

## In-Confidence

**Under** the Inquiries Act 2013  
**In the matter** of the Royal Commission of Inquiry into Abuse in State Care and in  
the Care of Faith-based Institutions

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## Brief of Evidence of Ernest Garth Young for the Ministry of Social Development – Redress

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1	<b>Introduction</b> .....	2
2	<b>Scope of evidence</b> .....	2
3	<b>Composition and functions of working groups</b> .....	3
4	<b>Process for collecting information on confirmed and alleged perpetrators</b> .....	10
	How was information gathered .....	11
	28 August 2006 memo to the Historic Claims Steering Group .....	12
	21 September 2017 report to the Minister for Social Development .....	14
	How was information about alleged offenders shared within the Ministry and with other agencies .....	15
	Referral to other agencies .....	15
5	<b>Outcomes from Police referrals</b> .....	16
	MSD Police referral process prior to 2016 .....	16
	2016 letter of agreement between MSD and the Police .....	16
	Commencing a process to refer allegations of sexual and physical offending to Police .....	18
	Court Action .....	18
	Revised Police referral process and current practice .....	18
	Outcomes from Police and incorporation into the assessment and settlement process .....	19
6	<b>The roles and responsibilities between the Ministry and Crown Law for the use of and scope of use of private investigators in the <i>White</i> and other cases</b> .....	19
7	<b>Mr Keith Wiffin’s Claim</b> .....	20
8	<b>Changes made to MSD policies or processes, if any, following the Crown Law and MSD workshop of 21 November 2007</b> .....	22
9	<b>Support of claimants and “wellness” payments</b> .....	23
	“Wellness” payments .....	23
10	<b>High Tariff Offenders</b> .....	24
11	<b>Concluding comments</b> .....	25

## **1 Introduction**

- 1.1 My full name is Ernest Garth Young. I am known as Garth.
- 1.2 I am the Lead Claims Advisor with the Historic Claims Team at the Ministry of Social Development (**Ministry**), a role I have held since late 2018.
- 1.3 I have been employed by the Ministry or its predecessors since 1984 when appointed as a social worker first in Invercargill then in Whangarei. I carried a varied caseload that included care and protection matters, youth offending, adoptions and caregiver training. While in Whangarei I became a senior social worker leading a team of care and protection social workers, before becoming a social work trainer, running courses across Tai Tokerau and in Auckland.
- 1.4 In 1997 I became manager of the parliamentary services team for Child, Youth and Family in Wellington. As Child, Youth and Family began a commitment to addressing historic claims of abuse, I was seconded into a position that ultimately became manager of the historic claims team. I remained manager until 2012/13 when I was appointed Chief Analyst of historic claims until my current appointment.
- 1.5 I hold a Postgraduate Diploma in Social Sciences from Massey University (1993).
- 1.6 As Lead Claims Advisor I am primarily responsible for providing expert advice on social work practice and its relationship to the assessment of claims. In doing so, I support and advise claimant support and claim assessment team leaders and team members on a wide range of issues and may be required to review and/or advise on particularly complex claims. As required, I also assist the development of strategy and policy in relation to historic claims.

## **2 Scope of evidence**

- 2.1 My colleagues Linda Hrstich-Meyer and Simon MacPherson have set out in their briefs of evidence the development of the historic claims team from 2004 through to the present day and other related matters (such as litigation around the redress process and to address matters raised by survivors in their briefs of evidence). I do not repeat their evidence here, except to note areas of their evidence which relate to the topics set out below.
- 2.2 The Royal Commission has asked me to comment on, in summary, the following topics:
  - (a) the composition, roles, responsibilities, functions, and influence of the various groups that contributed in some way to the development of the historic claims process, including, but not limited to the Interdepartmental Working Group, the Historic Claims Steering Group and the Historic Claims Strategy Group;
  - (b) the processes and timeframes under which information relating to known perpetrators of abuse in State care was collected, centralised, analysed and disseminated within MSD, and to other agencies dealing with historic claims of abuse, so it could be used in claims assessments and settlement offers;

- (c) the processes by which outcomes of referrals to Police were obtained and shared by MSD and other Crown agencies, and incorporated into assessment and settlement processes
- (d) the roles and responsibilities between the Ministry and Crown Law for the use of and scope of use of private investigators in the *White* and other cases;
- (e) the Ministry's management of the claim brought by Mr Keith Wiffin;
- (f) the changes made to MSD policies or processes following a workshop between MSD and Crown Law following the *White* case;
- (g) MSD policies relating to "wellness payments" and provision of other services, and the interface with ACC entitlements; and
- (h) High Tariff Offender policy development and implementation.

### 3 Composition and functions of working groups

- 3.1 There have been a number of groups set up to assist in developing and implementing policy around redress which I discuss below. By way of brief introduction, the groups covered by the Royal Commission's request that I will describe are as follows.
- (a) The Interdepartmental Working Group (2004 – approximately 2009) comprised representatives from multiple Crown agencies. It was established at an early stage in the Crown's consideration of historic abuse claims. Its purpose was to develop high-level, Crown-wide policies and principles.
  - (b) The Historic Claims Steering Group (2006 – approximately 2006) was comprised of senior Ministry officials. Its objective was to provide high-level direction to the Ministry's management of historic abuse claims.
  - (c) The Historic Claims Strategy Group (2008 – approximately 2014) comprised senior Ministry officials and a Crown Law representative. Its purpose was to provide a forum for strategic discussion of the Ministry's management of historic abuse claims and the associated litigation.
  - (d) The Historic Claims Completion Strategy Governance Group (2013 – 2018) comprised senior Ministry officials and representatives of Crown Law and the Ministry of Education (**MoE**). Its objective was to identify strategies for improving efficiency in the resolution of claims with a view to having all pre-1993 historic claims resolved by the end of 2020. This group oversaw the development of the Two Path Approach.
- 3.2 In general, I note that the two cross-government groups (the Interdepartmental Working Group and the Historic Claims Completion Strategy Governance Group) were established to develop a whole of Crown approach to claims. The Historic Claims Steering Group and Historic Claims Strategy Group were specific to the Ministry's management of claims (while bearing in mind all of Crown considerations).

- 3.3 My own involvement with these groups varied. I had quite significant involvement in the Interdepartmental Working Group (along with other Ministry colleagues). I provided information about the nature and volume of claims faced by the Ministry and took part in the group's discussions of potential Crown responses to claims.
- 3.4 By comparison, I was not a formal member of the Historic Claims Completion Strategy Governance Group, but provided advice and information to the group as required and attended meetings when requested.
- 3.5 I had substantial involvement with the two internal Ministry groups (the Historic Claims Strategy Group and the Historic Claims Steering Group). My role included providing information and advice when required.

#### ***Interdepartmental Working Group***

- 3.6 In November 2004 Cabinet agreed to the establishment of an Interdepartmental Working Group, led by the Ministry of Justice, to develop a framework of policies and principles that should apply to processes to deal with historic claims of abuse against the state. The group was to include representatives from Treasury, the Ministry of Health, the Department of Child, Youth and Family Services, the Ministry of Social Development, the Ministry of Education, and Crown Law.
- 3.7 In August 2006 a report to the Associate Minister for Social Development and Employment noted that Crown Law and the Interdepartmental Working Group agreed the need to consider options for how historic abuse claims might be managed and that a Cabinet paper be prepared setting out the status of claims and that policy work commence to explore options for alternative means of resolving claims outside of the courts.<sup>1</sup>
- 3.8 In parallel the Ministry considered how, in the context of the wider government approach to claims, it might best address those claims brought against it. In September 2006 we reported to the Associate Minister on work carried out to date including reviewing international approaches to the resolution of historic claims of abuse, meeting with members of the Confidential Forum for ex-patients of psychiatric hospitals and meeting with Sonja Cooper of Cooper Legal and nine of her clients (referred to below).<sup>2</sup> The report also canvassed options for the resolution of claims and sought approval for continuing that work alongside other agencies.
- 3.9 At the 17 November 2006 meeting of the interdepartmental working group the Ministry gave an overview of the work it had done to date on exploring options for resolving claims. The group agreed to hold a workshop early in 2007 to develop a coordinated strategy for addressing historic claims.

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<sup>1</sup> Ministry of Social Development *Management of Historic Abuse Claims* (Report to the Associate Minister for Social Development and Employment, 8 August 2006) (Crown Bundle, Tab 17).

<sup>2</sup> Ministry of Social Development *Historical Claims: Options for Resolution* (Report to the Associate Minister for Social Development and Employment, 29 September 2006) (Crown Bundle, Tab 18).

- 3.10 Following that workshop, a paper from joint ministers was presented to the Cabinet Policy Committee.<sup>3</sup> It recommended establishing a listening and assistance service to hear the experiences of people in state care prior to 1992 and to provide them various support services; and that Crown Law review the litigation strategy in light of proceedings to be heard in 2007, to consider whether there were other options to deal with the cases, with a greater emphasis on settlement to promote the early resolution of claims. The Committee approved those recommendations.<sup>4</sup>
- 3.11 On 21 May 2008 Cabinet, "*agreed that for the next two years the Crown litigation strategy for historic abuse claims comprise the following:*
1. *agencies will seek to resolve grievances directly with an individual to the extent practicable;*
  2. *the Crown will endeavour to settle meritorious claims;*
  3. *those claims that cannot be resolved will be defended in court;*"<sup>5</sup>
- 3.12 Cabinet also directed Crown Law and the Ministry of Justice, in consultation with other departments, to undertake a further review of the Crown litigation strategy and report back by February 2010.
- 3.13 The interdepartmental group provided advice to joint Ministers in December 2009 on options for historic claims resolution<sup>6</sup>, followed by a 14 January 2011 paper from Crown Law to the Attorney-General<sup>7</sup> seeking agreement to a strategy which:
- (a) acknowledged that claims needed an individualised approach with a continuum of options for resolution;
  - (b) approved engaging with claimants to understand their core grievance, investigating and testing allegations, and – where claims were assessed to have legal or moral merit – making individualised offers that could include elements of:
    - (i) an apology and acknowledgement of their experience;
    - (ii) a contribution to legal aid debt or legal costs so the claimant is not left with a debt;
    - (iii) the provision of services;
    - (iv) an ex gratia payment;

<sup>3</sup> Cabinet Policy Committee "Historic Claims of Abuse and Neglect in State Care" (18 June 2007) POL (07) 207 (Crown Bundle, Tab 25).

<sup>4</sup> Cabinet Policy Committee "Historic Claims of Abuse in State Care" (20 June 2007) POL Min (07) 13/1 (Crown Bundle, Tab 26).

<sup>5</sup> Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (21 May 2008) POL Min (08) 8/2 (Crown Bundle, Tab 35).

<sup>6</sup> Report to Joint Ministers of Justice, Health, Education, Social Development and Employment, and to the Attorney-General *Historic Claims – Update on Review* (15 December 2009) (Crown Bundle, Tab 47).

<sup>7</sup> Letter from Crown Law Office to the Attorney-General regarding Historic Claims: Crown strategy and claims update, 14 January 2011 (Crown Bundle, Tab 53).

- (c) determined that if a claim cannot be resolved by that method then it would be defended in Court.

3.14 To my knowledge, this group has not met since 2009.

***Historic Claims Steering Group.***

3.15 The Historic Claims Steering Group was established in August 2006 shortly after the merger of the Department of Child, Youth and Family Services with the Ministry. The membership included the Deputy Chief Executive and Associate Deputy Chief Executive with responsibility for historic claims, the Chief Social Worker, the Chief Legal Advisor and representatives from the Chief Executive's office, the policy group, legal services and the historic claims team.

3.16 Minutes of group meetings show it was concerned with maintaining an overview of claims, how they were being managed at the time, and providing advice and direction on how they might best be managed for the benefit of claimants and in the context of the wider government claims strategy. Four broad areas of work were of interest to the group:

- (a) understanding the context in which the claims were being made, including oversight of the research into residential care;
- (b) oversight of those claims working through the litigation process;
- (c) considering policy options on non-litigation options including working with other agencies and the inter-departmental working group; and
- (d) ensuring claimants were receiving all the support services they were eligible for.

3.17 The group was relatively short lived and the last minutes recorded are dated December 2006. This Group acted as a predecessor to the historic claims strategy group.

***Historic Claims Strategy Group***

3.18 The Historic Claims Strategy Group was established in 2008. Its members included:

- Associate Deputy Chief Executive Corporate and Governance
- Representative of the Office of the Chief Executive
- General Manager Client Advocacy and Review
- National Manager Historic Claims
- Chief Legal Advisor
- Team Manager Legal CYF Litigation and Historic Claims
- Representative of the Communications team
- Representative of CYF Operations
- A Crown Law representative.

3.19 The background to and purpose of the group was stated in its terms of reference:

*"The Ministry has contributed to the development of a whole of government response to Historic Claims. The overall strategy is to*

*respond to any information, health and welfare needs of those people who allege abuse or neglect or have concerns about their time in State care, and to facilitate early resolution of claims where appropriate...In December 2007 a meeting was held between the Legal Service, the Historic Claims Team and Crown Law to review the management of recent litigation and the overall management of historic claims by the Ministry. That meeting identified a need for a forum where the Ministry could debate the strategic issues involved in the management of this type of claim...The purpose of the Strategy Group is to provide a forum for discussion on the potential strategies to deal with groups of claims and individual claims. The Claims Strategy Group will discuss and approve or make recommendations to the Chief Executive on individual litigation management plans to ensure that Crown Law are able to move forward with clear instructions from the Ministry.”<sup>8</sup>*

- 3.20 In practice the group maintained an overview of all aspects of the historic claims process. While claims were still largely being progressed by litigation, there was a strong view amongst officials – in line with the government strategy – to focus on alternative process for working directly with claimants. That was reflected in a historic claims process document I drafted in June 2008:

*“Having regard to the above principles, the Ministry is increasingly seeking to meet face to face with people who have filed claims. The purpose of the meeting is to:*

- *provide the plaintiff with the opportunity to tell of their experiences to senior Ministry staff*
- *hear from the plaintiff the impact those experiences have had on the plaintiff and their family*
- *hear from the plaintiff what expectations they have of the Ministry to address their claim*
- *identify any existing services or assistance that the plaintiff and/or their family may benefit from receiving*
- *explore what opportunities there may be for resolving their claim*

*The Ministry also encourages people who have not filed claims, or who may be contemplating doing so, to approach us directly to discuss their claim or grievance.*

*The Historic Claims team has responsibility for managing such enquiries and deals with them according to the following process:*

- *Following initial contact by the client, the Historic Claims Team (most often the National Manager Historic Claims) makes telephone (or sometimes written) contact with the client*
- *The purpose of that conversation is to*
  - *get an overview of their claim/grievance*
  - *determine what they would like to achieve from the process*
  - *determine whether or not the client has or requires a copy of their personal files*



- *provide the client with an overview of how their claim/grievance can be dealt with including that they are free to get legal advice at any stage if they wish to*
- *arrange to meet with the client if they wish to do so*
- *answer any questions they may have.*
- *Meet with the client (either by going to them or paying for their travel to Wellington) for the same purposes as above, ie*
  - *to give the client the opportunity to tell of their experiences to senior Ministry staff*
  - *to hear from the client the impact those experiences have had on the plaintiff and their family*
  - *to clarify what expectations they have of the Ministry to address their claim or grievance and how it might be resolved*
  - *to identify any existing services or assistance that the client and/or their family may benefit from receiving.*
- *The claim or grievance is then investigated in a way that essentially mirrors that used for a filed claim, but does not use the resources of Crown Law*
- *The findings of the investigation are reported back to the client, typically through both another face to face meeting and a written response.*

*As for a filed claim, where legal liability is established or a moral obligation is recognised, an appropriate settlement offer will be made along the same lines as for a claim.”<sup>9</sup>*

- 3.21 Minutes of the Strategy Group indicate that a wide range of strategic, policy and individual case issues were carefully considered, including:
- (a) the aim to resolve claims before the courts without the need for judicial settlement conferences;
  - (b) a desire to work with Cooper Legal on agreeing the claims process;
  - (c) the importance of consistency of payment across claims of similar fact;
  - (d) the Ministry meeting the legal aid debts of claimants on discontinuing their claim;
  - (e) the payment of ex gratia/settlement payments to a claimant’s estate if they die before the claim has been finalised;
  - (f) supporting the research into and drafting of profiles of key departmental residences to inform the assessment of claims;
  - (g) confirming there is no requirement for a memorandum of settlement other than where proceedings have been filed (17/4/2012);
  - (h) confirming a review process when a claimant is unhappy with the outcome of their claim (17/10/2012);

<sup>9</sup> Historic Claims – Summary of Claims Process, 25 June 2008. **Crown Bundle - Tab 115**

- (i) consideration of a potential MOU for Cooper Legal to get easier access to Archive files (18/6/2013);
  - (j) confirming that claims should be dealt with in date order and the basis for prioritising claims (18/6/2013);
  - (k) maintaining an overview of the development of the Two Path Approach and endorsement of the Steering Group's decision to implement that approach (21/07/2014);
  - (l) maintaining an overview of the intractable claims process; and
  - (m) the approach to joint MSD/MoE claims (eg, 18/9/2014).
- 3.22 The Strategy Group would also report to the Historic Claims Completion Governance Group.
- 3.23 By mid-2012 the Strategy Group noted that there were some 700 claims pending with a wait time of 18 to 24 months for resolution.<sup>10</sup> The group considered various options to speed up the resolution process including relying on CLAS tapes to assess the claim rather than meeting the claimant (where the claimant was comfortable with that) and asking Cooper Legal to draft letters of offer to set out the basis of their clients' claims rather than meeting with them.
- 3.24 The Strategy Group also endorsed a survey of claimant satisfaction which was subsequently carried out by the research and evaluation unit, and contracted some work to forecast the potential number of future claims and consider options for the faster resolution of claims.
- 3.25 The final minutes of the group are dated December 2014.

#### ***Strategy Governance Group***

- 3.26 The Historic Claims Completion Strategy Governance Group was established in July 2013. Members were:
- (a) Deputy Chief Executive Corporate and Governance, MSD
  - (b) Chief Legal Advisor, MSD
  - (c) General Manager, Client Advocacy and Review, MSD
  - (d) Director, Office of the Chief Executive, MSD
  - (e) Deputy Chief Executive, Risk and Assurance, MSD
  - (f) Deputy Solicitor-General
  - (g) Chief Legal Advisor, Ministry of Education.
- 3.27 *"The goal of the Historic Claims Completion Project is to provide a strategy for significantly reducing the time taken to resolve historic claims at the same time as working to complete all historic claims by 31 December 2020."* A historic claim

<sup>10</sup> Claims Strategy Group Memorandum *Future Directions of CCR*, 8 June 2012. Crown Bundle - Tab 119

was defined as, “...any claim that arises from a person alleging abuse and/or neglect while in the care of the Ministry’s predecessor organisations prior to 31 December 1992.”<sup>11</sup> This date was chosen as it was the date that CLAS worked to.

- 3.28 The project brief identified three objectives of the strategy:
- (a) to clear the current backlog of historic claims;
  - (b) to resolve all historic claims by the end of 2020; and
  - (c) to manage the impact of the closure of the Confidential Listening and Assistance Service (to occur by June 2015).
- 3.29 To that extent the group maintained oversight of the development of the Two Path Approach, the key element in reducing the backlog of claims and thus potentially enabling claims to be closed by 2020. As time progressed however, it became evident that our forecasting of new claims had been significantly underestimated, which compromised the ability to develop a completion strategy.
- 3.30 The 22 October 2015 revised terms of reference for the group reflect that, rather than overseeing MSD’s claims strategy, the group had become more focused on ensuring a common approach across agencies that adhered to the Crown litigation strategy, and on keeping member agencies informed of decisions taken by individual agencies that have an impact on the Crown’s historic claims environment.<sup>12</sup> One means of enhancing a coordinated Crown approach to claims was to invite the Ministry of Health and the Department of Corrections to join the group.
- 3.31 Minutes of meetings over the last two years of the group reflect consideration of a number of issues including updates on the judicial review of the Two Path Approach, updates on tranche 2 of the Two Path Approach, the proposed high tariff offender policy, updates on the Waitangi Tribunal claims, and reporting to the Social Sector Board on Crown approaches to claims.
- 3.32 The final minutes of this Group are dated 2018. My understanding is that the Ministry’s Leadership Team now has governance responsibility for historic claims.

#### **4 Process for collecting information on confirmed and alleged perpetrators**

- 4.1 As noted above, the Commission has asked me to comment on two somewhat overlapping issues:
- (a) the processes and timeframes for collecting, analysing, and sharing information about “known” perpetrators of abuse, both within the Ministry and with other agencies, for use in claims assessment and settlement offers; and

<sup>11</sup> Project Brief for Historic Claims Completion Strategy, 20 August 2013. **Crown Bundle - Tab 120**

<sup>12</sup> Historic Claims Completion Strategy Governance Group Terms of Reference, October 2015.

**Crown Bundle - Tab 121**

- (b) any processes by which information about the outcomes of the Ministry's referrals to Police, such as convictions, were shared between the Ministry and other Crown agencies, for use in claims assessment and settlement offers.
- 4.2 As these two questions both relate to sharing information about alleged perpetrators, I have first set out some general comments on how this type of information impacts on the Ministry's approach towards settlement of claims.
- 4.3 For an allegation of abuse to be accepted for the purpose of settling a claim, it is not (and never has been) a requirement that the alleged perpetrator of abuse must have been charged or convicted. Similarly, the Ministry has never required evidence of abuse by an alleged perpetrator to be documented in official records in order for that allegation to be accepted for the purpose of settlement. Nor did we routinely ask the police for information on the alleged abuser, however if we believed that they may have faced charges or been convicted then we would generally have sought this information.
- 4.4 This does not mean that information on convictions are irrelevant to the consideration and settlement of claims. Confirmation that criminal offending occurred will be relevant when assessing the facts of a claim.
- 4.5 The way in which information about alleged and known perpetrators of abuse has been collected has varied over time depending on the intended purpose. Initially, it was to get some overall sense of what was known and what was documented about abusive behaviour in residences by people who worked in residential care. For example, all available historic files relevant to the administration of residences were examined. My report to the Historic Claims Steering Group dated 28 August 2006 (referred to below) states that these confirmed 16 incidents of abuse or inappropriate behaviour towards residents were by staff, however in most cases we were unable to link these incidents to specific staff.<sup>13</sup> I would expect that other incidents occurred that were not identified and confirmed and or were not documented. When enquiring into individual claims enquiries would be made into specific alleged perpetrators and/or the places where they worked or provided care. Perpetrators might also be identified in the course of responding to information requests under the Privacy or Official Information Acts.
- 4.6 There were no set timeframes for the processing and forwarding of information concerning alleged offenders within the Ministry or externally. However, as much as possible when allegations are made that may concern current staff or caregivers, we make efforts to confirm their identities and take appropriate action as set out below.

#### **How was information gathered**

- 4.7 In 2005 a key function of the embryonic historic claims team was responding to requests made under the Privacy Act for the records of people who had been in state care. Primarily those requests came from the solicitor representing potential claimants. Other requests were made under the Official Information Act for administrative records of varying sorts.

<sup>13</sup> Ministry of Social Development Report to Historic Claims Steering Group *Update on Investigation*, 28 August 2006. **Crown Bundle - Tab 111**

- 4.8 In the process of responding to those requests we:
- (a) collated the names, roles, and dates of employment at various residences since we had not at that stage (and still have been unable to) identified a centralised record of past residential staff; and
  - (b) identified any instances of abuse or maltreatment by Ministry staff or caregivers recorded in Ministry documents (generally records of the institution).
- 4.9 That information was collated in a variety of spreadsheets. The purpose of collecting this information was threefold – to help develop a picture (so far as written records can) of staffing across residences and across years, to identify any instances of abuse and maltreatment of children and young people, and to inform our assessment of claims.
- 4.10 Confirmed perpetrators, or instances where allegations were made and documented but not confirmed one way or the other, were also identified in the course of assessing individual claims. For the purpose of assessment of allegations the Ministry would search personal, staff/HR and administration files. Public information sources such as media reports and the Sensible Sentencing Trust database would be cross-checked. This has occurred consistently over the life of the historic claims team.
- 4.11 Relevant information on alleged perpetrators was filed under the name of the individual concerned for reference purposes.
- 4.12 The Royal Commission has requested that I comment on two specific documents, namely a 28 August 2006 memo to the Historic Claims Steering Group and a 21 September 2017 report to the Minister for Social Development. These are discussed below.

#### **28 August 2006 memo to the Historic Claims Steering Group**

- 4.13 Early in 2006 we received from Cooper Legal a document titled “*Culture of Abuse and Perpetrators of Abuse at Department of Social Welfare Institutions*”.<sup>14</sup> It summarised the claims many of Cooper Legal’s clients made about the nature of the abuse they suffered while placed in a number of state institutions and community-based programmes. The document also identified 235 ex-residential and programme staff members who allegedly abused or maltreated residents.
- 4.14 In response to this paper I drafted a memo to the Historic Claims Steering Group on 28 August 2006 providing a summary of the background investigation work that had been carried out as a result of Cooper Legal’s paper. The Ministry’s responses are detailed below.<sup>15</sup>
- 4.15 Cooper Legal’s paper was very helpful in providing us with an understanding of the experiences some residents had endured and of the issues that we could expect to arise in forthcoming claims.

<sup>14</sup> Also discussed in Simon MacPherson’s brief of evidence from 5.11.

<sup>15</sup> Ministry of Social Development Report to Historic Claims Steering Group *Update on Investigation*, 28 August 2006. **Crown Bundle - Tab 111**

- 4.16 One of the first responses to the document was to identify if any of the named alleged perpetrators were still employed by the Ministry and if so, whether they might present a risk to Ministry clients.
- 4.17 Of the 235 ex-residential staff named by Cooper Legal's clients, nine were identified as current employees of the Ministry and working in varying capacities. A working group representing Historic Claims, Legal Services, Operations, the Chief Social Worker and People and Capability agreed a process by which any potential risk for current clients would be managed, while meeting the Ministry's employment obligations.
- 4.18 That process involved the General Manager Operations (for the then Department of Child, Youth and Family Services) and a senior HR manager meeting with the nine staff members. They were advised of any allegations made against them, that no determination had yet been made about any allegation, that their employment was not in jeopardy (at that stage), and of the support services available to them if needed.
- 4.19 In conjunction with the relevant managers of the staff concerned, an assessment was also made of whether or not any of them presented a potential risk to clients. In one case the staff member was placed on special leave because of the nature of the allegations and because of his position, which placed him in direct contact with children and young people.
- 4.20 To the best of my knowledge, none of those nine were subsequently confirmed by independent means to be perpetrators of abuse.
- 4.21 As well as the Ministry's internal process, it considered referral to the Police in respect of the alleged criminal offending. To that end we met with police officers from National Headquarters in March 2006. As a result of that meeting, Police requested from Cooper Legal the names and contact details of its clients to take complaints for potential investigation of sexual offending and serial physical abuse.
- 4.22 Of particular interest to Police were the nine current Ministry staff. It had been agreed that any criminal investigation needed to proceed prior to any employment investigation, so Police and the Ministry worked with Cooper Legal to obtain the consent of relevant clients to their details being provided to Police. Cooper Legal made efforts to do so where they could, and the relevant information was supplied to Police on 28 April 2006.<sup>16</sup>
- 4.23 Subsequent correspondence between Police and Cooper Legal confirmed that Police would not be following up any matters unless a claimant wished to pursue a criminal complaint. The Ministry received confirmation of that position from Police on 12 May 2006.<sup>17</sup>
- 4.24 On 12<sup>18</sup> and 17 May 2006<sup>19</sup> I wrote to Cooper Legal seeking further details of allegations against the current staff members to enable HR investigations to be

<sup>16</sup> Email from Ministry of Social Development to Police *Historic Allegations*, 28 April 2006. **Crown Bundle - Tab 106**

<sup>17</sup> Letter from Police to Ministry of Social Development *Child Youth and Family Referral of Criminal Matters to Police*, 12 May 2006. **Crown Bundle - Tab 108**

<sup>18</sup> Letter from Garth Young to Cooper Legal *Allegations against current Child, Youth and Family Staff*, 12 May 2006. **Crown Bundle - Tab 107**

carried out. By reply they acknowledged the importance of the investigations but advised they did not have the resources to specifically collate that information and instead undertook to provide it to us as part of their normal work. The Chief Social Worker confirmed (by email to me of 23 May 2006) that in the absence of information linking staff with specific allegations containing dates of offending and who the allegations are made in respect of meant "CYF cannot progress this matter further given lack of information or substance to support the abuse claims."<sup>20</sup>

- 4.25 Cooper Legal and I had contact again early in October 2006 about the possibility of getting further information on eight current staff members. We also had a positive meeting on 13 October 2006 to discuss the same issue, but Cooper Legal raised the same resourcing issues discussed in May. To the best of my recollection the matter went no further, other than the HR process as described above.
- 4.26 Another response by the Ministry to Cooper Legal's document was to commence interviewing a number of staff that were still employed by the Ministry and who had previously worked in residential care to obtain their perspective of the practices and culture that prevailed in the past. This process is covered in more detail in the brief of my colleague Simon MacPherson at paragraphs 5.14 and 5.16.
- 4.27 Cooper Legal's document has been an often-used reference in the years since. As noted above, as we have gathered information about the persons named in it, and other individuals named in claims. That information has been collated in an individual file for ongoing reference.

#### **21 September 2017 report to the Minister for Social Development**

- 4.28 On 21 September 2017 I prepared a report to Minister Tolley.<sup>21</sup> The report was to provide advice on issues that were raised in a story aired by TV3's the Nation concerning allegations against 18 named ex-residential staff members. The journalist in question was particularly interested in whether any of those staff had been transferred from one residence to another as a result of allegations of abuse being made against them.
- 4.29 At the time of preparing my report, one of the persons named by the journalist was not known to the Ministry. All the other 17 were previously known to the Ministry's historic claims team, and payments had been made to claimants in respect of 14 of those. Payments have subsequently been made in respect of two other of the named perpetrators.
- 4.30 The report also noted that contemporaneous complaints of abuse had been made to the Ministry about 13 of the 17 staff members and that Police were advised at the time in six cases – four of those by the Ministry and two by unknown sources. Four faced charges at the time, while a further seven faced charges and were convicted in later years, although convictions for three of those did not relate to employment at Ministry residences.

<sup>19</sup> Letter from Garth Young to Cooper Legal *Allegations against current Child, Youth and Family Staff*, 17 May 2006. **Crown Bundle - Tab 109**

<sup>20</sup> Email from Chief Social Worker to Garth Young, 23 May 2006. **Crown Bundle - Tab 110**

<sup>21</sup> Report to the Minister for Social Development *Claims Update*, 21 September 2017. **Crown Bundle - Tab 124**

- 4.31 The report advised that three of the staff were transferred to another departmental residence after complaints were made. One of those transfers (in 1981) followed allegations of physical assault of a boy; one (in 1972) followed allegations of sexual abuse of girls (the Police were advised, the complainants interviewed, but no charges were laid), and one was transferred in 1979 at the direction of the State Services Commission following charges of improper conduct being laid and heard under the State Services Act. The report noted also that a circa 1982 letter from a DSW staff member to the Human Rights Commission suggested that a fourth of the 17 staff members was transferred following allegations of being in a female resident's bedroom for four hours.

**How was information about alleged offenders shared within the Ministry and with other agencies**

- 4.32 As noted above, information about alleged and confirmed perpetrators was collected within the Ministry's historic claims team in two main ways – a master staff list and files in the name of the individual. The purpose of doing so was to make that available to all team members involved in assessing claims.
- 4.33 The master staff list contains (where known) the date the person was appointed to a position at a particular residence or facility, what allegations have been made against that person and which claims those allegations were made in relation to. Individual files will record any known specific information about that person including links to claims in which they have been named and, where available, a copy of any employment records for them.
- 4.34 Where necessary and relevant, for example if a claim contained an allegation of abuse against a current staff member, then that was shared with appropriate staff outside of the historic claims team and, since April 2017, that information has been shared with Oranga Tamariki.

**Referral to other agencies**

- 4.35 In all cases where a claimant alleges abuse against a named staff member or caregiver, a safety check is carried out to determine if that person is a current staff member or caregiver of the Ministry or of Oranga Tamariki.
- 4.36 Where it is confirmed or suspected that the alleged abuser is a current staff member or caregiver, then the matter is escalated to me in my capacity as Lead Claims Advisor for review. I review the available information and decide whether or not a referral should be made to Oranga Tamariki or the relevant section of the Ministry, having regard to court orders and privacy considerations.
- 4.37 Those Oranga Tamariki or Ministry staff with responsibility for making inquiries into that individual will decide whether a referral should be made to Police.
- 4.38 Where allegations of abuse are made against a staff member or caregiver of an operating NGO, then two processes follow – within the context of any relevant court orders and privacy considerations:
- (a) For potential safety purposes the Ministry will advise the NGO of the allegation so it can determine if there are any current safety concerns that need to be addressed.



- (b) In the process of assessing the claim, the Ministry will consult with the NGO to determine what information it might hold that is of relevance to the assessment of the claim.
- 4.39 Where claimants who have approached the Ministry directly allege potential criminal offending, they are advised of their ability to lay a complaint with Police, and would be offered assistance and support to do so if that was their choice.

## 5 Outcomes from Police referrals

### MSD Police referral process prior to 2016

- 5.1 Prior to the 2016 Police referral agreement, discussed below, there was no systematic process for referring allegations of sexual or physical abuse to the Police.<sup>22</sup> Where a claimant wanted an alleged offender held accountable, they were advised they could lay a complaint with Police and were offered assistance and support in doing so. As a result of claimants laying a complaint with the Police, either of their own initiative or at the suggestion of the Ministry, I am aware that some ex staff members and caregivers were charged and convicted of offences. The Ministry has assisted the Police by providing any records of relevance during the course of their investigations and in the course of court hearings.
- 5.2 Many claimants elect not to make a complaint. This may be due to a complaint having been previously laid, or the claimant not wishing to involve Police.<sup>23</sup>
- 5.3 In 2015 work began within MSD to design a process to refer allegations of possible criminal behaviour to Police. An internal MSD workshop was held and Police officials were consulted.<sup>24</sup> Along with my then manager and other colleagues I was part of those discussions in my capacity as Chief Analyst for historic claims. Police were of the view that to advance an investigation without consent may retraumatise and distress a complainant.<sup>25</sup> In the consultation Police indicated that in certain circumstances they may be prepared to meet with a claimant and encourage them to make a complaint.<sup>26</sup> This was particularly the case where there was a possibility of continued offending by the alleged perpetrator.<sup>27</sup>

### 2016 letter of agreement between MSD and the Police

- 5.4 On 18 May 2016 a letter of agreement (LOA) was signed between the New Zealand Police and the Claims Resolution Team.<sup>28</sup> The LOA sought to develop a process in relation to historic abuse claims for the purpose of Police completing an assessment and investigation of allegations.<sup>29</sup> The LOA outlined a two stage

<sup>22</sup> Affidavit of Garth Young in *J v Attorney-General* (CIV-2019-485-662), 20 September 2017.

<sup>23</sup> Ibid. **Crown Bundle - Tab 123**

<sup>24</sup> Ibid.

<sup>25</sup> Ibid at [8].

<sup>26</sup> Ibid at [9].

<sup>27</sup> Ibid.

<sup>28</sup> Letter of Agreement between Ministry of Social Development and Police, 18 May 2016.

<sup>29</sup> Ibid. **Crown Bundle - Tab 122**

process whereby MSD would provide information to Police which Police then assess and request any further information from the Ministry.<sup>30</sup>

- 5.5 The referral process changed slightly from that set out in the LOA. In practice it involved the following steps:
- (a) The Ministry provided to Police a spreadsheet which contained brief details of allegations of sexual and physical abuse, the claimant and the alleged offender. The claimant was not advised of the referral.
  - (b) Once Police assessed that information, they requested further information about any allegations they identified as requiring further enquiry.
  - (c) The Ministry searched readily available records for information as requested and provided it to Police.
  - (d) In those cases where Police determined that further action was required on their part, they asked the Ministry to contact the relevant claimant and complete a Police Information Sheet.
  - (e) The Ministry then contacted the claimant to discuss the referral and either assisted them to complete the form or did so on their behalf and then referred it to Police.
  - (f) In those cases where the Ministry knew that the claimant did not want any contact with Police then the form was completed but it was noted for Police that the claimant did not want to be contacted by them.
- 5.6 The spreadsheet referred to Police contained the name and date of birth of the claimant, their contact details (for those who were legally represented that was their lawyer's details), the name and date of birth of the alleged offender (where known), the relationship of the alleged offender to the victim, the location of the alleged abuse, the nature and date of the alleged offence, whether or not a statement of claim was available, and the date MSD had been advised of the alleged offence. Between 18 May 2016 and 26 July 2017, 413 alleged offences were referred to the Police. That included multiple offences and alleged offenders for the same victim.<sup>31</sup>
- 5.7 For Cooper Legal clients, address details provided to the Police were those of Cooper Legal. If Police wanted to investigate further an allegation by a client of Cooper Legal, MSD would contact Cooper Legal to ask whether the client wished the Police to follow up the allegation. This occurred on six occasions during the period the LOA was in place and prior to the High Court action taken on this matter.

<sup>30</sup> Ibid. **Crown Bundle - Tab 122**

<sup>31</sup> Ministry of Social Development *Police Referrals Spreadsheet May 2016 – June 2017*. Almost all information in this document is highly sensitive and as such I have not included it in the documents attached to my brief of evidence.

### Commencing a process to refer allegations of sexual and physical offending to Police

- 5.8 After the LOA was signed, MSD wished to commence a process to refer allegations of physical and sexual abuse from closed claims to Police. It was MSD's intention to refer allegations progressively over time, however it is my understanding that no referrals were made, although allegations were collated in preparation for referral.<sup>32</sup>

### Court Action

- 5.9 In a case management conference in 2017 Cooper Legal raised an objection to MSD referring claims of alleged criminal offending to the Police. An interim order was made in the Wellington High Court halting MSD's referral process pending a hearing.<sup>33</sup>
- 5.10 I provided an affidavit on the matter to the High Court on 20 September 2017.<sup>34</sup> In this affidavit I outlined the LOA between MSD and how referrals to Police were handled and had evolved since the LOA.
- 5.11 On 7 June 2018 the High Court issued a decision that restricted MSD from providing material received in the course of litigation to third parties, except for in particular circumstances.<sup>35</sup> This is discussed further in the brief of Una Jagose QC. The Crown appealed against that decision.
- 5.12 The appeal was heard in the Court of Appeal on 3 April 2019. In October 2019 the Court dismissed the appeal and upheld the decision of the High Court.<sup>36</sup>

### Revised Police referral process and current practice

- 5.13 After the High Court interim order in 2017, the Ministry began considering whether changes needed to be made to update the police referral policy. In the meantime, referrals were put on hold, the only exception being where a claimant asked us to make a referral on their behalf. I and my colleagues worked with Police to explore what a referral process could look like, with two significant considerations being the need for any information provided to Police to be as helpful as possible for the prevention or prosecution of offences while ensuring it did not unduly breach an individual's privacy.
- 5.14 Those discussions continued during 2018 and a revised referral process was drafted which the Police needed to consider further. My active involvement in discussions on the process did not continue beyond early 2019. I understand that over the past year there have been further discussions between MSD, the Police and Oranga Tamariki but that a referral process has not yet been confirmed.
- 5.15 As noted by Simon MacPherson at 12.8 of his witness brief, current practice for referring allegations to Police is that referrals are only made with the claimant's

<sup>32</sup> Affidavit of Garth Young in *J v Attorney-General* (CIV-2019-485-662), 20 September 2017, at [26]. **Crown Bundle - Tab 123**

<sup>33</sup> *J v Attorney-General* [2018] 1331 (7 June 2018), at [3]-[4] (Crown Bundle, Tab 84).

<sup>34</sup> Affidavit of Garth Young in *J v Attorney-General* (CIV-2019-485-662), 20 September 2017.

<sup>35</sup> *J v Attorney-General* [2018] 1331 (7 June 2018), at [8] (Crown Bundle, Tab 84).

<sup>36</sup> *Attorney-General v J* [2019] NZCA (16 October 2019) (Crown Bundle, Tab 94).

consent. Other than one or two cases where a claimant has asked us to refer a matter to the Police I am not aware of any further referrals that have been made.

#### **Outcomes from Police and incorporation into the assessment and settlement process**

- 5.16 In cases where the Ministry did make a referral to Police, we did not necessarily receive any feedback from Police or claimants as to the outcome of the referral. As I have said earlier, the assessment of a claim was not reliant on such feedback. However, where Police commenced an investigation then it was common for them to request any potentially relevant further information from us. It was my practice to ask Police to keep us informed of the outcome of any investigation and prosecution, and they did so in a number of cases. I have assisted the court as a witness in two cases leading to the conviction of an ex-staff member and an ex-caregiver.
- 5.17 If we did receive information about a staff member, whether it was via the Police or another source, our practice was to record that in their EDRMS record. When assessing an allegation against a named individual for whom the Ministry might have been responsible, various information sources were drawn from to inform that assessment. Those include staff and caregiver files, EDRMS records (as mentioned above), other claims that included allegations about the same person, and publicly available sources such as media reports. Any relevant information would be taken into consideration in the assessment of that allegation. It is perhaps self-evident, but by way of example, where a claimant alleges sexual assault by a named person and that person has convictions for sexual offences then those convictions are clearly relevant and would be taken into account.

## **6 The roles and responsibilities between the Ministry and Crown Law for the use of and scope of use of private investigators in the *White* and other cases**

- 6.1 Through my involvement in preparing for the *White* claims to go to trial, I was aware that a private investigator was engaged to assist. I have no specific recall of how that decision was made or by whom, but I was aware that the Queen's Counsel representing the Crown had engaged him previously and that she believed he would be useful.
- 6.2 My understanding was that the investigator was used in locating some Crown witnesses but that primarily he assisted in briefing various Crown witnesses. Along with Crown Counsel I attended some of those briefings to provide expert advice on any practice issues that arose and to advise the witness of any supports that they may require.
- 6.3 I was aware that the private investigator contacted the mother of the plaintiffs to determine if she could be a potential witness and that she had told him that she did not want to speak with him or engage with the Crown. That was not pursued any further.
- 6.4 I do not recall at any stage there being discussion about the possibility of the private investigator carrying out surveillance activities. In the course of the

Ministry identifying relevant documents for the State Services Commission investigation into the use of external security consultants, I became aware of a note from a January 2007 meeting on this subject (discussed in Una Jagose QC's brief of evidence). I was not present at that meeting.

- 6.5 I myself on a very few occasions sought the assistance of a private investigation firm to locate people relevant to the assessment of a historic claim. The two that I recall are:
- (a) seeking the assistance of an investigator to confirm that an alleged offender in Keith Wiffin's claim (referred to below) lived at a particular address; and
  - (b) when a claimant asked for our assistance to locate her long estranged sister. When we were unsuccessful at finding her, I sought the assistance of a private investigator.

## 7 Mr Keith Wiffin's Claim

- 7.1 First, I want to acknowledge the trauma Mr Wiffin has endured, not only due to the abuse he suffered whilst in state care, but also through the process of having his claim recognised. He has shown resilience, courage and fortitude in pursuing his claim – something that he should not have had to do. If there is any one claim that troubles me, it is his. For that I once again apologise to Mr Wiffin.
- 7.2 I note at Section 4 of her Reply Brief of Evidence, Ms Hrstich-Meyer comments on a number of issues Mr Wiffin raises in his statement including his frustration at the settlement process. The following is my perspective and understanding of the Ministry's management of his claim.
- 7.3 I first met Mr Wiffin on 7 September 2006 along with his solicitor, Ms Cooper. The aim of the meeting, and similar meetings with a small number of other Cooper Legal clients, was to get a personal understanding of the experience he had whilst in state care and to hear his thoughts on what a claim resolution process should include. The views of Mr Wiffin and others genuinely contributed to the process that ultimately eventuated. It disturbs, but does not entirely surprise me, to read in Mr Wiffin's statement his perspective of that meeting.
- 7.4 Following that meeting I wrote to Mr Wiffin on 11 September enclosing for him a copy of the Residential Care Services Code of Conduct and *Puao-te-ata-tu*.
- 7.5 The 8 November 2007 Official Information Act request from Cooper Legal (transferred to the Ministry by Crown Law) asks for "staff records and any other information MSD holds about the staff members". I replied on 20 February 2008.<sup>37</sup> In respect of Mr Moncrieff-Wright I stated that

*"the Ministry holds 1 staff file and 2 staff cards noting dates of employment for Mr Moncrieff-Wright. There is nothing contained in the file that relates to [name of another client] or Mr Wiffin. Nor is there any information relating to any allegations of physical or sexual abuse against Mr Moncrieff-Wright."*

<sup>37</sup> Letter from Garth Young to Cooper Legal *Re: Staff Information – Official Information Act Request*, 20 February 2008 (Keith Wiffin Bundle, Tab 7). WITN0080012

- 7.6 The Ministry certainly was aware of the offences committed by Mr Moncrieff-Wright prior to that date. I accept that it may appear as though I or the Ministry was not wanting to disclose that fact, but that was certainly not my intention.
- 7.7 On 14 May 2008 Mr Wiffin's solicitor contacted me to say that he wanted the opportunity to meet with us to try and resolve his claim.<sup>38</sup> A meeting was arranged and took place on 24 July 2008. The following day I wrote to Mr Wiffin thanking him for the opportunity to meet and acknowledging that it could not have been easy.<sup>39</sup> I also invited him to contact me if he wanted to take up the opportunity to visit Epuni and talk with my colleagues about the current care system.<sup>40</sup> I advised also that we would respond to him once his claim had been assessed. As Mr Wiffin said in his brief of evidence, he wrote to me on 4 August 2008<sup>41</sup> and I responded with a further letter on 7 August 2008 acknowledging receipt.<sup>42</sup>
- 7.8 It was not until 2 February 2009 that I allocated Mr Wiffin's claim to one of the teams senior social work advisors for assessment. I noted in my allocation email that I had overlooked the need to continue investigating this claim earlier and that I was angry with myself for having done so since that was his expectation, and because it felt as though some goodwill had built up between us.<sup>43</sup>
- 7.9 It is my recollection that, based on Mr Wiffin's account, our then knowledge of Mr Moncrieff-Wright and other available relevant information, the senior advisor formed the view that the abuse by Mr Moncrieff-Wright was likely to have occurred as described by Mr Wiffin.
- 7.10 I recall joint discussions with Crown Law on how the claim might be resolved, culminating in the settlement offer from Crown Law to Mr Wiffin of 9 April 2009.
- 7.11 Mr Wiffin contacted me by phone on 22 April 2009. He was concerned that no progress had been made with his claim and in response to my question, said that he had not been in touch with his solicitors for two weeks but was meeting with them shortly. He also said that he still wanted to visit Epuni and have some support to work through his files but was not able to do that at present. I assured him the offer to do both remained open whatever the outcome of his claims, and however long it may take for him to be ready to deal with that.
- 7.12 It was clear from Cooper Legal's 13 May 2009 response to letter from Crown Law of 9 April 2009 that Mr Wiffin was deeply hurt and unhappy about the letter and for personal reasons was not able to continue his claim.<sup>44</sup>
- 7.13 As has been noted in my colleague's brief, in September 2009 the Crown asked Sir Rodney Gallen to review the process by which a number of claims had been managed by the Ministry, one of which was Mr Wiffin's. While he had no criticism of the approach the investigators took in endeavouring to resolve the

<sup>38</sup> Email from Cooper Legal to Garth Young *RE: ADR Meeting – Keith Wiffin CIV 2006-485-668*, 14 May 2008. **Crown Bundle - Tab 114**

<sup>39</sup> Letter from Garth Young to Keith Wiffin, 25 July 2008 (Keith Wiffin Bundle, Tab 9). **WITN0080014**

<sup>40</sup> Ibid.

<sup>41</sup> Letter from Keith Wiffin to Garth Young, 4 August 2008 (Keith Wiffin Bundle, Tab 10). **WITN0080015**

<sup>42</sup> Letter from Garth Young to Keith Wiffin, 7 August 2008. **Crown Bundle - Tab 116**

<sup>43</sup> Email from Garth Young *Keith Wiffin*, 2 February 2009. **Crown Bundle - Tab 117**

<sup>44</sup> Letter from Cooper Legal to Crown Law *Keith Vernon Wiffin: Response to settlement offer*, 13 May 2009 (Keith Wiffin Bundle, Tab 18). **WITN0080023**

claim, he noted *"It follows that I have some reservations about the outcome of this claim."*<sup>45</sup> As reflected in my 4 December 2009 summary of Sir Rodney's report for the Deputy Chief Executive, that gave us cause to review Mr Wiffin's claim and ultimately to offering him an ex gratia payment and letters of apology from the Chief Executive and from me.<sup>46</sup>

- 7.14 I note at paragraph 45 of Mr Wiffin's statement his suspicion that Mr Moncrieff-Wright may have abused children while working at Hamilton Boys Home and was moved to Epuni Boys Home in the full knowledge of his offending and without due care for potential victims. The records for Mr Moncrieff-Wright confirm that he worked at Hamilton Boys Home for 18 months immediately prior to commencing at Epuni. The same records do not contain any mention of alleged offending while at Hamilton. That does not of course mean that Mr Moncrieff-Wright did not offend against children at Hamilton, but simply that the records do not indicate the reason that he moved.
- 7.15 I wish to add, and this should in no way be seen as a defence for our management of Mr Wiffin's claim, I would be concerned if the Commission was of the view that Mr Wiffin's claim was representative of the way in which many claims have been resolved over subsequent years. I will further reflect on this in my closing remarks.

## **8 Changes made to MSD policies or processes, if any, following the Crown Law and MSD workshop of 21 November 2007**

- 8.1 The records show that a workshop with the Ministry and Crown Law was held on 21 November 2007. The stated overall purpose of the workshop was *"To enhance the effectiveness of the working relationship between MSD and CLO with respect to the management and resolution of historical abuse claims."*<sup>47</sup>
- 8.2 Unfortunately, I have no particular recollection of the workshop or any outcomes from it. From my perspective, there was generally good and honest communication between us and Crown Law, although that is not to say that there may not have been disagreements or differences between agencies from time to time.
- 8.3 I always saw a positive working relationship between Crown Law and the Ministry when working collectively on such cases as the *White* claims. I note from a written record of the meeting that some of the workshop discussion about those claims was the significant resources that were required and the extent to which they could be optimised in future cases.
- 8.4 I was subsequently involved in a small number of other claims that were being prepared in advance of trial (but were settled beforehand) and felt that we worked collectively in a coordinated, planned and collegial way.

<sup>45</sup> Sir Rodney Gallen *Assessment of MSD Processes on Historic Claims* 27 November 2009 (Crown Bundle, Tab 46) at [130].

<sup>46</sup> Garth Young Report to DCE *Sir Rodney Gallen Report – Historic Claims*, 4 December 2009.

<sup>47</sup> Ministry of Social Development and Crown Law Historical Abuse Claims Workshop Abstract, 21 November 2007. **Crown Bundle - Tab 112**

## 9 Support of claimants and “wellness” payments

- 9.1 From the early days of the claims process it has been acknowledged that many claimants may benefit from various types of support and assistance whether to enable them to cope with the process of bringing a claim, to deal with past and present issues, or both.
- 9.2 In general terms, such non-monetary supports were provided in one or both of two circumstances. The first, and most common, was the payment of a limited number of sessions for the claimant to receive professional counselling/support to assist them through the claims process. Where longer term support may be necessary to address longer standing issues, then in addition to any support the Historic Claims team could provide, the claimant may be referred to an existing service provider. The second circumstance is the provision of counselling and/or services as part of the package to resolve a claim.
- 9.3 Non-monetary support has also been discussed by Linda Hrstich-Meyer at 3.17 and 3.18 of her brief. Any support, financial or otherwise, that the Ministry provided to a claimant did not mean that they could not access whatever supports and services might have been available to them from other agencies including ACC. Where a claimant might have qualified for ACC and had a need for counselling beyond what the Ministry could provide, then they would be encouraged to make a sensitive claim to ACC and the Ministry would support and assist them to do so. As Linda Hrstich-Meyer’s brief explains at 3.9, a claimant who has received an ACC payment in relation to sexual abuse is not precluded from registering a claim with the Ministry as the agencies have different functions and address different claimant needs.
- 9.4 We have no centralised collation of the number of claimants who have been offered these types of supports. Our financial records show that we paid \$105,686 for counselling over the 2006 to 2019 period. A greater amount will have been approved (\$182,109 for the 2014 to 2019 period for example) but some claimants choose not to take it up – or they may choose to take it up at a later date. A further \$46,532 was spent to provide a range of other support services to claimants.

### “Wellness” payments

- 9.5 The concept of wellness payments was developed as part of the whole of government response to the historic claims filed in the Courts. A wellness payment may have been made where there was no basis on which to make a settlement payment to a claimant, but was a means of enabling the claimant to receive some helpful services or be reimbursed for services for which they had already paid.
- 9.6 Over January and February 2010, joint ministers agreed to a proposal that:<sup>48</sup>

*“...the Crown make a one-off offer to claimants who wish to discontinue their claim, without judgement of that claim, of: Crown reimbursement up to a fixed amount of a plaintiff’s actual incurred costs from their*

<sup>48</sup> Report to Joint Ministers of Justice, Health, Education, Social Development and Employment, and to the Attorney-General *Historic Claims – Update on Review* (15 December 2009) (Crown Bundle, Tab 47).



*efforts to restore their wellbeing. For example, reimbursement for the costs of counselling, anger management, drug and alcohol related services, or tattoo removal could be included (and) settlement of a person's legal aid costs to ensure that the person faced no outstanding debt or charge to the Legal Services Agency."*

- 9.7 This applied to claims where it was determined that there was no basis for the making of a settlement payment, but would allow the claimant to exit the litigation process without debt and with some level of support.
- 9.8 In addition to these wellness payments, some settlement offers to claimants (both those legally represented and those who approached the Ministry directly) included the payment for some professional counselling supports or services.
- 9.9 In reality a small number of wellness payments were made relative to the total number of claims resolved.
- 9.10 Our available records do not reveal any clear rationale for why the wellness payments were stopped. My recollection is that there were various opinions about the circumstances in which they could be made, potentially leading to inconsistencies. A paper setting out the parameters for the payment of services to claimants was drafted in April 2016, but there is no record that it advanced beyond a draft. To my knowledge no wellness payments have been made in recent years. Of course, while wellness payments have not continued, settlement and ex gratia payments have, as has Historic Claims' funding of counselling and other relevant support services for claimants.

## **10 High Tariff Offenders**

- 10.1 In section 10 of his brief of evidence, Simon MacPherson sets out a summary of some policy considerations for how settlement payments might be made to those claimants identified as high tariff offenders.
- 10.2 Consideration of this issue was prompted by the then Minister for Social Development and Employment receiving a letter from the family of a homicide victim expressing concern at the possibility the convicted offender may receive a compensation payment as a result of an historic abuse claim. I was involved in discussions between the Ministry and Crown Law on this issue.
- 10.3 It was recognised that this issue was not straightforward. In discussions that I was involved in around the development of this policy, the Ministry's perspective was that there was no principled basis on which to treat high tariff offenders differently than other claimants. It was recognised that the fact they are serious offenders could suggest that the damage caused by their experiences in care was more significant, and that the basis for payment is moral – ie settlement payments are about what happened to the claimant while in care, not what the claimant has gone on to do afterwards.
- 10.4 Some of the difficulties, challenges and conflicts that this issue presented are I think exemplified by the fact that despite consideration of various options, reports to Minister's and policy rework, no agreement was reached in the years since the April 2013 Strategy Group meeting. At one point it was proposed to the Minister that no further work be done on the issue, meaning that payments

would be made to high tariff offenders in the same way as any claimant. That was not agreed.<sup>49</sup>

- 10.5 What was never in question was the Ministry's intent to assess the claims made by high tariff offenders in the same way as all other claimants. What may have been different was the way in which those payments were to be applied had government introduced relevant legislation.
- 10.6 As noted by Mr MacPherson, in December 2017 the Government decided not to introduce legislation that would have allowed settlement payments made to this group of claimants to be managed in some way. Shortly thereafter, settlement offers began to be made to this group. At no stage was the proposed policy for high tariff offenders implemented by the Ministry, although assessments for high tariff offenders were largely not processed while the policy was being developed.

## 11 Concluding comments

- 11.1 Preparing this brief has provided an opportunity to reflect on the past 15 years and on my personal involvement with historic claims over that time.
- 11.2 The first comment I want to make is that it has been a privilege to be part of this work. The extent to which survivors have graciously and courageously opened up to us about their most private and harmful experiences has never ceased to amaze me and my colleagues. An equal privilege has been to see the difference that listening, believing, acknowledging and apologising can make to the mana and the lives of many survivors. We have been witness to many emotionally powerful moments.
- 11.3 In saying that, I am also aware that we have not always got it right and for some survivors we have fallen far short of their expectations.

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<sup>49</sup> Ministry of Social Development *Decision sought on future of work on compensation payments due to serious offenders* (Report to Ministers for Social Development and Corrections, 15 December 2017), at [9] (Crown Bundle, Tab 82).

11.4 This work has also provided an opportunity to view social work and state care practice over many decades – the good, the bad and the ugly. Many good people have worked in the field and numerous efforts have been made over the years to innovate and enhance practice. But hidden in that are the experiences of abuse survivors – those who have been let down so badly by the system. We should all be grateful that survivors and their advocates have begun to shine a light on those experiences and to hold those who need to be, accountable. I appreciate the opportunity to provide this evidence to the Royal Commission.

Date: 31/07/2020.

**GRO-C**

Ernest Garth Young