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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 Una Rustom Jagose for the Crown Law Office – Redress

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1 Introduction

1.1 E nga kaiwhakawā, tēnā koutou. Ko Una Rustom Jagose tōku ingoa. Ko au te rōia matāmua o te karauna.

1.2 My full name is Una Rustom Jagose. I am the Solicitor-General of New Zealand. I have previously given a brief of evidence to the Royal Commission dated 28 February 2020.

1.3 The purpose of this brief of evidence is to reply to some of the evidence contained in the briefs of evidence of Sonja Cooper and Amanda Hill filed for the redress hearing (the **Cooper Legal brief**) and of some survivors of abuse in State care.

1.4 I have read all of the survivor briefs of evidence filed for this redress hearing. I acknowledge the pain and the frustrations they have suffered in engaging with the Crown in seeking redress for their experiences in State care.

1.5 I acknowledge that the Crown's litigation response, which has been about ensuring that any liability is properly found, according to law may, to some, be said to be "ducking for cover". However, as I have said already, the policy decisions made about how litigation was to be conducted meant that in the litigation processes, the Crown defended claims that did not settle, according to law.

1.6 I acknowledge also that having all the resources of the Crown at your back confers a considerable privilege on the Crown as litigator. Over my nearly twenty years working in the Crown Law Office I have seen and, I hope, demonstrated, a shift in understanding the burden that this privilege also confers; in this context I would say that the Crown has not always been survivor-focused in its historic abuse litigation processes. It may never be as survivor-focused as survivors would wish – but as I have already set out, there have been significant shifts to a differently focused litigation approach already and this Commission will undoubtedly recommend others.

1.7 I do, however, emphasise that the Crown's litigation approach has changed over the years with the intention of improving the experience of redress in litigation for survivors. (I am referring here to the changes set out at para 2.23 of my first brief of evidence).

1.8 However, while the Crown has been prepared to change its approach to matters of litigation strategy, procedure, and tone, as the Cooper Legal brief illustrates, the law has evolved in a way which generally supports the Crown's position as defendant in the litigation of historic claims. This means the legal difficulties to achieving redress through the courts still exist. The relevance of the ACC regime in New Zealand cannot be overstated. It is an internationally unique legislative context. That regime effectively means claimants who have cover cannot, through the courts, recover damages other than exemplary damages (which are

punitive in nature, not intended to compensate, are reserved for the most egregious of cases, and are typically low in amount).

1.9 Against that backdrop, the approach I take in this reply brief is not to respond to every point or to try and defend every criticism of the Crown's approach – indeed I accept that some criticisms are warranted. Since the establishment of this Royal Commission I have been personally motivated to ensure the Crown response is open, but not defensive, so that the Crown can learn from the Commission's independent inquiry. That has been my stance to Ministers, to my chief executive colleagues and to other colleagues. I maintain that position now as a witness before the Inquiry: I wish to be open and explain why things were done as they have been but not to defend every step, and to accept some of the criticisms made as valid ones. Most of all I want to be clear that we will learn from this Royal Commission, and that starts now, in our approach before it.

1.10 Accordingly, in response to the Cooper Legal brief the approach I have taken here is to respond to certain themes that have not already been covered in my first brief of evidence. I have also not responded to the legal submissions made in relation to various statutory provisions and causes of action in the Cooper Legal brief. I consider these to be legal issues which the Royal Commission is well placed to comment on. I have also not responded to statements in the Cooper Legal brief to the effect that legislative change is required as this is a matter for Parliament once it considers the outcomes and findings of this Royal Commission.

2 Courts are independent

2.1 The Cooper Legal brief is critical of various judicial decisions and makes submissions to the effect that certain decisions are wrong or have had unfair or undesirable outcomes.

2.2 I do not consider that it is necessary or appropriate for me to respond to these submissions: the correctness of judicial decisions is not a concern of this Royal Commission. What I do wish to say in this regard is:

(a) Rights of appeal provide the appropriate mechanism for challenging Court judgments, and these rights have been pursued in some of the relevant cases by Cooper Legal clients.

(b) New Zealand has a strong and independent judiciary which is free from Executive Government influence. I refute the suggestion that the Courts apply "a different standard.....where the State is the defendant", as the Cooper Legal brief suggests at para 104.

(c) Where litigants are aggrieved about the conduct of judges, they may complain to the independent Judicial Conduct Commissioner.

3 Suggestions that the Crown's conduct has been improper

3.1 While having acknowledged that the Crown's approach to litigation has evolved for good reason, and acknowledging that there are valid criticisms that can be made of some Crown steps in litigation I strongly deny that any decisions or steps the Crown has taken have been improper or taken in bad faith, a criticism

which appears to be suggested by the Cooper Legal brief. I have set out in this reply brief some examples of what the Cooper Legal brief has referred to as Crown tactics and seek to explain the Crown's perspective on those matters.

3.2 However, in the spirit of openness with which the Crown comes to this Inquiry, all requested litigation files have been made available to the Commission. If there are specific matters the Inquiry wishes to ask me about, I will attempt to be as prepared as possible to respond to specific inquiries – though I may need to be given prior notice of them.

3.3 In the early days, the Crown took a relatively orthodox approach to the historic abuse litigation, undifferentiated from other litigation it defended. I acknowledge that the early correspondence between Crown Law and Cooper Legal in relation to these claims was direct and uncompromising in tone (on both sides), although I consider it was well within the bounds of ethical propriety.

3.4 There was mutual frustration about a number of issues. For example, in trial preparation in the *White* litigation, the Crown was seeking to get more specific pleadings and evidence.[1] Cooper Legal regarded this as tactical; the Crown regarded requests for further particulars and better evidence as necessary to inform its understanding and response to the claims. A detailed and accurate statement of claim is essential, especially when the allegations go back many years. I appreciate that particulars as to dates times and names may be difficult and painful to recall, but without that information much public resource will be wasted while general searches of records are undertaken. This was all done under the supervision of the Court, which timetabled the furnishing of better particulars (which was achieved through the filing by the plaintiffs of amended pleadings).

3.5 I have already said in part 4 of my main brief that the Crown's litigation approach has been to test some novel and complex issues of law arising from these claims within the legal framework of limitation, ACC and other barriers to such claims. I recognise that to the individual plaintiffs the Crown's response may appear "tactical" and designed to deny them justice but I don't accept that criticism as valid.

3.6 I reject the assertion that Crown Law has engaged in intentionally delaying or obstructing claims so as to wear down the claimants and I note that it is not supported by reference to any particular examples. Cooper Legal appear to rely on the delays that occurred in the proceedings and the difficulties they encountered as if they spoke for themselves. However, in reality, there are many reasons why delays occur in the legal system.

3.7 In civil proceedings, time may be consumed because the statement of claim is not ready when first filed, for example not adequately particularised as I have already mentioned in relation to the *White* case. Another example is where a claim is filed in respect of which there is a leave requirement (either Limitation or Mental Health enactments) and for which the plaintiff needs to file supporting evidence.

3.8 There is also the right to discovery of documents, which is confirmed by the High Court Rules. Compliance with discovery obligations is often a time-intensive

[1] See paragraph 19.29 in Appendix 2 to my main brief.

exercise for the Crown, especially where the information is voluminous or deeply held in archives.

3.9 One of the longest delays occurs when the interlocutory steps are all complete, and a substantive hearing is awaited. The Courts' resources are finite also and time must be found for criminal as well as civil cases. When a case requires a lengthy hearing (the *White* case took 17 hearing days) that delay can be substantial. According to the records, *White v AG* was set down for hearing on 3 February 2006, but the hearing did not commence until 26 June 2007 (after the adjournment of a hearing first fixed for June 2006).

3.10 The delay in the *White* case was also contributed to by Cooper Legal preferring to wait for the Court of Appeal to release its decision in *S v Attorney General*, and from the plaintiffs' decision to appeal against the interlocutory decision of the trial Judge concerning name suppression (discussed below).

3.11 I agree that, in the early days, the Crown saw *White* in a wider context. The case raised important and contentious aspects of the law particularly as to limitation of claims, vicarious liability and the availability of different types of damages. The outcome in *White* would necessarily have an effect on the way many hundreds of similar claims would be dealt with. Cooper Legal were just as aware of the wider context of *White*. Some of the legal obstacles to their other clients could have been reduced or removed if they had succeeded in the case.

4 Mr Wiffin's civil claim

4.1 I address some comments Mr Wiffin has made in his brief of evidence as I remember his claim and, of the survivor briefs, Mr Wiffin has the most to say about Crown Law. When viewed against the legal framework that I have outlined in my earlier evidence, Mr Wiffin's civil claim had a low chance of success in Court. That is not to say that he was not ill-treated and assaulted in the ways he described, but rather that the legal framework did not impose a civil liability. The settlement offer made reflected our understanding of the law as it would be applied to those facts.

4.2 I can understand Mr Wiffin's view about the letter I wrote to Cooper Legal about his claim in April 2009. I note it was a letter to Mr Wiffin's legal counsel and not to him. However, even so, I would like to think that today I would have a more thoughtful approach to writing such a letter, and would take more time to acknowledge the survivor's reality, despite the legal barriers to the claim.

5 Issues regarding the proper defendant to claims

5.1 I am aware of the many challenges that arise in litigation of this kind. In particular, there have been differences of opinion between the Crown and Cooper Legal as to the factual and legal framework that applies to a claim, and the "indivisible Crown" issue, all of which are referred to in the Cooper Legal brief.

5.2 For example, at paragraphs 695 to 704, the Cooper Legal brief refers to the letter received by Crown Law on 12 February 2019, referring to how the Crown was described as the defendant in historic abuse proceedings, and proposing a different approach to how the Crown was named — in short, that the Attorney-

General should be named as the sole Crown defendant, rather than being named as a defendant multiple times in respect of different government departments.

5.3 The Crown made this proposal given that unnecessary complications appeared to be arising from the approach of naming departments separately – including the perceived need for plaintiffs to apply for the Attorney-General to be joined as a separate party with respect to an additional ministry; and the prospect, following the establishment of Oranga Tamariki, of the Attorney being joined as a further separate defendant to many claims. In light of these complications, Crown Law thought it would be worthwhile to work with Cooper Legal to regularise how the Crown is named in the proceedings. It was also anticipated that it would be helpful for claimants for the claims to be pleaded in this way, removing any potential limitation risk for claimants in the event they mis-characterised the division of responsibility between MSD and MOE (which can be easily done: see Cooper Legal brief at pages 167-169).

5.4 In making the proposal, the Crown was mindful of not imposing an unnecessary burden on claimants and their counsel, making clear that it was not proposed that amended pleadings for extant claims needed to be filed at that time (rather, the issue could be addressed on a case by case basis as amended pleadings are filed and/or claims progress to trial). It was anticipated that the issue would be able to be addressed on a consent basis.

5.5 In light of Cooper Legal's strongly-held opposition, the Crown has not sought to pursue the matter before the Court on a contested basis, not considering it to be a priority in the litigation. Crown Counsel intend to discuss appropriate next steps internally in the coming months, mindful that the issue of how claims that include allegations for which Oranga Tamariki is responsible still needs to be addressed.

6 Legal Aid

6.1 There are many criticisms of Crown Law in the Cooper Legal brief with respect to questions of legal aid. Where I can, I address these below.

6.2 Reference in the Cooper Legal brief is made to various cases which, it is said, illustrate the Crown's tactics used in trying to defeat claims. As I have said, I consider the approach taken to the cases mentioned in the Cooper Legal brief to have been appropriate.

6.3 Access to justice has been, and remains, a significant issue in our legal system. The presence of an independent agency or decision maker to decide which cases the Crown should fund is a central part of the Crown's commitment to access to justice. I understand that the Ministry of Justice is giving evidence to this Inquiry about legal aid issues and I will not address the valid public interest in ensuring that the limited legal aid money enhances access to justice. I have already outlined the changing approach to legal aid in the historic claims litigation in my main evidence.

6.4 Another such change occurred in Crown Law's policy towards communicating with the Legal Services Agency. After criticism from the High Court in *Martin v*

Legal Services Agency[2] of the Crown's approach of writing to the Legal Services Agency when it considered the merits of a legal aid funded case to be weak, Crown Law altered its policy, making clear that no correspondence should be entered into with the Legal Services Agency until counsel has either made a strike out or summary judgment application, or has applied for a security for costs order. The policy also sets out the steps to be taken in making such communications, and who can approve such communications.[3]

6.5 At [183] of the Cooper Legal brief it is stated that in *W v Attorney-General*[4] the Crown sought costs against Mr W, who was not legally aided. Mr W alleged abuse in the course of his service in the Royal New Zealand Navy.[5] The application that gave rise to the Crown seeking costs was an application by Mr W for leave to appeal to the Court of Appeal following a High Court decision that was itself a review of pre-trial case management directions given by an Associate Judge. The application was dismissed, and MacKenzie J decided that costs should follow the event.

6.6 In this case the Crown objected to delays continuing to enable the plaintiff to seek various legal aid appeals; it objected to the failure of plaintiff's counsel to progress fixed timetables on the basis that funding was not available; and it considered the case had little prospect of success.[6] As set out above, in respect of the Crown's successful opposition to the application for leave to appeal, the High Court found that costs should be awarded to the Crown.

6.7 At [186] of the Cooper Legal brief it is stated that in *KB v Attorney-General*[7] the Crown opposed the adjournment of a leave hearing following the withdrawal of legal aid.

6.8 In this case on 3 July 2009 the Crown opposed adjourning a hearing set down for 28/29 September 2009 on the basis that a pending legal aid appeal was not grounds to vacate the hearing. The Crown considered that prejudice would arise if the hearing was vacated, in particular because of continued delays and the time that had elapsed from the alleged events in issue to the hearing of the claim. Our records indicate that the Court initially decided an adjournment was not appropriate but that following receipt of an application to withdraw by the plaintiff's counsel (which was refused) a two-month adjournment was granted.[8]

6.9 At [192] and [194] of the Cooper Legal brief it is stated that in *LRB v Attorney-General*[9] the Crown opposed the adjournment of an allocated hearing date.

6.10 A review of Crown Law's records in relation to this case indicate that the Crown opposed the suggested adjournment because counsel for the plaintiff was not prepared for hearings and had threatened not to turn up to hearings, leaving Mr

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[2] *Martin v Legal Services Agency* HC AKLD CIV-2006-404-007251 [6 August 2007]
[3] Crown Law Policy, "Communicating with the Ministry of Justice, Legal Aid Services – Policy and Guidelines", Published on 19 March 2010. Updated 12 June 2014, 13 December 2016 **Crown Bundle - Tab 132**
[4] *W v Attorney-General* HC WN CIV-2006-485-874 [17 December 2008]
[5] *P v Attorney-General* [2010] NZHC 959
[6] See judgment at note 2.
[7] *KB v Attorney-General* HC WN CIV 2007-485-698 [17 July 2009]
[8] *KB v Attorney-General* HC WN CIV 2007-485-698 [23 September 2009]
[9] *LRB v Attorney-General* HC WN CIV 2008-485-1541 [19 November 2009]

B representing himself.[10] At the time I considered whether opposing an adjournment in this case was consistent with the Crown's obligations as a model litigant and I concluded that it was.

6.11 At paragraph [225] of the Cooper Legal brief, reference is made to a legal opinion provided by Crown Law to the Legal Services Agency which was "equivocal" about legal aid advice being provided directly to Cooper Legal clients. I understand despite undertaking searches for such advice, neither Crown Law or the Ministry of Justice has been able to locate a copy of this advice and I have no recollection of it.

6.12 I deny the allegation at paragraph [231] of the Cooper Legal brief that there was ever a strategy on the part of State agencies to remove Cooper Legal as the sole provider of legal services to survivors.

6.13 Both Cooper Legal and Mr Wiffin make the point that the cost to the Crown of defending historical abuse claims is very high and are critical about that expenditure. I do not agree that there is a valid criticism here – the Crown needs to be able to defend itself against liability where none exists (for example where barred by ACC or Mental Health legislation) or where aspects of that liability are disputed, factually or legally. I agree that the precedent effect was of significant concern to the Crown. In these cases, however, and as already covered, the Crown has been careful to ensure that settlements with survivors are what they receive "in the hand" and that costs to the legal aid system are met by the Agency and not by the survivor from their settlement sums.

7 Name suppression

7.1 At paragraphs 836 and following of the Cooper Legal brief, the Crown's evolving approach to name suppression applications on behalf of claimants' witnesses has been characterised as an inconsistent approach on the part of the Crown. It is correct that the Crown's approach has changed over time.

7.2 Name suppression involves the balancing of competing considerations and open justice is a weighty/worthy consideration in all cases. The principle of open justice has been judicially described as a principle of "utmost importance." The Court of Appeal in the *Y v Attorney-General* case[11] confirmed that the correct approach requires the Court to strike a balance between open justice considerations and the interests of the party who seeks suppression.

7.3 In *White v Attorney-General*, name suppression was sought for witnesses who were to give evidence of their experience at Hokio and Epuni, on the basis that most of them were victims of sexual abuse (although their evidence was about a wider set of allegations). The Crown opposed suppression on the basis of the primacy of the principle of open justice. The reasons are set out in a letter from Crown Counsel to MSD[12], that they *"[saw] it as very important that these witnesses should not be protected from publication and instead should be called to publicly account for the allegations they are making. We also felt it would be*

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[10] Memorandum of counsel for first defendant opposing plaintiff's application for adjournment dated 12 November 2009.

[11] *Y & Anor v Attorney-General* CIV-2006-485-2863 (see decision *Y & Anor* v *Attorney-General* [2015] NZHC 844 and *Y v Attorney-General* [2016] NZCA 474)

[12] Letter from Crown Law to MSD dated 12 March 2007 **Crown Bundle - Tab 131**

likely to discourage other persons in the same position." I have obtained the Attorney-General's permission to waive privilege in this letter.

7.4 While the Crown's position on name suppression in the *White* application was largely upheld by the Court, this is no longer an approach that Crown Law would recommend be taken. Generally, as demonstrated by the later cases referred to by Cooper Legal, the Crown approach to applications of this kind will be to abide the Court's decision. That position better reflects that, in specified sexual violence criminal cases, name suppression for survivors is automatic by operation of law and the growing appreciation of the vulnerable position of survivors in civil litigation where sexual violence is an aspect of civil claims against the Crown.

7.5 In other cases, the Crown opposed name suppression because of what were seen as deficiencies in some of the applications made by Cooper Legal. For example, in *Y & Anor v Attorney-General*[13] (as referred to at [846] onwards of the Cooper Legal brief) the Crown opposed name suppression for witnesses *other* than those who gave evidence of sexual abuse. The Crown took this position because it considered name suppression was not justified solely on the basis of an allegation of physical abuse or incarceration as a class; and because only five witnesses (of 29) gave affidavits in support and of those five none gave compelling evidence that they or their family would suffer any particular harm. Brown J declined to make name suppression orders for anyone not giving evidence of sexual abuse. In addition, the Court of Appeal dismissed a subsequent appeal by 12 of 13 witnesses. The Court of Appeal granted name suppression for CW due to evidence he had significant PTSD from abuse at Whakapakari (although I note this was on the basis of evidence that was not before Brown J in the High Court).

7.6 In the *S* and *C* cases referred to in the Cooper Legal brief, when considering the approach to name suppression for witnesses who were giving evidence of their time as children or young people in state care (regardless of whether or not they are alleging abuse) it was determined that the Crown should not put obstacles in the way of such witnesses getting name suppression, for example, by imposing onerous evidential requirements. Cooper Legal was asked to set out certain information about each witness in writing. The Crown then abided the Court's decision on name suppression. In reaching this view the following were taken into account:

(a) The Cabinet Principles governing the Crown's response to this Royal Commission, which require the Crown to conduct litigation in a manner that reflects the principles, where possible and appropriate. In particular, it was decided that the first principle, manaakitanga (treating people with humanity, compassion, fairness, respect and responsible caring) supported granting name suppression to witnesses giving evidence of time they spent in state care as children or young people.

(b) Comments by the Court of Appeal in *Y v Attorney General* [2016] NZCA 474. In that case, the Crown had opposed name suppression. The Court of Appeal commented that although there was a public interest in the case, that public interest did not extend to knowing the identity of witnesses who had allegedly been abused. The Court also commented

[13] *Y & Anor v Attorney-General* CIV-2006-485-2863 (see decision *Y & Anor* v *Attorney-General* [2015] NZHC 844 and *Y v Attorney-General* [2016] NZCA 474)

that there is a public interest in ensuring that witnesses are prepared to come forward and give evidence. In relation to one witness (who had supporting affidavit evidence), the Court held that the presumption of disclosure was "firmly displaced" by countervailing public and private interests. The Court then outlined some views on what evidence would be required for the other witnesses to support name suppression, although said they were not intending to be "prescriptive" and that what is sufficient will be a matter for the High Court.

7.7 Therefore, as set out above the Crown gave notice that it would abide the Court's decision on name suppression. The orders were made by Ellis J on 11 February 2020.

8 Referrals to Police

8.1 The issue of police referrals also highlights the different perspectives that can be taken to the same set of facts. At paragraph 909 of the Cooper Legal brief, disclosure of client information to Police and other agencies has been described as "tactical". I have explained the background to this issue in my primary brief.[14]

8.2 I agree with the views expressed by Mr Groom and Mr MacPherson in their reply briefs that the Crown has not been motivated by 'tactical' reasons in making referrals to the Police. Rather, the disclosures have been intended to protect the safety of children. Before the Court of Appeal, the Crown acknowledged that the potential for disclosure to occur without claimants' consent might deter potential litigants from bringing their cases to court, and identified this access to justice consideration as a relevant factor for the Court to take into account when determining whether the non-disclosure order was necessary and appropriate.[15]

9 "Model Litigant" criticisms

9.1 Paragraphs 980 following of the Cooper Legal brief refer to the Crown as a "model litigant". I have already addressed this issue extensively in my primary brief.[16]

9.2 I disagree with Cooper Legal that the Crown stepped away from a model litigant policy [para 1000] or that the Crown's conduct is contrary to the values that lie behind that concept. While I accept that there will be steps taken or things done in specific litigation that can be criticised, the examples Cooper Legal give at paragraphs 980 and following are of the Crown taking legitimate litigation steps and/or defending contested claims (factually or legally).

9.3 I accept that litigation can be a long and drawn out process, but taking steps to better particularise claims, to seek further evidence for matters, for defending claims or exposing the true cost to the Crown in defending claims for which no court would find liability are not contrary to model litigant standards, nor to the Attorney-General's values for the conduct of civil litigation.

GRO-C

Una Rustom Jagose

[14] Paragraphs 16.8 following.
[15] *Attorney-General v J* [2019] NZCA 499 **Crown Bundle - Tab 94**
[16] Paragraphs 3.6 following.