppression for any person who was not giving evidence of sexual abuse in the trial.

859. We appealed Justice Brown's decision to the Court of Appeal. The appeal was heard at the same time as the appeal in *X v Attorney-General*, which is dealt with in more detail below. Our submissions were filed on 1 March 2016.[557] By that time, the claim by Mr Z had settled, and so the appeal was not pursued in respect of his proceeding. The basis of our appeal was (inter alia):

a) That Justice Brown had failed to follow precedent decisions relating to historic abuse claims in respect of name suppression;

b) That Justice Brown stated there must be a compelling reason to displace the presumption of open justice, but had not applied that test to the evidence before him, in particular the expert evidence provided by Drs Stanley and Millichamp;

c) That Justice Brown had misinterpreted the issue of suppression for a class of persons;

d) Justice Brown did not give enough weight to the expert evidence about the damage and vulnerability of the witnesses, and placed too much weight on the fact that the majority, but not all of the intended fact witnesses had their own claims;

e) Justice Brown had not given enough weight to the fact that the witnesses were children at the time the abuse occurred and were accordingly entitled to protection from unnecessary disclosure of their personal information while giving evidence;

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557 *Y v Attorney-General* submissions for the appellant, 1 March 2016.

f) Justice Brown failed to take account of the fact that open justice could still be served while anonymising the names and details of witnesses; and

g) Justice Brown had not accepted or addressed the evidence brought by individual witnesses about why they wish to have name suppression.

860. The Attorney-General maintained that Justice Brown's decision was correct.[558]

861. We also sought to provide fresh evidence to the Court of Appeal about one witness, CW, for whom an expert report had become available in the time since the High Court hearing. The report reflected the vulnerability of CW, and the negative impact giving evidence in open court would have on him.

862. The Court of Appeal's decision was issued on 4 October 2016.[559] The Court identified that previous decisions dealing with name suppression principles in civil proceedings disclosed divergent approaches, and so there was a need for clarification. The Court of Appeal attempted to state and explain the principles that should guide the suppression of names of parties or of witnesses in particular civil cases.

863. The Court held that the correct approach required the Court to "strike a balance between open justice considerations and the interest of the party who seeks suppression": judgment, [31]. On that basis, Justice Brown's statement of principle was erroneous.

864. The Court also noted that it was troubled by Justice Brown's acceptance of the Attorney-General's submission that the majority of the proposed witnesses did not truly fall within the strongest claim category of a witness who has no interest in the proceeding, because they had commenced parallel proceedings of their own.

865. Applying the balancing exercise to CW, the Court stated that as this case involved allegations that boys in the care of the State or its agents were abused, it was undoubtedly of public interest. However, that public interest did not extend to knowing the identity of CW or the other boys who were allegedly abused: judgment, [42]. Further, CW had deposed to concern that he would face retaliation for narking if his name was not suppressed. He also wanted name suppression so he could give evidence without feeling intimidated. Lastly, the evidence of Dr Vesna Rosic, who had examined CW, provided a firm

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558 *Y v Attorney-General* respondent's submissions on name suppression appeal, 15 March 2016.

559 *Y v Attorney-General* [2016] NZCA 474.

evidentiary basis for suppressing his name to avert further psychological damage and distress to CW. It was on this basis that CW's name and identifying details were suppressed.

866. However, the Court of Appeal held that there was insufficient evidence for name suppression to be granted to the other witnesses. The Court held: "If properly supported applications are made, the Attorney-General may consent to name suppression as he did for those witnesses who are to give evidence that they were sexually abused": judgment, [53].

867. There was no basis for this statement. The Attorney-General had not consented to name suppression for witnesses because they were not giving evidence of sexual abuse. The issue of psychological harm had never been raised as an issue by the Attorney-General.

868. The Court of Appeal also assumed that as the witnesses were plaintiffs in their own right, some, if not all of them, had been referred to a psychologist or a psychiatrist for assessment. This was incorrect. CW was the outlier, and the other witnesses had not had expert reports prepared.

869. We complained that providing an expert report (at a cost of $3,000-$4,000) for each witness in support of name suppression was oppressive. If a witness sought suppression on the grounds of psychological harm, the effect of the Court of Appeal decision was that such a report would be required. This created an impossible barrier for witnesses seeking name suppression.

X v Attorney-General & Anor: Name Suppression

870. Mr X had issued proceedings against MSD and an incorporated society which had contracted with MSD to provide care to young people (YFT). YFT had been joined as a second defendant to the proceeding several years after the original proceeding was filed, because of MSD's more clearly articulated stance that it would not accept liability for providers who were approved under section 396 of the 1989 Act.

871. YFT applied for name suppression in the proceeding. We were very surprised by this, as it is highly unusual for an organisation or company to apply for, and receive, name suppression in the civil jurisdiction. YFT's application was heard before Justice Brown, after his decision in *Y v Attorney-General* had been issued, but before it was overturned (in part) by the Court of Appeal.

872. The application by YFT was based on its concern about potential adverse consequences for young people in its care, or young people who had been in its care previously. YFT was concerned about people

drawing a link between the allegations by X and the care they received currently. It was clear to us that YFT's primary concern was negative publicity. There was also a secondary concern about the impact on current and former staff of YFT. We were able to point to a number of publicly available sources which described allegations against YFT of physical and sexual abuse by staff members and other children at the facility. We were able to point out that name suppression in this case could not protect YFT from allegations previously made. We also pointed out that there were no similar decisions in New Zealand of an incorporated society being granted name suppression in proceedings like this.

873. Justice Brown's decision about YFT's application was issued on 10 December 2015.[560] His Honour applied the same reasoning from his decision in *Y v Attorney-General,* even though the applicant was an incorporated society. Justice Brown granted name suppression to YFT, based on three primary considerations:

a) That people who were likely to suffer adverse consequences of the publication of YFT's name were third parties who were vulnerable people who had no personal stake in the litigation and yet could be significantly affected;

b) The sexual abuse allegations by the plaintiff arising from his time at YFT were now the subject of "credible contrary evidence filed in support of the section 47 application to the effect that the instance of abuse which resulted in the conviction was a fabrication"[561]; and

c) The order was interim only pending the substantive hearing of the proceeding.

874. We were deeply concerned at the Judge's reasoning. He had deemed unidentified young people to be more vulnerable than the witnesses in the *Y v Attorney-General* case. There was little evidence of significant adverse effect by the publication of YFT's connection with the proceeding. In our view, open justice required people to know that organisations paid by the State to provide care to young people faced allegations, so they could take steps to ensure that young people were safe and had support.

875. We were also very concerned at the Judge's reliance on the evidence filed in support of the section 47 application filed by MSD, which will be dealt with below. That application had not been heard, and there had been no assessment of the credibility of the evidence filed in support of it.

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560 *X v Attorney-General & Anor* [2015] NZHC 3149 [10 December 2015]

561 Judgment, [32].

876. Finally, the Judge's assertion that the order would only be for a short time was not borne out. Subsequently, YFT was granted a permanent suppression order.

877. As with the decision in *Y v Attorney-General,* Justice Brown's decision was appealed. A core part of our submissions to the Court of Appeal was the point that an organisation which was approved, and paid, to care for children, had been given greater access to name suppression than individual people who had suffered physical and psychological abuse in care.[562]

878. The Court of Appeal issued its decision on 4 October 2016.[563]

879. The Court of Appeal, noting that it had already impugned Justice Brown's reasoning from his decision in *Y v Attorney-General*, considered the matter afresh. The majority of the Court considered Justice Brown's reasoning and considered that the balancing exercise favoured suppression of the second respondent's identity, pending trial: [35]. YFT continued to have the benefit of name suppression. A dissenting decision of the now Chief Justice accepted our view that YFT should not have name suppression.

Name suppression in 2019

880. In stark contrast to the Crown's position in the *Y* and *X* proceedings, the Crown's approach to name suppression in two proceedings being tracked towards a trial in August 2020 could not be more different. Given our experiences in the earlier litigation, we expected to have to make an interlocutory application for name suppression for the witnesses who we intended to call to give evidence in support of the two plaintiffs, Mr S and Mr C. We flagged this with the High Court and with Crown Law very early on, and provided Crown Law with a large amount of detail in support of our view that name suppression should be granted to the witnesses, whether or not they gave evidence of sexual abuse, and whether or not they were in prison.[564]

881. Crown Law responded to our letters about name suppression, advising that, in light of the principles the Crown had adopted in its response to the Royal Commission, it would take a different approach to name suppression in the trials. Crown Law stated:

> In the particular circumstances of these proceedings, we accept that there is likely to be limited public interest in requiring public disclosure of the identity of witnesses who are giving evidence of their experience as children or young people in State care. We also recognise the public interest in witnesses being prepared to come

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562 *X v Attorney-General & Anor* Submissions for the Appellant (Court of Appeal), 1 March 2016

563 *X v Attorney-General & Anor* [2016] NZCA 475

564 Letter from Cooper Legal to Crown Law regarding S and C name suppression, 8 April 2019.

> forward and give evidence in these proceedings. We accept, in principle, that many of the witnesses will be giving evidence that is intensely private or personal. It is also possible that for some witnesses, the fact they were in State care as children or young persons is itself something they wish to keep confidential. These factors may not necessarily hold true for all witnesses who were in State care as children. For example, some witnesses may already have spoken in public about their experiences in State care, or may wish to do so now.
>
> In light of these considerations, the Attorney-General is inclined to consent to name suppression for witnesses who are giving evidence of their experiences when they were children or young people in State care.[565]

882. To enable consent orders to be made, the Crown requested the following information from us:

a) The name of the witness;

b) A high-level description of the evidence that witness will give (for example, that the witness will give evidence of physical abuse whilst they were in State Care);

c) Confirmation in writing that we had spoken to the witness and they did want name suppression;

d) Confirmation in writing that the witness had not spoken publicly about the subject matter of their evidence, for example in the media or on a blog; and

e) An explanation, in high-level terms, of the private interests the witness relied on to outweigh the public interest in open justice.

883. Subsequently, when we served draft briefs of evidence on Crown Law in respect of these proceedings, we provided this information about each witness. With some few exceptions, the Crown consented to name suppression being granted, and orders were made accordingly.

884. The approach by the Crown in this case reflected what we saw as being the proper approach. While we were very happy to not have to fight for name suppression, it was frustrating to reflect on the litigation which had gone on in 2015-2016, which was a direct result of the Crown's position at that time.

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565 Letter from Crown Law to Cooper Legal regarding the S and C proceedings, 25 September 2019.

X v Attorney-General: application under section 47 of the Evidence Act 2006

885. The proceeding of *X v Attorney-General & Anor* is referred to above in relation to name suppression. X had been placed in the care of CYFS as well as the care of an incorporated society, YFT. The X proceedings are demonstrative of the Crown using an interlocutory application to its advantage, in a way that a non-Crown defendant would not be able to. The full details of X's claim are set out in a separate case study.[566]

886. One of the key allegations made by X related to sexual assaults perpetrated on him by another resident, CW, while he lived at YFT. In December 2004, CW was found guilty of four charges of sexual offending perpetrated against Mr X, and one charge of threatening to cause grievous bodily harm to Mr X. During the same trial, CW was found guilty of one charge of indecent assault on a girl under the age of 12. In addition, CW pleaded guilty to a second charge of indecent assault on a girl under 12 and one charge of wilful damage. In January 2005, CW was sentenced to four and a half years' imprisonment. He did not appeal that sentence.

887. Of course, only the Crown can prosecute individuals for offending against others. It was the Crown which pursued the conviction against CW, but, when the Crown became a defendant, we saw the Crown step away from that role to take a position more advantageous to it in the civil litigation.

888. On 1 October 2015, the Crown filed an interlocutory application for orders under s47(2) of the Evidence Act 2006[567]. It sought an order from the High Court permitting Crown Counsel to offer evidence tending to prove that CW did not commit the offences against Mr X for which he was convicted.

889. Section 47 of the Evidence Act 2006 provides:

> Subpart 7— Evidence of convictions and civil judgments
>
> **47 Conviction as evidence in civil proceedings**
>
> (1) When the fact that a person has committed an offence is relevant to an issue in a civil proceeding, proof that the person has been convicted of that offence is conclusive proof that the person committed the offence.
>
> (2) Despite subsection (1), if the conviction of a person is proved under that subsection, the Judge may, in exceptional circumstances,—

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566 *X v Attorney-General* case study, to be prepared by Counsel Assisting.

567 First defendant/applicant's interlocutory application on notice for orders under section 47, Evidence Act 2006.

> a) permit a party to the proceeding to offer evidence tending to prove that the person convicted did not commit the offence for which the person was convicted; and
>
> b) if satisfied that it is appropriate to do so, direct that the issue whether the person committed the offence be determined without reference to that subsection.
>
> […]

890. The Crown submitted that the exceptional circumstances which would allow a Court to make such an order were the claimed retraction by X of his allegations against CW, made to his caregivers after CW had been convicted. To support this, the Crown provided affidavits from the caregivers, which deposed to events in December 2005.

891. It was difficult to establish why the caregivers had not provided this evidence in the 10 years between the alleged retraction and the application under section 47 of the Evidence Act.

892. The Crown application gave rise to a subsequent appeal against conviction by CW. That was ultimately successful. Crown Law appointed an independent barrister to represent it in the appeal, reflecting its conflicted position. We later learned that the lawyer for CW had been paid by MSD to advise CW[568].

893. Justice Brown in the High Court issued a decision on 18 December 2015, determining how the application would be heard, and what evidence was relevant to it.[569]

894. The Judge needed to determine the mode of hearing the two parts of an application pursuant to section 47(2) of the Evidence Act. The different modes of hearing were:

a) Hearing both section 47(2)(a) and (b) together at a single interlocutory hearing;

b) Hearing subsections (a) and (b) at separate interlocutory hearings; or

c) Hearing subsection (a) at an interlocutory hearing and deferring subsection (b), which was the issue of whether the person committed the offence be determined without reference to subparagraph (a), heard as part of the trial.

895. We submitted that the exceptional circumstances requirement was relevant to both parts (a) and (b) of the section, so they needed to be heard at the same time.

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568 The costs associated with the X litigation are detailed in Chapter 2

569 *X v Attorney-General & Anor* [2015] NZHC 3325.

896. Justice Brown did not agree, instead adopting the Crown's position that the application for an order under part (a) would necessarily first involve a determination on the issue of exceptional circumstances, which should be heard before trial. His Honour stated:

> I agree with the first defendant's submission that the evidence only needs to cross the threshold of "tending to prove" that Mr GRO-B did not commit the offences, and does need to meet some more onerous standard of proof.[570]

897. We were very concerned that the Judge was applying a lower, civil standard of proof (the balance of probabilities) to effectively overturn a conviction obtained using the higher, criminal standard of proof of beyond reasonable doubt.

898. Further, at [23] of the decision, Justice Brown held that the only relevant evidence for consideration of an order under part (a) was that of the two caregivers. The Judge did not see CW's evidence being necessary at the earlier stage. We objected to this, because all the evidence that we could see, pointed to CW confessing to abusing X, and his engagement with programmes like the Kia Marama Programme were strongly suggestive of his position of accepting the offending.

899. Because of these problems, we appealed the decision of Justice Brown to the Court of Appeal.[571] The appeal centred on the mode of hearing elected by Justice Brown, and the evidence he had determined was relevant to determination of part (a) of the application.

900. The Court of Appeal allowed our appeal and set aside Justice Brown's decision.[572] The Court of Appeal directed the High Court to reconsider the issue, noting that the decision dealt only with the procedure to be followed for resolving the Attorney-General's application.

901. The Court of Appeal held that subsections (a) and (b) needed to be dealt with at the same time[573]. The Judge needed to determine whether to deal with those two steps before the trial or during the trial. We favoured dealing with the application before the trial began. While this would give certainty to Mr X, it would also mean that there would be a double-up in the evidence, first heard at the interlocutory application stage and then again at the trial.

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570 Judgment, [22].

571 *X v Attorney-General & Anor* notice of appeal of Judgment of Brown J in relation to first respondent's application under section 47(2) Evidence Act 2006, 23 December 2015.

572 *X v Attorney-General & Anor* [2016] NZCA 476.

573 Judgment, [29].

902. The Court of Appeal set out what it thought was a logical sequence of events[574]. This required the Judge to hear the Attorney-General's evidence in support of the application (presumably the evidence of the two caregivers and perhaps that of CW). The Judge would then hear any evidence from Mr X in respect of step one which would counter the Attorney-General's evidence or tend to prove that CW did commit the offences. At that point, the Judge should rule under subparagraph (a) as the admissibility of the Attorney-General's evidence.

903. There were two thresholds: "exceptional circumstances", and the evidence must "tend to prove" the person convicted of the offence did not commit it. If the evidence was ruled admissible, the Judge should then give a direction under subparagraph (b) directing that the question whether CW committed the offences against Mr X be determined without reference to section 47(1). This did not mean that Mr X's allegations would be determined without reference to the convictions, as the fact of the convictions would still be relevant and must be taken into account along with the other relevant evidence, but it did mean that the weight to be attached to the fact of the convictions will depend on the other relevant evidence. The trial would then flow on from that point.

904. By that time, we had obtained evidence from an expert about counter-intuitive evidence in sexual assault cases, particularly the circumstances in which sexual assault victims may retract their allegations. We had compelling evidence to explain why our plaintiff may have retracted his allegations, which we had put before the High Court. We were also endeavouring to get CW's records from Kia Marama, a programme for those who acknowledge they are sex offenders in Christchurch, as we had obtained documents indicating that CW had admitted some kind of sexual offending against the plaintiff.

905. In relation to our application for the Kia Marama documents, Crown Law also acted for Corrections – opposing the release of the Kia Marama documents to Cooper Legal on the grounds this would undermine the integrity of the Kia Marama Programme. This opposition reflected, in our view, the Crown's conflicted position. In this case the Crown's steadfast opposition to the Kia Marama documents being disclosed, supported by CW, prevented the plaintiff from obtaining material to counter CW's denial of the offending and the significance of the purported retraction.

906. The High Court ultimately ruled in favour of the documents being released, but this decision was appealed by CW (the appeal was not opposed by Corrections). Because the case ultimately settled, the Kia Marama documents were never released.

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574 Judgment, [33].

907. It was disconcerting to Cooper Legal that the Court of Appeal bench hearing CW's appeal was aware of the fact Cooper Legal held counter-intuitive evidence regarding the alleged retraction evidence and that CW had made disclosures in the Kia Marama Programme which Cooper Legal was trying to access. This was because applications had been made to the Court of Appeal, twice, for X to have separate legal representation in the criminal appeal because of the Crown's conflicted position. Both applications were denied and appeals to the Supreme Court were dismissed. CW's convictions were ultimately overturned, in circumstances which, in our view, provided no justice to the 2 victims of CW's offending, including X.

908. In the end, this issue was rendered moot by CW's successful appeal against his convictions and settlement of the claim.

Disclosure of client information to Police and other agencies

909. Although MSD and Oranga Tamariki (OT) will refute the interpretation of their conduct as 'tactical', it is a fact that MSD (and more recently Oranga Tamariki) have adversely affected the willingness of our younger clients, particularly, to disclose what happened to them in care, because of the fear that such information will be disclosed to third parties, including the Police and/or the persons who harmed them.

910. This issue was first raised in 2006. By way of background, throughout 2005 Cooper Legal prepared a detailed paper, setting out the allegations of the client group at that time. The paper identified perpetrators of abuse and corroborating evidence of abuse in residences, as well as some programmes. The paper did not identify the clients who had made the allegations. It was provided to MSD (then known as CYFS) and Crown Law in January 2006.

911. In March 2006, following discussions between Crown Law and Sonja Cooper, the paper was provided to the Police. On 30 March 2006, Cooper Legal received a letter from a Detective Superintendent stating that he was looking to investigate any previously unreported allegations of sexual offending, or any similar cases of multiple, or very serious physical assaults. Included in the latter category would be any allegations involving five or more clients and any allegation where a weapon was used. The Detective Sergeant stated that to enable the investigation to take place, the Police would need to be able to speak to the clients and obtain their accounts of what took place. Cooper Legal was requested to contact our clients and obtain their authority to disclose any statements they might have made to us in the first instance and to obtain current contact details for any clients

who wanted to make a complaint so that Police could meet with them.[575]

912. Sonja Cooper wrote to the Detective Sergeant on 4 April 2006.[576] For the purpose of this brief of evidence it is sufficient to note that Cooper Legal had sent out a newsletter about the Police request for clients to come forward for the purpose of prosecuting perpetrators. Cooper Legal advised clients that the Police had no details as to which clients had identified perpetrators of abuse. Clients were advised that it was entirely their call whether they wished to be involved with the Police investigation.

913. The Detective Sergeant and Sonja Cooper then had email correspondence regarding the timeframe over which an investigation could take place.[577]

914. The Detective Sergeant and Sonja Cooper exchanged further emails in May 2006.[578] In an email from Sonja Cooper to the Detective Sergeant dated 5 May 2006, the Police were alerted to the very real safety and security issues for clients and staff members of Cooper Legal if unsanctioned disclosures were made to Police of our clients' information. This had arisen in the context of CYFS providing information to the Police which Cooper Legal had provided to CYFS to assist in the investigation of a particular staff member.

915. On 12 May 2006, the Detective Sergeant wrote to Sonja Cooper again. He stated that in the absence of an express indication that a client wished to speak to the Police, the Police did not expect any complaint to be referred to them.[579] This appeared to be the end of the matter.

916. The issue arose again in January 2008. On 17 January 2008 Sonja Cooper received a letter from Crown Law advising that it had received a request under the Privacy Act from the Police for information held by MSD in relation to Mr Drake, a former staff member who was being investigated.[580]

917. The letter advised that MSD was going to release portions of the statements of claim filed by four identified clients of Cooper Legal to the Police.

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[575] Letter from Police to Cooper Legal dated 30 March 2006.

[576] Ms Cooper provided Police with a copy of the memorandum she had sent to every client in the DSW Litigation Group.

[577] Emails dated 6 April 2006.

[578] Refer to email exchange between 2 May and 8 May 2006.

[579] Letter from Police to Cooper Legal dated 12 May 2006.

[580] Letter from Crown Law to Cooper Legal dated 17 January 2008.

918. Our response, sent on 22 January 2008, was to strongly object to those documents being provided in the absence of the clients' consent. Cooper Legal described this as a fundamental and significant breach of client privacy.[581]

919. Over the top of Cooper Legal's strong objections, on 21 February 2008 Crown Law advised Cooper Legal that the identified portions of the statements of claim would be provided to the New Zealand Police.[582]

920. In mid-2009, Cooper Legal was approached for assistance in the investigation and prosecution of several staff members from DSW and Salvation Army institutions. Sonja Cooper had email correspondence with a Detective Sergeant who was leading Police action against two former Social Welfare staff members, Clive Chandler and Ivan Chambers. With the consent of clients, Cooper Legal provided the Police with the names of clients who were willing to be part of the Police investigation.

921. In 2010, Sonja Cooper was again contacted by Police, this time in relation to the prosecution of Ivan Chambers, referred to earlier. Ivan Chambers was a staff member who had sexually abused boys in his care while he worked at Epuni. In his District Court trial, Mr Chambers was initially represented by a lawyer who had requested disclosure of the statements of claim and other material prepared on behalf of the complainants in the criminal trial, for their civil claims. Cooper Legal declined to provide that information.[583]

922. On 31 August 2010, Sonja Cooper was summonsed to appear at a non-party disclosure hearing in the District Court on 6 September 2010. This was further to a formal application by the lawyer for Mr Chambers under the Criminal Disclosure Act 2008. On 6 September 2010, a hearing was held in the District Court. The District Court ordered disclosure of material to the Judge so she could consider whether any of it was relevant. On 9 September 2010, pursuant to the order of the Court, Cooper Legal provided information about the named complainants. On 10 September 2010, Cooper Legal made further submissions on behalf of the complainants under the Criminal Disclosure Act 2008.

923. On 17 September 2010, the District Court ordered very limited disclosure of the available information to the defence lawyer.

924. In the first few months of 2011, Mr Chambers changed his lawyer. On or around 4 April 2011, the Crown Prosecutor advised Sonja Cooper

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581 Letter from Cooper Legal to Crown Law dated 22 January 2008.

582 Letter from Crown Law to Cooper Legal dated 21 February 2008.

583 Refer to Cooper Legal letter to Christopher Stevenson dated 15 July 2010.

that the new lawyer had applied to the High Court for release of the statements of claim of the complainants and was given them. No notice had been given to Cooper Legal about that application.

925. In spite of this, on 13 April 2011, a jury convicted Ivan Chambers on 8 of the 11 charges he faced. Mr Chambers was subsequently sent to prison.

926. The issue of Police involvement in civil claims came up again in relation to the proceeding *Y v Attorney-General*. Y's claim was filed in 2006. Y's claim was tracking towards trial, because he had been placed on the Whakapakari Programme, where he alleged that he had been sexually assaulted by one of the staff there.

927. In February 2016, MSD through its counsel, advised the High Court that it intended to refer Y's allegations to the Police. Cooper Legal advised the High Court that Y had chosen to bring a civil claim and did not want to make a police complaint.

928. In May 2016, Katie Ross asked MSD about progress on the criminal complaint, as Cooper Legal was concerned that it would delay the impending trial. We were advised that the complaint had not been forwarded to the Police by then, but MSD hoped to do that shortly.

929. Following that, memoranda were filed in the High Court covering this issue, among other issues. In a memorandum dated 17 May 2016, Cooper Legal complained that Y's allegations had not yet been forwarded to the Police by MSD. Cooper Legal repeated that Y had made a clear decision to opt for the civil process and that he maintained his position he would not cooperate with any Police investigation. Cooper Legal stated that if MSD raised any future referral of Y's allegations to the Police as a further reason for a trial date not to be allocated, this would be strenuously opposed.

930. Counsel for MSD replied in a memorandum dated 18 May 2016. The memorandum advised that the intention of referring Y's allegations of sexual assault to the Police had been flagged as a courtesy to the Court and following considered reflection by MSD since receiving Y's signed brief of evidence.[584]

931. Unbeknown to Cooper Legal, it was around this time that MSD was finalising an information-sharing protocol with Police. To this day, neither Cooper Legal nor Y have any idea what, if any information, was provided to the Police from Y's court file.

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584 *Y v Attorney-General* memorandum of counsel for defendant dated 18 May 2016.

Information-sharing protocol: MSD and Police

932. In July 2017, Cooper Legal received a letter from MSD relating to three clients of the firm, including Y. Cooper Legal was advised that MSD had referred all allegations it considered could constitute criminal acts to the Police. Cooper Legal was asked to contact the three clients to seek their views on their allegations being further investigated by the Police.[585]

933. None of the three clients concerned had consented to having the details of their claims provided to any entity except MSD. Further, in respect of two of those clients, including Y, name suppression orders were in place which should have protected their identity from being disclosed.

934. Cooper Legal requested, and received, a copy of the Protocol relied on by MSD to provide the personal information of the complainant to the Police.[586]

935. As referred to earlier, what became obvious is that a Protocol had been in effect since 2 May 2016. In the face of that, the letter from MSD to Cooper Legal was the first notice to any client of Cooper Legal, and to Cooper Legal, that such an agreement was in place.

936. The Protocol (since amended), in its original form, allowed MSD to forward significant personal information about a claimant (including their current address, names and details of perpetrators, and details of the abuse that was perpetrated on the claimant) to the Police, without reference to the complainant.

937. The complainants instructing this firm could have easily been contacted through this firm but were not. The Police had, instead, asked MSD to contact the complainants and ask if they wanted the Police to follow up.[587]

938. Due to our concern about the widespread disclosure of client information to the Police, at a CMC with Justice Ellis on 31 August 2017, Sonja Cooper raised Cooper Legal's concerns about information sharing between MSD and the Police.

939. In the meantime, MSD continued to contact us with requests to make contact with other clients whose information had been forwarded to the Police.[588]

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585 Letter from MSD to Cooper Legal dated 27 July 2017.

586 Child Protection Protocol: Joint Operating Procedures between New Zealand Police and Child, Youth and Family September 2016.

587 Email from MSD to Cooper Legal dated 19 September 2017.

588 See the exchange of emails, for example, between MSD and Cooper Legal dated 19 September 2017.

940. On that same date, Justice Ellis issued a Minute directing, on an interim basis, that MSD and MOE were not permitted to provide any material received in the course of litigation to third parties, except for the purpose of progressing the litigation. She further directed that the Court files for the plaintiffs in both the DSW and MOE litigation were not to be searched, except with the leave of a High Court Judge, after consultation with counsel.

941. In the meantime, Justice Ellis directed that Cooper Legal and Crown Law file documents to address the issue at a hearing, scheduled to be heard on 2 October 2017.

942. Cooper Legal made a formal complaint to the Office of the Privacy Commissioner ("OPC") on 12 September 2017. The complaint was sent on behalf of the three persons whose information we had been told had been sent by MSD to Police, and on behalf of the unknown clients of Cooper Legal whose information had been sent to the Police.[589]

943. We complained that information had been referred to the Police by MSD, in the absence of consent by any of the clients concerned. We referred to the Protocol having been in effect between the Police and MSD since 2 May 2016, but that we had not been notified of it until July 2017. We complained, in particular, that it was a breach of each client's privacy for MSD to provide their information to the Police, as well as a breach of name suppression orders in the case of Y and another client. We observed that the scope of our retainer with each client is to progress a civil claim against MSD for the harm each person suffered. We explained that our clients are very damaged individuals. Further, many have criminal records or are serving prison sentences, and have deep-seated mistrust of the Police and the Justice system. We explained that many see talking to the Police, even about their own childhood experiences as "narking".

944. We complained that the disclosures made by MSD did not comply with the relevant principles of the Privacy Act. In particular, we observed that MSD had been in the possession of much of the information it had disclosed for a very long time – over ten years in relation to Y and for at least a year in respect of the other two clients. Cooper Legal observed that the three clients have suffered harm and distress as a result of the disclosures. We observed that, in the case of Y, the persistence in providing his personal information to the Police, against his wishes, had re-opened old wounds and undone any finality in his settlement. We observed that all three were (at that point in time)

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589 Letter from Cooper Legal to Office of the Privacy Commissioner (MSD-Police) dated 12 September 2017.

prison inmates with little trust of the Police. There was considerable concern about their personal safety in the prison context.

945. The reply from the OPC was disappointing, to say the least. In a letter dated 22 December 2017, the OPC found that the privacy interests of children presently in care outweigh any privacy interests of Cooper Legal clients.[590]

946. In accordance with the directions of Justice Ellis, Cooper Legal applied for orders that documents from the Court file not be disclosed by MSD and MOE to third parties. Cooper Legal also sought an order that no plaintiff's court file could be searched, except with leave of the court after hearing from counsel.

947. On 20 September 2017, the Crown consented to the "no search order" but opposed the non-disclosure order.

948. After the hearing on 2 October 2017, Justice Ellis issued a further Minute in which she held that passing documents contained on the court files onto the Police without leave of the court would be a breach of the 'no search' order and a subversion of the relevant High Court Rules as to search of a court file. She further directed that if the Crown wished to pass such documents on in a particular case, then an application should be made and it would be determined on its merits, after hearing from the relevant plaintiff.

949. On 31 October 2017, the Crown filed a further application asking to, alternatively, vary the decision recorded in the Minute on the basis that Justice Ellis' view was wrong, or grant leave to appeal, or clarify the effect of the Minute.

950. Disclosure issues continued to arise. Further hearings took place, which were, in the end, resolved by consent. Hearings took place on 9 February and 11 February 2018, respectively. However, there remained a considerable distance between Cooper Legal, on the one hand, and the Crown on behalf of MSD and Oranga Tamariki on the other hand in terms of how these applications should be dealt with and what weight should be given to client safety.

951. Because of that, Justice Ellis issued a substantive decision on 7 June 2018.[591]

952. This is possibly the first judgment in which the High Court explicitly acknowledged the vulnerability of the client group. Indeed, Justice Ellis stated in her decision that "both individually and as a group, the

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590 Letter to Cooper Legal from OPC, 22 December 2017

591 *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [2018] NZHC 1331 [7 June 2018].

plaintiffs in these proceedings are undoubtedly some of the most vulnerable people in New Zealand society".[592]

953. While Justice Ellis acknowledged that choosing a litigation path should prepare plaintiffs for the possibility of some form of public airing of the details of their claims, she noted that most claimants hoped and expected an out of court resolution.[593]

954. Again, for probably the first time, the High Court acknowledged that many plaintiffs had had interactions with the Police, the criminal justice process and the Corrections system.[594] She accepted that for many, their experience in State care, together with their subsequent interactions with the Police, had resulted in their developing a deep distrust of those in authority and a genuine reluctance to engage or cooperate with them.[595] She accepted that many plaintiffs had good reason to be sceptical of any undertakings that may now be made to keep them safe or to protect their interests.[596] Finally, Justice Ellis acknowledged that for plaintiffs presently in prison, associated with organised criminal groups of gangs, or who had made allegations against those associated with such groups, safety issues may arise in the context of any perceived cooperation or interaction with authorities, including the Police.[597]

955. Taking those factors into account, and also the history of this firm objecting, on behalf of the client group, to individual client information being provided without their consent, Justice Ellis concluded that the plaintiffs had a "strong and legitimate expectation that their claims will be kept confidential and private".[598]

956. Ultimately, relying on the inherent jurisdiction of the High Court, Justice Ellis concluded that the Court was able to make an order restricting release of court documents to third parties, if it was necessary to do so in order to act fairly and efficiently within its own jurisdiction.[599] She repeated that there were important and relevant policy reasons favouring protecting the plaintiffs' confidentiality and privacy interests.[600] In light of that, Justice Ellis concluded that no copies of documents contained on the DSW and MOE litigation files were to be provided by a party to a non-party without leave of the Court. This did not apply to providing copies to counsel or other

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592 *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [7].
593 *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [18] – [19].
594 *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [22](a).
595 *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [22](b).
596 *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [22](c).
597 *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [22](d).
598 *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [24].
599 *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [67].
600 *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [68].

persons involved in the conduct of the litigation, or between MSD, Oranga Tamariki or MOE for the purposes of ensuring the safety of children presently in care.[601]

957. On 4 July 2018, the Crown applied for leave to appeal this decision. In the intervening period, on 6 and 21 September 2018 respectively, further applications were made to disclose information contained in claims before the High Court. On 27 September 2018, the High Court reissued its judgment. On 19 October 2018, the High Court granted leave to appeal the decision to the Court of Appeal.

958. The appeal was heard in the Court of Appeal on 3 April 2019. Hearing the appeal were Justices Joseph Williams, Toogood and Collins. During the course of submissions, the Crown, which instructed Paul Rishworth QC to argue the appeal, submitted that the Courts had no jurisdiction to interfere with what was essentially a statutory power held by Oranga Tamariki to refer information obtained from claimants on to third parties. The Crown also argued that its right to pass on such information to Police was "throwing a light" on abuse, which was potentially beneficial to children currently in care, but also more generally.

959. In reply, Cooper Legal strongly argued that the effect of the Crown's actions, to date, and the fear that the appeal might succeed, had led to some plaintiffs refusing to disclose the particulars of their allegations of abuse in their claims and in offer letters made by this firm to MSD. We stated, therefore, that the impact of the Crown's conduct had had the effect of inhibiting claimants from disclosing what had happened to them in care, for fear that their allegations may be disclosed to the Police and to their perpetrators. We observed, further, that this benefitted MSD in the settlement process, as MSD could simply refuse to take such allegations into account, on the grounds that the individual claimant had provided insufficient detail. In that context we observed that MSD and Oranga Tamariki had competing interests.

960. We also observed that the updated Police protocol required that a claimant consent to being engaged in a Police prosecution, before any referral would be made.[602]

961. The Court of Appeal decision was issued on 16 October 2019. The decision was reissued on 25 October 2019 as a "public" and "confidential" version, following concerns on the part of MSD that the decision in its original form might identify the three plaintiffs referred to, and possibly identify a staff member employed by Oranga Tamariki.

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601 *J (and other plaintiffs in the DSW Litigation Group) v Attorney-General* [69].
602 Letter from NZ Police to Cooper Legal dated 17 October 2018.

962. Yet again, the Crown was unsuccessful. In its decision[603], the Court of Appeal observed that some claimants 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 do not wish to cooperate for any collateral purposes under any circumstances. Some are too ashamed to disclose what happened to them outside the proceedings.[604]

963. After setting out the history of the litigation in relation to this issue, the decisions made by the High Court and then the evidence about the issues, the Court of Appeal undertook its analysis. The Court of Appeal accepted our argument that the Oranga Tamariki Act creates "opportunities" for information sharing between agencies, but no duty to that effect.[605] The Court of Appeal went on to state that, in the context of historic abuse cases, the power of the State 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 wellbeing of claimants in proceedings before it. If it 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".[606]

964. Again, accepting our argument, the Court of Appeal found that the Privacy Act does not impose a duty on MSD or MOE to share information to third parties relating to allegations of abuse.[607] Importantly, the Court of Appeal acknowledged that privacy is the most valuable where the loss of it exposes its owner to harm. On the other hand, privacy is far less valuable if the surrender of it will prevent harm to others, without presenting any risk to its owner.

965. The Court of Appeal expressly disagreed that the Privacy Act places responsibility for weighing the competing interests in the hands of the State. Instead, the Court of Appeal found that the needs of the administration of justice are best determined by Judges in transparent judicial proceedings in which the parties are heard and proper reasons given.[608]

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603 *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)* [2019] NZCA 499 [16 October 2019].

604 *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)* [3].

605 *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)* [69].

606 *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)*, [76].

607 *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)*, [77].

608 *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)*, [78].

966. The Court accepted that the claims involve serious allegations of criminal conduct, which raise the public interest that such offences should be investigated by independent prosecutors, tried, and, if proved, then punished.[609] The Court accepted, however, that some claimants genuinely fear for their safety, others wish to protect their privacy for the sake of their mental wellbeing, and still others feel ashamed to be the victims and do not want their secret to be published more than is necessary to obtain a remedy.[610]

967. The Court of Appeal went on to say that the potential impact of an inadvertent disclosure may well be very significant in terms of the safety and wellbeing of particular claimants.[611] As with the High Court, the Court of Appeal expressed the view that it would have been better if the parties had agreed a protocol to resolve these kinds of issues, but noted that had not occurred, resulting in the need for judicial intervention.[612]

968. Finally, the Court of Appeal held that any applications for leave should be dealt with quickly and without undue formality.[613]

969. Unfortunately, while there had been some respite from continuing requests for clients to consent to disclosure of their information and ensuing Court applications, the issue has now reared its head again. As at 20 December 2019, one of the claimants referred to in the Court of Appeal decision, who had refused consent to his information being provided by Oranga Tamariki to his perpetrators on the grounds of fear for his personal safety and the safety of his family, is now, yet again, the subject of a renewed request for the information to be put to his perpetrator. That claimant has felt pressured to consent to his allegations being provided to his perpetrators, although he remained fearful for his own safety and that of his young family.

970. MSD has also more recently advised that it has referred information to Oranga Tamariki in relation to a claim brought by a client of Cooper Legal whose claim was filed in June 2015 and whose offer letter was sent a year later. MSD has explained it has only now identified a potential safety issue for children now in care, in spite of having had this information in its possession for over 4.5 years, because it has a large backlog of claims to assess and because it did not implement its safety checking process until the first half of 2008.[614]

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609 *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)*, [83].

610 *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)*, [84].

611 *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)*, [86].

612 *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)*, [87].

613 *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)*, [88].

614 'Confidential' email from MSD to Cooper Legal dated 24 January 2020.

971. The continued requests made to disclose information to the Police and/or alleged perpetrators is deeply disappointing and reflects, in our view, a failure to acknowledge the vulnerability of our clients, or their need to be kept safe. It will continue to deter some clients from fully disclosing what happened to them, which will ultimately impact on the compensation they are offered by MSD.

Section 100 examinations

972. The now repealed Judicature Act 1908 empowered the High Court to order that the plaintiff be examined by a medical practitioner, in other words a psychiatrist, where their physical or mental condition was at issue. This has been another powerful tool used by MSD, particularly, to defend claims against it.

973. The first time, from recollection, MSD relied on the s100 provisions was in the *White* trial. In that case, the Crown obtained orders that the two plaintiffs be examined by a psychiatrist appointed by the Crown. While we make no criticism of the Crown psychiatrist, he did not, to our knowledge, have extensive experience working with victims of child abuse. His vast experience was working in the forensic mental health context. We observe that Justice Miller placed considerable reliance on that psychiatrist's opinion in relation to both brothers. In particular, he accepted that the younger brother had not suffered any discernible harm at the hands of his sexual abuser.[615]

974. Following the *White* case, the Crown utilised the s100 process to have plaintiffs examined for the purposes of leave hearings. We have already explained, above, how leave hearings were pursued during the withdrawal of aid process. We have also explained, above, how the courts, particularly the High Court, took an increasingly hard line on the evidence required to surmount Limitation Act hurdles. During this period, our experience was that the High Court consistently relied on the Crown evidence to dismiss leave applications, rather than leave them to be dealt with at trial.

975. In respect of one psychiatrist, we took the step of complaining to Crown Law about his conduct of examinations of our clients. One client's interview, which had been video-recorded displayed conduct of repetitive questioning, in the nature of cross-examination, and continual testing of the allegations made by the client. We had several complaints that our clients could not understand the questions being asked of them by the psychiatrist and that his style was intimidatory and discouraging. Not surprisingly, our complaints were strongly rejected by Crown Law.[616]

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615 *White v Attorney-General* HC WN CIV 1999-485-85 [28 November 2007], [430].

616 Letter from Crown Law to Cooper Legal dated 13 October 2010.

976. In more recent trials we have avoided the need for our clients to be examined by a Crown expert by withdrawing the application for leave to proceed, relying on the strength of the expert evidence we have obtained. This has also avoided the need for leave hearings as a preliminary issue.

Private Investigators

977. We first encountered Crown Law's use of private investigators during the *White* trial. Crown Law, with the knowledge of MSD, contracted private investigators to seek information which could be used to cross-examine (and to discredit) similar fact witnesses to be called by the plaintiffs. The private investigators also conducted surveillance on at least one similar fact witness. The use of private investigators was confirmed when Garth Young, an employee of MSD, was cross-examined by Sonja Cooper during the course of the *White* trial.

978. We had serious concerns about the use of private investigators to dig into the background of our similar fact witnesses. These concerns were borne out in the Report of the Inquiry Into the Use of External Security Consultants by Government Agencies, which was published on 18 December 2018.[617] The Inquiry found that Crown Law's instructions to the private investigators were broad, and Crown Law did not rule out low-level surveillance in the lead-up to the trial. The Inquiry found that the broad nature of the instructions, without explicit controls to protect privacy interests, breached the Code of Conduct requirement to respect individual privacy and avoid activities that might harm the reputation of State Services. MSD had been aware of the potential use of low-level surveillance and a covert approach in the *White* case. The Inquiry did not find any evidence that MSD queried this or sought any assurance that individual privacy would be properly weighed and protected. Both MSD and Crown Law were found to be in breach of the Code of Conduct. The Inquiry found that Crown Law paid more than $90,000 to the private investigators over six months between January and July 2007.[618]

979. In February 2007, the investigators noted that MSD raised a concern about the reputational risk for the organisation if MSD staff knew that a private investigator was interviewing them. The Inquiry recorded: "It was suggested that the investigator be presented as part of the litigation team, rather than as a private investigator." The Inquiry report detailed the experiences of our similar fact witnesses during this time. It described a sister of the plaintiffs in the *White* trial complaining that investigators had behaved in a demanding and aggressive way. One similar fact witness gave a statement to the

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617 *Inquiry into the Use of External Security Consultants by Government Agencies,* Doug Martin and Simon Mount QC, 18 December 2018.

618 *Inquiry into the Use of External Security Consultants by Government Agencies* report, page 41.

Inquiry describing his own experiences of private investigators. He described two men sitting in a car outside his house watching him. When he confronted them, they acknowledged they were investigators and were watching him. This was confirmed by the file provided by Crown Law.

The requirement to act as a Model Litigant

980. In our evidence for the Contextual Hearing heard in November 2019, we referred to the Crown Litigation Strategy which, in our experience has led to the Crown defending the claims, vigorously, to avoid any liability to the Crown.

981. As we explained, prior to 2012, Crown Law and other State agencies, including MSD, were supposed to act as Model Litigants.

982. In 2010, at a New Zealand Law Society seminar, the Crown acknowledged that it is subject to higher duties than an ordinary litigant,[619] and that although there had been no formal adoption of a Model Litigant policy in New Zealand, as from at least 2002 the Crown had attempted to be a Model Litigant. [620]

983. The Crown described a Model Litigant being one which acts honestly and fairly in handling claims in litigation by:

a) Dealing with claims promptly and not causing unnecessary delay in the handling of claims in litigation;

b) Making an early assessment of the prospects of success/potential liability of the Crown;

c) Paying legitimate claims without litigation, where it is clear that liability is at least as much as the amount to be paid;

d) Acting consistently in the handling of litigation;

e) Endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by considering ADR and by participating in ADR Processes where appropriate; and

f) Where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

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619 Referred to in "*Litigating against the Crown*", April 2010, NZLS/CLE Paper, at pp 5-6.

620 Referred to in "*Litigating against the Crown*", April 2010, NZLS/CLE Paper, at p6.

- "Not requiring the other party to prove a matter which the Crown knows to be true;
- Not contesting liability if the Crown knows the dispute is really about quantum;
- Monitoring the progress of the litigation and using methods appropriate to resolve it including settlement offers and payments into court;
- Not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
- Not relying on technical defences unless the Crown's interests would be prejudiced by the failure to comply with a particular requirement;
- Not undertaking/pursuing appeals unless the Crown believes it has reasonable prospects for success or the appeal is otherwise justified in the public interest;
- apologises where the Crown is aware that it or its lawyers have acted wrongfully or improperly."[621]

984. As stated, our experience was that Crown Law and MSD, particularly, acted in a manner that was, in our view at least, quite inconsistent with the obligations of a Model Litigant.

985. In particular, the claims were not dealt with promptly. As we discussed at the Contextual Hearing and in the course of this evidence, there have been considerable delays resolving claims brought by our client group – due mainly due to the conduct of Crown agencies, including their instructed counsel.

986. We have never experienced the Crown making an early assessment of the prospects of success, or its potential liability. The fact that the claims run for many years illustrates this point.

987. The early path of the litigation demonstrated a complete unwillingness on the part of the Crown to pay legitimate claims without liability. As is evident, we were forced into a litigation process by both MSD and CHFA in order to obtain any settlements for our large client groups. As is also evident, the Crown, acting for both MSD and CHFA, took steps to have the claims struck out.

988. Again, from our perspective, there has been no consistency in the handling of the claims. As we have demonstrated, in this evidence, claims have been handled differently, not only as between individual litigants, but also as between various Crown agencies.

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621 Referred to in "*Litigating against the Crown*", April 2010, NZLS/CLE Paper, at pp6-7.

989. Further, as our evidence demonstrates, at least in the early stages it was almost impossible to engage the Crown in resolving the claims out of court. We have explained how our earlier attempts to resolve the DSW and psychiatric hospital claims in an out-of-court process were rebuffed by the Crown, resulting in us having to file all the claims in the early-mid 2000s. We have also explained how our attempts to utilise out-of-court processes to resolve the claims, including the Intractable Claims Process, failed due to the lack of cooperation on the part of the Crown, particularly MSD.

990. The Crown also failed, certainly in the earlier days, to keep the cost of litigation to a minimum. The *White* trial demonstrates that the Crown required the plaintiffs to prove matters that the Crown knew to be true. Indeed, Justice Miller commented that very little about the plaintiffs' claims was formally admitted, "somewhat surprisingly since much of their case is squarely based on the contemporary records of the Child Welfare Branch".[622] Similar comments were made in the *White* decision relating to the Crown's position relating to duty of care issues.[623]

991. We also observe that the Crown has typically contested liability at all phases of litigation. A good example of that is requiring preliminary hearings to address Limitation Act issues. Another example is the Campbell Park litigation, where we endeavoured to have discreet hearings to resolve factual disputes, but the Crown insisted on a full trial so as to preserve all of its defences.

992. In our view, at many points along this process, the Crown has taken advantage of our legally aided claimants – often with the support of Legal Aid. The decision to pursue the leave hearings, already referred to in our evidence, is a good example of the way in which the Crown, mainly MSD, pursued hearings in the full knowledge that legal aid funding had been withdrawn, and that decisions were pending. We also observe that in the unsuccessful litigation, the Crown has pursued costs applications (as we have also referred to), including directly against plaintiffs, providing a large disincentive for Legal Aid to continue funding the litigation, particularly as we understand MSD sought reimbursements of the costs from Legal Aid.

993. Significant costs awards were made in the unsuccessful litigation. For example, in the *White* case, Justice Miller stated that, were it not for the operation of s40 Legal Services Act, costs in the sum of $811,631.82 would have been awarded to MSD.[624] As we have

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622 *White v Attorney-General* HC WN CIV 1999-485-85 [28 November 2007], at [27].

623 *White v Attorney-General* HC WN CIV 1999-485-85 [28 November 2007], at [27] – [29].

624 *White v Attorney-General* HC WN CIV 1999-485-85 [25 September 2008], at [23].

already commented, in that case, MSD also asked for a costs order to be made personally against Paul White. Justice Miller declined to make such an order, stating that there were "no exceptional circumstances" warranting departure from the statutory limitation on costs orders against a legally aided party.[625] In our view, it was odious that we had to make submissions to protect Paul White from a personal costs award.

994. In the *J v CHFA* case, Justice Gendall started by observing that the plaintiff established she had been subject to physical assaults and had witnessed similar assaults at Porirua Hospital and that, but for the Limitation Act bar, she would have been entitled to a "modest" award of damages for her then distress. He went on to state, however, that she failed in substantial parts of her claims.[626] Ultimately, Justice Gendall stated that it was proper that Legal Aid, the parties and the public knew that, but for the grant of legal aid, the sum fixed by the Court would have been the costs awarded against the plaintiff.[627] Ultimately, he awarded CHFA the sum of $122,006.19.[628]. In the *K* case Justice Gendall made an award in favour of CHFA in the sum of $88,160.78[629].

995. In chapter 2 of our evidence, we commented on the costs incurred by the Crown to defend the claims against individual plaintiffs, and generally. Multiple claims could have been settled for the costs incurred by the various State agencies to litigate these individual claims. Instead, the Crown has behaved as an aggressive litigant, pursuing every legal defence available to it and then pursuing costs awards as a deterrent to Legal Aid funding ongoing litigation of this nature.

996. Reliance on defences such as the Limitation Act, in our view is relying on a technical defence to avoid liability. While we acknowledge that the Limitation Act is an available defence to any defendant, it is a choice about whether to invoke it. This is one of the reasons why we strongly advocate for the Limitation Act to be repealed in the same way that other Commonwealth jurisdictions have done.

997. We also observe that the Crown has pursued appeals, including in the CHFA litigation, for the purpose of striking out the claims. As we have already stated, the psychiatric hospital claims against CHFA, represented by Crown Law, involved four years of litigation, all paid for by the public purse, with the result that the Crown was ultimately unsuccessful and most of the claims were able to proceed. As we said

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625 *White v Attorney-General* HC WN CIV 1999-485-85 [25 September 2008], at [15].
626 *J v Crown Health Financing Agency* HC WN CIV-2000-485-876 [2 April 2008], [9].
627 *J v Crown Health Financing Agency* HC WN CIV-2000-485-876 [2 April 2008], [16].
628 *J v Crown Health Financing Agency* HC WN CIV-2000-485-876 [2 April 2008], [17].
629 *K v Crown Health Financing Agency* HC WN CIV-2005-485-2678 [13 February 2008], [15].

in our evidence, the Crown raised quite unpalatable arguments, in our view, to justify the stance it was taking, including arguing that burning a patient with cigarettes could somehow be treatment.

998. We observe that the High Court, during the withdrawal of aid process, rejected our submissions that the Crown was acting in breach of its Model Litigant obligations in pushing on the leave hearings during the withdrawal of aid process.

999. As the Crown itself referred to in the NZLS seminar, in the decision *LRB v Attorney-General*[630] the High Court took the position that the Court was pushing on the hearings, rather than the Crown and accordingly the Model Litigant obligations had not been breached.[631] This exonerated the Crown from its responsibility in opposing our applications for adjournments, in the first place.

1000. As we said in the Contextual Hearing, in 2012/2013 the Cabinet Directions for the Conduct of Crown Legal Business removed the Model Litigant obligation, replacing it with an obligation to act in a manner which "satisfies the Crown's objectives". From our perspective, this legitimated the approach we had already experienced in litigation brought on behalf of our clients.

1001. In correspondence received from the then Solicitor-General, Michael Heron QC, we were advised that the Crown may (amongst other things):

a) Test and defend claims made;

b) Decline to settle when settlement would not satisfy the Crown's objectives;

c) Plead limitation and other defences;

d) Require opposing litigants to comply with necessary procedural obligations; and

e) Like any other litigant, pursue defences available to it.[632]

1002. In a subsequent letter, the Solicitor-General stated that the Crown conducted civil litigation in accordance with the Attorney-General's Values for Crown Civil Litigation (2013).[633]

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630 *LRB v Attorney-General* HC WN CIV-2008-485-1451, [11 March 2010]

631 *LRB v Attorney-General* HC WN CIV-2008-485-1451, [11 March 2010], [26] – [28].

632 Letter from Michael Heron QC to Cooper Legal dated 6 March 2015 and our reply of the same date.

633 Letter from Michael Heron QC to Cooper Legal dated 13 March 2015.

1003. It is timely to refer to the *Review of Strategy for the Resolution of Historic Claims*, issued by the Minister of State Services on 17 December 2019.[634] The Government agreed six principles to guide the Crown's engagement with the Royal Commission. These include: manaakitanga, openness, transparency, learning, being joined up, and meeting the obligations under Te Tiriti O Waitangi.[635] Five updated principles have been articulated to ensure that the Crown Litigation Strategy reflects the six principles as much as possible. These include:

a) Principle 1: agencies will endeavour to resolve grievances early and directly with the individual, including others in the process where the claimant wishes;

b) Principle 2: settlement will be considered for all meritorious claims, which will generally be full and final without admission of liability. 'Meritorious claims' are not defined;

c) Principle 3: additional material information claimants become aware of, or circumstances not considered by the Crown under earlier settlements may be considered, including whether any additional response should be made;

d) Principle 4: where claims are litigated in court, the Crown will concede any factual matters not in dispute and will rely on **appropriate factual and legal defences**; and

e) Principle 5: the Crown's approach to ADR and litigation of historic abuse claims will be guided by the principles referred to above and the outcomes that support those principles.[636]

1004. We refer to the discussion in the Review Paper about the Limitation Act. The Review acknowledges that the "abuse of children is particularly abhorrent and there is no public benefit in allowing perpetrators or those vicariously liable for their acts to escape civil liability".[637] Nevertheless, resort to the Limitation Act has still been retained – pending consideration of any significant reform in the area. We observe this is the recommendation of officials, which frankly does not surprise us.[638]

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634 *Review of Strategy for the Resolution of Historic Claims*

635 *Review of Strategy for the Resolution of Historic Claims*, para [3].

636 *Review of Strategy for the Resolution of Historic Claims*, para [8].

637 *Review of Strategy for the Resolution of Historic Claims*, para [50].

638 *Review of Strategy for the Resolution of Historic Claims*, para [50] – [54].

1005. We also note that while the Crown Litigation Strategy is renamed the Crown Resolution Strategy, we see very little difference in practice for the way in which claimants engage with the Crown.[639] We have addressed this in the course of our evidence.

1006. In particular, we challenge the statement that the approach to ADR and litigation of historic abuse claims is open and transparent. We have given the very recent example of MSD refusing to provide to us crucial parts of the new process implemented to deal with claims against MSD. This flies in the face of an undertaking to be transparent and open. If crucial components of the MSD process remain hidden from public view, there is no way in which its process can be judged, whether by claimants, independent monitors, or by legal advisors.

1007. As we have commented in our evidence, there is even less transparency around the processes operated by MOE and MOH. There is virtually nothing publicly available about those processes. Our evidence, based on client experiences over a long period of time, demonstrates inconsistency, the lack of any principled approach and also a lack of consistency with other Crown processes.

1008. While we are happy that the Review expressly states that the Attorney-General's expectations are that the Crown will behave as a Model Litigant, we are yet to see much evidence of that.[640] The one area in which we have experienced movement is in relation to name suppression, which we have already addressed in our evidence. Other than that, the Crown approach appears to be "business as usual", particularly in terms of opposing witness evidence, potential reliance on the limitation defence, and failing to engage in the resolution of the claims as early as possible, at least in any meaningful way.

1009. As the Royal Commission will be aware, the Australian Royal Commission into Institutional Responses to Child Sexual Abuse identified Model Litigant obligations as one of the critical issues in that Inquiry and also made recommendations about implementation of Model Litigant policies in its final report.

1010. In its discussion and conclusions on the Model Litigant issue, the Australian Royal Commission stated it was "satisfied" there were advantages for both survivors proceeding with civil litigation, as well as governments and non-government institutions receiving civil claims for institutional child abuse, to adopt specific guidelines for

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639 *Review of Strategy for the Resolution of Historic Claims*, para [55].

640 *Review of Strategy for the Resolution of Historic Claims*, para [63].

responding to claims for compensation concerning allegations of child abuse.[641]

1011. The Australian Royal Commission heard evidence of litigation being handled by lawyers of institutions in an overly adversarial manner "with little sensitivity to the potential re-traumatising effect on a survivor of child [sexual] abuse".[642]

1012. For that reason, the Australian Royal Commission recommended the adoption of guidelines already in place in Victoria and New South Wales so that survivors should benefit from:

a) "a more sensitive handling of claims by defendants and their lawyers

b) More focus on the merits of the claim

c) An increased change of an early settlement or quicker resolution of the claim

d) Access to information about services and supports, counselling, records and apologies

e) Less reliance on limitation periods and other procedural requirements (such as a formal statement of claim or confidentiality clauses in terms of settlement)."[643]

1013. The Australian Royal Commission went on to state that both government and non-government institutions should adopt guidelines for responding to claims for compensation concerning allegations of child abuse.[644]

1014. In terms of the recommendations, the Australian Royal Commission recommended a guideline which included an obligation to provide assistance to claimants and their legal representatives in identifying the proper defendant to a claim, if that proper defendant was not identified or was incorrectly identified, as well as publishing the guidelines adopted or otherwise making them available to claimants and their legal representatives.[645]

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641 Final report – Redress and civil litigation, p522.
642 Final report – Redress and civil litigation, p522.
643 Final report – Redress and civil litigation, p523.
644 Final report – Redress and civil litigation, p523.
645 Final report – Redress and civil litigation, p524.

1015. We also refer to the Investigation Report issued in September 2019 by the UK Independent Inquiry Child Sexual Abuse entitled '*Accountability and Reparations".* In the Conclusions section of that Report, it was acknowledged that the effects of child [sexual] abuse on victims and survivors "can be life long and devastating".[646] The Investigation Report recommended that defendants, including government and non-government organisations (including their insurers) must take this into account in responding to civil claims, together with the fact the claimants "may struggle to disclose details of their abuse and to initiate and engage with the process of litigation".[647] That Report acknowledged that claimants should be "treated with sensitivity and defendants should recognise that the provision of explanations, apologies, reassurance, and access to specialist therapy and support may be as important (or more important) to them than the receipt of financial compensation".[648]

1016. In that same Report, reference was made to an Interim Report, at which time the Inquiry recommended that legislation be passed ensuring that victims and survivors of child [sexual] abuse in civil court cases be afforded the same protections as vulnerable witnesses in criminal court cases.[649]

1017. We agree with that recommendation, although the Evidence Act in New Zealand is, arguably, broad enough to take those considerations into account in any event.

Our recommendation

1018. It is our view that the State (and non-State entities) litigating historic (or indeed current) abuse claims should be expressly subject to Model Litigant obligations. We also believe such obligations should be enforceable in the courts.

1019. We recommend that a Model Litigant Policy is implemented, based on existing policies in New South Wales and Victoria, Australia. The following principles should be included:

a) Claims should be dealt with promptly;

b) Claimants who lack resources to litigate a legitimate claim, including when legal aid has been withdrawn and/or is the subject of review, should not be taken advantage of;

c) Legitimate claims should be settled as soon as possible, without the need for litigation;

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646 *Accountability and Reparations* p101.
647 *Accountability and Reparations* p101.
648 *Accountability and Reparations* p101.
649 *Accountability and Reparations* p102.

d) Litigation should be avoided;

e) Costs should be kept to a minimum;

f) Apologies should be given where the State has acted inappropriately;

g) Defendants, particularly the State, should be mindful of the potential for litigation to be a traumatic experience for claimants;

h) If a limitation defence is to remain, defendants should ordinarily not rely on a defence that the limitation period has expired, either formally or informally. If a limitation defence is relied on, careful consideration should be given as to whether it is appropriate to oppose an application for extension of the relevant period;

i) Defendants should consider facilitating early settlements and should generally be willing to enter into negotiations to achieve this;

j) In litigation, defendants should avoid an unnecessarily adversarial approach;

k) There should be consistency between claimants in similar circumstances;

l) The State should respond to the different circumstances of different claims brought against the State, including the availability of different forms of damages;

m) Training should be available for lawyers who deal with historic (and current) child abuse claims;

n) Defendants should consider requests for alternative forms of acknowledgment or redress in additional to monetary settlements;

o) Early information should be provided about available services and support; and

p) Defendants should facilitate access to free counselling and access to records.[650]

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650 The Australian Royal Commission into Institutional Responses to Child Abuse Report, pp 513 – 515.

CHAPTER 9

THE ROLE OF HUMAN RIGHTS INSTRUMENTS

- **The Bill of Rights Act 1688**
- **The Role of the Human Rights Commission**
- **The NZ Bill of Rights Act 1990**
- **United Nations Conventions**

THE ROLE OF DOMESTIC AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

1020. In our evidence for the Contextual Hearing, we touched briefly on the role of the BORA.[651] There are two major issues we wish to highlight for the Royal Commission in terms of redress in the context of domestic and international human rights instruments:

a) None of the current redress schemes (in particularly, for MSD and MOE) appropriately acknowledge breaches of fundamental human rights, or provide appropriate remedies for those breaches; and

b) The redress schemes themselves are in breach of New Zealand's obligations under international human rights instruments.

1021. In *Ashby v White*, Holt CJ famously stated:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it: and indeed it is a vain thing to imagine a right without a remedy; for want of a right and want of a remedy are reciprocal.[652]

1022. Any scheme which addresses wrongs committed by the State against its citizens must be cognisant of the fundamental human rights which were implemented to protect against such wrongs – and must, at the same time, provide a remedy for the identified breach. This is addressed further, below.

Our attempt to invoke the Bill of Rights Act 1688

1023. In the context of the Crown forcing on leave hearings to determine whether a claim could survive the Limitation Act, and in the face of the withdrawal of legal aid process, our only possible avenue left to argue was that the Bill of Rights Act 1688 applied and that legal rights to a remedy were not extinguished by the Limitation Act provisions. This was for clients who were in care prior to the BORA coming into force.

GMM v Attorney-General[653]

1024. This issue arose in the context of an application by MSD to strike out GMM's claim, on the basis it was time-barred.

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651 Brief of evidence of Sonja Cooper and Amanda Hill on behalf of Cooper Legal, 5 September 2019 [211] – [213].

652 *Ashby v White* [1703] 2 Ld Raym 938,92 ER 126 at 953, 163, cited in Butler et al, *The New Zealand Bill of Rights Act: A Commentary.*

653 *GMM v Attorney-General* HC WN CIV 2006-485-000665 [9 December 2009]

1025. The expert evidence we had received for GMM, particularly under the new, more rigorous process, did not strongly support continued causes of action in tort. That left us with two causes of action, namely a claim for breach of fiduciary duty, and a claim for breach of domestic and international human rights instruments pursuant to the Bill of Rights Act 1688.

1026. In this case, the plaintiff was adopted into a family where he suffered physical, sexual and psychological abuse. He was then placed in a Boys' Home in Hamilton and then at Hokio, where he suffered further sexual and physical abuse by unnamed boys and abuse at the hands of two named staff members, one in Hamilton and the other at Hokio.

1027. Following other New Zealand decisions, including *S v Attorney-General,*[654] the High Court held that the alleged breaches of the (assumed) fiduciary care were actually breaches of a duty of care in negligence. Accordingly, the limitation position was the same as it would have been, had the plaintiff sued in tort. This was fatal to the fiduciary cause of action.[655]

1028. The Court then went on to consider the Bill of Rights 1688 cause of action. It was acknowledged by the Crown, and accepted by the Court, that the Bill of Rights Act 1688 remains part of New Zealand law.[656] Having said that, the High Court stated that Mr GRO-B had to establish three successive propositions, the first being to establish that the ill treatment he alleged was "punishment" within the meaning of Article 10.[657] The High Court stated that Article 10 was directed at judicially imposed penalties, referring to Canadian and US case law.[658] The Court concluded that guardianship was not a "punishment" and that even if 'tough living conditions' did exist at the Boys' Homes and could be termed a "punishment" they were not judicially imposed. For that reason, he held that the ill-treatment alleged by Mr GRO-B was not a "punishment" in terms of the Bill of Rights Act 1688.[659]

1029. The Court then went on to consider whether Article 10 gave rise to a cause of action for public law compensation.[660] We argued that *Baigent's Case* and *Taunoa* make it clear that damages in those cases were awarded, not for breaches of the Bill of Rights Act, but "because, given the nature of the breaches and the fundamental rights

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654 Referred to in Chapter 1.

655 *GMM v Attorney-General* HC WN CIV 2006-485-000665 [9 December 2009] at [22]

656 *GMM v Attorney-General* HC WN CIV 2006-485-000665 [9 December 2005] at [28] and [29].

657 *GMM v Attorney-General* HC WN CIV 2006-485-000665 [9 December 2005] at [30] – [31].

658 *GMM v Attorney-General* HC WN CIV 2006-485-000665 [9 December 2005] at [32] – [34].

659 *GMM v Attorney-General* HC WN CIV 2006-485-000665 [9 December 2005] at [41] – [42].

660 *GMM v Attorney-General* HC WN CIV 2006-485-000665 [9 December 2005] at [43].

concerned, declaratory relief would not provide an effective remedy for those plaintiffs".[661] The High Court proceeded to address the history of the Bill of Rights Act 1688, including the reason for its implementation. The Court concluded that the justifications for the creation of *Baigent* damages were absent from the 1688 Bill of Rights. Specifically, the Court distinguished the 1688 Bill of Rights from modern covenants requiring compensation for victims of human rights breaches, focussing on the purpose of that legislation being to curb the power of the monarch.[662] The outcome was that the High Court accepted the Crown's argument that the Bill of Rights Act 1688 did not provide for public law compensation.[663]

1030. Finally, the Court considered whether such a cause of action was subject to a limitation period, either directly or by analogy.[664] After considering New Zealand and Canadian case law involving claims for breaches of human rights, the Court concluded that the claim for damages was, by analogy with tort and contract causes of action, time-barred. For that reason, the plaintiff was not permitted to bring his claim and his claim was struck out.[665]

PCW v Attorney-General[666]

1031. In this case, the plaintiff was sexually assaulted on board a New Zealand Navy ship in February 1984 when he was aged 18 years old. The sexual assault was perpetrated by a Steward of a higher rank than the plaintiff.[667]

1032. Although this case failed principally due to the Accident Compensation bar, [668] the Court did consider whether the conduct was within the scope of the 1688 Act. Consistent with the decision in **GRO-B** the Court held that a sexual assault and subsequent threats and intimidation in connection with making a complaint may be "degrading treatment" but this could not be enough to fall within the 1688 Act.[669] Once again, the Court stated that, in any event, the plaintiff had not established why the 1688 Act should be interpreted as providing civil remedies, even if a breach had occurred.[670]

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661 *GMM v Attorney-General* HC WN CIV 2006-485-000665 [9 December 2005] at [50].
662 *GMM v Attorney-General* HC WN CIV 2006-485-000665 [9 December 2005] at [60] – [61].
663 *GMM v Attorney-General* HC WN CIV 2006-485-000665 [9 December 2005] at [62].
664 *GMM v Attorney-General* HC WN CIV 2006-485-000665 [9 December 2005] at [63].
665 *GMM v Attorney-General* HC WN CIV 2006-485-000665 [9 December 2005] at [66] and [72] – [73].
666 *PCW v Attorney-General* HC WN CIV 2006-485-874 [16 June 2010].
667 *PCW v Attorney-General* HC WN CIV 2006-485-874 [16 June 2010] at [17].
668 *PCW v Attorney-General* HC WN CIV 2006-485-874 [16 June 2010] at [13]-[14].
669 *PCW v Attorney-General* HC WN CIV 2006-485-874 [16 June 2010] at [193].
670 *PCW v Attorney-General* HC WN CIV 2006-485-874 [16 June 2010] at [194]-[195].

1033. In this case, the High Court also rejected our submissions that public law remedies should be available in a civil claim pre-NZBORA, following *Taunoa*.[671]

The Role of the Human Rights Commission

1034. As we explained at the Contextual Hearing, in December 2008 we complained to the Human Rights Commission about the Government's response to the historic claims. We told the Commission that the appropriate response to the claims should be to institute an Inquiry, akin to the more informal Inquiries in some states of Australia, Canada, Ireland and England. In November 2009 we were formally advised by the Chief Commissioner of Human Rights, Rosslyn Noonan, that the Commission had agreed to undertake a review (by way of Inquiry) of the State's response to historic claims of abuse and mistreatment suffered while under the care of the State.

1035. While the report was never finalised, due to a change in Chief Commissioner and, in our view due to political pressure, the process did bring about some attitudinal changes which directly benefitted the claimant group. Particularly, MSD assured the Human Rights Commission that it did not rely upon the Limitation Act 1950, or other technical defences, to resolve claims. We observe that this representation was made while MSD was still instructing Crown Law to seek leave hearings to strike out claims as being time-barred.

The New Zealand Bill of Rights Act 1990 ("BORA")

1036. Far more recently, our own courts have determined that a wide range of remedies are available for breaches of the BORA. In the courts, four key words consistently feature in discussions about compensation for breaches of BORA: appropriate, effective, proportionate and vindication.[672] The authors of *The New Zealand Bill of Rights Act: A Commentary*, have noted in relation to these four themes:

a) The use of the word "appropriate" refers to the notion that the remedy chosen to respond to a proven breach of BORA should be a type that relates to, and speaks to, the particular breach;

b) The word "effective" is usually used to describe the courts' desire to ensure that any remedy granted to a person whose BORA rights have been unjustifiably breached is sufficient to undo the damage caused by the breach. The concept of effectiveness can be sourced to the terms of Article 2.3 of the International Covenant of Civil and Political Rights;

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[671] *PCW v Attorney-General* HC WN CIV 2006-485-874 [16 June 2010] at [196]-[206].

[672] Butler et al, *The New Zealand Bill of Rights Act: A Commentary*, 2nd edition, pages 1520-1525.

c) The word "proportionate" is used to capture the notion that a remedy granted for breach of BORA should attempt to strike the right note in marking the seriousness of a particular breach. In other words, a remedial response should be never too much nor too little, but rather "just right". Through the notion of proportionality, the courts underscore the discretionary nature of any BORA remedy; and

d) "Vindication" is the word most usually chosen to describe the purpose of BORA remedies. Vindication was described by Justice McGrath in *Taunoa v Attorney-General* as the upholding of the right in the face of the State's infringement.[673] In *Taunoa*, Justice Tipping wrote that the dual purposes of an effective remedy were vindication and compensation. He stated:

> The dual purpose of Bill of Rights remedies is reflected in the fact that when there is a breach of human rights there are two victims. First there is an immediate victim. The interests of that victim require the Court to consider what, if any, compensation is due. But, because the breach also tends to undermine the rule of law and societal norms, society as a whole becomes a victim too. Hence, the Court must also consider what is necessary by way of vindication in order to protect society's interest in the observance of fundamental rights and freedoms.

1037. The BORA provides the following key protections for young people in care:

a) the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment (section 9);

b) the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise (section 21);

c) the right not to be arbitrarily arrested or detained (section 22);

d) for young people deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the person (section 23(5)).

1038. Actions that could constitute a breach of the BORA for people in State care include:

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673 *Taunoa v Attorney-General* [2007] NZSC 70.

a) Strip-searching children and young people without lawful authority;

b) Placement in Secure Units and/or Time Out rooms without lawful authority and/or circumstances which were arbitrary;

c) Being held in confined placements, such as the use of the island known as Alcatraz on the Whakapakari Programme, where young people were placed for long periods without adequate food, shelter or supervision;

d) Actions which could constitute a failure to treat someone who was detained with humanity and respect for the inherent dignity of the person, or which could constitute cruel, degrading, or disproportionately severe treatment or punishment. Examples that we have come across include:

i. Chaining a young person to their bed (Otara Legionnaires Academy) or to dog houses, poles, or other items for long periods while being beaten, verbally abused and urinated on (Moerangi Treks; Eastland Youth Rescue Trust);

ii. Brutal sexual assaults by caregivers and/or at the direction of caregivers, and/or violent physical assaults;

iii. Placement in Secure Units or Time Out rooms while naked; and

iv. Placement in Time Out rooms without functioning toilets or similar circumstances.

Strip-searches

1039. Strip-searches in a Youth Justice residence are authorised by section 384E of the Children, Young Persons, And Their Families Act 1989. This means that strip-searches are permissible under some circumstances, but only in Youth Justice residences. The section does not apply to programmes like Whakapakari, where strip-searches happened as a matter of course. In the absence of a positive statutory provision that allowed the strip-searching of a child or young person at Whakapakari, it was unlawful and a breach of section 21 of BORA. There is a significant body of case law about unlawful strip-searching, often in the context of arrests or prison inmates. There are no decisions in relation to young people under Youth Court orders at programmes like Whakapakari.

Alcatraz

1040. Descriptions of the use of Alcatraz at Whakapakari can be found elsewhere in our evidence, including in the discussion about BORA compensation below.[674] In short, a young person was placed on a small island with limited water and often, limited food. There was no shelter, and if the island was being used as punishment, the young person was frequently beaten by staff members (if they were present), or other boys. Documents written by CYFS staff members refer to concerns early on that the use of Alcatraz constituted a false imprisonment. However, even after that comment, the use of Alcatraz continued up until the closure of Whakapakari in 2004.

1041. As with strip-searching, many decisions in the courts relate to adults being held in prisons or Police cells.

1042. Consideration of whether there has been a breach of section 23(5) requires an initial determination about whether the young person is "detained". There is an outstanding issue about when a young person is "detained", given the different ways the young person could be brought into care, and held in programmes, residences and in other situations, where they were not permitted to leave. In our view, a young person held under a court order in a particular place is certainly detained, and in many other circumstances, a child or young person in foster or family home care could also be detained, as they are not permitted to leave and return home to their families. There will often be an assessment on a case-by-case basis about whether a young person is detained for the purposes of BORA.[675]

Compensation for BORA breaches

1043. This issue is relevant to redress schemes because we have always maintained that people who have their rights breached under BORA are entitled to additional damages for those identified breaches, or an uplift in compensation paid to them. We take this view, because it cannot be the case that a fundamental human rights instrument in New Zealand is effectively ignored when we are looking at the experiences of people who were abused in State care. This is particularly so, when the BORA imposes a positive duty on the State to keep people in its care, safe.

1044. The position of State agencies as to the BORA has been inconsistent, lacking in transparency and inconsistent with BORA jurisprudence for other factual circumstances. None of the redress schemes (be they with MOE, MOH or MSD) have identified provisions that relate to

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674 Descriptions of Alcatraz can also be found in our evidence for the Contextual Hearing.

675 The Court of Appeal has addressed this issue in a case involving a challenge to the placement of a child under care and protection status, in a Youth Justice residence; *O'Connor v Chief Executive of the Ministry of Vulnerable Children, Oranga Tamariki* [2017] NZCA 617.

BORA. The only State agency which has attempted to deal with the issue, and done so poorly, is MSD.

1045. Under MSD's Fast Track Process, two factors affected compensation to people who were in care while BORA was in force:

a) The FTP categories did not account for breaches of BORA and provided no additional compensation; and

b) MSD took the position that it was not liable for abuse at s396 programmes like Whakapakari, Youthlink Family Trust and Moerangi Treks, so allegations relating to those programmes were not taken into account.

1046. The issue came to the fore when we started progressing several younger clients towards a trial. Our pleadings included a cause of action for breach of BORA. During that time, we obtained opinions from Russell McVeagh in respect of several clients, as to whether it was likely that breaches of BORA had occurred, and in addition, what quantum of damages a person who had experienced such breaches could expect. Those opinions remain privileged to the individual clients involved. However, our view of both the applicability of BORA and the level of damages available was confirmed.

1047. It is important to note that MSD's liability under BORA could be very broad. It will be primarily liable for any breaches of an individual's rights under sections 9, 22 and/or 23(5) of the BORA that it or its agents or servants have committed. Even if the ill-treatment has been committed by people other than MSD or its employees or agents, MSD could owe an individual a positive duty under sections 9, 22 and/or 23(5) to protect them from that ill-treatment.

1048. This means that liability extends further than MSD and its direct staff and social workers. MSD is liable for breaches of the BORA (we say) for harm committed in programmes approved by it under section 396, or when MSD has placed children or young people with approved (or even unapproved) individuals. Further, even when a young person lived at home while they had legal status with MSD, or in a foster placement, MSD had a positive duty to keep them safe and protect them from ill-treatment.

1049. The advice we received also confirmed our view that there was a higher level of compensation available if we could show that breaches of BORA had occurred. Most of the claims we looked at had compensation levels of $50,000 or above. Several got close to $100,000 in potential quantum. However, because BORA decisions in the courts tended to be in relation to imprisonment or arrest scenarios, there were no hard and fast rules or precedents to guide us about what quantum would be appropriate. We have had to try to

work that out with MSD over the last few years, with varying degrees of success.

1050. One case which provides an example of the potential quantum for claimants who suffered abuse after BORA was enacted, was the case of LXS. LXS has been in care between 1996 and 2004. He had been placed in numerous foster placements and several residences, as well as the Whakapakari Programme. Unusually, settlement for LXS was split into two parts. As we were in discussions with Crown Law about the quantum attaching to aspects of claims relating to Whakapakari, LXS's claim was settled with the exception of particular events he alleged at Whakapakari. There were three key aspects that remained unresolved:

a) A strip-search carried out on LXS at Whakapakari;

b) His placement on Alcatraz for one week; and

c) A serious physical assault from a member of the Flying Squad.

1051. MSD only offered to settle in relation to the strip-search and the use of Alcatraz. After considerable negotiation, Mr LXS received an additional $20,000 for the strip-search and one week on Alcatraz from MSD[676]. This is the only time we have been able to isolate the quantum for particular unlawful actions which would also be a breach of BORA. However, as will be seen, this compensation was not made available to other people who suffered the same events as Mr LXS. In the end, the compensation package for LXS was in the vicinity of what we would expect for someone who was compensated for breaches of their fundamental rights as a young person.

1052. We contrast the approach to LXS's claim with the way the claim by SEM has been treated.[677]

1053. SEM was in care between 1994 and 1998. He made a range of allegations about different placements during his time in care, including a number of Youth Justice residences, and Whakapakari. His allegations about Whakapakari included:

a) Regular assaults by named staff members, which included punching, stomping and hitting with weapons such as a pick handle;

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676 Letter Crown Law to Cooper Legal (LXS), 16 January 2016 (without prejudice); Letter from Cooper Legal to Crown Law (LXS), 10 February 2017 without prejudice; settlement agreement for LXS, 21 June 2017.

677 CIV-2007-485-1509 *SEM v Attorney-General*, statement of claim, and without prejudice letter from Cooper Legal to Crown Law dated 11 June 2013.

b) An attempted rape by a group of boys while a staff member looked on;

c) A pat-down search on his arrival at Whakapakari, which constituted an unlawful search;

d) Regular beatings by other boys, known as the Flying Squad; and

e) At least two weeks on the island known as Alcatraz as punishment.

1054. Because of the length of time SEM's claim sat with MSD, he was eligible for an offer under the Fast Track Process. SEM was eventually made an offer of $12,000 in relation to all of his allegations of abuse in care. Our analysis reflected the likelihood that that compensation related to assaults in other institutions, **not** Whakapakari. There was no acknowledgement of SEM's rights under the BORA, or the breaches that were apparent from his allegations. Despite our advice not to accept an offer under the Fast Track Process, SEM accepted the offer and his file was closed.

1055. In short, SEM received less for his entire experiences than LXS had received for two aspects of his time at Whakapakari.

1056. MSD may argue that it was SEM's choice to accept the offer from MSD, and in doing so, MSD could not be challenged about it. However, the State's position of power over vulnerable people cannot be overemphasised here. SEM had been released from prison and was desperate for money. He felt compelled to take the offer, particularly since he had been waiting nearly 10 years to have his claim resolved. (His statement of claim was filed in 2007 and he received settlement funds in early 2017.) MSD should not take advantage of vulnerable, impecunious victims of abuse. It should also not approach settlement as a "take it or leave it" process.

1057. Another example of a very low settlement offer for a person covered by BORA was the claim by BSM.[678]

1058. BSM had been in care between 1999 and 2005. He had been placed in a number of foster homes and two Youth Justice residences, as well as on the Whakapakari Programme. He suffered serious assaults in the residences, but his worst experiences were at Whakapakari. On that programme, BSM:

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678 CIV-2013-485-6962 *BSM v Attorney-General*. Statement of claim dated 1 October 2013, and letter of offer from Cooper Legal to Crown Law dated 15 February 2013, without prejudice save as to costs.

a) Was one of the youngest and smallest boys, as he was placed there under care and protection status;

b) He was strip-searched by staff members on arrival at the programme;

c) He was frequently physically assaulted by staff members and other boys, particularly because he was one of the few pakeha boys there;

d) He was denied medication for a known medical condition;

e) He attempted to run away from the programme with another boy and phoned his mother, telling her that he was being physically assaulted. He was not removed from the programme but returned to it where he was further punished by placement on Alcatraz and was required to stay there for several weeks without any food, except the fish and oysters he was able to catch, and no shelter. This was communicated to his social worker who did not object;

f) BSM witnessed an assault on the boy he ran away with, T, causing that boy a serious head injury;

g) BSM was repeatedly physically assaulted by boys known as the Flying Squad, in particular while he was on Alcatraz.

1059. Under the Fast Process, BSM was offered $5,000. Against our strong advice, BSM accepted the offer, because he wanted the matter "over and done with". While the Fast Track Process offered no transparency as to how MSD got to that position, we anticipate that the $5,000 was for physical assaults by other boys at residences, and did not account for Whakapakari (where MSD said it was not liable for it) and did not offer any additional damages for breaches of the BORA (because the FTP did not account for it). Once again, a vulnerable, poor client took an offer that they could not resist in the short-term, but subsequently had long-term regrets.

1060. In contrast to BSM's experience, the boy who was assaulted in his presence (T) settled his claim, which related only to Whakapakari, for $60,000.[679] T had not qualified for an offer under the Fast Track Process, and his claim was tracking towards a trial. His experience reflected MSD's practice of paying higher compensation when it was threatened with the possibility of litigation (and, possibly, publicity).

1061. It would be understandable for people to question why we say that those in care after BORA was enacted should receive a higher level

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679 CIV-2015-485-65 *T v Attorney-General.*

of compensation. Many of our clients would view this as unfair. However, from a legal perspective, it is important to the integrity of our human rights scheme that BORA is recognised, and where breaches are identified, those breaches are vindicated, and compensated for. Otherwise, there would be no point in having human rights legislation at all.

1062. MSD may argue that, because it does not investigate allegations to the extent that a court would, it is not appropriate for it to provide compensation for breaches of BORA. However, it has done so, but only for people who are being tracked towards a trial. There is a vast difference in compensation paid to that small group of people, and the majority of people who settle under MSD's process. In our view, there should be no difference between the compensation received by an unrepresented claimant, a represented claimant, and a person who is being tracked towards a trial. Effectively, MSD is paying more money to ameliorate the risk of litigation, than it is paying for a breach of BORA. That simply cannot be right.

United Nations Convention on the Rights of the Child ("UNCROC")

1063. The UNCROC was ratified by New Zealand on 6 April 1993. MSD is responsible for administering the UNCROC, and the optional protocols to UNCROC, in New Zealand. Both MSD and the Ministry of Justice have publicly stated that New Zealand's laws are compliant with UNCROC, and the provisions of UNCROC have been referred to in our domestic courts.

1064. However, there is no acknowledgement by any State agency engaged in redress processes, of specific breaches of UNCROC.

1065. In our view, actions by MSD and MOE have repeatedly breached UNCROC since its ratification in 1993. This is primarily through:

a) The use of third-party providers for care by MSD, such as Whakapakari, Moerangi Treks, Lake Tarawera, the Ruatoki Bush Programme and the Heretaunga Maori Executive, where there have been sustained breaches of young people's rights under UNCROC, but where MSD has distanced itself from those breaches by virtue of its contract arrangement with the providers;

b) The use of seclusion, secure units and time-out rooms in CYFS residences, residential schools and State schools; and

c) Failures to provide fundamental entitlements such as education while a child was in State care, together with appropriate health care and a settled family life.

1066. In our view, the redress schemes need to acknowledge identified breaches of UNCROC when they occur. This would be consistent with an open and transparent process, as well as our accountability to international human rights organisations.

1067. We have previously provided the Royal Commission with our reports to the United Nations in respect of New Zealand's compliance with UNCAT, the ICCPR, and UNCROC[680].

Redress schemes: a breach in and of themselves

1068. One aspect that we have repeatedly raised in our reports is that the redress schemes in place are, themselves, a breach of New Zealand's international human rights obligations.

1069. We have been clear for many years that the serious allegations made by claimants can, in some circumstances, amount to torture or other cruel, inhumane or degrading treatment or punishment. Some acts by State actors are a breach of those provisions of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT").

1070. For the purposes of the Redress Hearing, we say that the redress schemes themselves, designed to address State wrongs, are a breach of Article 14 of UNCAT, which provides:

> 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependence shall be entitled to compensation.
>
> 2. Nothing in this Article shall affect any right of the victim or other persons to compensation which may exist under national law.

1071. New Zealand has entered the following reservation to Article 14, in relation to the State's obligation to fairly and adequately compensate victims of torture:

> The Government of New Zealand reserves the right to award compensation to torture victims referred to in Article 14 of the Convention only at the discretion of the Attorney-General of New Zealand.

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680 These were included in the bundle of documents for the Contextual Hearing, and we encourage you to review those documents as part of your review of redress processes in New Zealand.

1072. As noted in our evidence to the Contextual Hearing, UNCAT was made a part of our domestic legislation by the Crimes of Torture Act 1989.[681]

1073. We have now been raising these issues in international forums for over a decade. It is worth reviewing the most recent interactions between the UNCAT Committee and the New Zealand Government. In its List of Issues, the Committee against Torture touched on Articles 12-14 and sought information from New Zealand on the following issues:[682]

a) The Committee has sought statistical data on complaints of acts of torture or ill-treatment recorded during the reporting period. The Committee requested information on investigations, disciplinary and criminal proceedings, convictions and the criminal or disciplinary sanction applied;

b) In relation to Article 14, with reference to the previous concluding observations at the Committee, information was requested on the progress made by the Claims Resolution Team and other bodies that can provide compensation, apologies and other remedies in dealing with historic experiences of cruel treatment, and the status of those claim; and

c) With reference to the Committee's previous concluding observations, updated information was requested on any changes to New Zealand's position on withdrawing its reservation to Article 14 of UNCAT.

1074. In response, New Zealand submitted a 7th periodic report in September 2019.[683]

1075. The New Zealand Government noted there had been no prosecutions for torture over the reporting period. There was no data on complaints and investigations of ill-treatment because there were several different complaints mechanisms and complaints were not always categorised relating to ill-treatment in detention.

1076. New Zealand's response in relation to the historic claims begins on page 43 of its report. Firstly, the Government noted the establishment of the Royal Commission. Turning to MSD's

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681 Contextual Hearing evidence of Sonja Cooper and Amanda Hill, [200] – [209].

682 Committee on Torture, List of Issues prior to submission of the 7th periodic report of New Zealand, 9 June 2017.

683 7th periodic report submitted by New Zealand under Article 19 of the Convention pursuant to the optional reporting procedure, due in 2019 (advance unedited version), 25 September 2019.

Historic Claims Team, it was noted that as at 31 March 2019, MSD had resolved 1,794 of the 3,667 claims received, and made apologies and payments totalling approximately 27.6 million dollars to 1,450 people. Individual payments ranged between $1,150 and $80,000, with the most common payments sitting in the $10,000 - $25,000 range. Another 1,870 claims were waiting to be resolved at the same date. The report noted that in November 2018, MSD had begun implementing a new, streamlined operating model. The report said nothing about the redress scheme operated by MOE, but does refer to the MOH scheme.

1077. We do not believe that New Zealand takes seriously its obligations to provide fair and adequate compensation to survivors of abuse, as it is required to do to meet its international (and domestic) obligations. We explore, in the next chapter, how poorly New Zealand survivors of abuse fare – not only within New Zealand, but also compared with survivors in other jurisdictions.

CHAPTER 10

COMPENSATION

- **MOH, MOE and MSD Compared**
- **Comparison with other State payments**
- **Comparison with international redress schemes**

CHAPTER 10

COMPENSATION

1078. Throughout our evidence, we have commented on the lack of transparency in the State settlement processes. That applies to compensation payments, as much as the criteria adopted to settle the claims, although some information has been released publicly.

1079. We have also frequently commented on the low level of compensation paid to survivors of abuse in New Zealand. As we (and others) said at the Contextual Hearing, survivors of abuse in care often suffer abuse over many years, from multiple perpetrators. They typically suffer life-long impacts from that abuse, resulting in many (if not most) living in impoverished and deprived circumstances. Again, this has been addressed in the Contextual Hearing.

1080. It is a sad fact that most of our clients will never own more than a few personal possessions (if that). They will typically be in debt. They will often have few to no work skills. For those few who do work, this will typically be unskilled work, paid at lower levels. For the vast majority, they will live on benefits and/or be supported by the State (whether that be through benefits or being forced to reside in State-run residences included mental health facilities and prisons). This affects not only their quality of life, but that of their families.

1081. For trial purposes, we always ask an actuary to calculate the economic loss suffered by the individual clients, because a component of the civil claims is compensation for past and future economic loss. Without referring to specific clients, we refer to recent reports we have received for 3 clients who are on a trial track and are now in their early 30s. In each case, the actuary has calculated that their economic loss is between $590,000 and $910,000. This reflects that actual settlement payments, discussed below, are a mere scintilla of the actual loss suffered by survivors of State abuse. This is a topic requiring real discussion. If settlement processes are to be meaningful, then redress must be meaningful as well.

MOH

1082. We have very limited information about the psychiatric hospital settlements. The only historic information we have is contained in an MSD response to the Social Services Committee in response to an Inquiry into its handling of a case.[684] That document provides information about compensation and the levels of compensation paid

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[684] Social Services Committee Inquiry into the Ministry of Social Development's handling of Ms M Vivian Needham's Case (Petition 2011/87), Response to supplementary question from the Committee, received 15 May 2015, dated 23 May 2014.

by various State agencies. It includes information about the "Round 1 and Round 2" Lake Alice compensation payments, along with payment made to those with other psychiatric hospital claims as at May 2014.[685]

1083. We observe that the report shows that the Round 1 claimant group from Lake Alice received payments ranging from $10,000 to $120,000 with an average of $68,000 including legal costs.[686] The Round 2 Lake Alice claimants on the other hand, received payments ranging from $20,000 to $124,000, with an average payment of $49,500 excluding legal costs.[687]

1084. This compares rather graphically with the information provided about payments made to those with "other" psychiatric hospital claims. In that case, the payments ranged from $2,500 to $18,000, as we have discussed, with the average payment being $9,607 excluding legal costs.[688] We expect that the average will now be much lower, taking into account the cap of $9,000.

MOE

1085. We have referred to the Social Services Committee information in the paragraph above. Of interest, there is nothing provided about settlements by MOE as at May 2014. It is unclear whether this is because the MOE had not settled any claims as at that date, or whether it was simply not included in the data obtained. Given that all other government agencies were included in the document, we consider it is more likely that MOE had not made settlement payments by 2014, or if it had there was insufficient data to be included in the documents. As we have already commented, MOE is not referred to in the 7th periodic report to UNCAT, either.

1086. We have referred to compensation payments by MOE in some detail in Chapter 6. We also refer to the discussion about compensation for BORA breaches in Chapter 9.

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685 Social Services Committee Inquiry into the Ministry of Social Development's handling of Ms Vivian Needham's Case (Petition 2011/87), Response to supplementary question from the Committee, received 15 May 2015, dated 23 May 2014, para 6.

686 Social Services Committee Inquiry into the Ministry of Social Development's handling of Ms Vivian Needham's Case (Petition 2011/87), Response to supplementary question from the Committee, received 15 May 2015, dated 23 May 2014, para 6.

687 Social Services Committee Inquiry into the Ministry of Social Development's handling of Ms Vivian Needham's Case (Petition 2011/87), Response to supplementary question from the Committee, received 15 May 2015, dated 23 May 2014, para 6.

688 Social Services Committee Inquiry into the Ministry of Social Development's handling of Ms Vivian Needham's Case (Petition 2011/87), Response to supplementary question from the Committee, received 15 May 2015, dated 23 May 2014, para 6.

MSD

1087. The information about settlements made by MSD has been the subject of media and public reports.

1088. In the State Services Commission document referred to above, MSD reported as at May 2014 that it had made payments ranging from $1,100 to $80,000, with an average payment of $20,468 excluding legal costs.[689] In addition to those payments, from 2009, MSD had made 17 payments in relation to complaints against CYFS, with payments ranging from $1,000 to $15,000. The average payment was $6,501. [690]

1089. Media reports have provided some more recent information. For example, in an article published on stuff.co.nz on 15 November 2014[691], it was reported that MSD had made payments totalling $713,315 to 43 claimants, with an average payment of $16,500. That report stated payments had varied between $4,500 and $45,000.

1090. It is interesting, and perhaps concerning, that this information is at variance with the information provided to the Social Services Committee, just six months earlier.

1091. We next refer to another article published on stuff.co.nz on about 7 May 2015.[692] On that date, the article stated MSD had paid $8.4 million in 583 cases resolved to that date, averaging just under $14,500 per case. This information was provided in the context of the announcement of the Fast Track Process.

1092. We next refer to correspondence from MSD to reporter Mike Wesley-Smith dated 21 June 2015, responding to a request for information under the OIA regarding historic claims.[693] Contrary to the information provided in the Stuff article referred to at the paragraph above, this article stated that for claims resolved to 31 March 2015, the average payment was $20,221.[694] The letter is silent about whether that average payment included any contribution to legal costs. It is also difficult to see why that figure was so different from the information reported by staff in May 2015. The same letter states that between 1

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689 Social Services Committee Inquiry into the Ministry of Social Development's handling of Ms Vivian Needham's Case (Petition 2011/87), Response to supplementary question from the Committee, received 15 May 2015, dated 23 May 2014, para 7.

690 Social Services Committee Inquiry into the Ministry of Social Development's handling of Ms Vivian Needham's Case (Petition 2011/87), Response to supplementary question from the Committee, received 15 May 2015, dated 23 May 2014, para 8.

691 Article, stuff.co.nz: "Payment, apologies to victims of child abuse", 15 November 2014.

692 Article, www.stuff.co.nz: "Payment for abuse victims deeply flawed", 7 May 2015..

693 Letter from Janet Green, MSD to Mike Wesley-Smith dated 21 July 2015.

694 Letter from Janet Green, MSD to Mike Wesley-Smith dated 21 July 2015, p.4.

December 2006 and 31 March 2015, MSD had spent $5,689,306 on legal fees for Crown Law and external legal counsel. The amount excluded GST.[695]

1093. In a paper prepared by Dr Stephen Winter in 2018, Dr Winter stated that as at 31 December 2017, MSD had closed 1,632 claims and paid 1,315 settlements. Approximately 71% of all settlements were below $20,000. The "mean average" at that stage was around $19,124. [696]

1094. The most up to date information is contained in the draft and final 7th periodic reports for UNCAT dated May and September 2019, respectively.[697] In the May report,[698] it was reported that, as at June 2018, MSD had resolved 1,727 claims, making apologies and payments to 1,398 people totalling over 26 million dollars. The report states that individual payments had ranged between $10,000 and $80,000.[699] This report does not specify whether the payments included legal costs. Our calculation is that this amounts to an average payment of $18,598.

1095. In the September 2019 final report, the figures had changed. At paragraph 305, it is reported that, as at 31 March 2019, MSD had resolved 1,794 of the 3,677 claims received, making payments totalling approximately $27.6 million to 1,450 people. The report states that individual payments ranged between $1,150 and $80,000, with the most common payment sitting in the $10,000 to $25,000 range. This report does not identify whether the payments include legal costs. We calculate an average of just over $19,000, which may or may not include payment of legal costs to claimants. We are unable to explain the rise in average payment, other than this may be due to settlements in a higher range for clients who had a BORA component to their claim.

1096. Compared with the information provided in May 2014, the average payment, particularly if it includes legal costs, is dropping. That would certainly be consistent with our experience of MSD settlements – particularly following the FTP.[700]

Comparison with other State payments

1097. We have already commented on the fact that the payments made by MOH and MOE, particularly, are very low. This applies particularly to

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695 Letter from Janet Green, MSD to Mike Wesley-Smith dated 21 July 2015.

696 Stephen Winter, "*Redressing historic abuse in New Zealand: a comparative critique*." (2018) Rutledge, pp 8 – 9.

697 7th periodic report for UNCAT dated September 2019.

698 Draft 7th periodic report for UNCAT dated May 2019, paragraph 337.

699 Draft 7th periodic report for UNCAT dated May 2019.

700 We also refer to the discussion about compensation for BORA breaches, in Chapter 9.

the MOH group who qualify, now, for a top payment of only $9,000 except in exceptional circumstances.

1098. It is illustrative to refer to the Social Services Committee report, referred to earlier. That demonstrates, on the whole, that victims of abuse are treated poorly compared with other recipients of State compensation. For example, settlements for those who contracted Hepatitis C through contaminated blood received $69,620 each.[701] We have already referred to the payments made to the Lake Alice claimants. We also refer to payments made in other State contexts, which appear, in the main, to be considerably higher than those who have suffered abuse in care – except for those who make complaints against the Police.[702]

1099. In our view, it is difficult to understand why our claimant group is paid significantly lower compensation sums than others who have been paid State compensation in other contexts. Most likely, this reflects the Crown's reliance on its statutory defences, particularly the Limitation Act, to justify the limited payments of compensation. We have also commented on its approach to social work practice failures, allegations of assault by staff and false imprisonment allegations – which also lower the amount of compensation offered.

1100. Several of our clients have had multiple compensation settlements for different breaches of their rights. Almost always, the compensation payable to them for abuse while they were a child in State care is the lowest figure they have received. If it is not the lowest, when compared to the settlements for other actions by State actors, there is certainly a disconnect between the level of compensation and the other events complained of.

1101. This is demonstrated by the cases of BA, ZYL and Kerry Johnson.

The case of BA

1102. The first example of this is BA. BA had been in Child Welfare care between 1964 and 1979. His allegations included:

a) Physical assaults by staff members at the Greytown Reception Centre;

b) Physical assaults by Nuns at the Star of the Sea Convent and sexual assaults by another boy at the Convent;

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[701] Social Services Committee Inquiry into the Ministry of Social Development's handling of Ms M Vivian Needham's Case (Petition 2011/87), Response to supplementary question from the Committee, received 15 May 2015, dated 23May 2014, para 6.

[702] Social Services Committee Inquiry into the Ministry of Social Development's handling of Ms M Vivian Needham's Case (Petition 2011/87), Response to supplementary question from the Committee, received 15 May 2015, dated 23May 2014, para 9-15.

c) Physical assaults by foster parents Mr and Mrs RB;

d) Multiple practice failures while he lived with his family;

e) Insufficient care and visiting by social workers while he was at the Star of the Sea Convent, which was run by the Sisters of Mercy;

f) Practice failures relating to Mr and Mrs RB's care of him; and

g) Neglect by social workers for long periods of time.

1103. We also had a separate claim for BA against the Sisters of Mercy which ran the Star of the Sea Orphanage. Unfortunately, BA's claim was the subject of a preliminary hearing on the Limitation Act in 2008, and the claim was not granted leave to proceed, bringing his claim to an end. BA did not receive any compensation from the Sisters of Mercy.

1104. BA's claim against MSD was eventually reinstated for the purposes of ADR.

1105. BA was a plaintiff in the proceeding in the HRRT for interference with privacy. BA's records had been received over 11 months late. BA received **$11,000** from MSD to settle his privacy claim.

1106. BA received an offer under the Fast Track Process to settle his substantive claim against MSD. Given the amount of time his claim had been running, BA elected to accept it and received **$5,000**.

1107. BA's settlement for the delay in receiving his records about his claim was twice the settlement he received for the abuse he suffered as a child.

The case of ZYL

1108. ZYL had been in care between 2003 and 2008. He had met with the CCRT in September 2011 and his claim was filed in 2015.

1109. ZYL's main allegations included:

a) Physical assaults from the foster father at a Family Home in Dunedin;

b) Physical assaults from the staff members and other residents at the Berwick Boys' Home;

c) Sexual assaults by another boy at Berwick Boys' Home, which was reported to the caregiver, but no action was taken;

d) ZYL was tied to another resident and handcuffed to a pole at the Berwick Boys' Home; and

e) Physical assaults by an identified staff member at the Puketai Residential Centre.

1110. ZYL's entire claim was covered by BORA. We advised ZYL not to accept a Fast Track offer, because of the BORA aspect and because of the high number of practice failures in his case. However, ZYL accepted an Fast Track offer of **$5,000**.

1111. As an adult, ZYL has been a prison inmate from time to time. As a result of the *Marino/Gardiner* litigation against the Department of Corrections, challenging how remand credit is accounted for in the calculation of prison sentences, it was established that ZYL had spent 89 days in prison longer than he should have. ZYL was paid compensation of nearly **$30,000** plus his actual and reasonable legal costs.

The case of Kerry Johnson

1112. Finally, we refer to the case of Kerry Johnson, who will give evidence in this proceeding.

1113. Mr Johnson was at Marylands School, run by the St John of God Order (SJOG). He suffered serious sexual abuse at Marylands. Mr Johnson received $59,500 in compensation from SJOG.

1114. Mr Johnson was also in Social Welfare care, and at Campbell Park. His allegations against MSD and MOE included:

a) While he was at Campbell Park, being regularly and seriously physically assaulted by staff members and other boys (the latter while staff members watched without intervening);

b) Repeated sexual abuse by two different staff members;

c) Placement in the lock-up unit at Campbell Park, with a diet of bread and water while being forced to sleep on a concrete floor;

d) Witnessing a range of traumatic events such as sexual abuse and suicide attempts;

e) At Stanmore Road, a Social Welfare institution, Mr Johnson spent prolonged periods in the Secure Unit;

f) Due to inadequate supervision, Mr Johnson was involved in fights with other boys, had access to drugs and alcohol and was provided with cigarettes; and

g) While admitted to Kingslea in Christchurch, he spent prolonged periods in the Secure Unit and, due to inadequate supervision, had access to drugs and alcohol at Kingslea and was provided with cigarettes.

1115. Mr Johnson was made an offer by MSD under the Fast Track Process. The offer did not take into account of the Campbell Park elements of his claim, because MSD took the position that it was run by MOE. Mr Johnson accepted a settlement of **$5,000**.

1116. Mr Johnson's claim against MOE continues, and he has not been made a settlement offer by MOE.

1117. Finally, Mr Johnson has resolved a claim in relation to abuse he suffered in psychiatric care. Demonstrative of the speed of the MOH process, Mr Johnson's allegations were sent to MOH in September 2019. They included:

a) Inappropriate sexual behaviour by other patients at Templeton Hospital;

b) Verbal abuse by a staff member at Templeton Hospital;

c) Fights with other residents at Sunnyside Hospital;

d) Verbal and psychological abuse at Sunnyside;

e) Placement in seclusion at Sunnyside;

f) Being kept in his pyjamas as punishment;

g) Multiple restraints by staff members, when he was dragged into a Time Out room and sedated;

h) Being handcuffed to railings and tied to his bed at Sunnyside.

1118. In relation to his psychiatric claim, Mr Johnson accepted a settlement of **$6,000**.

1119. Mr Johnson's experiences reflect the myriad of outcomes in terms of compensation as between the different Government Departments, and an external Church organisation.

Observations

1120. The compensation offered by State agencies does not stand up to comparison with settlements in other contexts. It should not be the case that a person who suffered adverse experiences in State care is paid more for the delay in releasing records than the experiences themselves.

1121. We also need to compare the issue of arbitrary detention/false imprisonment. Where young people are kept in the Secure Unit too long, MSD is more likely to characterise this as a "practice failure" and pay a very small amount of compensation, if any, for it. A child who is left on an island, or chained to their bed, or held in a Time Out room for long periods receives less than an adult who is confined in a prison for longer than lawfully permitted.

1122. Of course, these clients accepted offers under the Fast Track Process. We know, now, that offers under the full investigation process for people who rejected FTP offers have not been an enormous improvement on the FTP offers. Some offers have decreased. In light of this, there has been risk in rejecting a Fast Track offer for some clients.

Comparison with international compensation payments

1123. Survivors of State abuse also fare badly in terms of compensation when compared with other survivors of State abuse, who receive payment in different jurisdictions.

1124. We do not present to be experts about international redress programmes, or about compensation payments made to survivors of abuse in comparable jurisdictions. In that regard, we can refer to a few resources we have located. We will rely on the considerable resources of the Royal Commission to collect in further data in relation to this issue.

1125. The information we have relates to Ireland, Canada and Australia.

1126. In the article by Dr Stephen Winter, referred to above, he first observes that the redress bands and awards in Ireland range from up to $87,000, to a maximum of $522,000, converted to New Zealand dollar amounts. Although the timeframe is difficult to ascertain, his article stated that the average payment in Ireland under its redress programme was $108,305.[703] He makes the point that there is no reason to think that abuse in care in New Zealand, on the one hand,

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703 Stephen Winter "Redressing historic abuse in New Zealand: a comparative critique." (2018) Rutledge, p. 21.

where the average was $19,124, was on average 555% less severe than in Ireland.[704] He comments, and we agree, that there are "reasonable concerns that New Zealand survivors are not receiving just settlements".[705]

1127. We have been unable to find anything up to date in relation to England, Scotland and Wales. We invite the Royal Commission, with its greater resources, to access information from available resources. We also have limited information about Canadian settlements. The only resource we have about Canadian settlements is now dated. The information we have, as at 2014, is that average Canadian payments ranged from $10,000 to $100,530, while average Australian payments, at that stage, ranged from $7,000 to $58,333.[706] We note that some Canadian payments were considerably higher than the average. The same comment applies to Australian payments.

1128. The most recent information we have about Australia is in relation to the National Redress Scheme, introduced in June 2018.[707]

1129. A recent report states that as at 1 November 2019 the National Redress Scheme had made around 716 decisions, including 700 payments, totalling over $56.9 million. The average payment was $80,466.[708]

1130. Even that sum reflects that New Zealand survivors receive considerably less compensation than other survivors of abuse.

Concluding remarks

1131. Compensation is a critical issue. Payments should be meaningful and should make a real difference in the lives of survivors. Our analysis of New Zealand settlements reflects a dismal failure to meet those objectives. It is something requiring urgent review, to ensure New Zealand meets its international obligations towards survivors of abuse, as well as its obligations to ensure that survivors of State abuse receive comparable compensation to other survivors of harm caused by the State. Compensation paid to survivors of abuse should reflect the life-long impacts of that abuse and the impact of that, generally, on the quality of life for survivors and their families.

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704 Stephen Winter "Redressing historic abuse in New Zealand: a comparative critique." (2018) Rutledge, p. 21.

705 Stephen Winter "Redressing historic abuse in New Zealand: a comparative critique." (2018) Rutledge, p. 21.

706 Kathleen Daly, Redressing Institutional Abuse of Children, 2014, Palgrave MacMillan Publishers, p. 143.

707 National Redress Scheme for Institutional Child Sexual Abuse Act 2018.

708 National Redress Scheme Latest News, November 2019.

A proposed solution

1132. While we recognise that there is a limited fiscal budget to meet compensation claims for survivors of abuse, this exercise demonstrates, in our view, just how poorly New Zealand survivors have been treated. There is strong justification for the State to be required to review payments it has made to survivors, to date, to ensure survivors have been treated fairly and equitably. Where necessary, top-up payments should be made, in the same vein MOH has, and continues to make top-up payments to the Round 2 Lake Alice claimants.

CHAPTER 11

THEMES, PATTERNS, CONCLUSIONS AND SOLUTIONS

- **Themes and patterns**
- **Conclusions**
- **A possible solution – a legislative scheme.**

CHAPTER 11

THEMES, PATTERNS, CONCLUSIONS AND SOLUTIONS

Themes and patterns

1133. When there were only a handful of claims being pursued through the courts, the judicial response was reasonably positive towards the plaintiffs. The early decisions, such as *W v Attorney-General* and *S v Attorney-General*, gave plaintiffs successful outcomes in pursuit of the resolution of their claims.

1134. However, as the number of claims grew, the judicial response to the claims shifted, with a far tighter interpretation, particularly of the Limitation Act. It is our view that the courts had one eye to the inevitable floodgates argument and the imposition on State resources if the earlier decisions were applied to a larger group of claimants. The court cases which led to the withdrawal of legal aid were never treated as cases decided on their own facts, but representative of flaws in the wider claimant group. They became the reference point for a narrative that historic claimants could not succeed in court (and so should not receive any redress for their claims) and should not be the recipient of public funds to pursue them.

1135. Plaintiffs have few tools available to them to seek redress. With litigation effectively removed as an option, the imbalance of power between plaintiffs and the Crown was extreme. During this time, the Crown used all available tools to its advantage – and there were many tools available:

a) The CPA and mental health legislation have provided immunities for Crown conduct which are not available to non-Crown individuals;

b) The Limitation Act 1950 is a powerful weapon for Crown defendants, who often hold the levers of funding and information and can delay the progress of claim while time runs under the Limitation Act; and

c) The accident compensation legislation, which has been repeatedly altered over the years by successive governments to limit the plaintiffs' right to redress, while not adequately substituting a remedy, as the ACC scheme was supposed to do.

1136. The Crown also took advantage of its seemingly unending resources to push on litigation, knowing that plaintiffs had no legal aid available, and sought to strike out a number of claims (even though, years later, they would settle them).

1137. Funding through Legal Aid has been problematic, at various points in time. Especially since the withdrawal of aid process commenced in 2008. This has compromised the ability of Cooper Legal to undertake substantive work for claimants over sometimes very lengthy periods of time and is itself a factor contributing to the delays. Our evidence also shows that various State agencies, including Legal Aid, have collaborated at times to agree on strategies that served the Crown's interests rather than the claimants'.

1138. In 2010-2011, there was an attitudinal shift by the Crown in respect of claims across the board, which coincided with our resort to domestic and international complaint mechanisms. Settlement processes were eventually agreed with both MSD and CHFA, where both defendants leveraged off the litigation to implement redress schemes which lacked transparency, independence and accountability. The CHFA settlement model provided very modest redress, and funding issues complicated the process.

1139. The MSD process has been constantly changing, with nobody having visibility over the rules MSD is operating by. Any efforts to implement changes to the process, or bring in new aspects to the process which could help resolve claims, have been strenuously resisted. Claimants have been forced to engage in processes to resolve their claims, only to have MSD change its position, often after a great deal of time and funding has been spent engaging in a particular process. The Intractable Claims Process is a good example. On the whole, Cooper Legal has been forced to be reactive to MSD's whims, rather than proactive in progressing the claims.

1140. When MSD's backlog got too much, it implemented the deeply flawed Fast Track Process. This process also lacked transparency and was not properly funded, from the outset. It also failed to account for crucial parts of claimants' experiences in care. People who rejected FTP offers have subsequently had their claims stalled, and have been neglected while MSD has moved on to a new process, with new claimants. The range of distractions over the years of the settlement processes (for example, redactions in documents, the HTO policy, changes in policy around the role of Oranga Tamariki) have all been barriers to settlement for claimants. Each new policy decision has been almost always a disadvantage to claimants, and it has taken immense work, utilising the Offices of the Privacy Commissioner, Ombudsman and even HRRT litigation to create change and try to put claimants on a more even playing field.

1141. Like MSD, MOE's settlement process lacks transparency, is terribly delayed, is inconsistent and produces very low offers of compensation. MOE operates within an arbitrary scope of its liability and it also operates "behind closed doors" with MSD. It has not

entered into an agreement to stop time under the Limitation Act, forcing claimants to file their claims with the High Court to protect their legal position.

1142. In any case, MSD's agreement to stop time under the Limitation Act has no effect once a claim is placed on a trial track. This allows MSD to control claimants, and, where settlement processes are terribly delayed, the Limitation Act timeframe will have expired by the time an offer is received, prejudicing a claimant's ability to typically seek a remedy from the courts.

1143. The MOH settlement process has very low compensation amounts, and no independence or transparency.

1144. For claims which do track towards a trial outside of the redress processes, the Crown will use its arsenal to defend, delay and deny claims. It has refused name suppression, causing some claimants to be too scared to give evidence, it has disclosed claimant information to the Police and perpetrators of abuse, unlawfully used private investigators to investigate claimants and their witnesses and, overall, failed to act as a Model Litigant, which should be the proper role of the State responding to claims like these.

1145. None of the redress processes operated by Crown agencies properly acknowledge our domestic and international human rights obligations, and do not provide appropriate compensation for breaches of those instruments. In and of themselves, the redress processes are a breach of Article 14 of the UNCAT.

1146. In our final chapter, we provided an analysis of compensation provided by the various State redress schemes, as well as the information provided in relation to MOE settlements (Chapter 6) and compensation for breaches of BORA (Chapter 9). We show that there has been no consistency, and no "all-of-government" approach to settlements. We lag far behind compensation schemes in other countries, and, even comparing State compensation for different wrongdoings, there is a serious disconnect between the compensation paid to a person abused as a child, and the compensation paid for other wrongs done to a person by the State, such as breaches of privacy. There must be some consistency across these issues.

1147. It is fitting at the conclusion of this section to note the Crown's "strategic approach" to responding to the Royal Commission of Inquiry. The Crown has articulated 6 principles as to how it will operate and behave in making the Crown response to this Royal Commission. Those principles include: manaakitanga; openness; transparency; learning; being joined up; and meeting its obligations under Te Tiriti O Waitangi.

1148. These are admirable principles. However, the Crown agencies have never applied them to the redress processes put in place to address the claims of survivors of State abuse. The funding made available to the Crown Secretariat to respond to the Royal Commission is disproportionate to the funding provided to compensate survivors of abuse in State care.

1149. If the Crown applied those principles to the redress processes it currently has in place, we could begin to make progress towards a fair, equitable and full rehabilitation and redress scheme for all survivors.

Conclusions

1150. As we stated at the Contextual Hearing, our strong view is that the State redress processes are "not fit for purpose" – indeed they are broken. Each State redress process is flawed due to the lack of transparency, the lack of independence and the inability to obtain accountability for decisions made within each process.

1151. We continue to advocate for redress processes to sit independently from the agency that caused, or is legally responsible for, the abuse and/or neglect. It is anathema to principles of justice for the abuser to be placed in the position of fact-finder, judge and holder of the budget for settling claims. We hope our evidence has demonstrated that the current processes produce unfair, inequitable and inconsistent outcomes for claimants.

1152. We have also illustrated how funding issues have affected the ability of Cooper Legal, as lawyers for the claimants, to achieve just and meaningful outcomes for claimants. This is particularly, as we have shown, during periods when the Crown agencies have collaborated on strategies around forcing claimants into particular processes that are to the advantages of the Crown agencies concerned. This has included, in our view, endeavouring at one point in this process to remove lawyers altogether from the process.

1153. It is an unfortunate reality for claimants, on the whole, that they are regarded with suspicion and mistrust by the Crown agencies dealing with their claims. This applies particularly to MSD and MOE. If there is a starting point of disbelief, then a higher burden is placed on a claimant to prove events have occurred, for which there may now be no records, and/or the records do not support the allegations or have been lost by the Crown agencies concerned. It is our view that this is another reason for requiring that the claims be dealt with by independent agencies.

1154. Throughout the course of our involvement with this claimant group, the Crown has engaged in strategies which minimise, delay and "wear down" the claimants with the effect that they often accept the eventual unacceptable offer made to them – typically after many years of waiting for an outcome.

1155. We are very clear that those working with survivors must be those who have had special training to understand issues such as: why it takes such a long time to report abuse; why it is difficult to report historic abuse and how that impacts on memory; the importance of ensuring survivors (and their representatives) are provided with as much information as possible to present their claims; the importance of resolving claims early; the necessity of avoiding any steps that may unnecessarily traumatise or further harm a claimant; and generally treating claimants (and their representatives) with the dignity and respect they deserve.

1156. We believe that all those working with survivors should demonstrate they have the training and skills to do so. That includes lawyers and judges who deal with the claims.

1157. Claimants should have a choice of forum for resolving their claims. We take issue with any recommendations that deny claimants the right of access to the courts. There are very complex legal issues that arise in these claims. Many of those claims are critical issues about which Cooper Legal and the Crown agencies have very real differences. These claims also raise difficult factual issues for which there should also be an independent forum (not necessarily the courts) in which those factual matters can be tested and resolved.

1158. As much as possible, the present, very real legal barriers to the claims being progressed in the courts should be removed, or at least ameliorated. We have already made proposals as to how that could be achieved and make further proposals in the section below.

A possible solution: a legislative scheme

1159. One possible solution is to pass legislation dealing specifically with abuse claims of the kind this Inquiry is investigating.

1160. In our view, the legislation should be comprehensive, covering State and non-government organisations dealing with claims of this nature.

1161. The legislation should provide for a statutory redress scheme. Primarily, that redress scheme should cover State agencies, but, as in Australia, the option could be available for non-State organisations to join the scheme.

1162. We propose that the statutory redress scheme has the power to review settlement payments already accepted by claimants and permit a “top-up” payment to be made where the settlement is below what would be payable under the statutory redress scheme.

1163. As in Australia and Ireland, the scheme should provide levels of compensation. Those compensation levels should be comparable with compensation provided in comparable jurisdictions, including Australia, Canada and the United Kingdom.

1164. One of the strongest recommendations we make is that any redress scheme is operated independently from the State agencies who were responsible for the abuse. Hopefully, our evidence reinforces the need for independence, due to the complete lack of transparency, fairness and consistency in the redress schemes presently in operation.

1165. It is important to recognise that, in addition to a redress scheme or schemes, some claimants will want to take their claims to court.

1166. We favour the imposition of a statutory duty of care being imposed on the State and any organisation or individual into whose care a child or vulnerable adult is placed. We are particularly concerned to cover caregivers who are funded by, or through the State. The statutory duty of care should require that a child and/or vulnerable person in care is kept safe from harm and/or damage. A statutory duty of that nature would, in our view, potentially alleviate some of the difficulties for claimants, to date, in succeeding with claims.

1167. We also consider that the burden of proving a breach of duty should be placed on a defendant, rather than the plaintiff. In other words, there should be a presumption that a breach of that duty to protect and keep safe has been breached, unless the defendant can establish, on the balance of probabilities, that it took appropriate steps to fulfil the statutory duty of care.

1168. We have also highlighted issues relating to causation. We propose that the statute provides that a claimant who proves harm and/or neglect while in care will satisfy the test for causation. Again, we propose that there be a reverse burden on the defendant to establish, on the balance of probabilities, that the damage suffered by the claimant was not due to the abuse and/or neglect in care.

1169. Recognising that, we recommend that the legislation removes the Limitation Act barriers. As stated earlier in our evidence, we are not in favour of a residual discretion being left for the courts to dismiss claims on the grounds of prejudice to a defendant. Given our experience with the courts, referred to in our evidence, our worry is that the discretion would often be exercised unfavourably against claimants.

1170. We have addressed the ACC barrier. As stated, we are clear that the ACC legislation should not apply to any claims for physical and sexual abuse prior to 1 April 1974 when the first Act was implemented.

1171. We also advocate for the ACC legislation to be amended to permit civil claims being brought for compensatory, aggravated and exemplary damages – with the proviso that any damages awarded are set off against any sums paid under the ACC Scheme. If the statutory bar remains in place, provision should be made for lump sum payments by ACC.

1172. We propose that section 394 of the Oranga Tamariki Act 1989, which limits the liability of MSD/Oranga Tamariki for the acts of other young people in care, is repealed.

1173. We also propose that a statutory Model Litigant Policy be implemented, along the lines we have set out in Chapter 8. As part of that policy, it should be expressed that only trained lawyers and judges can deal with claims of this nature. That policy should also apply to professionals involved with any statutory redress scheme.

1174. It is important that funding is available for survivors in both the out-of-court and court contexts. We have already articulated our concerns about funding sitting within Legal Aid which is a State agency.

1175. Having said that, if there is a statutory legal assistance scheme, pursuant to this legislation which is specifically for this client group, then some of our concerns may be alleviated.

1176. We propose that any person who fits the criteria under the statute as a survivor of abuse has an entitlement to funding, regardless of their financial means. We also propose that the claimant should be able to elect whether to progress their claim via court or the statutory redress scheme.

1177. Although we acknowledge that “prospects of success” issues should continue to be of relevance, we advocate for a more human rights focused test to be articulated, which will permit claimants to pursue their legal rights through the courts, where there are important legal and factual issues to be determined and/or the case raises more general issues of legal and/or factual significance.

1178. We are conscious that other jurisdictions have the equivalent of Community Law Centres funded to provide legal advice. In a sense, Cooper Legal acts in the position of a Community Law Centre. We see no reason why a firm such as Cooper Legal (and hopefully other individuals and/or law firms) should not continue to be funded to provide advice to claimants.

1179. As will be evident from our evidence, this is a very complex area, not only legally, but also factually and professionally. It is extremely important that those with knowledge of this area are supported to continue work, rather than “reinventing the wheel” and setting out new legal support services.