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

# Reply Brief of Evidence of Helen Hurst for the Ministry of Education – Redress

**13 March 2020**

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# Reply Brief of Evidence of Helen Hurst for the Ministry of Education – Redress

## 1 Introduction

1.1 Tēnā koutou katoa. My name is Helen Hurst. I am the Associate Deputy Secretary, Operational Delivery in the Ministry of Education's Sector Enablement and Support Group.

## 2 Overview

2.1 On 27 January 2020, I provided the Royal Commission with a brief of evidence on behalf of the Ministry.

2.2 Since then, briefs of evidence that discuss matters relevant to the Ministry have been lodged with the Royal Commission by:

(a) Cooper Legal (chapter 6 refers);

(b) Kerry Johnson;[1]

(c) James Packer; and

(d) Chassy Duncan.

2.3 In this brief, I will provide the Royal Commission with further information and general comments in relation to some of the themes that have come out of the abovementioned briefs of evidence rather than discussing at a granular level. I continue to rely on my primary brief of evidence which is relevant to the issues raised.

2.4 This brief will provide some further comment on our claims process, issues with the limitation agreement and some of the matters raised in the survivor briefs.

2.5 As stated in my primary brief, the Ministry's mandate to resolve abuse claims is derived from the legal framework and the Cabinet approved Crown Litigation Strategy. We have drawn from the principles set out in the Crown Litigation Strategy to develop and respond to historic abuse claims outside the court process. The claims resolution process developed in 2010 was modelled on MSD's process in an effort to achieve greater consistency in approach.

2.6 As this work has grown and progressed we have sought to make improvements whenever we can and will continue to do so in a manner that is reasonable and in good faith. For example, we have expanded the scope of claims investigated under our process to include schools closed after 1993 and we have increased resourcing within our Sensitive Claims team.

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[1] Cooper Legal Pseudonym adopted as name subject to a s15 order

## 3 Issues that have impacted on our claims process

3.1 I have focussed my comments in this section on addressing in particular Cooper Legal's statement in paragraph 677 of their brief that:

> *The redress scheme run by MOE is characterised by legal and factual complexity, changing legal positions, a lack of transparency, intergovernmental conflict and enormous delay.*

### Legal framework of the Education Sector

3.2 I agree with Cooper Legal's above comment that the legal and factual landscape of the education sector is complex. I provided an overview of this in Chapter 3 of my primary brief. It is correct that for example there was an instance where a targeted discovery was necessary and further factual information was required to determine who the appropriate respondent was for claims about Kelston Deaf Education Centre (an open school). This issue arose after a claimant represented by Cooper Legal filed a claim against both the Ministry and the school's Board. This example demonstrates some of the complexity around the Ministry's liability.

3.3 Paragraph 695 of Cooper Legal's brief states that a school Board of Trustees is effectively an agent of the Crown and therefore the Ministry has standing to respond to claims about open schools post-1989. It is inaccurate to describe a school board in this manner. As Cooper Legal have noted in the preceding paragraph, post 1989 schools are governed by Boards of Trustees. A board is a separate legal entity[2] and is able to seek independent legal advice on all matters of legal liability, as well as have insurance cover and make its own decisions about the settlement of court proceedings.

3.4 To an extent, this factual and legal complexity has also had a bearing on why claims concerning the Ministry were filed with MSD instead of the Ministry prior to 2015. I have discussed joint claims in my primary brief at paragraphs 5.39 to 5.41 and further refer to them briefly below.

### Further comments about issues raised with our assessment claims process

3.5 A number of issues have impacted on the Ministry's ability to assess and respond to claims and the timeframes for response.

3.6 The Ministry's assessment process requires sufficient factual information, an understanding of that information, and ability to weigh complex and at times competing information to make informed judgements that are robust.

3.7 The challenge and cause of tension is how the Ministry applies this in individual cases and in particular, how it often has to manage claimant expectations of having their claims accepted at face value or of receiving higher settlement offers.

3.8 The historical nature of these claims adds further complications as there are gaps in institutional records, there are often no witnesses or they are hard to find or their recollections are sketchy.

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[2] Schedule 6(2)(a) of the Education Act 1989.

3.9 The Ministry responds to these challenges by locating and providing as much information as possible to the claimant, by carefully explaining its process of assessment, listening to and taking account of what the claimant says, explaining its findings on the basis of the information available (including what the claimant has said) and basis for settlement. If appropriate, following the provision of additional information, the Ministry would also be willing to review a decision.

3.10 Gathering all the relevant information to support the findings can take time. If claims are filed against the wrong defendant, this can also add to the timeframes for responding to claims. The Ministry may not have information about a claim, and even where it does, may not have standing to respond to the claim where the claim has been filed with MSD, except with the consent of the parties to the claim.

3.11 Individual assessments are resource intensive and also take time, and this has increased as the number and complexity of claims has increased in recent years.[3] The time taken to complete the assessments is in part a reflection of the Ministry seeking to provide the claimant with a non-threatening mechanism for addressing their concerns and understanding the information held by the Ministry about their time at the educational facility.

3.12 Cooper Legal have also described the Ministry as routinely offering the same amount of compensation to multiple claimants.[4] Where multiple claims are effectively about the same issues, the claims may be considered together and the assessment is likely to result in similar settlement offers unless there is specific information available particular to a claim that warrants a different outcome.

3.13 Concluding this section then, I agree with Cooper Legal's description that redress relating to abuse in the care of the Ministry is legally and factually complex. The sources of that complexity include the legal environment the Ministry operates in and the challenges associated with resolving allegations of abuse that are often historical and often have limited corroborating information.

3.14 I accept that claims have taken longer to resolve than is desirable for both the claimants and the Ministry. The time taken is, however, a reflection of the complexity of these claims and, more recently, the relatively sudden increase in the volume of claims received. I consider the Ministry has acted in good faith by providing an assessment process, as an alternative to claimants having to pursue claims through Court, that is non-adversarial, voluntary, accessible, allows for face to face interaction, and with costs that are met by the state.

**Limitation Policy**

3.15 Paragraphs 4.27 – 4.29 of my primary brief provide comments about our attempts to achieve a Limitation Agreement with Cooper Legal.

3.16 Despite considerable work, no agreement has been reached as these discussions raised further issues that require wider consultation including:

(a) whether the scope of any agreement should be extended to cover claims that should be properly directed to Boards of Trustees; and

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3 Discussed in my primary brief from paragraph 4.8.

4 At paragraph 680.

(b) potential flow on effects from MSD's Limitation Agreement.

3.17 It became clear that consultation with MSD and Crown Law was required to work through these issues and ensure a consistent approach in keeping with the Crown's overall approach to limitation defences. The development of a cross-ministry policy on limitations is referred to at paragraph 12.5 of the primary brief of evidence of Una Jagose for the Crown Law Office.

## 4 Management of joint claims

4.1 As discussed above, there are several matters that impact on the length of time it takes to resolve claims. Delay is also sometimes associated with claims involving multiple agencies.

4.2 Until a claim is filed or redirected to the Ministry with the consent of the claimant, the Ministry is unable to respond to the claim (as discussed further below).

4.3 The Ministry has worked with MSD to resolve a number of joint claims. As the resolution of these claims requires some sharing of information this process must also take into account any privacy or legal constraints such as the Court Directions issued in late 2017 preventing referral of material in court files to third parties without leave or the claimant's consent.

## 5 Survivor Evidence

5.1 The Ministry value's the evidence provided by survivors to the Royal Commission about their experiences of its claims process. We accept that there have been delays in the process that can be frustrating for claimants. We are endeavouring to take steps to address this (as I explain below in relation to the current review of the claims process).

5.2 I respond below to some points in the survivor briefs with a view to providing further useful information for the Commission.

**Kerry Johnson and Chassy Duncan**

5.3 Cooper Legal state in paragraph 756 of their brief that they *"have always been clear that a plaintiff is entitled to elect their defendant and if their claim was to be discussed with another Ministry, there had to be transparency around that."*

5.4 Kerry Johnson and Chassy Duncan both provide examples of the process when a claim is first made against another agency and later with the Ministry. Both of their claims were initially lodged with MSD. The Ministry of Education components of these claims were redirected to the Ministry at a later date.

5.5 In the case of Mr Johnson, he explains in his brief that he first lodged a claim against MSD, including details about his time at Campbell Park School, in 2008.[5] The claim against the Ministry was lodged much later, in November 2018.[6]

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5 At paragraph 26.

6 At paragraph 57.

5.6 I understand that Mr Duncan's claim against MSD will be discussed in the reply brief of Linda Hrstich-Meyer. A separate claim was lodged by Mr Duncan with the Ministry in September 2014.

5.7 Mr Duncan's claim against the Ministry was substantially amended in August 2018. Much has happened with this claim since then. The claim has been filed and amended, and discovery has been completed. Mr Duncan rejected the Fast Track offer made in 2018 to settle his entire claim (including complaints about Waimokoia). A meeting with our assessor was held in October 2019 and we are actively working to provide our response to the claim.

5.8 In the case of both Kerry Johnson and Mr Duncan, it is only when the claims are transferred to the Ministry that its own claim assessment process will be engaged.

**James Packer**

5.9 On 21 February 2020 we provided the Royal Commission with all of the relevant background documentation it holds about Mr Packer's claim. Below I make some comments about this claim.

5.10 When the issue of potential Kelston claims being lodged with us arose in 2013, we met with Cooper Legal and explained our claims process to them. Cooper Legal and Mr Packer have referred to this in their briefs.

5.11 Mr Packer's full claim was subsequently lodged with the Ministry in 2014 by letter of offer and filed in court in 2015. The claim was assessed in 2016 and we provided our offer of settlement later that year.

5.12 We have not met with Mr Packer at the request of his lawyer. We understand Mr Packer is severely autistic, hence all communications have been through his lawyer and his mother, Cheryl Munro.

5.13 We completed a detailed assessment based on all available information, which included documentation from the school. The reasons for our findings were set out in a letter of offer sent via Crown Law.

5.14 Mr Packer has raised the independence of our process in paragraph 6.6 of his evidence. We acknowledge that our investigations are not carried out by an independent agency but we do not agree that the Ministry is interested in "protecting its conduct and reputation, and those of teachers" at the expense of claimants.

5.15 In this case the allegations against the teacher were investigated by the Police and the school at the time and the Ministry took those investigations into account.

5.16 The Ministry considers its findings and subsequent offer to be fair and reasonable. We also consider the timeframe for responding to his claim once we were in possession of all the relevant information (less than a year) was reasonable.

5.17 Mr Packer did not accept the Ministry's settlement offer. The claim was subsequently resolved at a judicial settlement conference where the offer was increased.

5.18 Notwithstanding these complexities, I accept that these claims should have been responded to sooner and that further improvements are required. While the Ministry's claim assessment process is necessarily constrained by the Crown Litigation Strategy, I acknowledge the claim resolution process could be improved through less delay, improved communication with claimants, and better handling of claims involving multiple agencies. A review of our process has been initiated.

## 6 IHC Evidence

6.1 We note that a statement of evidence has been made to the Royal Commission by Trish Grant on behalf of Advocacy at IHC.

6.2 The majority of Ms Grant's statement is about ongoing Human Rights Review Tribunal proceedings relating to education access for intellectually disabled children.

6.3 In 2016, IHC and the Ministry had a series of facilitated conversations to work towards an agreement on how to progress these issues. A key outcome was that the Ministry would meet regularly with IHC, at twice yearly stakeholder forums, to share progress on provision for learning support. Our relationship with IHC is respectful and collaborative.

6.4 As Ms Grant's brief is predominantly not about redress for claims of abuse in state care, which I understand to be the issue for consideration in this hearing, we do not provide further comment on it in this brief.

## 7 The Ministry's Treaty of Waitangi Policy

7.1 My primary brief discussed the Ministry's Treaty of Waitangi policy from paragraph 5.42. That policy has been updated since the time of filing and so I take this opportunity to provide the Royal Commission with the updated policy.[7]

7.2 The updated policy shifts from a focus on obligations to a focus on positive outcomes that can be achieved through working in Te Tiriti / Treaty honouring relationships.

7.3 I also note that staff and management involved in our claims process are completing bespoke Treaty of Waitangi training and this new organisational policy will inform the review of our sensitive claims process noted above.

GRO-C

Helen Hurst

[7] Te Tiriti o Waitangi | Treaty of Waitangi policy for Ministry staff.