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.

REDRESS HEARING: EVIDENCE IN REPLY BY SONJA COOPER AND AMANDA HILL

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Introduction

1. We have reviewed the evidence of Una Jagose QC, Simon McPherson, Linda Hrstich-Meyer, Phillip Knipe, Helen Hurst, Brett Dooley and Steven Groom. We have also reviewed the Crown bundle of documents, most of which we have never seen before.

2. Because some of the evidence for the Crown agencies overlaps or intersects, where possible we have divided our response into topics, rather than responding to each brief of evidence.

3. It is useful to refer back to the three key elements we say are missing in the Crown response to historic claims, which are:

   a) Independence;

   b) Transparency; and

   c) Accountability.

4. We note at the outset that the Solicitor-General identifies that survivors are some of New Zealand's most vulnerable people.[1] This is a fairly recent acknowledgement, and is not reflected in the way in which the Crown has treated claimants.

Independence

5. The lack of independence of any of the Crown redress processes permeates the response to claims across all of the Crown agencies. It has a negative impact on claimants at every stage of the process.

6. The Crown response to claims has been driven by several different Crown litigation strategies and a range of policies over the years.[2] The Crown, holding the balance of power, has driven the direction of the claims.

7. Having set the rules, the Crown agencies have regularly and repeatedly changed them or interpreted them to the Crown's advantage.

8. An example of this is the use of the term "systemic abuse" as a threshold for a particular kind of redress process. The Crown had determined that claims about the Lake Alice Child and Adolescent Unit

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[1] Evidence of Una Jagose QC: [2.2]

[2] Evidence of Una Jagose QC: [8.2] – [8.4]; [8.6]; [8.8]; [9.10]; [10.1] – [11.6].

met the threshold of "systemic abuse", because many of the complaints were the same, the complaints were supported by documentary evidence, and the complaints had been overseen by the same person – Dr Selwyn Leeks.

9. No other claimant group has met the Crown's threshold and been entitled to the type of settlement process offered to the Lake Alice claimants.[3] This is despite the critical mass of claims which have now been settled and which are still in train, and which reflect very common themes. MSD accepted as far back as 2006 that there was substantial evidence to support themes across a number of institutions of initiation beatings, a Kingpin hierarchy, and violence in the Boys' Homes.[4]

10. The definition by the Crown of "systemic abuse" as being claims that "contain fixed and consistent sets of facts and timeframes"[5] is met by the non-Lake Alice psychiatric claims and most claims about Social Welfare / CYFS care, and has been met for several years. That was the finding of CLAS. The Confidential Forum noted similar themes. However, the Crown has consistently refused to acknowledge the "systemic" nature of abuse in care over many years.

11. The second phrase we have difficulty with is the term "meritorious claims". In his review of MSD processes in 2009, Sir Rodney Gallen noted that:[6]

> ...the view which has been taken by the Department and the Department's advisors was that a meritorious claim was one where there was some moral liability as a result of indisputable conclusions that abuse had taken place, but that a claim in the courts may be defeated by the limitations which stood in the way of such claims. In such cases, the moral liability is not to be met by way of a payment for compensation, but rather an *ex gratia* payment, to be seen as an acknowledgement that there was a moral if not a legal obligation. That was a generous conclusion.

12. It is unclear what "moral liability" means in reality. It appears, however, to be a claim which could be proved on the facts, but may be defeated by statutory bars or affirmative defences. Several of the later Court decisions referred to in our evidence were successful in proving the facts of the claim, but lost on the limitation point, including *White* and *J*. These claims fit the definition of "meritorious claims", but the plaintiffs were left without any remedy for many years – indeed, *J* never received any compensation, to our knowledge.

13. The decision-maker for meritorious claims has always been the Crown. The Crown also controls the access to information across claims, giving

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[3] Evidence of Una Jagose QC: [2.17]. See also evidence of Una Jagose: [10.3].

[4] Update of the Executive Committee, Zoe Griffiths, 5 April 2006, Tab 15.

[5] Evidence of Una Jagose QC: [2.17].

[6] Sir Rodney Gallen *Assessment of MSD Processes on Historic Claims* 27 November 2009

it the ability to accumulate a body of knowledge which is not available to the claimants. It is never clear whether this information is applied in determining whether a claim is "meritorious", disadvantaging survivors.

14. The approach that the Crown may not be legally liable for a claim, but may have a "moral obligation" has served to minimise the Crown's legal liability. With no transparency around what the Crown deems to be its "moral liability", the goal posts for people trying to assess claims against this threshold continuously move.

15. The lack of independence in the redress process of one Crown agency has been replicated by other Crown agencies.[7]

16. The lack of independence of MSD's process is illustrated in the way it addresses allegations against current MSD staff members or caregivers. Alleged perpetrators are permitted to read not only the allegations, but are also given the opportunity to review the portion of the draft case assessment that is relevant for them, to check for errors of fact. They are advised of MSD's conclusions in respect of the allegations and they are then advised of the outcome of the claim. Where MSD says it has obligations to its former and current staff, it cannot fairly determine claims in this way.[8]

17. Oranga Tamariki's legislative scheme makes its redress processes even more disadvantageous for claimants, by requiring survivors to go through its internal complaints process before filing proceedings. This will allow the Crown to rely on the Limitation Act to strike-out the claim at a later date,[9] because the complaints process delayed the filing of a claim.

18. The complaints process of Oranga Tamariki is monitored by external bodies, but the claims resolution process is not. Complaints are handled by local Oranga Tamariki offices which may not have the expertise or resources to deal with them. It appears to be a matter of local office discretion as to whether a complaint is escalated to head office.[10] This will further disadvantage claimants, as the complaints process becomes fragmented, inconsistent and potentially very drawn out.

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[7] See evidence of Helen Hurst at [4.4], where MOE took guidance from MSD in the development of its settlement processes. See also evidence of Steven Groom at [4.2], where he refers to Oranga Tamariki's desire to have consistency of outcomes with MSD. There was also some replication as between CHFA and the Ministry of Health, which will be dealt with in more detail in other parts of our reply evidence.

[8] Historic Claims Policy and Practice Handbook, 10 June 2014, Tab 58, [10.2] – [11.1].

[9] Evidence of Steven Groom at [2.4]. It is not clear what response a Court could make to a filed proceeding for a survivor who has not been through the internal complaint process first.

[10] Evidence of Steven Groom at [3.3]-[3.4]

19. Mr Groom says that claims involving both MSD and Oranga Tamariki will be addressed by the organisation "responsible for the majority of the harm".[11] We cannot see how this will be assessed, prior to any investigation of the allegations taking place. It is not clear whether this will be an objective assessment of the seriousness of the allegations, or an assessment of the claimant's wellbeing. It is more likely to be the latter, even though for many survivors, it may not be the most objectively serious events which have had the most devastating impact on them.

20. Without any agreement as to the management of these claims, they are in limbo.[12] Mr Groom refers to a desire to have consistency of outcomes with MSD. Given the deeply flawed nature of the MSD process, and the lack of any transparent process by Oranga Tamariki, this is not a desirable objective.[13]

The Interconnectedness of Claims

21. The Crown evidence reflects the lack of independence of the redress processes. Legal Aid, which was later absorbed into the Ministry of Justice, worked closely at times with other parts of the Government in ways which were disadvantageous to claimants, even when options for resolution were available.

22. Mr Dooley for the Ministry of Justice refers to a 2004 High Court decision which, he says, triggered the ability to fund settlement negotiations.[14] For the reasons set out in our brief of evidence, this was not our experience of Legal Aid.

23. Mr Dooley's analysis of the cases in terms of the 'prospects of success' test does not acknowledge the successful cases in relation to foster care (*S* and *W*).[15] Further, the CHFA litigation was still before the Courts at that stage, and the Mental Health immunity barrier was not, ultimately, as significant a barrier as he suggests. By this time, Crown Law had shifted to a test of "meritorious claims" so the 'prospects of success' test was of limited use.

24. Legal Aid had already begun implementing the withdrawal of aid process before the costs decision in *K v CHFA* was issued.[16] Funding was withdrawn, even though we repeatedly told Legal Aid about the proposed settlement processes with MSD and CHFA.[17]

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[11] Evidence of Steven Groom at [3.7]

[12] Evidence of Steven Groom at [3.7]

[13] Evidence of Steven Groom at [4.2]

[14] Evidence of Brett Dooley at [3.12]

[15] Evidence of Brett Dooley at [4.9]

[16] Evidence of Brett Dooley at [4.10]

[17] See documents from as early as January 2008, Cooper Legal Bundle of Documents, Chapter 2.

25. There has been an element of cooperation between Legal Aid, Crown Law and MSD, in particular, which has been to the disadvantage of claimants. The extent of that cooperation was not fully known to us until we received information under an OIA request on 5 July 2011[18]. For example, a letter to the then Minister of Justice from Legal Aid recorded[19]:

> The Ministry of Social Development has established its Care, Claims and Resolution Team... Legal aid is available to cover the cost of legal advice (if required) for a claimant going through this process. The ability to award compensation, an apology and other assistance are available through the CCRT process.
>
> The Agency is now proactively bringing the attention of DSW claimants to the MSD process and is also declining aid in relation to new DSW applications unless they have constructively engaged with the CCR Team.

26. The correspondence reflects a series of meetings between MSD and CHFA on the one hand, and Legal Aid on the other – without the knowledge of Cooper Legal or Johnston Lawrence.

27. At the same time as we were trying to keep funding for the settlement process, we were also well aware of the shortcomings of that process, and we were writing to MSD to try to stop the Limitation Act from taking effect of claims, and also to try to improve MSD's settlement process. We were not willing to keep the claims alive, only to have claimants treated unfairly in a process we viewed as fundamentally flawed.[20]

28. We have never seen the agreements between Legal Aid and other Crown agencies which provides for debt to be written-off.[21]

29. While the May 2011 Limitation Act Agreement with MSD was positive, funding issues continued after it was in force.[22]

30. Mr Dooley refers to the legal aid user charge, and the subsequent exemption for some historic complainants.[23] The exemption came about because Cooper Legal complained to the Regulations Review Committee that the user charge was unfair.[24] The exemption was opposed by the Ministry of Justice.[25] Many of our clients are still subject

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[18] Letter from MSD to Cooper Legal (OIA Response) 5 July 2011.

[19] Letter from Legal Services Agency to Minister Simon Power, 31 March 2010 (included in OIA request received on 5 July 2011).

[20] Letter from MSD to Cooper Legal, 23 April 2010; Letter from Cooper Legal to MSD, 28 April 2010.

[21] Evidence of Brett Dooley at [4.29] – [4.33]

[22] Evidence of Brett Dooley at [4.36]

[23] Evidence of Brett Dooley at [4.37]

[24] Complaint by Cooper Legal to the Regulations Review Committee, 11 September 2013.

[25] Letter from Ministry of Justice to Hon Maryan Street, 18 October 2013

to the user charge, because their claims post-date 1993, creating a further disadvantage for them.

31. The higher rate paid to Sonja Cooper and Roger Chapman (as opposed to other lawyers in their firms) was agreed to by Legal Aid to reflect their particular expertise, not for the development of systems and templates.[26] This was within the guidelines of the time, and only when each claimant consented. At the same time, there was also a "global" billing line, which allowed us to carry out work which related to the whole claimant group, but with the costs shared over the individual files. This also only applied when claimants consented to sharing costs. Both of these arrangements were cancelled unilaterally by Legal Aid[27], although the global billing arrangement was later reinstated after a review by the LARP. The reason for the cancellation was the same as the withdrawal of aid more generally – Legal Aid was concerned about the 'merits' of the claims.

32. Mr Dooley attaches a schedule of total Legal Aid expenditure to his evidence.[28] He does not provide evidence of the repayments made by Crown agencies which respond to claims, which are between half and two-thirds of the Legal Aid debt. This is a better "return on investment" than many Legal Aid files.

Te Tiriti o Waitangi

33. The evidence for the Crown repeatedly states that processes have been, or are currently, formed in accordance with Te Ao Māori, or which are reflective of the principles of Te Tiriti o Waitangi.[29]

34. There is nothing in the 2014 Claims Handbook which reflects that the historic claims staff were "always encouraged to be sensitive to cultural concerns".[30] Mr McPherson for MSD references a consultation in 2006 with 9 Cooper Legal clients, 6 of whom were Māori. However, that consultation was not intended to address whether the historic claims process was operating in accordance with the principles of Te Ao Māori. It was squarely focused on the process of investigation and compensation. The fact that a significant proportion of the claimants were Māori just reflected the demographics of the claimant group does not mean it logically follows that their feedback was directed to that issue.

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[26] Evidence of Brett Dooley at [5.3]; Letter from the Legal Services Agency to Johnston Lawrence, 25 February 2003.

[27] Letter from the Legal Services Agency to Cooper Legal, 24 November 2008

[28] Evidence of Brett Dooley at [6.1], schedule 2.

[29] Evidence of Simon McPherson: [8.1] – [8.5].

[30] Evidence of Simon McPherson: [8.2].

35. Despite the 2018 consultation process, we have seen no changes to the historic claims process, to reflect MSD's commitment to the principles of Te Tiriti o Waitangi. The claims process does not take into account cultural damage, the destructions of whānau and hapū and iwi links, the removal from Kōhanga Reo, the loss of language and so on. There is a difference between a process reflecting the principles of Te Ao Māori, and actually acknowledging the harm done to Māori.

36. It may not be possible, in our view, for the Crown to adequately reflect the partnership principles reflected in Te Tiriti o Waitangi while it runs these processes without any independent voice or oversight. Our view is that the obligation of partnership requires the removal of these processes from the Crown altogether, to ensure it is on a more equal footing with tangata whenua.

37. The Crown evidence reflects two paths: formal litigation and informal settlement processes. The Solicitor-General says that there has not been a choice available to plaintiffs to engage in a formal process in which factual disputes, liability and damages could be determined by an independent third party, without the barriers against claims being brought for personal injury and without legal defences being used by the Crown. It is suggested that, in the absence of litigation, there are no external fact-finders available to claimants.[31]

38. This is not correct. MSD and Cooper Legal agreed the terms of reference for the Intractable Claims Process, which is not mentioned in the evidence for the Solicitor-General or the two representatives from MSD. This was the only fully-formed independent fact-finding process which could have resolved a range of disputes between the parties. MSD unilaterally withdrew from the process, and it never got off the ground.

39. The only other example of an external process is the Lake Alice settlement process, which was managed by Sir Rodney Gallen.

Transparency

40. The evidence for the Crown agencies reflects a very low level of transparency in the various redress processes. Without transparency, claimants (and their lawyers, and the general public) cannot be reassured that the Crown is "playing by the rules" or even what the rules actually are. In the absence of transparency, the claims process becomes increasingly unfair, inconsistent and unpredictable.

41. Nearly every facet of these processes is not transparent.

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[31] Evidence of Una Jagose QC, [2.19].

Scope and nature of duty

42. The evidence for the Crown repeatedly narrows the scope of the duty of care owed to claimants.

43. The Solicitor-General suggests that the vicarious liability of the Crown for the wrongful acts done by others such as foster parents is not a matter of settled law in New Zealand. This is not correct, because the decision in *S v Attorney-General*[32] is still good law in New Zealand. In addition, the UK Supreme Court has come to the same conclusion as that in *S v Attorney-General.*[33]

44. The Solicitor-General's similar statement about third-party agencies is, however, correct. Each of the Crown agencies has utilised the services of an enormous number of third-party agencies, under a wide range of contractual arrangements. In our view, and as set out in our brief of evidence for the Contextual Hearing, MSD should be liable for the acts of third-party agencies, not just through its contract with the agency, but on the basis of the complex approval scheme each agency was subject to, pursuant to section 396 of the legislation, and the custody and control that MSD or its predecessors had over the individual child at the time they were in the third-party's care.[34]

45. While the Solicitor-General says the law is unsettled here, CYFS and MSD accepted responsibility for the actions of third parties very early in the life of the historic claims. The Historic Claims Team was born out of CYFS liability for abuse in Salvation Army homes, by virtue of the children being State Wards and/or by virtue of its licencing of the Salvation Army homes.[35] The same papers which acknowledged that CYFS could be liable for abuse in a Salvation Army home, also noted the recent Court of Appeal decisions in *W* and *S*, delivered on 15 July 2003, which established that compensatory damages for sexual abuse prior to the commencement of the ACC scheme were available. On the basis of those decisions, CYFS anticipated a large number of claims.

46. MSD's position in relation to third parties, in particular the Whakapakari Programme, has been inconsistent over time, disadvantaging claimants. The evidence of the Solicitor-General notes that Crown Law was involved in discussions in November and December 2013 in

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[32] Evidence of Una Jagose QC: [2.12].

[33] *Armes v Nottinghamshire County Council* [2017] UKSC 60; [2017] 3 WLR 1000; [2018] 1 All ER1 (SC).

[34] Evidence of Sonja Cooper and Amanda Hill, Contextual Hearing, [34] - [36]; see also Appendix B

[35] SMT report, Policy and Development: "The Management of Historic Child Abuse Complaints against the Salvation Army", 3 December 2003. [Tab 5]. See also the document at [Tab 6], a report to the Associate Minister of Social Development and Employment dated 3 December 2003, which recorded: "Child, Youth and Family had responsibility both as the custodian and/or guardian of the State Wards placed in the Salvation Army Homes and as their licensing authority that approved the Salvation Army to operate the children's home."

relation to the Whakapakari claims, "whereby it was acknowledged that there was sufficient nexus between the Crown and the third-party provider for settlement to be considered warranted."[36] This was not reflected in the statements of defence filed by MSD to claims about Whakapakari, which variously said that the scope of the duty was a matter of contract between Whakapakari and MSD, or declined liability on the basis that the Whakapakari Programme was an independent contractor.

47. Further, this conflicts with MSD's position on third-party providers during the Fast Track Process, where offers made to clients excluded consideration of placements at Whakapakari and similar programmes altogether.[37]

48. The Crown evidence also incorrectly states that MSD only owes a duty of care to people who were State Wards. The case law has clearly stated that a duty of care arises in many other instances, including where a family is placed under preventive supervision, or a child is placed under legal supervision, a voluntary agreement for care or is remanded to the care of the Director-General of Social Welfare and the successor agencies.[38]

49. Where a duty of care is owed, the State has more than a moral obligation to provide a remedy. Where a breach occurs, a legal obligation arises, even though that may be affected by subsequent issues of statutory immunities or affirmative defences like the Limitation Act.[39]

50. The Solicitor-General has stated that "the Crown has always accepted that sexual assaults can never be explained on the basis of the standards of the day".[40] In the CHFA litigation, the Crown argued that only "serious sexual assaults" were outside of the scope of the Mental Health Act immunity.[41]

51. The Crown also minimises physical assault allegations by characterising them as corporal punishment. The relevant social work Manuals were clear about what was acceptable corporal punishment, where it could happen, and by whom it could be administered. This was a real issue in the *White* trial, because the Crown argued that most assaults by staff were acceptable corporal punishment. The Crown

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[36] Evidence of Una Jagose QC: [12.19.2]

[37] Evidence of Sonja Cooper and Amanda Hill at [413], [415].

[38] Evidence of Simon McPherson, [5.29] ; *S v Attorney-General* (2002) 22 FRNZ 39; [2002] NZFLR 295 (HC) and *S v Attorney-General* [2003] 3 NZLR 450; *W v Attorney-General* (Unreported, Court of Appeal, CA 227/02, 15 July 2003) and the decision in *White v Attorney-General.*

[39] Evidence of Simon McPherson, [5.29]

[40] Evidence of Una Jagose QC: [2.25].

[41] Evidence of Sonja Cooper and Amanda Hill, [266]

regularly characterises serious physical assaults as being within the bounds of acceptable practice for the day. It has done this in terms of kicking, punching, and beating with implements.

52. The Crown has also said that invasive vaginal testing of young girls for venereal disease at homes like Bollard was acceptable practice for the day, even where those searches were not in accordance with the Manual and were raising concerns at the time.[42]

The release, and use, of information

53. In our brief of evidence, we talked at length about the range of problems with the release and use of records by Crown agencies. We have been raising concerns about the way records are managed, edited and provided to claimants for over a decade.[43]

54. The Crown evidence refers to a number of changes in the way records have been provided by Crown agencies, but does not reflect that the changes were often brought about by challenges to the Crown process, where the processes were found to be inadequate, or unlawful.

55. We disagree with the assertion by Linda Hrstich-Meyer that information requests are appropriately redacted in accordance with the provisions under the Privacy Act 1993 and the Official Information Act 1982[44] (where applicable). MSD has regularly and repeatedly redacted information where there is no basis to withhold it, and often, that information supports the allegations made by the claimant. We received a good example of this in relation to Mr MN, where we received unredacted information in discovery in relation to MN's placement at a programme called Wairaka Kokiri in 2004. The original version of his Privacy Act release had redacted identification information about a person who physically assaulted him while he was on the Wairaka Kokiri programme. Amongst the information redacted was:

    a) The name of the staff member who assaulted MN;

    b) A record of a phone call to CYFS from the programme supervisor, saying he was concerned about MN's safety because he was perceived as a nark. The file note included the response by CYFS, which was to leave him on the programme because his removal would send the wrong message to other people;

    c) The previous convictions of a caregiver for MN, which included convictions of assault;

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[42] Evidence of Sonja Cooper and Amanda Hill for the Contextual Hearing at [70]-[71].
[43] Letter from Cooper Legal to Crown Law, 13 July 2009.
[44] Evidence of Linda Hrstich-Meyer at [4.7].

d) Psychiatric reports prepared on MN;

e) A report about previous assaults on MN by a family member.

56. MSD has also repeatedly asserted in High Court proceedings that it is entitled to redact information in discovery documents which it perceives as not being relevant to a claim. The High Court has clearly directed MSD that it has no such entitlement, and information should be provided in accordance with the decision in *N v Attorney-General*.[45]

57. Ms Hrstich-Meyer refers to the personal file of a claimant as critical.[46] We say that the family file of the claimant is also critical, but is often so heavily redacted that we cannot make sense of it.

58. It is evident from reports commissioned by MSD, in particular, that its process for retrieving, reviewing, redacting and providing records remains fundamentally flawed.[47] The Allen + Clarke report from August 2017 identified 15 steps in the process for Privacy Act requests, and recommended modifications to 11 of the 15 steps. The report noted fundamental problems with the provision of information by MSD, ranging from a lack of formal induction for new employees, a lack of capacity planning, a lack of clarity on the rules or responsibilities, the omission of major reports like CYRAS from determining the timeline for release, a lack of dedicated resources, a lack of communication with the requester and problems with the redaction software.

59. We also note from the Allen + Clarke report that it was clearly envisaged that court documents were to be part of a Privacy Act release. This did not fit with MSD's approach to court documents, which was only changed in 2018.[48]

60. While they have been reluctant to provide claimants with information about themselves, and their experiences, the Crown agencies have been determined to disclose the personal information of claimants to other people, whether or not claimants have been willing parties to the disclosure. Mr McPherson suggests that employment investigations for 8 of 9 staff members employed by MSD were impeded by the decision by Cooper Legal clients not to make criminal complaints. That is rejected. It is entirely possible to progress an employment investigation on the basis of anonymous information. It was also unsurprising that the claimants elected not to participate in a criminal complaint, given

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[45] This relates to recent CMC's in the High Court proceeding *S v Attorney-General*, which is on foot in the High Court at Wellington.

[46] Evidence of Linda Hrstich-Meyer, [3.23]

[47] Matahaere-Atariki and Douglas, *Report on the consultation process on the historic claims resolution process with Māori claimants* (Ministry of Social Development, Tab 73, at page13) and Allen + Clarke *Review of Privacy Act requests for the claims resolution function* (28 August 2017).

[48] Evidence of Linda Hrstich-Meyer, [4.20]. We are unsure of the "clarifying High Court decision" Ms Hrstich-Meyer refers to.

the police approach of not investigating allegations of physical abuse except where there are more than three complainants, or serious sexual abuse in limited circumstances. It was also made clear to Cooper Legal clients, both in 2006 and more recently, that the police could not do anything substantial to protect the safety of people who allowed their information to be provided to third-party providers or individual alleged abusers.[49]

61. We note the disconnect here: MSD is better served in its goals if claimants do not disclose their abuse, as it would result in a lower settlement. In contrast, Oranga Tamariki wants the information from the claimant, but potentially at the cost of the clients' safety. MOE, on the other hand, is happy to accept information about alleged perpetrators on an anonymised basis, which our clients are usually happy to provide.[50]

62. Mr McPherson notes that NGOs are responsible for addressing allegations made against their staff and caregivers. Often, a CYFS staff member will resign from their employment and begin work with an NGO, often shifting between several different organisations. Conversely, a staff member who has had allegations made against them while they worked for an NGO has subsequently been employed by CYFS. We are concerned that the siloed nature of these investigations would mean that critical information about perpetrators is not shared. As we have said, this can be done on an anonymised basis.

63. This is not just in respect of historic claims, but current practice. Where Oranga Tamariki is responsible for the approval of organisations and programmes under the relevant legislation, it may also take responsibility for the actions of the staff and supervisors on those programmes, which could include assisting with employment investigations, particularly for small or ill-equipped organisations.

64. The recent focus on disclosure also reflects the time taken by MSD to process allegations made against individual staff members or caregivers. The safety check process when a claim is received, which is described by Mr McPherson in his evidence, is a very recent process. We have recently received a request to disclose information from a claimant who first provided their allegations to MSD in 2009.[51] Another request to disclose the allegations of a group of clients about a single staff member relates to information MSD has had for up to ten years, and which was the subject of an interview with the staff member in

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[49] Letter from NZ Police to Cooper Legal, 17 October 2018.

[50] Evidence of Simon McPherson: [12.7].

[51] This relates to Mr CP, who first made allegations against a staff member at Kohitere in their statement of claim filed in June 2015. After seeking instructions from Mr CP about disclosure of those allegations, we were subsequently told that the alleged perpetrator did not work for a State Agency anymore. This caused needless stress to Mr CP.

2013. The delay between MSD receiving information about alleged perpetrators, and MSD seeking to do anything about the allegations, causes our clients to be cynical that there is little genuine interest in dealing with the alleged perpetrator, and more interest in delaying the processing of the individual's claim.

Publicly available information

65. All Crown agencies provide limited information about their settlement processes to the general public. Sometimes, that information is misleading or incorrect.

66. For instance, Mr Knipe for the Ministry of Health says that he is responsible for claims relating to events occurring in Health Care "prior to 1993".[52] In reality, claims should be accepted up until 30 June 1993.[53]

67. By and large, District Health Boards have refused to engage in claims for events arising after 30 June 1993, leaving those claimants without a remedy. Claimants with experiences which extend both before and after that date have their claims compartmentalised, even though the cut-off date has little connection with the realities of their treatment, or the legislative scheme.

68. The lack of any publicly available information about the MOH process further disadvantages claimants.[54]

69. There is also limited information available about the MOE claims process, and the recent expansion of the eligibility process is not included in the public information.[55]

70. In the absence of an agreement by MOE not to use the Limitation Act, claims by people who were turned away under the old eligibility criteria by MOE, but who later become eligible, could be seriously prejudiced – assuming they ever find out that they could bring a claim at all.

Use of statutory bars and immunities in ADR processes

71. The Crown agencies refer at length to the three primary obstacles to historic claims: the ACC bar on compensatory damages for personal injuries; the Limitation Act 1950 (and subsequently the Limitation Act 2010); and the immunities in the Mental Health Act and its predecessor legislation. When these aspects are dealt with in the context of formal litigation, there is a level of transparency about how they are used by a

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[52] Evidence of Phillip Knipe: [1.4].

[53] Evidence of Sonja Cooper and Amanda Hill at [813].

[54] Evidence of Phillip Knipe: [7.4].

[55] The changes described by Helen Hurst in her evidence at [4.13] are not publicised at all. The website only refers to abuse or neglect at a residential special school before 1989.

defendant. However, the Crown agencies have also used the statutory immunities to leverage advantage over the claimants, and also as a basis to deflate the compensation payable to claimants.

72. The Crown's starting point of settling "meritorious claims" is based on the underlying assumption that (a) the evidence is so strong that MSD could not refute the facts of the claim and (b) the claim will ultimately be barred by the Limitation Act, or severely limited by the ACC bar.[56] The Crown starts from a position that none of the claimants are sufficiently disabled to get through the Limitation Act. This was the Crown's position at a time when a substantial proportion of the psychiatric hospital claimants remained under compulsory treatment orders, or were diagnosed with established mental health conditions. This is the same Crown which now acknowledges that the claimant group are the most vulnerable people in New Zealand.

73. By determining that no claims could surmount the obstacles, the Crown placed itself, not in the position of a liable defendant with litigation risk, but in the position of a person with a benign, moral obligation which could never be enforced. This was the gateway to compensating claims at a lower level than would have been the case if the Crown had placed a litigation risk lens over the claims.

74. The Crown's assessment was made, in the main without the plaintiffs filing evidence to explain why they could surmount the Limitation Act.[57] The claimants were trapped between a rock and a hard place here. Proceedings had to be filed to stop time running under the Limitation Act, but there was no legal aid funding, and no available psychiatrists to provide the evidence to say that the claims had been filed in time. We have explained this in our brief of evidence.

75. The key point here, though, is that the Limitation Act defence is an option for defendants – and the Crown chose to use it. That is not the action of a model litigant.

76. In the Solicitor-General's discussion of the early settlement process for Lake Alice, Ms Jagose QC noted that the process involved attempting to settle claims with claimants and their counsel directly, but where settlement was not possible to proceed either through mediation and arbitration or, failing that, litigation.[58] Ms Jagose QC references a September 2000 Cabinet Policy Committee paper about Lake Alice.[59] In an attached memorandum to the paper, it was noted that it was not recommended that the Crown agree to waive its right to statutory

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[56] See the earlier definition of meritorious claims, noted in the 2009 Gallen review of MSD's settlement processes.

[57] Evidence of Una Jagose QC: [2.14].

[58] Evidence of Una Jagose QC: [6.6].

[59] Cabinet Policy Committee "Grievances of former patients of Lake Alice Hospital: Alternative Dispute Resolution Process" (28 September 2000) POL (00) 125, Tab 1.

defences, because if it did, it would substantially strengthen the negotiating position of the lawyers involved, and weaken the ability of the ADR process as a test of the veracity of all of the former patients' specific allegations.[60]

77. That paper conflicts with the Crown evidence that it did not waive its use of the defences because it did not wish to weaken the law. It is clear that, in relation to Lake Alice, waiving the defences was a negotiating tool, rather than a principled approach.[61] There was no assessment of the veracity of individual claims in the Lake Alice process.[62] There was only an assessment of the allegations to determine an allocation of quantum. The principles applied to Lake Alice were not subsequently applied to other claims against the State.

78. Ms Jagose QC notes that a significant feature of the legal landscape for these claims was the bar on bringing claims for compensatory damages arising directly or indirectly from personal injury covered by the accident compensation legislation.[63] While the ACC bar is a significant feature, it is all too often treated as a total bar on any compensatory damages, for any failure by the State. That is not correct. The ACC bar does not apply to:

    a) Claims for false imprisonment;[64]

    b) From 1992, psychological harm which is not connected to a physical or sexual assault, such as the trauma of witnessing an event, or the psychological harm caused by threats, bullying or similar situations;

    c) Breaches of the Bill of Rights Act 1990; and

    d) Practice failures, being failures of social work or breaches of manuals and guidelines which affected a claimant's care.

79. While ACC was used as a reason to implement an ADR process, it is also often used as a reason to deflate compensation payable to claimants, without any acknowledgement of the parts of their claim which are not covered by the ACC bar. There is no differentiation in the settlement process about abuse which took place prior to 1974, or acts which are not covered. All claimants are treated the same. The influence of the ACC bar on compensation is addressed in relation to Sir Rodney Gallen's review of the compensation processes in 2009.

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[60] Cabinet Policy Committee "Grievances of former patients of Lake Alice Hospital: Alternative Dispute Resolution Process" (28 September 2000) POL (00) 125, Tab 1 at page6, [24].
[61] See evidence of Una Jagose QC: [4.6].
[62] This was undertaken by Sir Rodney Gallen.
[63] Evidence of Una Jagose QC: [2.9].
[64] *Willis v Attorney-General* [1989] 3 NZLR 574.

Process issues

80. Over the life of the historic claims, several reports generated by Crown agencies or their external contractors have urged the Crown to be transparent in its processes.[65]

81. In our brief of evidence, we identified a wide range of problems associated with the Crown redress processes. Those concerns will not be repeated here, except in response to statements made by the Crown Agencies.

82. The approach taken to the Lake Alice claims is directly linked to the characterisation of the allegations as "systemic". However, there is a disconnect about what the Crown says it was compensating the Lake Alice claimants for at the time, and what it has subsequently required claimants to agree to in settlements. The advice to Cabinet in October 2004 about these claims says that the Lake Alice settlement was for the "improper medical treatment suffered at the hands of Dr Leeks. While individual claims of physical and sexual abuse were advanced, they were not investigated, nor were individuals compensated for such alleged abuses".[66] However, settlement documents purport to settle the entirety of each claim by a Lake Alice claimant. This means, in the case of someone like Patrick Stevens who will give evidence in the Redress Hearing, the settlement agreement he signed purported to compensate him for all of his experiences, including sexual and physical abuse, not just the improper medical treatment identified by the Crown agency.[67]

83. If the Crown never intended to investigate, let alone compensate, physical and sexual assaults, then claimants should not have the impression that they are being compensated for the entirety of their claim.

MSD - 2009 Gallen report

84. The report by Sir Rodney Gallen, which is referred to by the Crown agencies as "generally positive"[68] reviewed several files of individual

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[65] Ministry of Social Development *Historical Claims: Options for Resolution* report to the Associate Minister for Social Development, 29 September 2006. At [70] where it was recorded that the process must be open to public scrutiny and that how the system works should be clear. See also KPMG *Ministry of Social Development: Historical Claims Process Advice* (3 June 2016), Tab 66 at [2.5], where KPMG emphasised that process transparency was important and claimants should know the expected timeframe, the key steps to the process, what alternatives they have in terms of direct claims and information on expected financial payments. KPMG provided an example of how this could occur.

[66] Cabinet Policy Committee "Psychiatric Hospitals Claims: Proposal of Alternative Dispute Resolution Process" (18 October 2004) POL (04) 317. Tab 7 at [48.3].

[67] Settlement Agreement for Patrick Stevens.

[68] Evidence of Una Jagose QC, at [9.8]; Evidence of Linda Hrstich-Meyer at [2.4].

claims. The factual outline for each of those files is familiar to us, as several were former clients. We note from that report:

a. The claimant from file C[69] had abuse which occurred prior to 1974, and so the assessment was that ACC would not apply. In relation to this case, Sir Rodney noted that there was no mention of solitary confinement in the settlement. He noted that the use of solitary confinement was "not something which should be simply ignored". Sir Rodney set out his view of the legal considerations which needed to be taken into account in determining whether or not legal liability arose in relation to allegations of solitary confinement. He noted that solitary confinement of 14 days needed "very substantial justification";[70]

b. It is clear that Sir Rodney had serious concerns about the use of solitary confinement which were not being addressed in MSD's settlement process. This has been a bone of contention between Cooper Legal and the Crown agencies since that time, and remains a live issue in 2020. MSD will characterise the misuse of Secure Units as an administrative failure or a practice failure, rather than a false imprisonment. The Crown agencies have clearly justified the use of the Secure Unit at Kohitere, but only ever released the sanitised summary of the document "Understanding Kohitere". In our view, MSD has never altered its treatment of solitary confinement in accordance with Sir Rodney's recommendations;

c. Sir Rodney also commented in relation to file C that the claimant's complaint of abuse from another named person who had been convicted of similar behaviour, but not against the complainant, had not been accepted, but Sir Rodney thought it should have been. He also had reservations about the advice that causation was in issue. He described the experiences of the claimant as "downplayed";[71]

d. Sir Rodney expressed unease about the treatment of another claimant who had been made a very low *ex gratia* offer and had subsequently committed suicide. He expressed other reservations about most of the claims he reviewed and noted that MSD "not infrequently" failed to acknowledge some aspects for the claim which were important to the claimant, but not to the investigator;

e. Sir Rodney Gallen dwelled in some detail on the impact of the Limitation Act and his disquiet about its application to these claimants. In contrast to the Crown position of all of the claims

[69] 2009 Gallen Report at [50].
[70] 2009 Gallen Report at [84].
[71] 2009 Gallen Report at [85] - [86].

being potentially barred by the Limitation Act, Sir Gallen felt that it was at least arguable that the "kind of claimants" with which the Crown were dealing could be said to have a disability.[72]

85. The process issues identified by Sir Rodney continue to be problems today. MSD routinely minimises the allegations of complainants or does not address them at all. It does not treat solitary confinement as it should, and it does not consistently take similar fact evidence into account.

86. Despite these issues, the compensation amounts outlined in the 2009 Gallen Report remain higher than the offers made to people who have similar factual allegations to those claims.

87. Overall, the evidence for MSD reflects an inflexible approach which is bound by the "big picture", rather than focussing on individual cases. In the absence of public data about settlements, it is MSD which determines whether cases are "like" or "different" and it is very difficult for claimants to respond to that.[73]

88. The details of the MSD assessment and settlement process appear to have been largely unwritten until 2014.[74]

89. The 2014 Handbook provides that a claimant who instructed a lawyer was required to sign a memorandum of settlement, rather than receive an *ex gratia* payment[75]. In this way, legally represented claimants were disadvantaged by entering into a full and final settlement when unrepresented people did not.

90. The Handbook provides that a claim which cannot be settled because of a dispute of fact could be referred to an independent fact-finding authority, administered by Fairways Resolution.[76] MSD unilaterally withdrew from the Intractable Claims Process, so it was never an option for claimants.

91. The Handbook provides that new claims would trigger a search to establish if current MSD or CYFS employees were the subject of allegations.[77] This was not followed in any regular fashion, and years could pass between a claim being provided to MSD and a safety check being done. We have noted in relation to the lack of independence of the process, the inherent conflict of MSD collaborating with alleged perpetrators which it employs or engages as caregivers.

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[72] 2009 Gallen Report at [159] - [161].
[73] Evidence of Simon McPherson, at [7.7].
[74] Evidence of Linda Hrstich-Meyer, at [3.3].
[75] Historic Claims Policy and Practice Handbook, 10 June 2014, Tab 58, at [7.2].
[76] Historic Claims Policy and Practice Handbook, 10 June 2014, Tab 58, at [7.3.3].
[77] Historic Claims Policy and Practice Handbook, 10 June 2014, Tab 58, at [10.2].

92. We do not agree that MSD has obligations to people who no longer work for it.[78] Where the Crown often declines to accept liability for its contractors, it is difficult to accept that it owes them obligations in the investigation of allegations by claimants. This issue gives rise to serious conflicts which impact on the independence of the process. This has been addressed above.

93. The Handbook includes advice by a QC on the use of circumstantial evidence.[79] These assessments were being done by former social workers, not lawyers, who may have lacked the skills necessary to properly apply such advice.

94. Against this background, determining whether to interview an alleged perpetrator only where MSD had formed the view that the alleged event *did not* occur (and, only then when the claim was filed)[80], was fundamentally flawed.

95. The Handbook provides for an assessment of the credibility of the claimant.[81] MSD did not meet most legally represented claimants, so this assessment could never properly be carried out for those people – placing them at a disadvantage.

96. In conflict with the directions in the Handbook, MSD assessors have applied different approaches to similar fact evidence.[82]

97. The Handbook provides that "where but for the absence of a record it is not possible to make a determination of a claim one way or the other, then the claimant must be given the benefit of the doubt".[83] Put bluntly, this has hardly ever occurred and is still a major issue. MSD treats the absence of a record as *evidence that the event complained of did not occur.* MSD started from a position of disbelief (and we say – still does).

98. MSD has regularly departed from the advice in the Handbook that unjustified placement in Secure is a breach of duty.[84] Far too often, in factual circumstances which do not support the finding, MSD characterises the unjustified placement in Secure as a "practice failure" (which deflates the compensation) or justifies the placement, making no adverse finding. We have given very recent examples of that in our evidence.

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[78] Evidence of Una Jagose QC, [2.24]

[79] Historic Claims Policy and Practice Handbook, 10 June 2014, Tab 58, [12.2] - [12.3]

[80] Historic Claims Policy and Practice Handbook, 10 June 2014, Tab 58, [12.4.2]

[81] Historic Claims Policy and Practice Handbook, 10 June 2014, Tab 58, [12.5]

[82] Historic Claims Policy and Practice Handbook, 10 June 2014, Tab 58, at [12.6]. Stephen Winter (2018): Redressing Historic Abuse in New Zealand: A comparative critique, political science, page 18.

[83] Historic Claims Policy and Practice Handbook, 10 June 2014, Tab 58, at [12.8]

[84] Historic Claims Policy and Practice Handbook, 10 June 2014, Tab 58, at [13.1]

99. Ms Hrstich-Meyer says that claimants who want factual findings need to go to court.[85] Given the Crown's approach to raising statutory defences, as well as the funding issues which invariably arise, this is not realistic for most claimants.

100. Ms Hrstich-Meyer also records the various ways claims are registered, nothing that a claim is registered by a solicitor contacting MSD on their behalf.[86] We did this for years, stating that a claimant wished to raise a claim against MSD and making a request for records at the same time. As we noted in our brief of evidence, we were later forced to complete over 570 claim registration forms, as a large group of our clients 'fell off the radar' and were not registered with MSD. Despite assurances that the claim registration forms would be backdated to the original records request, we are concerned that this has not occurred, prejudicing those clients, because claims should be prioritised in the order they are received.

101. Ms Hrstich-Meyer has accepted that MSD's prioritisation process disadvantaged Cooper Legal clients over a 5-year period.[87] We remain concerned that legally represented claimants have their claims delayed to encourage claimants to participate in the process without a lawyer. There is an ongoing perception that direct claimants are dealt with more quickly by MSD, one that in our view is encouraged by MSD.

102. MSD and Crown Law's earliest assessments of quantum were flawed.[88] We say this because:

    (a) Lump sum payments from ACC are based on a medical assessment of an individual's capacity to function. They reflect the individual's circumstances and are difficult to apply to others;

    (b) The range of lump sum payments is very wide;

    (c) The availability of lump sum payments from ACC has been severely restricted in recent times, so there are few modern comparators in any case;

    (d) We assume there has been no adjustment to the Crown baseline figures for CPI, making them outdated;

    (e) The knowledge landscape between 2004 and 2020 has changed radically, and will influence how allegations are treated;

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[85] Evidence of Linda Hrstich-Meyer. [3.29]
[86] Evidence of Linda Hrstich-Meyer at [3.12]
[87] Evidence of Linda Hrstich-Meyer at [3.31]
[88] Evidence of Linda Hrstich-Meyer at [3.34]

(f) There are few decisions about exemplary damages, and they are often fact-specific. Exemplary damages will often be low;

(g) There is no transparency about how Crown Law or other agencies have used the very wide range of figures to assess quantum for individual claims.

103. MSD has never been forthcoming about how quantum is assessed. We obtained information about quantum in the FTP only through evidence filed in opposition to judicial review. For the most recent iteration of the MSD Process, the information has continued to be withheld.

The 2PA / Fast Track Process

104. Given the limitations of the FTP assessment process, any attempt to make it consistent with past settlements would never work *while being fair to claimants.*

105. The assertion by MSD that payments under the FTP were moderated to ensure consistency with previous payments is incorrect.[89] They were moderated because MSD did not ask for sufficient funding at the outset and did not seek further funding when it accepted its budget request was wrong. Moderation was to ensure that the payments fitted within budget.

106. The three key problems with the FTP – the exclusion of practice failures, the exclusion of Bill of Rights considerations and the exclusion of allegations against third-party providers – means that the quantum paid to claimants under this process should not have been used as a basis for quantum under different processes.[90] The payments under the FTP were weighted towards the lower end by these exclusions, and the inclusion of them in later assessments, working off an "average" payment, means that the figures will ultimately be lower for claims where practice failures and allegations about third party providers *are accepted.*

107. The inclusion of FTP payments (where no detailed assessment was done) in the development of categories for MSD's new process will have had a deflating effect on compensation.[91] That certainly accords with our view of the recent offers.

108. The FTP was successful only in that it reduced the backlog at MSD for a short time.[92] It is difficult for us to characterise it as a success for claimants, because they had been waiting so long for resolution already.

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[89] Evidence of Linda Hrstich-Meyer at [5.12]
[90] Evidence of Linda Hrstich-Meyer at [3.37] - [3.38]
[91] Evidence of Linda Hrstich-Meyer at [3.39]
[92] Evidence of Linda Hrstich-Meyer at [5.19]

MSD's New Process

109. The KPMG report[93] set out the primary considerations which would trigger a senior staff review and/or a "comprehensive review" of a claim.[94] These largely reflect consideration of the risk to MSD.

110. While a standard assessment suggests allegations will be accepted on their face, in our view a comprehensive claim might be better for the claimant because there is a wider review of information and the extent of the breach or failing. However, standard assessments are the default setting.

111. The offers we have received to date under this process do not identify whether a standard or a comprehensive assessment has occurred. We are not told what documents MSD has reviewed, so we are unable to assess whether all relevant material has been taken into account.

112. The KPMG report suggests that MSD does not ascribe any quantum to things we see as important – like the existence of a no-narking policy, which reflected systemic failings and drove the non-disclosure of abuse.[95]

113. The August 2018 Claims Resolution Service Design Report[96] captures the intended new process and the change to a burden of proof which starts from a point of belief "unless it is unreasonable to do so".[97]

114. While we have seen more allegations accepted by MSD under the new process, many allegations still only receive the response that "there is insufficient information to support this allegation". This is difficult for us to work with, when we do not know what information MSD has looked at in the first place. In addition, the increased acceptance of allegations has not been reflected in an increase in compensation.

115. The risk that some people who had had their claims previously resolved may feel disadvantaged, is identified as an issue to be "managed".[98] If the process had been robust from the first instance, this would not be a risk at all. This also creates a lack of clarity about whether a claimant who settles their claim, but later obtains fresh information or MSD's position changes, can revisit their claim. An example of this would be victims of John Ngatai, a situation covered in our brief of evidence.

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[93] KPMG *Ministry of Social Development: Historical Claims Process Advice* 3 June 2016

[94] KPMG report at [2.3.2]. See also the table at page 9 of the report.

[95] KPMG report, page 13

[96] Ministry of Social Development *Claims Resolution Service Design* (Report to the Minister for Social Development, 9 August 2018), Tab 74

[97] *Claims Resolution Service Design* at [12]

[98] *Claims Resolution Service Design* at [22]

116. The August 2018 paper identifies that MSD's new process *is not consistent with our obligations under the international law.* It identifies that a "further process may be necessary". In our view, the *entire* process needs to be consistent with international law, or it should not be used at all.

117. The list of categories provided by Ms Hrstich-Meyer for the new process is more information than we have ever been provided – but the categories are vague and the examples are unhelpful in light of the wide range of claimant experiences.

118. Many of our clients would fall into the category 4 or category 5 range, but we are only rarely seeing offers above $25,000. This makes us think that the amounts have been moderated downwards. Most offers we have seen under the new process are below $20,000.

119. Payment for breaches of the Bill of Rights Act is discretionary under the new MSD process, which is deeply problematic in itself.[99] We have not seen any uplift in payments to account for the Bill of Rights Act under the new process, to date, even for clients whose claims are on a trial track and where MSD has significantly greater information and litigation risk. We were advised, very early on in the life of the historic claims, that any allegation of a breach of section 9 of the Bill of Rights Act (torture, or cruel and inhuman punishment) would have to be heard by a Court and would not be the subject of settlement.[100]

120. The calculation of average payments by Ms Hrstich-Meyer does not appear to include the payments to the earlier plaintiffs S and W, who received substantially more.[101]

121. The quantum assessments by the Crown consistently seek to compensate for acts of abuse rather than the *effects* of the abuse. As the actuarial reports we provided in our evidence show, if the latter approach was taken, the compensation would be much higher.

122. MSD aims to "share past mistakes and what the Ministry has learnt with Oranga Tamariki and other agencies providing care services" to improve the experience of children in care today.[102] We have difficulty seeing how this can happen, where:

    (a) MSD no longer makes a firm decision on allegations – it "takes into account" allegations "for the purposes of settlement" rather than accepting or rejecting allegations. It is not clear how this can translate into hard data to learn from;

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[99] Evidence of Linda Hrstich-Meyer at [3.41]

[100] Letter from Crown Law to Cooper Legal, 10 November 2009, without prejudice

[101] Evidence of Linda Hrstich-Meyer at [3.43]

[102] Evidence of Linda Hrstich-Meyer at [6.1]

(b) It is not clear how claimant information can be collated in a way which is useful to Oranga Tamariki, and whether that process has even started. To our knowledge, information about alleged perpetrators who may still work in the sector is the only information passed to Oranga Tamariki; and

(c) It does not appear that MOE intends to take similar steps, even though it ran similar institutions.

Collaboration between Ministries

123. There is no consistency in the collaboration between MOE and MSD.[103] There is no collaboration at all between MSD and MOH,[104] meaning claims by people who were placed in psychiatric care when they were a State Ward are dealt with as two separate issues – which MSD never accepts any responsibility for, except for failures to visit the child or young person once they have been admitted.

Non-Governmental Organisations

124. We disagree with Ms Hrstich-Meyer's description of MSD's engagement with NGOs:[105]

(a) MSD did not take any abuse at an NGO placement into account during the FTP process, whether it was still operating or not. This included placements with national organisations like Youthlink and well-known operations which were shut down by MSD such as Whakapakari, Moerangi Treks or Eastland Youth Rescue Trust – but still forced claimants to sign a full and final settlement;

(b) NGOs which have tried to engage with MSD about a joint claim are told that steps will only be taken when time comes to assess the claim – for a client filed in the High Court due to his young age, it was suggested that the NGO had to wait for four years (the time it would take MSD to address the claim) before the Crown would look at the claim;

(c) We are often forced to engage with NGOs directly. Some have responded well, and others have not – but the claimants struggle to understand why two processes are necessary when the NGO was often approved by MSD to care for them;

(d) We have never seen the MOU referred to by Ms Hrstich-Meyer, and so we are unable to advise our clients about MSD's approach[106].

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[103] Evidence of Linda Hrstich-Meyer at [3.55]
[104] Evidence of Linda Hrstich-Meyer at [3.56]
[105] Evidence of Linda Hrstich-Meyer at [3.57] - [3.60]
[106] Evidence of Linda Hrstich-Meyer at [3.59]

MOH Process

125. The eligibility restrictions imposed by MOH leave people who were in care after 30 June 1993 with no access to the settlement process. DHBs are very difficult defendants and few claims have been settled.[107] There is no evidence to support the view that there has been a significant decrease in abuse claims in the mental health system. Many complaints are filtered through different mechanisms or agencies, which will make data compilation harder.

126. We refer to our earlier comments about the refusal of the Crown to implement a Lake Alice-style settlement process. The Confidential Forum final report[108] noted a range of themes in these claims which we say reflect systemic abuse.

127. Mr Knipe relies on the Supreme Court decision *B v CHFA* to say that the restrictive immunities in the mental health legislation made litigation unsuccessful and inappropriate for claimants.[109] However, the Supreme Court found in *favour* of the claimants, because the case turned on whether the immunities applied to informal patients. Mr Knipe says that plaintiffs face significant difficulty proving their claims. That was not the case for J (who lost on limitation). Finally, Mr Knipe says the delays caused the claimants to accrue a significant legal aid debt. Virtually all of the legal aid debt was incurred due to the Crown's litigation strategy, which required the claimants to prove their case to a very high level.

128. In relation to the categorisation of these claims for settlement, Mr Knipe refers to the involvement of Cooper Legal[110]. Johnston Lawrence was similarly involved in the categorisation process, for the claimants that firm represented.

129. Mr Knipe sets out the categories of payments now used by MOH, describing them as "wellness" payments.[111] He says that the figures were based on previous offers made by CHFA for similar unfiled claims, but discounted to reflect the fact that no legal proceedings or costs had been incurred by the claimant. This is incorrect insofar as it relates to Cooper Legal clients. CHFA settled claims based on the broad categories, whether or not they had filed claims. Such an approach was proven to be incorrect in the *Zentveld* litigation. We also note that the claimants in the CHFA settlement process paid legal costs separately, so this approach is clearly flawed.

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[107] Evidence of Phillip Knipe at [3.11]

[108] Confidential Forum for Former In-Patients of Psychiatric Hospitals Te Āiotanga: Report of the Confidential Forum for Former In-Patients of Psychiatric Hospitals (June 2017) Tab 24

[109] Evidence of Phillip Knipe at [4.55]

[110] Evidence of Phillip Knipe at [4.57] – [4.59]

[111] Evidence of Phillip Knipe at [5.9]

130. This approach unfairly disadvantages the second claimant group, which is something MOH did with the second Lake Alice group until Mr Zentveld litigated the matter.

MOE

131. We have commented, elsewhere in our evidence, about the inconsistencies of eligibility with the MOE process.

132. Ms Hurst identifies several principles identified in 2010 when MOE established its process.[112] Two of these principles – ensuring that the process supports an outcome that is enduring, fair and based on a degree of supporting information and the idea that the approach to resolving claims does not create new concerns or risks – appear to be in conflict. The latter also suggests that payments should be kept low to deter new claimants from coming forward.

133. There is no indication of the role natural justice has to play in the MOE process.[113] We do not receive the assessor's reports.[114] The information given to the claimant is a watered-down version, which is prepared by MOE. The assessors used by MOE are only nominally independent. Both have a long employment and/or contracting history with MOE. One assessor previously provided services to Campbell Park, but is still permitted to assess those claims.

134. Payments by MOE are significantly lower than MSD and are more comparable to MOH payments.[115]

135. Some claims have been delayed by the clustering of claims for assessment – for example, claims about McKenzie School.[116] It is also clear that the MOE claims team has been chronically understaffed for years.

136. Ms Hurst says that MOE considers resolved claims with similar allegations about the same school.[117] It is difficult for us to accept this, when MOE has stated to us previously that it does not take similar fact evidence into account at all. Even when similar fact evidence is referred to, it is only given weight when there are other records which also support the allegation. To our knowledge, MOE has never accepted an allegation purely on similar fact evidence.

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[112] Evidence of Helen Hurst at [4.5]
[113] Evidence of Helen Hurst at [4.6]
[114] Evidence of Helen Hurst at [4.20]
[115] Evidence of Helen Hurst at [4.24]
[116] Evidence of Helen Hurst at [5.14]
[117] Evidence of Helen Hurst at [5.16]

137. MOE declines our offer to record meetings and relies on the handwritten notes of assessors.[118]

138. Ms Hurst says that MOE bases payments on similar claims.[119] This traps MOE in a cycle of very low compensation payments, even when the information it receives has dramatically improved.

139. It is not clear whether MOE's average payment (as calculated by Ms Hurst) includes the contribution to legal costs it typically makes.[120]

Accountability

140. We have already referred to the lack of independence in the Crown redress processes. A lack of independence gives rise to a lack of accountability. There are several other aspects which mean that the redress processes lack accountability, and therefore are not robust.

141. The Solicitor-General says that a 2011 review of Crown Law identified that there was no written policy capturing the model litigant expectations. They also noted that the expectations were not clear or commonly shared.[121] However, the obligations seemed clearly articulated by 2010.[122]

142. The Crown has never been forced to test the issues of limitation and the extent of the ACC bar.[123] It has always been a choice for the Crown.

143. The evidence of the Solicitor-General reflects a concern about the downstream effect of decisions in creating further risk and cost to the Crown, even where those claims were as meritorious as the ones which had settled.[124] This was not a principled basis on which to make decisions about how similar claims to Lake Alice would be dealt with.

144. We are not just concerned with the accountability of Crown agencies to the general public about their processes. We are also concerned about the accountability of Crown agencies for organisations that it approves, funds and engages to carry out functions which are within the natural purview of the State. In particular, the approach by MSD to whether or not it will accept responsibility for organisations it has approved under the relevant legislation to care for children has changed over time. Often, where the programme has shut down or the incorporated society has been dissolved, there is no viable other defendant for a claimant to

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[118] Evidence of Helen Hurst at [5.22]
[119] Evidence of Helen Hurst at [5.35]
[120] Evidence of Helen Hurst at [5.36]
[121] Evidence of Una Jagose QC at [3.7]-[3.8]
[122] Evidence of Sonja Cooper and Amanda Hill for the Contextual Hearing, [184].
[123] Evidence of Una Jagose QC at [4.4].
[124] Cabinet Policy Committee "Lake Alice Hospital Claims: further settlement" (7 December 2001), Tab [2] of the Crown bundle at [36].

seek redress from. MSD is able to approve organisations as a safe place for children on the one hand, but then say it is not responsible for children it places with those organisations, on the other hand. This cannot be a principled way for the Crown to behave.

145. In adopting different redress processes, the Crown agencies have often elected not to adopt key recommendations of reports commissioned by it. We have previously noted the recommendations in reports from KPMG and Allan + Clarke that redress processes are transparent. Those parts of the recommendations were not accepted by MSD. As the lead agency, or at least the agency with the most developed assessment process, its decisions have been replicated by MOE and Oranga Tamariki. Oranga Tamariki and MOE will then be able to point to MSD, to say that any faults with their processes lie with MSD.

146. The Crown agencies have placed themselves in the position of information provider, information assessor, Judge, actuary and service provider. It cannot fulfil all of these functions, for a wrong originally committed by a Crown agency. There will be no accountability in this process until it is removed from the Crown altogether.

Dated: 6 March 2020

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GRO-C

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