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

Amended 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 held this role since February 2016. I have worked at the Crown Law Office since 2002, first as Crown Counsel, as Team Leader of a public law team from January 2007 at Crown Law (with responsibility, along with the then Deputy Solicitor-General and Solicitor-General for managing the historic abuse litigation), and as Deputy Solicitor-General of the Public Law Group from October 2012 – 2015. I was away from Crown Law for a year from March 2015 until February 2016, as Acting Director of the Government Communications Security Bureau (GCSB), immediately prior to being appointed Solicitor-General.

1.3 As Crown Counsel and Team Manager I was heavily involved in historic claims matters. It is not because of that role that I am giving this evidence (although aspects of my evidence do reflect my involvement with the claims). The Solicitor-General is the Junior Law Officer of the Crown and, along with the Attorney-General as Senior Law Officer, is responsible for the conduct of Crown litigation and for determining the Crown view of the law. It is appropriate that I appear before this Royal Commission to explain the Crown litigation response to the claims filed in the High Court at Wellington in respect of a large number of plaintiffs' experiences of State care. My evidence is inevitably historically focussed in order to provide assistance to the Royal Commission as it moves forward in its current process.

1.4 In this brief, when I refer to "historic claims", I am referring to the civil claims filed in the Wellington High Court by individual plaintiffs who claimed general and exemplary damages against the Crown for various alleged breaches of a duty of care owed to them by an arm of the State; for example, a social welfare agency or home, a psychiatric or education institution. For convenience, I will generally refer to these claims in my brief in the past tense, although many are ongoing.

1.5 Crown Law's involvement in historic claims can be divided into the following periods (delineated by the government strategy in place for the particular period):

(a) pre-2004, which includes the receipt of psychiatric care claims in the late 1990s and the Lake Alice Settlement, followed by the receipt of claims alleging abuse of children in State care;.

(b) 2004-2008, which encompasses the establishment of the DSW Litigation Group, the 2004 Crown Litigation Strategy, the Confidential Forum, the *White* High Court trial (mid-late 2007) and *White* judgment (November 2007) and the establishment of the Confidential Listening and Advice Service (**CLAS**);

(c) 2008-2011, which encompasses the 2008 update to the Crown Litigation Strategy, the 2009 review and the *White* appeal; and

(d) 2011 onwards, which begins with the update to the Crown Litigation Strategy in 2011 and encompasses the Department of Social Welfare (**DSW**) litigation and the disestablishment of CLAS.

2 Overview

2.1 I acknowledge the importance of this Royal Commission and this redress hearing. I wish to provide evidence about the litigation of historic claims to assist the Royal Commission in its investigation of the redress processes that have developed to date and to provide information to help inform any recommendations the Royal Commission may make for the future provision of redress.

2.2 I acknowledge also the survivors who have been instrumental in having this Royal Commission and who have had to fight to have their experiences in State care examined by the Royal Commission. The claimants and historic claims plaintiffs in the Courts are some of this country's most vulnerable people whose claims are of personal and traumatic experiences while in State care. I understand that their experiences may mean they have low trust in State agencies and in the Courts. And I appreciate that, in that context, claimants must find the litigation processes extremely difficult.

2.3 My aim in this brief of evidence is to outline the litigation approaches the Crown has taken through the years, and the reasons for those approaches (including the broader contextual framework in which the claims processes arose). While the explanation in this brief is about the Crown's litigation approach and processes, the brief needs to be viewed in the wider context of the policy decisions set out in other briefs of evidence from the Crown through department officials. The issues are interlinked and how the Crown has conducted the litigation has been linked to policy decisions about settling claims and alternative forms of redress.

2.4 Litigation is but one piece in a complex response by successive governments on behalf of the Crown and is the most formal of processes in any redress system. It is governed by rules both as to the way counsel conduct themselves, and the manner in which filed claims are brought, advanced and responded to by defendants, and managed through the Courts.

2.5 In this litigation, over time, the parties and the Courts have reached consensus and/or made decisions to adapt the litigation processes to take into account the circumstances of claimants and of the settlement processes that have evolved within a framework of defined rules and procedures.

2.6 The manner in which the claims emerged is an important aspect of understanding the evolving Crown response to them. Up until the early 2000s, historic claims were filed in relatively small numbers and the relevant government department dealt with them in the usual way – a statement of claim would be filed and served on the Crown, usually through the Crown Law Office and – in accordance with the Cabinet Direction for the Conduct of Crown Legal Business – the Crown Law Office would conduct the litigation, taking instruction from the relevant agency, usually through its legal team.

2.7 By about 2003, it became clear that many more claims would be filed. The Crown was told by lawyers representing most historic claims plaintiffs (primarily Roger Chapman, Johnston Lawrence and Sonja Cooper, Cooper Legal) that many hundreds of such claims were to be filed.

2.8 As in all litigation against the Crown, the starting point when receiving a new filed claim is to consider the claim and to advise the relevant department on the law, and on likely liability, so they can undertake an assessment and determine how to respond, including how to take the first litigation steps. That would usually be the filing of a statement of defence including any positive defences but it also might be an interlocutory step like a strike out application or request for better particulars before pleading defences. In the early days, this was the process followed by Crown Law, in consultation with the relevant agency.

2.9 The historic claims raised many similar issues relevant to determining liability and likely outcomes in Court. A significant feature of the legal landscape into which these claims were filed is the bar on bringing claims for general damages arising directly or indirectly from mental or physical injury covered by the Accident Compensation legislation.[1] Since 1974 the "social contract" of the ACC scheme means that in New Zealand the removal of the right to bring specified personal injury claims has been balanced with a no fault compensation scheme. The other part of that social contract are the supports provided under the ACC scheme. While the ACC legislation has changed over time, including being retrospectively amended as a result of an historic abuse claim being heard by the Court, and can be at times a complicated regime to work through, it was the first legal barrier against bringing proceedings in Court for damages for personal injury. The Court of Appeal in the *White* litigation was clear that whatever one thinks of the fairness of the ACC regime the Court was bound to apply the bar.

2.10 In respect of claims relating to most psychiatric institutions, the historic Mental Health Acts of 1911 and 1969 also had a bar against certain claims being filed. Those early pieces of legislation contained a provision protecting the Crown and any person who took action under the authority of the relevant Act from civil or criminal liability, unless such actions were taken in bad faith or without reasonable care.[2] No civil or criminal proceedings could be brought against the Crown or any such person without the leave of the (then) Supreme Court[3], with such leave not being able to be granted unless the Judge was satisfied there was substantial ground for the contention that there has been bad faith or a lack of reasonable care.[4] The earlier Acts contained a time bar for the seeking of such leave of six months after the action complained about or (where the injury or damage was ongoing), within six months after the injury or damage ceased.[5]

2.11 Further, many of the claims were also met by the Limitation Act 1908 and Limitation Act 1950 defences.[6] These defences limited actions in tort being brought more than six years after the cause of action accrued,[7] or more than two years for bodily injury actions (unless a defendant consented to a six year

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1 See Mallon J in *P v Attorney-General* [2010] NZHC 959 at [13].
2 Section 124(1) Mental Health Act 1969.
3 Now the High Court.
4 Section 124(2) Mental Health Act 1969.
5 Section 124(4) Mental Health Act 1969.
6 Then – now the Limitation Act 2010.
7 Section 4(1) Limitation Act 1950.

period), with the High Court being able to grant leave for a six year period where certain conditions were met.[8]

2.12 In addition, the vicarious liability of the Crown for wrongful acts done by others such as foster parents and third-party care agencies was not – and is still not – a matter of settled law in New Zealand. Some of the historic claims cases that have been the subject of Court determination have advanced or clarified the law of State vicarious liability.

2.13 When the Crown conducts any litigation, it must be mindful of not just the particular case it is considering, but also the precedent effect across time and other cases. In so doing, any decision made by the Crown to take an approach outside of the approaches taken in other cases, is a decision taken carefully, usually where there are distinguishing features in relation to the legal or factual issues that justify it being treated differently.

2.14 It was not clear from the claims themselves as they were filed how these legal impediments could be met or overcome by the plaintiffs. Nor, as is required, at the beginning did many plaintiffs initially file evidence to explain why their claim might in fact (or law) be brought in time through the exceptions that may apply under the Limitation Act.

2.15 As the Crown took its litigation steps in response, the plaintiffs developed their claims too – and so, for example, it was some time after the initial filing of many cases that claims would plead international human rights and New Zealand Bill of Rights Act 1990 breach allegations, covering the same factual pleadings. These developments also raised further complex issues of law.

2.16 The significant and complex legal issues raised by the claims were and have always been taken very seriously by the Crown. But, also, the Crown was keen to ensure the claims proceeded in the Courts on a legal footing that was proper for those fora. Throughout the policy decisions taken by successive governments (which I will cover in this brief), it is evident that where historic claims were advanced in the Courts, litigation was to be conducted according to the Court rules, the law and with defences available being taken.

2.17 Since the early 2000s when the claims started to be filed in greater numbers, successive governments have decided not to take a global approach to resolving these claims of historic abuse in State care without Court determination (such as had been done for a range of other claims against the Crown including the Lake Alice Child and Adolescent Unit which is discussed further below in this brief). It was clear that the allegations were widespread through all institutions run by the State. However, groups of claims like the Lake Alice Child and Adolescent Unit claims contained fixed and consistent sets of facts and timeframes (in that situation, for example, the documented use of unmodified ECT as punishment by Dr Leeks and his staff during Dr Leeks' employment). By comparison, the historic claims that were being filed and analysed in the early 2000s (outside of those Lake Alice claims), were a set of widespread but individually based allegations. The Crown responded individually too as it did not come to the conclusion that there were systemic abuses throughout State care.

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[8] Section 4(7) Limitation Act 1950. Refer to section 9 below for a summary of limitation provisions and to the *White* case summary (Appendix B) for the applicability of these conditions.

2.18 Therefore, as my brief sets out, and as the record shows, other than the claims relating to the Lake Alice Child and Adolescent Unit, successive governments took policy decisions not to respond to the claims as a group, but rather to build an alternative pathway for those claimants who wanted to settle claims or resolve their grievances out of Court through informal processes. There was no Government decision taken to establish a separate forum for determining liability in these cases – such as occurs, for example, in the Weathertight Homes Tribunal established under the Weathertight Homes Resolution Services Act 2006. Litigation as an option remained available if the informal processes were not wanted or did not resolve the matter. Litigation has a focus on determining a contest between parties as to factual allegations and the application of legal barriers and defences – and any associated financial damages award. It is clearly a confronting and difficult process for survivors to go through, as I have acknowledged above. The informal processes that were developed over time were intended to have the more caring and healing objectives of helping former children in State care to find a resolution, as well as having the Crown apologise and make some recompense for what they have experienced.

2.19 With those policy decisions, there has not been a choice available to plaintiffs to engage in a formal process in which factual disputes, liability and damages could be determined by an independent third party, without the barriers against claims being brought for personal injury and without legal defences being used by the Crown. The choice has been, instead, between continuing with civil litigation – and all of the discipline and complexity that requires - or engaging in informal processes designed to be survivor-focused and to assist in resolving claims. The intention of the informal processes was to reserve the formal mechanism of litigation for those claims that could not settle and for which the issues of law and fact remained in dispute between the parties. More recently (late last year), officials have been asked to start considering other options for the central assessment or review of historic claims.[9]

2.20 It has been a significant feature of the Crown approach to historic claims that officials have been instructed to pursue settlement on an informal basis with an associated lowering of barriers and standards of proof, but that (as the Court rules require) litigation processes were to be followed and claims filed and pursued on an appropriate procedural footing. As early as 2002, and at the same time as the litigation proceeded in this way, the Crown attempted to devise an agreed alternative disputes process which, by 2004, became the process outlined above (whereby claims are resolved where possible outside of the Court processes, but that if they do not settle or a plaintiff elects to take the litigation path, the Crown defends the claim). As the informal processes developed it became common to speak of "settlement on a moral basis" to describe claims that had a sound factual basis whether or not they would fail if determined by the Court.

2.21 That approach has persisted, more or less, in the nearly two decades of historic claims litigation, although there have been many changes in approach over that time both within the informal processes, but also in the litigation. In relation to the Crown's current approach to litigating the Department of Social Welfare

[9] Cabinet Social Wellbeing Committee "Review of strategy for the resolution of historic claims" (4 December 2019) SWC-19-MIN-0193. **Crown Bundle - Tab 95**

Litigation Group claims,[10] which I discuss later, these have been adjourned following the receipt of the claim, and in some cases the filing of a statement of defence and the exchange of discovery, to allow settlement discussions to take place. I will discuss the case management that occurs in these claims later.

2.22 The litigation position we are in today is more sophisticated than that in the early 2000s. All of the changes made were intended to assist and benefit claimants and be sensitive to their vulnerable positions, and also to balance the Crown's legitimate interest in the careful expenditure of public money, and the appropriate use of the Courts.

2.23 These changes (not in a particular order as to chronology or importance) include:

(a) an agreement to "stop the Limitation Act clock" in cases concerning the (now) Ministry of Social Development so as to remove the pressure on plaintiffs to file their claims in Court to avoid a successful Limitation Act defence and allow alternative dispute resolution processes to be undertaken without prejudice to the claimant's position;

(b) a more survivor-focussed approach to name suppression;

(c) agreement by the Crown to repay the legal services portion of the plaintiff's costs so that they receive the whole of the agreed settlement amount;

(d) stopping requiring that a claim be filed before the Crown will engage with a person who has a grievance;

(e) streamlining discovery processes;

(f) improvements made to the informal settlements processes so that claimants are better able to engage in it;

(g) an openness by the Crown to discuss process and options for better procedures, both informally and when taking litigation steps;

(h) endeavouring to settle claims promptly whether or not they would succeed in Court and, over time, reducing the evidential threshold for claimants to meet; and

(i) using a wider range of redress options than simply the payment of money (which is all a Court can give, along with a finding as to liability) and considering other services and individualised meetings with claimants.

2.24 The Crown also has obligations of fairness and natural justice to its employees, former employees and agents, some of whom have died or are no longer in the Crown's employ, and against whom significant allegations were made which needed to be explored before the Court could determine the matter. For

[10] This covers all historic claims filed in Court, including claims against the Ministry of Education.

example, the case of *K v CHFA*,[11] which I discuss further in the appendix to my brief, proceeded to trial where the Judge declined to find serious allegations against (by that stage, retired or almost retired) nurses were made out on the evidence. However, that is certainly not to say the Crown should avoid facing liability where it is likely to be, or is established, but rather to illustrate that disputed allegations need to be tested before factual findings can be made by the Court.

2.25 The Crown also had to carefully consider from the beginning how to respond in litigation terms to claims which included allegations relating to the use of practices which are no longer viewed as sound or best practice (for example, corporal punishment or the use of seclusion as managing behaviour), but may not have been negatively viewed by the norms of the day. The Courts have made this observation also.[12] However, the Crown has always accepted that sexual assaults can never be explained on the basis of the standards of the day.

2.26 I acknowledge the importance of tikanga Māori, and the Treaty principles in this area, when so many affected are Māori. The damage caused to individuals continues to be felt today for survivors and their whānau. This feature of the claims has not always been explicitly recognised in the manner it is today across the range of Crown responses to these claims. As a general proposition the Courts, the legal profession and the Crown are advancing our understanding of the impact on, and for, Māori of systems that for a long time have not taken account of tikanga.

2.27 I have endeavoured to address those issues in this brief of evidence, which includes a discussion of:

(a) the constitutional role of the Solicitor-General and Attorney-General, including by reference to the Cabinet Directions for the Conduct of Crown Legal Business and the Attorney-General values;

(b) a summary of Crown Law's approach over time to redress in respect of claims of historic abuse in State care;

(c) the Lake Alice Hospital claims between 2000 and 2004;

(d) the Waiouru Regular Force Cadet School claims in 2004;

(e) the beginning of historic claims and the first development of the Crown Litigation Strategy, including Crown policy on the approach to limitation, the accident compensation bar, and the Mental Health Act bar;

(f) the 2008-2009 update to the Crown Litigation Strategy and the Sir Rodney Gallen report assessing the approach of the Ministry of Social Development (**MSD**) to addressing historical abuse claims;

(g) the 2011 and 2019 review of the Crown Litigation Strategy;

(h) engagement with claimants, in particular those represented by Cooper Legal;

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[11] *K v Crown Health Financing Agency* HC Wellington CIV-2005-485-2678, 16 November 2007. **Crown Bundle - Tab 29**

[12] See comments of Gendall J in *J v CHFA* HC Wellington CIV-2000-485-876, 8 February 2008. **Crown Bundle- Tab 31**

(i) litigation pre-*White*, the *White* litigation, post-*White* litigation which settled, stayed litigation and legal aid-related litigation; and

(j) other matters, such as international law obligations and the State Services Commission (**SSC**) investigation into the use of external security consultants.

3 Constitutional role of the Solicitor-General & Attorney-General

3.1 As part of the Crown's constitutional role, the Solicitor-General (and, by extension, the Crown Law Office) has had a pivotal role in developing the strategy for responding to historic claims.

3.2 The Law Officers, the Solicitor-General and the Attorney-General, have constitutional responsibility for determining the Crown's view of what the law is, and ensuring that that Crown's litigation is properly conducted. The role of Crown Law in the historic abuse claims arises through the provision of advice to agencies and the conduct of Crown litigation, in accordance with the Cabinet Directions for the Conduct of Core Crown Legal Business.

3.3 The Attorney-General is the senior Law Officer of the Crown, with principal responsibility for the Government's administration of the law. This function is exercised in conjunction with the Solicitor-General, who is the junior Law Officer. Subject only to the Attorney-General in terms of the law officer function, the Solicitor-General is the government's chief legal adviser and advocate in the courts.

3.4 The Solicitor-General is also the Chief Executive of the Crown Law Office.

3.5 It has long been recognised that the nature and value of the office within government lies in part on the Solicitor-General's duty to give independent advice and, in relation to certain functions, to act independently. That independence is of considerable constitutional importance. Such impartial advice must be seen to be given without political direction, even on politically contentious issues. Nevertheless, once lawful decisions are made by government actors (Ministers, other role-holders), the Solicitor-General and her Crown counsel are obliged to conduct any litigation processes consistent with those decisions.

3.6 Core Crown legal matters, which include historic claims, must be conducted consistently with any applicable values of the Attorney-General, as expressed by the Attorney-General from time to time. [13]

3.7 At the centre of these values is the policy that requires the Crown to conduct itself at all times honestly and fairly and in accordance with the highest professional standards, to deal with litigation promptly and efficiently and without unnecessary delay, to consider (if appropriate) alternative means of resolution, to act responsibly in its use of public funds, and to not take unmeritorious points for tactical reasons.

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[13] https://www.crownlaw.govt.nz/assets/Uploads/Media-Statements/Attorney-Generals-Values-for-Crown-Civil-Litigation-2013.pdf

3.8 In 2011 Miriam Dean QC and David Cochrane were asked to conduct a review of the Role of the Solicitor-General and the Crown Law Office. Among a range of matters, they identified that while Courts and people referred at times to the "model litigant" in terms of the Crown's obligations in Court, there was no written policy capturing those expectations. And they noted the expectations were not clear or commonly shared. The values referred to above are the response to that recommendation. There has not been, to my knowledge, a Crown expression of a "model litigant" policy other than these Attorney-General values. I am aware that ACC also manages its litigation under a Model Litigant Policy.

3.9 In addition, Crown Counsel in the conduct of litigation, and in other aspects of their roles, are public servants. This requires that they, along with all other public sector employees, uphold the State Services Code of Conduct to be fair, impartial, responsible and trustworthy.

3.10 Also, and importantly, Crown Counsel are (as New Zealand registered lawyers) officers of the Court, to whom their paramount duty as lawyers is owed. This requires that, in conducting litigation, they never mislead the Court, they honestly represent the facts, provide a full and accurate representation of the law, they not abuse court process and they fearlessly and honestly represent their clients.

4 Summary of the Crown's approach to redress

4.1 In this section of my brief, I summarise the Crown's approach to redress in respect of historic claims. That approach has developed over time. Initially, in the early 2000s, although only a small number of claims had been filed, counsel for the plaintiffs had signalled that there were hundreds of claims to come, meaning that the Crown was facing a significant number of claims with a potentially enormous liability. There were legal points that needed to be tested in the courts to understand the parameters of the claims and likely liability, including limitation, the impact of the historic Mental Health Act bar on claims, and the accident compensation bar against damages arising from personal injury. Equally, even at an early stage of the claims, the Crown had an interest in trying to settle the cases and avoid going to trial where that was reasonably achievable. At the same time, because of the passage of time, there were practical difficulties in obtaining information and files and speaking to witnesses about the claims.

4.2 The overall theme is that, in the initial stages of the claims in the early 2000s and working through to the end of the *White* High Court litigation in 2007, the Crown took an orthodox approach to the litigation, largely undifferentiated from any other litigation defended by the Crown.

Reasons behind ACC and Limitation Act defences

4.3 If a person is eligible for ACC cover for an injury, they cannot (by statute) bring civil proceedings for compensatory damages arising directly or indirectly out of that injury in any New Zealand Court. Proceedings for exemplary damages are unaffected by the bar, but there is a high threshold to be overcome for an award of exemplary damages to be made and they are intended not to compensate but to punish wrongdoing in order to act as a deterrent.

4.4 The ACC bar is a statutory bar, and its ambit has been clarified over the years. The Court of Appeal in *S v Attorney-General* (discussed later in this brief) concluded that the bar did not apply to mental injury arising from sexual violence prior to 1 April 1974. This resulted in a 2005 amendment to the legislation providing for a deemed date of injury for "sensitive claims" between 1 July 1992 and 30 June 1999, and making it explicit that the sexual assault causing that injury may have occurred before 1 April 1974.

4.5 Because ACC is a statutory bar, plaintiffs in historic claims are required to overcome that hurdle before their claims for personal injury can even proceed.

4.6 The Crown's perspective on these claims is that if the litigation process does not provide a resolution for claimants due to, for example, the application of the ACC bar, the solution does not lie in making concessions in the litigation context that might weaken the framework of the law or legal processes (and which would require policy consideration by the Government) and result in inconsistencies with its application in other areas. This is in contrast to out of Court resolution processes which don't seek to rely on legal defences and seek to take a flexible and generous approach. If the law is considered not to provide a just result in respect of a particular set of circumstances, it is for Parliament to consider changing it or for governments to decide to provide redress in a different way. I note that ACC provides support, at least for those who have suffered injuries as a result of sexual violence, (including historic abuse). I understand that is covered in information provided to this Commission from ACC.

4.7 The Limitation Act defences which I have already mentioned are different. They are not statutory bars but are defences open to a defendant to raise. A statutory limitation defence to a civil proceeding is a time bar which a defendant may raise as a defence to a claim. I understand that the claimants, through counsel, say that the Limitation Act is a "technical defence" and the Crown should not take such technical defences. I disagree that the Crown should be stopped from bringing a defence available to it at law. Statutory limitation defences attempt to balance the competing policies of finality in civil litigation and justice being done in the individual case. In particular, limitation statutes are intended to prevent prejudice and injustice to a defendant in having to defend claims long after the event when the evidence has disappeared, witnesses' memories have failed or witnesses are unavailable; and reflect the principle that plaintiffs should pursue their claims with reasonable diligence. I acknowledge that recently other jurisdictions have taken different legislative responses to limitation, especially for sexual abuse claims. Cabinet in New Zealand has recently directed officials to undertake further policy work in this regard that will no doubt be informed by the Royal Commission process.

5 Period before 2000

5.1 In the 1990s and earlier, very few requests for redress were made. Initial claims in the social welfare context began to be filed in Court in approximately 1998. I understand the treatment of these earlier claims has been outlined in more detail in other briefs of evidence filed on behalf of the Crown.

5.2 From 2000 to 2004 (and outside of the Lake Alice context which is discussed below), the general process was that a person seeking redress for alleged abuse in social welfare care would write to the Minister (and sometimes the Prime

Minister of the time) seeking redress. Those letters would be referred to the relevant Department at the time. The response would be a formal letter acknowledging the situation and advising if the person wished to take the matter further, they would need to make a claim in the Courts. Towards the establishment of the Historic Claims Workforce in 2004[14] claimants were sometimes advised to directly contact a member of the Department's legal team who would offer initial assistance.

5.3 If a claim was filed in Court then, in accordance with the Cabinet Directions, the litigation was conducted by or through Crown Law, working with the relevant department to obtain instructions.

6 Lake Alice Hospital Child and Adolescent Unit claims (2000 to 2004)

6.1 In the late 1990s, some 95 former patients of the Child & Adolescent Unit at Lake Alice Hospital in the Manawatu (the **Unit**) filed proceedings against the Crown in respect of their treatment at the Unit. The former patients were represented by Grant Cameron & Associates. At the heart of the patients' complaints were allegations that they were detained unlawfully at the Unit, that the Crown breached fiduciary duties owed to them, and that electro-convulsive treatment (**ECT**) and treatment using the drug paraldehyde constituted assault and battery.

6.2 The purpose of this part of my evidence is to provide further detail about the process of the litigation and explain why a global settlement model was used for the Lake Alice claims (as opposed to the later filed historic abuse claims, as I have referred to at the beginning of this brief).

6.3 The Unit had been set up in 1972 as a separate unit for the treatment of children and adolescents. The only psychiatrist at the Unit was Dr Selwyn Leeks, who was primarily employed by the Palmerston North Hospital Board.

6.4 In 1977, a Commission of Inquiry was held into the Unit. It recorded admissions by Dr Leeks and other staff that unmodified ECT (i.e. ECT without the prior administration of a muscle relaxant) was given to patients but also recorded that this was thought to be medically justified. An Inquiry in the same year by the then Chief Ombudsman (Sir Guy Powles) identified serious defects in admission procedures and failure by hospital staff to obtain consent to treatment (particularly ECT) either from the adolescents concerned or from their parents or guardians (often the Department of Social Welfare). The Unit closed later in 1977.

6.5 After receipt of the claims filed by Grant Cameron & Associates in the late 1990s, in 2000 Cabinet approved the establishment of an alternative dispute resolution process to settle grievances of former patients in State care at Lake Alice Hospital.[15]

6.6 The purpose of the above process was to settle claims of abuse while in State care without recourse to litigation. The process established involved attempting

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[14] Discussed in the brief of evidence for MSD.

[15] Cabinet Policy Committee "Grievances of Former Patients of Lake Alice Hospital: Alternative Dispute Resolution Process" (28 September 2000) POL 00/125. **Crown Bundle - Tab 1**

to settle claims with claimants and their counsel directly, but where settlement was not possible to proceed either through mediation and arbitration or, failing that, litigation.

6.7 By December 2001, 95 of the former Lake Alice patients had reached settlement with the Crown and compensation of $6.5 million had been paid to these individuals.[16] A further proposal was made to settle the remaining claims. The process involved the appointment of retired High Court Judge Sir Rodney Gallen to apportion a global settlement sum between these individual claimants. The Crown also required that claimants consent to an "*Agreement to Submit to Expert Determination*" which required the claimants to acknowledge that the payment made, although ex gratia, constituted a full and final settlement of all claims able to be taken against the Crown or any other person with respect to their residence at Lake Alice.

6.8 The apportionment of funding, including the meeting of the claimants' legal costs, were dealt with in a confidential process devised by their lawyers. The Prime Minister and Minister of Health provided personal letters of apology to these claimants.

6.9 By May 2002, 60 people had come forward to be part of the Sir Rodney Gallen resolution process.[17] The Ministry of Health publicised a 30 June 2002 cut-off date for claimants wishing to seek ex gratia compensation from the Ministry of Health in relation to Lake Alice Hospital claims.

6.10 By October 2004, 73 new damages claims against the Crown by former psychiatric patients had been filed in the High Court since 2002.[18] At the same time, claims of historical abuse in numerous government-run institutions were becoming increasingly widespread.

7 Waiouru Regular Force Cadet School claims (2004)

7.1 By October 2004 the Crown was also responding to claims of historical abuse in the Waiouru Regular Force Cadet School (the **Cadet School**).[19] Those claims alleged abuse at the Cadet School from 1948-1991.

7.2 On 20 October 2004, Cabinet approved the appointment of his Honour Justice Morris to act as Independent Assessor, by means of a Ministerial Inquiry, to investigate claims of alleged abuse at the Cadet School. That assessor was tasked with reviewing the behaviour and treatment of Cadets at the Cadet School from 1948-1991, the events surrounding the killing of Cadet Grant Bain in 1981, and other related matters. [20] Cadet Grant Bain was a 17-year-old cadet who had been cleaning his rifle with cadets from his platoon and was shot by

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16 Cabinet Policy Committee "Lake Alice Hospital Claims: Further Settlement" (7 December 2001) POL (01) 372. **Crown Bundle - Tab 2**

17 Cabinet Policy Committee "Progress of Settlement of Lake Alice Hospital Claims" (1 May 2002) POL Min (02) 10/7. **Crown Bundle - Tab 3**

18 Cabinet Policy Committee "Psychiatric Hospitals Claims: Proposal for Alternative Dispute Resolution Process" (18 October 2004) POL (04) 317. **Crown Bundle - Tab 7**

19 Cabinet Policy Committee "Waiouru Regular Force Cadet School Assessment" (20 October 2004) POL Min (04) 25/3. **Crown Bundle - Tab 9**

20 Cabinet Policy Committee "Waiouru Regular Force Cadet School Assessment" (20 October 2004) POL Min (04) 25/3.

another senior cadet in an accidental discharge, which may have arisen as part of an alleged bullying culture at the Cadet School.

7.3 Justice Morris ultimately found that while bullying had taken place at the Cadet School in the relevant time period by some mainly senior cadets to a limited number of junior cadets, there was nothing to support claims of a culture of violence. He found some mistakes had been made by the authorities in relation to Grant Bain's death (ultimately leading to a manslaughter charge being brought against the senior cadet responsible).

7.4 The Inquiry led the Ministry of Defence to undertake a separate review of the efficacy of the New Zealand Defence Force policies and procedures to prevent physical, sexual and other abuse. That review found the polices were sound but recommended greater performance management measures to monitor the effectiveness of the policies.

7.5 In addition to the above, seven High Court proceedings were filed seeking damages for alleged abuse at the Cadet School. Only one of these cases went to trial with Williams J dismissing the claim. The claim failed because the claimant was unable to satisfy the Court that any abuse suffered caused injury. Williams J also found that if causation had been established the claim would have failed because of the application of the ACC legislation and the Limitation Act bar. Following the release of this decision the remaining claims were discontinued.

8 Early claims

8.1 I note that only a very small number of the early claims proceeded to a hearing. I discuss these claims later in my brief.

8.2 In October 2004 Cabinet agreed that Crown Law should continue to represent Crown defendants in response to former psychiatric patient claims under the current law (i.e. through the courts).[21] Settlement was reserved for meritorious claims.[22]

8.3 Cabinet also agreed that limitation defences might be waived (on an individual basis), and a case settled regardless of the Mental Health and ACC statutory bars, where the justice of the case demanded that the matter be determined on its factual merits.[23] This was in recognition that the law relating to the applicability of those defences had not been definitively settled, and there was still inevitable legal uncertainty and litigation risk.[24] The Crown Litigation

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21 Cabinet Policy Committee Minute "Psychiatric Hospitals Claims: Proposal for Alternative Dispute Resolution Process" (20 October 2004) (04) 25/18. Also Cabinet Minute "Psychiatric Hospitals Claims: Proposal for Alternative Dispute Resolution Process" (1 November 2004) CAB Min (04) 35/4F at [2]. **Crown Bundle - Tab 8; Tab 10**

22 Office of the Attorney-General "Memorandum to Cabinet Policy Committee: Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State: Reference to the Law Commission" (9 May 2005) POL (05) 95), at [6]. **Crown Bundle - Tab 14; Tab 12**

23 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Psychiatric Hospitals Claims: Proposal for Alternative Dispute Resolution Process, (attached to Cabinet Policy Committee "Psychiatric Hospitals Claims: Proposal for Alternative Dispute Resolution Process" (18 October 2004) POL (04) 317), at [38] – [39]. **Crown Bundle - Tab 7**

24 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Psychiatric Hospitals Claims: Proposal for Alternative Dispute Resolution Process, (attached to Cabinet

Strategy continued in this form through to May 2008, when an updated strategy was adopted.[25] The Crown Litigation Strategy influenced agencies such as MOH, MOE and MSD in how they responded to claims of historical abuse.

8.4 Cabinet also agreed to:[26]

(a) establish a confidential, non-critical forum where former psychiatric patients could air their grievances (the **Confidential Forum**); and

(b) establish an inter-departmental team, led by the Ministry of Justice, to provide policy advice on whether it was desirable to develop an alternative to the Court system for historical abuse claims.[27]

8.5 I understand the Confidential Forum is addressed in more detail in the brief of evidence of Philip Knipe provided on behalf of the Ministry of Health. Briefly, the Confidential Forum was announced by the Government in December 2004 and established in 2005.[28] The Confidential Forum provided an accessible, confidential environment in which former in-patients, family members of in-patients, or former staff members could describe their experiences of psychiatric institutions in New Zealand in the years before November 1992.[29] The Confidential Forum did not determine the truth of the accounts but was an uncritical listening forum.[30] The Confidential Forum completed its work in June 2007.[31]

2005 – 2006: development of Crown Litigation Strategy

8.6 As of 9 May 2005, officials from across all relevant departments, including Crown Law, began working on a strategy to respond to claims of historical abuse.[32] This included ensuring a consistent approach was taken on responding

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Policy Committee "Psychiatric Hospitals Claims: Proposal for Alternative Dispute Resolution Process" (18 October 2004) POL (04) 317), at [38].

25 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (16 May 2008) POL (08) 98. **Crown Bundle - Tab 34**

26 Cabinet Minute "Psychiatric Hospitals Claims: Proposal for Alternative Dispute Resolution Process" (1 November 2004) CAB Min (04) 35/4F at [3] and [6]. **Crown Bundle - Tab 10**

27 I understand the interdepartmental working group was established and in February 2005 advised Cabinet (amongst other things) that a single alternative mechanism may not be feasible and the issues involved are complex; further work is required to develop a framework of policies and principles which should apply to processes to deal with these claims; and the matter be referred to the Law Commission to report back by March 2006. At Cabinet's request, further work on the terms of reference for the Law Commission was undertaken and Cabinet then deferred referral to the Law Commission indefinitely.

28 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (21 May 2008) POL Min (08) 8/2 at [13]. **Crown Bundle - Tab 35**

29 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (21 May 2008) POL Min (08) 8/2 at [13].

30 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (21 May 2008) POL Min (08) 8/2 at [13].

31 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (21 May 2008) POL Min (08) 8/2 at [13]. Note also Confidential Forum for Former In-Patients of Psychiatric Hospitals "Te Aiotanga: Report of the Confidential Forum for Former In-Patients of Psychiatric Hospitals" June 2007. **Crown Bundle - Tab 24**

32 Cabinet Policy Committee "Historic Abuse Claims Against the State: Reference to the Law Commission" (9 May 2005) POL (05) 95, at page 1-2 (page 2 at [3]). **Crown Bundle - Tab 13**

to litigation and any settlement proposals.[33] A Cabinet Policy Committee paper at the time noted that:[34]

(a) claimants would be required to file claims in Court;

(b) the advantages of settling meritorious claims were noted; and

(c) the Crown was considering filing applications to strike out claims that were barred by accident compensation legislation, claims in relation to which the Crown had statutory immunity under the Mental Health Act, claims barred by limitations legislation, and reducing the scope of the Crown's exposure by eliminating some of the claims. These applications were naturally fact-specific to particular claims and were approached on this basis.

8.7 It was around this time that child welfare claims against the State began to be received. Prior to this, the claims had chiefly related to abuse in psychiatric hospitals.[35]

8.8 The Crown strategy at the time further included the following principles:[36]

(a) acting as a model litigant and in accordance with the highest professional standards;

(b) meeting liability if established but not paying public money without good cause;

(c) avoiding the development of ad hoc mechanisms that constitute an undesirable precedent for future claims; and

(d) using public resources efficiently in responding to claims of historical abuse.

8.9 Cabinet Policy Committee documents also discussed the Crown litigation policy of the time, noting that the first step was to require the plaintiff to provide a well-particularised claim, especially in respect of any alleged damage or injury. Counsel and relevant officials would then undertake an investigation to see if claims can be substantiated to a prima facie level.[37] If the bar against compensatory damages in the accident compensation legislation applied, the Crown would not offer a settlement payment for compensatory damages (even where the claim was able to be substantiated and might otherwise be

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33 Cabinet Policy Committee "Historic Abuse Claims Against the State: Reference to the Law Commission" (9 May 2005) POL (05) 127 at [4] – [6]. **Crown Bundle - Tab 13**

34 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State" (9 May 2005) POL (05) 95) at [5], [6], [17]. **Crown Bundle - Tab 14; Tab 12**

35 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State" (9 May 2005) POL (05) 95) at [15].

36 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State" (9 May 2005) POL (05) 95) at [31].

37 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State" (9 May 2005) POL (05) 95 at [32] and [33].

considered appropriate to settle).[38] Cabinet also noted that Crown Law would not recommend paying exemplary damages where the Crown's liability was vicarious (due to the intended punitive objective of an award of exemplary damages).[39]

8.10 Crown Law and relevant departments were directed to consider making settlement offers either directly to plaintiffs or following an alternative dispute resolution process where assessment of the claims indicated that there was a realistic prospect of liability.[40] The reasoning behind this approach is reflected in a letter from the then Attorney-General to Cooper Legal of 11 March 2009, which explained that the proceedings then filed did not support a global settlement without testing of the evidence and that, where the bulk of the claims were very old and contained contested allegations, the Court was the best forum to conduct that inquiry and make any damages awards.[41]

8.11 Under the Crown litigation strategy, parties were to be encouraged to settle cases where possible.[42] However, it was noted that "settlements will not to be proposed [sic] merely because it is more economic to settle than to defend a case. To do so would run the risk of encouraging non-meritorious claims against the Crown."[43] The quantum of settlements was directed to be non-confidential, although the amount each plaintiff might receive could be confidential.[44] Crown Law was directed to work with relevant departments such as MSD to maintain a schedule of settlement for sharing amongst agencies, as required, to ensure

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38 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State" (9 May 2005) POL (05) 95) at [36].

39 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State" (9 May 2005) POL (05) 95) at [38]. Noted in Cabinet Policy Committee Minute of Decision "Historic Abuse Claims Against the State" (11 May 2005) POL Min (05) 11/5.

40 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State" (9 May 2005) POL (05) 95) at [39]. Noted in Cabinet Policy Committee Minute of Decision "Historic Abuse Claims Against the State" (11 May 2005) POL Min (05) 11/5.

41 Letter from Attorney-General to Cooper Legal "Psychiatric and DSW historic claims litigation", 11 March 2009. This letter was responded to by Cooper Legal in a letter to the Attorney-General of 7 April 2009, to which the Attorney-General further responded by letter to Cooper Legal of 8 May 2009. **Crown Bundle - Tab 40; Tab 41; Tab 42**

42 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State" (9 May 2005) POL (05) 95) at [40]. Noted in Cabinet Policy Committee Minute of Decision "Historic Abuse Claims Against the State" (11 May 2005) POL Min (05) 11/5. **Crown Bundle - Tab 14; Tab 12**

43 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State" (9 May 2005) POL (05) 95 at [41]. Noted in Cabinet Policy Committee Minute of Decision "Historic Abuse Claims Against the State" (11 May 2005) POL Min (05) 11/5.

44 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State" (9 May 2005) POL (05) 95) at [42]. Noted in Cabinet Policy Committee Minute of Decision "Historic Abuse Claims Against the State" (11 May 2005) POL Min (05) 11/5.

consistency.[45] The reasoning was about the sensible use of public money and efficiency but wanting also to ensure that the processes are fair to those accused and that the Crown did not become a soft target for unmeritorious claims.[46]

8.12 At the same time, a report from the Law Commission into alternative/complementary processes for claims brought against the state for alleged harms was sought.[47] Though some progress was made towards commissioning the report was indefinitely deferred by the Government in 2005.

2007: Establishment of the Confidential Listening and Advisory Service and direction to review Crown Litigation Strategy

8.13 By 31 January 2007, Cooper Legal had approximately 500 former child welfare clients among its own clients all of whom alleged historical abuse against the Crown. Of these, approximately 140 had filed claims in the High Court. Approximately half of claims were filed jointly against the Ministry of Social Development and the Crown Health Funding Agency.[48] The *White* High Court litigation also takes place in this period and I discuss this later.

8.14 At the time Cooper Legal wished to have a small number of "test cases" proceed through the Courts. The Crown did not see a principled basis for selecting only a small number of claims, in situations where each claim would have to be assessed on a case-by-case basis. Aside from establishing the applicability of the legal defences under the accident compensation, limitations and mental health legislation, the Crown did not accept that the success or failure of a claim would necessarily resolve others due to the factual and legal complexities involved.

8.15 In light of the increasing volume of claims, in June 2007 the Cabinet Policy Committee agreed to the establishment of the Confidential Listening and Assistance Service (commencing July 2008) and directed Crown Law, in consultation with relevant departments, to consider whether a greater focus on settlement to promote early resolution of claims was appropriate.[49]

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45 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State" (9 May 2005) POL (05) 95 at [46]. Noted in Cabinet Policy Committee Minute of Decision "Historic Abuse Claims Against the State" (11 May 2005) POL Min (05) 11/5.

46 Office of the Attorney-General, Memorandum to Cabinet Policy Committee "Historic Abuse Claims Against the State" 11 May 2005 (attached to Cabinet Policy Committee "Historic Abuse Claims Against the State" (9 May 2005) POL (05) 95 at [42]. Noted in Cabinet Policy Committee Minute of Decision "Historic Abuse Claims Against the State" (11 May 2005) POL Min (05) 11/5.

47 Cabinet Policy Committee "Historic Abuse Claims Against the State: Reference to the Law Commission" (9 May 2005) POL (05) 127. **Crown Bundle - Tab 13**

48 Letter to the Attorney-General "Historic Child Welfare Claims" (31 January 2007) at [3].

49 Cabinet Policy Committee "Historic Claims of Abuse and Neglect in State Care" (18 June 2007) POL (07) 207 at [73] – [78]; Cabinet Policy Committee "Historic Claims of Abuse in State Care" (20 June 2007) POL Min (07) 13/1 at [9]. **Crown Bundle - Tab 21; Tab 25; Tab 26**

9 2008-2009: Update to the Crown Litigation Strategy and the Gallen Report

2008 update to the Crown Litigation Strategy

9.1 On 21 May 2008 a renewed strategy for historical claims of abuse was adopted by the Cabinet Policy Committee,[50] and the Crown Law Office and Ministry of Justice were directed to undertake a further review of the Crown Litigation Strategy at the end of 2009, providing a report to the Cabinet Policy Committee by 28 February 2010.[51]

9.2 Under the new strategy, grievances could be addressed through CLAS, or direct negotiation with the appropriate agency, or filing claims in Court. The strategy comprised the following three-pronged approach:[52]

(a) first, agencies to seek to resolve grievances early and directly with the particular individual where that is practicable;

(b) second, settlement to be considered for any meritorious claims (i.e. putting to one side available defences and investigating allegations to a standard less than absolute proof); and

(c) third, claims that do proceed to a Court hearing because they cannot be resolved are to be defended, and conducted according to the Cabinet's litigation strategy.

9.3 The Crown Litigation Strategy at the time included relying on defences under the Limitation Act, the Accident Compensation Act and the Mental Health Act.[53] The application of the Limitation Act was noted as being likely to be available in nearly all cases of historical abuse.[54] These were noted as not simply technical defences and rather that they should be considered and pursued for policy reasons (as discussed above).[55] The strategy was to be in place for two years, with a further review and report to advise on the position at that point.[56]

9.4 It was noted that as at 31 December 2007, 416 claims had been filed in the High Court in Wellington as follows:[57]

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50 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (21 May 2008) POL Min (08) 8/2 at [2] on page 1. **Crown Bundle - Tab 35**

51 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (21 May 2008) POL Min (08) 8/2 at [3] on page 1.

52 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (21 May 2008) POL Min (08) 8/2 at [5].

53 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), at [18]. **Crown Bundle - Tab 47**

54 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (16 May 2008) POL Min (08) 98 at [8]. **Crown Bundle - Tab 34**

55 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (21 May 2008) POL Min (08) 8/2 at [43]. **Crown Bundle - Tab 35**

56 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (21 May 2008) POL Min (08) 8/2 at [2] on page 1.

57 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (16 May 2008) POL Min (08) 98 at [9]. **Crown Bundle - Tab 34**

(a) 181 claims against the Crown Health Financing Agency in respect of psychiatric hospitals;

(b) 94 directly against that agency and the Attorney-General on behalf of Child Youth and Family;

(c) 129 against the Attorney-General on behalf of Child Youth and Family only; and

(d) 12 directly against the Attorney-General on behalf of Child Youth and Family and/or the Financing Agency, and a third party such as the Salvation Army or the Roman Catholic Church.

9.5 The Ministry of Education was noted as being a possible further joint defendant in 17 of the above claims arising from issues in residential special schools. Further claims against the Ministry of Education were pending.[58]

9.6 The 2008 renewed litigation strategy noted the following:

(a) Individual incidents of abuse had been found. However there continued to be no evidence of systemic abuse or failure within either of the two major areas of claims (psychiatric care and child welfare).[59]

(b) Resolving the large number of claims already filed within a litigation framework would incur significant cost and delay.[60] The total cost of resolving these claims (including the Crown's costs as a defendant, the internal costs of the relevant defendant agency, funding of the proceedings through legal aid and operational court costs) was substantial.[61] The nature of the claims, necessitating detailed investigation, contributed to the cost and delay.[62]

9.7 An MSD briefing to Ministers of 16 December 2009 (prepared in consultation with Crown Law, the Ministry of Justice, the Ministry of Health, the Ministry of Education, the Crown Health Financing Agency and the Department of Prime Minister and Cabinet) noted that Cabinet's approach in 2004 to historic claims was taken because there was no evidence of any system failure or systemic abuses justifying a global settlement or public inquiry. The 2009 briefing stated that this was still the case at that point in time.[63] Accordingly there was no basis for a comprehensive ADR or settlement process with minimal investigation[64] (as had been the case in the Lake Alice settlement and in other jurisdictions).

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58 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (16 May 2008) POL Min (08) 98 at [10].

59 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (16 May 2008) POL Min (08) 98 at [39].

60 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (16 May 2008) POL Min (08) 98 at [45].

61 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (16 May 2008) POL Min (08) 98 at [46].

62 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (16 May 2008) POL Min (08) 98 at [53].

63 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), at [7]. **Crown Bundle - Tab 47**

64 Cabinet Policy Committee "Review of the Litigation Strategy for Historic Claims of Abuse" (16 May 2008) POL Min (08) 98 at [39] to [40]. **Crown Bundle - Tab 34**

The Gallen Report

9.8 On 27 November 2009, Sir Rodney Gallen produced a report at the Government's request assessing MSD's process of addressing historical abuse claims.[65] Sir Rodney in his report discussed the potential need for a more expansive approach to the Limitation Act, particularly with respect to those who may be under continuing disability. This led, in part, to the changes to the Limitation Act which I summarise below.

9.9 I note that, contrary to recent media reports, parts of Sir Rodney Gallen's original Lake Alice report were eventually made public after a Court hearing in 2001 in which the Crown sought certain confidentiality orders. The orders were granted in respect of Parts 2 and 3 of the report, but the Court ordered that the publication of the Introduction and Part 1 of the report would not prejudice the Crown.[66]

Further development of the Crown Litigation Strategy

9.10 In December 2009 an interdepartmental group, including Health, Justice, Social Development, CHFA, Education, Treasury and DPMC, provided Ministers with an update on how claims of historical abuse were being managed. The update suggested that the existing Crown Litigation Strategy be continued although some updates were made. In particular agencies sought to be able to make offers to claimants to forgive legal aid debts and reimburse certain wellness-related costs to claimants.[67] This was approved and implemented.

Limitation Act 2010

9.11 On 1 January 2011, the Limitation Act 2010 came into force, repealing the Limitation Act 1950. The 2010 Act only applies to claims for acts or omissions after 31 December 2010. Despite being repealed, the 1950 legislation will continue to govern a claim before that date, provided the claim is brought against the relevant person or company by the later of either 15 years from the date of the act or omission, or five years after the 2010 Act came into force. Features of the 2010 Act include the introduction of the concept of "late knowledge", whereby if a plaintiff does not discover his or her claim before the end of the relevant limitation period, he or she has three years from when the claim is discovered to issue proceedings. There is, however, a 15-year absolute "longstop" by which all claims must be brought.

9.12 The 2010 Act also introduced a limited discretion to enable courts to grant relief in relation to claims concerning some abuse of minors, despite the existence of a limitation defence which would otherwise bar the claim. The discretion enables the Court to order monetary relief if the Court thinks it is "just" to do so. The discretion also operates in a limited way under the 1950 Act, enabling the Court to order relief in respect of an action as if the longstop period does not apply (but not extending to the other limitation periods under the 1950 Act). There

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65 Sir Rodney Gallen "Assessment of MSD Processes on Historic Claims", 27 November 2009. **Crown Bundle-Tab 46**

66 *A & ors v Attorney-General; B & ors v Attorney-General* CP91/99; CP92/99, High Court, Wellington, 12 October 2001, Ronald Young J.

67 Report to Ministers of Justice, Health, Education, Social Development and Employment and to the Attorney-General "Historic Abuse Claims: Update on Review" 15 December 2009. **Crown Bundle - Tab 47**

are a number of factors which the Court must take into account when considering the exercise of the discretion.[68]

9.13 The 2010 Act also permits parties to contract out of, or modify, the terms of the Act.

10 2011 review of the Crown Litigation Strategy

10.1 On 14 January 2011 Crown Law provided an update to the Attorney-General and subsequently to the Ministers and Associate Ministers of Health, Social Development and Education on the Crown Litigation Strategy (as required by the 2008 Cabinet paper). In broad terms, the Crown litigation strategy was to continue operating as it had done, that is:

(a) officials would attempt to settle claims where there was a good evidential basis to do so, even if there were legal impediments to a claim being brought (such as the Limitation Act and accident compensation legislation);

(b) claims would not be settled simply because it was more economic to do so; and

(c) claims that could not be settled would be defended in court.

10.2 A new recommendation was made to make a global settlement offer for claims against CHFA (relating to abuse in psychiatric hospitals).[69] Claimants would be offered a settlement on the basis that they could exit the litigation with no testing of their allegations, repayment by CHFA of any legal aid debt, and receive a modest contribution to wellness related costs. While this approach is not consistent with that taken for the other historic claims, the reasons for the difference are set out in the Report.[70] Further detail of this settlement is described in the evidence filed on behalf of the Ministry of Health.

10.3 The Crown position continued to be that a Lake Alice Child and Adolescent Unit-type settlement was inappropriate. As previously noted, the claims of abuse (aside from those involving the Lake Alice Child and Adolescent Unit) did not at this time suggest systemic problems in that the abuse was not the result of how the system was intended to operate nor was there recorded consistency of facts that would lead to a conclusion there was a systemic problem. So a broad-brush settlement was considered inappropriate. Officials accepted that some people did suffer physical and sexual abuses in State care. However unlike in Lake Alice Child and Adolescent Unit, they considered there was not such recorded consistency of factual circumstances (i.e. inappropriate medical treatment by the same doctor in a particular time period) that allowed the Crown to accept there was systemic, institution-wide abuse. The allegations covered many decades, were individualised and related to different types of abuse in different institutions.

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68 These are set out in section 18 of the 2010 Act (and section 23D of the 1950 Act).

69 Letter from Crown Law Office to the Attorney-General "Historic Claims: Crown strategy and claims update" 14 January 2011. **Crown Bundle - Tab 53**

70 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**

10.4 The 2011 review noted the ongoing issues arising from the legal barriers to claims, in particular the bar under the accident compensation scheme and the defence under the limitation regime, and, in relation to claims alleging breach of s 9 of the New Zealand Bill of Rights Act (the right not to be subjected to torture or cruel treatment), the high bar for establishing a breach of that section. The review noted that even where claims are barred by statute, they may still deserve resolution, including by compensation and acknowledgement or apology. The example given was for claims of sexual abuse against a person in care that could be barred by the Limitation Act.

10.5 Difficulties were noted in assessing these claims that were said to have a moral merit (even if they lacked legal merit):

(a) not all allegations are true, and assessing credibility is difficult;

(b) not all allegations, even if accepted as true, can be causally linked to damage or adverse outcomes claimed, but claimants may benefit from non-monetary options such as social services; and

(c) not all allegations, even if accepted as true, give rise to a cause of action – for example that a child was subject to harsh and unloving conditions. Again, claimants may benefit from non-monetary redress options.

10.6 Accordingly, the recommended approach included attempts to resolve claims at an early stage, including paying for costs of services aimed at improving the claimant's wellness, discussions with claimants about their files, and ex gratia sums (where a moral claim can be established). Other possible options for redress were noted as including:

(a) apology or acknowledgement of difficulty/hardship;

(b) contributions to legal costs; and

(c) payment for services and/or ex gratia payments.

10.7 In relation to legal costs, it was noted that officials were concerned that escalating legal aid debts presented a substantial obstacle to claimants disengaging from the process. Where none of the above options were possible, defending claims in court continued to be the last resort.

10.8 Further options, including CLAS, accident compensation cover and police investigation, continued to be open to claimants.

11 2019 Update to the Crown Litigation Strategy

11.1 Very recently, on 17 December 2019, the Minister for State Services announced a new strategy for resolving historic abuse claims that was intended to better reflect the Crown's principled response to the Royal Commission. This was following a Cabinet Direction of 8 April 2019 to review the Crown Litigation Strategy (amongst other things), in light of the principles the Government had announced for the Crown's engagement with this Royal Commission (namely manaakitanga, openness, transparency, learning, being joined up, and meeting obligations under Te Tiriti ō Waitangi).

11.2 The updated Crown Resolution Strategy updates the approach in a number of ways, including:[71]

(a) agencies will seek to resolve grievances early and directly with the individual, including in the process the individual's whānau, hapū, iwi and community in accordance with the claimant's wishes;

(b) settlement will be considered for all meritorious claims. Settlement will generally be full and final without admission of liability;

(c) if claimants become aware of additional material, information or circumstances that were not considered by the Crown at the time of settlement, the Crown may consider that new information and whether any additional response should be made; and

(d) where claimants wish to litigate their claims in court, the Crown will concede any factual matters it does not dispute and will rely on appropriate factual and legal defences.

11.3 The Strategy was also renamed the Crown Resolution Strategy to remove the focus on litigation, and better reflect the Crown principles and the centrality of the ADR processes available.

11.4 Additional expectations claimants can have of the Crown in litigation are, for example, the encouragement of communication with individuals and their representatives to arrange tools such as witness screens, name suppression in appropriate cases, statements of agreed facts wherever possible, and alternative hearing locations. The Crown will also ensure the investigation of claims complies with the State Services Commission Model Standards, *Information Gathering and Public Trust.*

11.5 Officials preparing the new Crown Resolution Strategy have also raised with Ministers the possible need for reform of the limitation defence in New Zealand, noting that it was possible for the Crown to decide not to rely on a limitation defence without the need for legislative reform. However, this would mean that plaintiffs with identical claims against non-Crown parties (such as faith-based institutions) would continue to face the potential barrier of a limitation defence.

11.6 The recommendations of the Cabinet Social Wellbeing Committee summarised above were agreed to by Cabinet.[72] Cabinet also directed officials to commence consideration of potential options for the central assessment or review of historic claims and legislative reform of the Limitation Act 2010 in respect of historic claims of abuse in care.

12 Engagement with claimants, in particular those represented by Cooper Legal

12.1 In litigation counsel does not communicate directly with a party who is represented. Accordingly, Crown Law communications with historic claims

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71 Cabinet Social Wellbeing Committee "Review of strategy for the resolution of historic claims" (4 December 2019) SWC-19-MIN-0193. **Crown Bundle - Tab 95**

72 Cabinet Social Wellbeing Committee "Review of strategy for the resolution of historic claims" (4 December 2019) SWC-19-MIN-0193.

claimants was done mostly through lawyers. Face to face engagements between Crown Law and claimants are more rare, though sometimes have occurred in settlement conferences or informal meetings with department officials such as MSD. I am aware that the formality of these communications and the somewhat dry discussion of the legal complexities of the claims has been seen by some plaintiffs as the Crown being unfeeling or insulting to their experiences. I can see how that view would be formed by claimants who read legal correspondence about their case. To some extent, the legal/professional tone will have been intended to be respectful of the seriousness of the issues, and acknowledges the need for those acting for the Crown to strive to be as clearly reasoned and moderate in their tone as possible. While I acknowledge that this can come across as a bit cold, and the tone of communication might be improved by being more mindful of claimants' experience of the litigation process, expressions that are more emotional or sympathetic from people who have not had the claimants' experiences could also come across as condescending or even manipulative in a context where the Crown's position does not align with that of the claimants.

Agreement to stop the running of time under limitations legislation

12.2 On 31 March 2010, Cooper Legal wrote to Crown Law requesting that Crown Law consider a proposal under which it would not raise limitation issues in claims against CHFA for the period between claimants instructing Cooper Legal and the filing of claims. Cooper Legal explained that the reason for the request was that it was reliant on Legal Services Agency approval of funding before it could file claims, and that this would enable the parties to consider settlement options.[73]

12.3 In early 2011 there was also discussion between Crown Law, MSD and Cooper Legal leading to the eventual agreement between MSD and Cooper Legal that MSD will suspend the counting of time for the purpose of a Limitation Act defence while a claimant is engaging with the Ministry's out of court resolution processes.[74] This approach is intended to ensure that claimants are not disadvantaged by engaging with the Ministry's out of court resolution processes in place of the courts. This does not prevent the Crown relying on Limitation Act defences for claims that (even taking account of the suspension of time under the Agreement) have still been brought out of time.

12.4 On 27 January 2015 an addendum to the 2011 limitation agreement was entered into between MSD and Cooper Legal under which the Ministry agreed not to rely on specified "long stop" provisions that had been added to the Limitation Act 1950.

12.5 I understand that from 2014, the Crown began engaging with Cooper Legal with respect to a stop the clock agreement with MOE. In October 2018, in light of complexities that arose in relation to the draft MOE agreement (in particular, the fact that inconsistencies that were developing across ministries), Crown Law wrote to Cooper Legal advising that relevant ministries consider the principled way forward is to consider the development of an across-ministry policy,

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73 Letter from Cooper Legal to Crown Law Office "Historic Claims Litigation – Undertaking in Relation to the Limitation Act" 31 March 2010. **Crown Bundle - Tab 49**

74 Agreement between the Ministry of Social Development and Cooper Legal, 11 May 2011. **Crown Bundle - Tab 56**

applying to both represented and unrepresented claimants.[75] Work on this policy within the Crown is well advanced, with the Crown expecting to be in a position to consult with Cooper Legal on the policy shortly.

Costs and Legal Services Agency funding

12.6 In the costs decision in *K v CHFA,*[76] which I discuss in detail later, Gendall J made an observation that "the Legal Services Agency ought to be accountable for funding litigation of dubious merit either on the facts or by reason of the Limitation Act provisions." Crown Law brought this observation to the attention of the Legal Services Agency.[77] I understand that this, together with the subsequent Court decisions which I discuss later (including *White*) in 2009 led to the Legal Services Agency reviewing the court decisions that had been issued by that point and deciding to review its ongoing funding of the claims.

12.7 As part of the ongoing scrutiny by the Legal Services Agency as an independent agency, Crown Law from time to time in specific cases copied correspondence between Crown Law and Cooper Legal to the Agency to keep the Agency informed of information about the cases. This arose in part because of a conversation I had with David Howden of the Agency in 2009, where he indicated to me that the Agency might not be receiving all of the correspondence Crown Law was sending to Cooper Legal. In the course of that conversation, both Mr Howden and I agreed that a meeting between the Agency, Crown Law and Cooper Legal would be useful in order to discuss whether there were options to resolve the DSW litigation claims rather than continue with the litigation. I emphasised to Mr Howden that the purpose of such a meeting was to discuss whether there is a way out of the claims for the plaintiffs with no debt to the Agency. I followed this phone call up with a letter to the Agency in February 2009, where I again explained that MSD was interested in exploring with the Agency what factors would allow plaintiffs to accept settlement offers and exit the litigation process with dignity and without a debt to the Agency. I also emphasised that neither MSD or any other agency wished to impose any pressure or attempt to influence the Agency about its funding decisions, recognising the statutory independence of the Agency. Rather, the intent of the meeting was to explore possible approaches to settling claims where there was a costs factor associated with the claim's funding arrangements.[78]

12.8 I had proposed such a meeting to Cooper Legal in a letter of 19 December 2008,[79] and in subsequent correspondence. Cooper Legal consistently declined to participate in such a meeting.

12.9 On 28 October 2011, following the disestablishment of the Legal Services Agency and the appointment of a Legal Services Commissioner within the Ministry of Justice, the Legal Services Commissioner wrote to the Ministry of Social

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75 Letter from the Crown Law Office to Cooper Legal "Approach to suspending the 'limitation clock'" 18 October 2018. **Crown Bundle - Tab 89**

76 *K v CHFA* [2008] NZHC 115 at [19]. **Crown Bundle - Tab 29**

77 Letter from Crown Law Office to Wellington Legal Aid Office "Application for the payment of costs under sections 40 and 41 of the Legal Services Act 2000" dated 12 June 2008 **Crown Bundle - Tab 36**

78 Letter from the Crown Law Office to the Legal Services Agency "Historic claims: meeting about settlement options" dated 4 February 2009. **Crown Bundle - Tab 39**

79 Letter from the Crown Law Office to Cooper Legal "DSW and Psychiatric Historic Claims" dated 19 December 2008. **Crown Bundle - Tab 38**

Development recommending that the current approach to legal aid debts, under which MSD would repay two thirds of the outstanding bill with Legal Aid/Ministry of Justice to write off the remaining third, should continue.[80]

Quantum

12.10 As I will discuss further below, in 2003 two claims alleging abuse in State care had proceeded to trial (*W* and *S*). The plaintiffs in those claims were successful and overcame ACC and Limitation Act obstacles. The claims were settled before the damages hearings. The settlements reflected the factual findings in the trials and contained a relatively large proportion for legal costs, reflecting the complexity of the proceedings.

12.11 The amounts eventually reached for settlement of these cases was based on Crown Law analysis, provided to MSD in respect of particular claims, of likely Court-ordered damages as the law stood at the time, having regard to the factual findings made in each case by the Court. From the record I observe that, subsequent to the settlement of *W* and *S*, Crown Law provided advice in relation to the settlement of various cases. This advice was often not comprised of one opinion but, rather, various pieces of advice in relation to different cases.

12.12 I understand evidence filed on behalf of the Ministries contains the range of figures which is applied for in informal settlement purposes.

12.13 Although it can be seen that the figures settled in the *W* and *S* cases were significantly higher than what is typically a settlement range now for claims in the informal settlement process, the reasons for this reflect the approach the Crown has taken to quantum. The factors bearing on quantum (including the extent to which a claim has been investigated and the allegations "proven") are complicated and are considered on a case-by-case basis. Crown Law provided advice, and engaged in discussions, on a case-by-case basis to MSD in relation to settlement of those claims proceeding to trial, including in relation to the sufficiency of the amounts to settle the claims.

12.14 In addition, the plaintiffs in both *W* and *S* had gone through the litigation process and had had factual findings made after overcoming some of the legal hurdles which I have identified in my brief already. There was still at that point in time, a certain amount of legal uncertainty around the application of the various bars and defences. As the law consolidated over time, including in later years with respect to Supreme Court findings on Bill of Rights Act compensation,[81] the approach to quantum inevitably shifted and evolved.

12.15 In assessing appropriate quantum in the MSD claims in the informal process, the Crown initially looked at a number of comparators in establishing some basis for making payments. These included earlier settlement offers made by Child, Youth and Family, ACC lump sum payments and exemplary damages awarded by the Courts. Over time agencies have endeavoured to make offers that are reasonable relative to each other and to these external comparators.

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80 Letter from the Legal Service Commissioner to the General Manager of Client Advocacy and Review at the Ministry of Social Development, "Resolution of Historic Abuse Claims" 28 October 2011. **Crown Bundle - Tab 58**

81 *Taunoa v Attorney-General* [2007] NZSC 780; [2008] 1 NZLR 429.

12.16 The amount offered in each case in the first days of settlement was based on the facts of the claim. Payments were made on a "first and final offer" basis which meant the Crown did not set a starting figure and require the claimant to negotiate up, though the Crown would change the amount offered if its assessment of the facts proved to be wrong.

12.17 Generally, relativity across payments was intended based on individual facts and regardless of whether claimants were legally aided or not, filed in Court or not, or any other distinguishing factor.

12.18 Subsequently MSD established a settlement process to ensure that amounts offered in settlement of each claim are based on the facts of the claim.

12.19 Crown Law has continued over the years to provide advice to MSD in relation to quantum in different cases and on different issues, and fulfils an ongoing legal advice role with respect to the settlement of claims. For example:

12.13.1 In August 2009 Crown Law provided advice to MSD in respect of relevant comparators. In particular, Crown Law provided an analysis of settlement amounts paid in respect of previous abuse claims brought against the Crown and considered relevant New Zealand cases in which exemplary damages had been ordered and United Kingdom authorities.

12.13.2 In November and December 2013 Crown Law was involved in discussions with MSD in relation to the settlement of claims relating to allegations concerning the Whakapakari program, whereby it was acknowledged that there was sufficient nexus between the Crown and the third party provider for settlement to be considered warranted.

12.13.3 In February and March 2014 Crown Law provided advice to MSD in relation to the quantum of damages that might be warranted in respect of claims that allege a breach of the Bill of Rights Act taking into account relatively modest awards for such claims in overseas redress schemes, and also the comments of the Supreme Court on public law damages in the *Taunoa* case.[82]

12.13.4 In 2014 and 2015 Crown Law was involved in discussions with MSD in relation to the settlement of claims using the Two-Path Approach. I understand this approach is discussed in more detail in the MSD evidence.

12.14 I understand the Ministry of Education has taken a similar approach to determining quantum, basing its analysis on the MSD approach. The Ministry of Health approach is discussed in the brief of evidence of Phil Knipe.

13 Civil litigation

13.1 Civil litigation for abuse in care can be broadly divided into three categories:

(a) pre-*White* litigation;

[82] *Taunoa v Attorney-General* [2007] NZSC 780; [2008] 1 NZLR 429.

(b) the *White* trial (hearing June-August and October-November 2007, with judgment November 2007); and

(c) post-*White* litigation.

14 Pre-*White* litigation

14.1 Before the *White* litigation was concluded in 2009, there were five historical abuse claims heard in full by the Courts. Summaries of these are appended to this brief (with the exception of the Navy claim)[83] and I discuss below the themes which these cases revealed.

Themes of pre-White litigation

14.2 What the pre-*White* cases particularly showed was that, by their multi-dimensional nature, these types of claims are for the most part unsuitable for resolution by the Courts. This was expressly recognised in an observation by Gendall J in *J v CHFA*[84] with his Honour commenting that while many patients hold deep grievances over conditions as they were in the past, plaintiffs have the "insurmountable hurdle" of limitation to overcome as a result of the passage of time. His Honour further observed that if any remedy was thought proper, it might preferably be addressed through the executive branch of Government.

14.3 Related to this, the early cases showed the real difficulties in establishing legal liability. Historical allegations are by their nature often undocumented, making them difficult to recall and establish in a court setting. Causes of action for harsh conditions, in the absence of tortious conduct, may not exist. Further, as the Judge also noted in *J v CHFA*, the courts may not be the best places to examine in hindsight whether the use of an historically accepted practice was appropriate. The Court of Appeal in the *W* case made a similar finding that, by the standards of the day, the Department of Social Welfare's treatment of W did not amount to a breach of duty which could justify the award of damages.

14.4 There may also be difficulties establishing causation between the impugned State conduct and the damage and/or life outcomes of survivors.

14.5 The statutory barrier of the accident compensation regime and the Limitation Act defence present real obstacles for plaintiffs. Further, the nature of exemplary damages in New Zealand (both as to the high threshold of impugned conduct to be established for an award, and the fact they are intended to punish and not to compensate) mean legal remedies for claims, even if established, are limited.

15 The *White* litigation

15.1 I have concentrated on the *White* litigation in some detail in this brief because requests by the Royal Commission for documents and other information indicate that the Commissioners are particularly interested in what occurred in the *White* litigation. Again, I have appended a summary of the litigation and address here the themes which the litigation covers.

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83 *P v Attorney-General* [2010] NZHC 959.

84 *J v CHFA* HC Wellington, CIV-2000-485-876, 8 February 2008. **Crown Bundle - Tab 31**

15.2 The *White* case aptly demonstrates the challenges of litigation as a mechanism to resolve these grievances (as the earlier cases also highlighted). In particular, the litigation showed the difficulties plaintiffs encounter in the Court setting of establishing a duty, establishing causation, meeting evidential burdens (both as to proof and as to proper admissibility of evidence), and overcoming statutory bars.

15.3 Even where a breach of duty can be established by plaintiffs, there may not be adequate redress available through litigation. For example, the High Court in *White* held that there was a breach of the duty of inquiry by the social workers over the period between August 1966 and January 1969. In particular, PW and EW should have been spoken to in private to ascertain their wishes. The Judge held that breach of the duty to inquire would not attract more than nominal damages however. Further, even though the Court found certain breaches of the duty of care to EW and PW, the Judge held that neither PW nor EW could establish that any of the breaches of duties of care had a material impact on them and the dominant cause of their difficulties was their early childhood experiences and/or genetics.

15.4 Many of the discovery and evidence issues encountered by both the plaintiffs and the defendants in the litigation arose because of the length of time that had passed since the events alleged. Significant events in the proceedings were alleged to have taken place between the early 1960s and the mid-1970s. As a result, a number of the witnesses who might have been able to give evidence to the Court to refute or respond to the plaintiffs' allegations were deceased or unable to be located. Where they were able to be located, they were in many cases elderly or suffering from serious medical conditions. Their recollections of factual matters had inevitably faded over time. Documents from the Child Welfare Division and DSW files that might have assisted in refuting or responding to the plaintiffs' allegations had been lost or destroyed during the decades since the alleged events took place.

15.5 Again, limitation proved to be an insurmountable hurdle for the plaintiffs, as did the high hurdle for an award of exemplary damages. In considering an extension of the limitation period, both the High Court and the Court of Appeal took a very factually based approach, requiring a demonstrable trigger leading to an understanding by a plaintiff of the link between their current injuries and the role of the defendant. Further, any reliance on disability for Limitation Act purposes required a very factual analysis. The Supreme Court, in declining leave to appeal, held that the decisions of the lower courts on the Limitation Act questions which the appellants sought to raise in the Supreme Court were based on concurrent findings of fact as to the credibility and reliability of the applicants' evidence, and no good reasons arose from the appellants' submissions for leave to suggest that the Supreme Court would disturb those findings. The Supreme Court noted that, while the applicants had undoubtedly undergone regrettable suffering during their childhood and adolescence, the Limitation Act operated to preclude them from seeking legal redress.

15.6 The Court of Appeal, in relation to accident compensation, was clear that whatever the fairness of the regime, the Court was obliged to apply it, meaning that some of EW's claims were also ACC-barred.

15.7 The principles of tort law were difficult to apply in historic abuse cases. Both the High Court and the Court of Appeal declined to extend the "reasonable

discoverability" doctrine used in more traditional negligence cases, and in cases involving sexual abuse, to cases beyond sexual abuse.

15.8 I acknowledge that litigation takes time and is costly. The *White* brothers' claims were filed in 1999 and 2001 respectively, and the Supreme Court decision declining leave to appeal issued in 2010. Much of the earlier stages of the litigation revolved around issues relating to proper pleading and the adequacy of discovery by both sides. These are inevitable steps in litigation and invariably take time in a busy court system.

15.9 I understand there has been a suggestion in the evidence for the contextual hearing that some questions asked by counsel for the Crown in cross-examination were directed to eliciting an admission from EW that he may have been a willing participant in his own sexual abuse in return for cigarettes. I note that in the transcript of the case, counsel for the Crown clearly advised the Court that the Crown was not suggesting a defence of consent was available.

15.10 Cross-examination is a necessary part of the Court process of parties testing, and the Court determining, contested evidence. That is what was happening here, but I acknowledge it is an uncomfortable part of a litigation process for litigants to have their evidence questioned.

16 DSW Litigation Group

16.1 In addition to the above, the following has occurred to date in relation to the MSD claims (in summary):

(a) On 2 May 2006, a Case Management Conference (**CMC**) was held at which Associate Judge Gendall ordered that "the DSW litigation cases are to be managed as a separate group".[85] The CMC was adjourned until 12 July 2006 to allow the parties to attempt to agree a protocol for managing the DSW litigation claims.

(b) On 12 July 2006 a joint memorandum of counsel was filed referencing the 2 May CMC and the attempts by the parties to agree the terms of a possible protocol to manage the DSW litigation. The parties requested referral to a High Court Judge to manage the cases and a conference so that a protocol could be ordered.[86]

(c) On 7 December 2006 Crown Law filed a memorandum setting out a proposed approach to managing the DSW litigation. This memo attached the "Protocol" used to manage previous psychiatric hospital claims and a letter from Sonja Cooper dated 8 November 2006 setting out her proposed approach. The memo was filed in advance of a conference on 8 December 2006, but this conference was adjourned. On the same date, Gendall J issued a Minute directing the parties to submit a joint memo of issues; inform the Court of claims that don't raise limitation issues; and discuss future management of the cases. There were subsequently no areas of agreement between the parties.[87]

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85 Minute of 2 May 2006.

86 Joint memorandum of counsel of 12 July 2006. **Crown Bundle - Tab 16**

87 Crown memorandum of counsel of 7 December 2006. **Crown Bundle - Tab 19**

(d) On 7 March 2007, Crown Law filed a memorandum in advance of the scheduled CMC, which set out the Crown's position at that time in relation to the management of the claims. That position, in summary, was:[88]

(i) The individual claims should be progressed in the usual manner through the Courts.

(ii) The claims should continue to be called together at a special conference and a judge assigned to manage them. Common directions should be made where possible, although defended interlocutory applications would need individual fixtures.

(iii) The Crown opposed the plaintiffs' proposal that only an initial pool of cases should be progressed, with the balance stayed indefinitely. The Crown advocated the claims being progressed so that they were put on a proper procedural footing and interlocutory matters such as discovery and leave issues were determined before considering whether some claims could be consolidated (even in part) or some progressed ahead of others.

(iv) Cases in which leave was sought should be timetabled to a leave hearing.

(v) Cases for which leave was not required should be timetabled for defences and discovery in the usual way.

(vi) Once individual cases are ready to be set down it may be appropriate to sort them into logical groups for consolidated hearings or to give some cases priority, but it was premature to make such decisions at that stage.

(e) On 10 September 2007, a CMC was held at which Gendall J made various directions, scheduling some claims for leave hearings, and issuing timetabling directions for defences and discovery in relation to other claims. The Minute issued following the CMC also noted those claims which were to be discussed and orders made at the next CMC.[89]

(f) Six-monthly CMCs continued to be held. In contrast to standard case management procedures in the High Court, only claims proposed by Cooper Legal are actively managed through CMC processes.

(g) Currently three proceedings in the DSW Litigation Group are at various stages of being prepared for a hearing.

16.2 By way of useful example, a Minute setting out the background to the way the claims are managed is that of Mackenzie J dated 26 August 2015.[90] By that time the litigation group had expanded to include MOE claims. Notably, his Honour ordered that, for those claims in the DSW Historic Claims, the DSW Recent Claims and the MOE Claims categories, in which proceedings were commenced only to protect time, no further steps in the proceeding (including the filing of a

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88 Crown memorandum of counsel of 7 March 2007. **Crown Bundle - Tab 22**

89 Minute of Gendall J of 10 September 2007. **Crown Bundle - Tab 28**

90 Minute of MacKenzie J of 26 August 2015. **Crown Bundle - Tab 73**

statement of defence) were to be taken until further order of the Court. Defences were, however, directed to be filed for the Whakapakari[91] plaintiffs within two months of a relevant claim being filed. The Whakapakari claims were more recent and some did not have some of the same limitation obstacles as the more historic claims. Further, as the Minute notes, some of the claims were more advanced and ready for trial.

16.3 The above process broadly remains in place. The claims are now managed by her Honour Ellis J. In advance of each six-monthly CMC, Cooper Legal sends Crown Law a draft memorandum of counsel setting out steps desired to progress certain cases (for example, nominating cases for which defences should be filed, and where discovery dates should be agreed) and listing new and settled claims from the previous six months. Crown Law then files a separate memorandum of counsel highlighting any issues Crown Law wishes the Court to consider. The current process is plaintiff-led and relies to a great degree on the preference of Cooper Legal as to which individual cases should be prioritised.

Judicial review of the Two Path approach to settlement

16.4 *XY v Attorney General*[92] involved a judicial review of the Two Path approach to settlement.

16.5 Cooper Legal claimed that MSD's decision to implement the Two Path Approach (as described in the brief of evidence of Simon MacPherson) was one made without adequate consultation or transparency, and without appropriate consideration being given to significant flaws in the process. Judicial review was sought on the grounds of breach of natural justice, breach of legitimate expectation, error of law, and mistake of fact.

16.6 The High Court held that the substance of the proceeding was not reviewable. Executive decisions relating to management of legal claims and resource allocation to resolve those claims were held to fall outside the judicial domain. In the absence of some statutory or policy underpinning, the decisions are not susceptible to assessment in terms of legality or otherwise. In addition, any prejudice to claimants was not considered material because a claimant could always reject a Two Path offer and elect a "full assessment" at any time.

16.7 In obiter statements, the Court also found that there had been adequate consultation, there was no legitimate expectation established, there was no error of law and no unremedied mistake of fact.

Disclosure of information on the Court file to promote the safety of children

16.8 As explained in the brief of evidence filed by Simon MacPherson on behalf of MSD, the claims sometimes include information that ministries consider necessary to share with relevant agencies to promote the safety of children today. Recent interlocutory litigation before the High Court and Court of Appeal has concerned the legal framework for the disclosure of such information, where it is included in court documents.

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91 The youth justice programme based on Great Barrier Island from the late 1980s to 2004.

92 *XY v Attorney General* [2016] NZHC 1196. **Crown Bundle - Tab 77**

16.9 In *J (and other plaintiffs in the DSW litigation group) v Attorney-General*[93], the claimants in the DSW Litigation Group applied for (1) an order preventing information provided to MSD, MOE or the AG from being disclosed to third parties who have no connection to the proceedings, without the plaintiff's consent ("non-disclosure order"); and (2) an order preventing search of the Court file without the Court's leave ("no search order"). The Crown consented to the no search order but opposed the non-disclosure order.

16.10 The types of disclosure at issue evolved over the course of the proceedings. The initial focus was on disclosures to Police,[94] but this expanded to include potentially urgent referrals to Oranga Tamariki and NGO care providers — for instance, where allegations have been made relating to a person who is currently caring for or working with children. Relevant ministries wished to be able to make disclosures they consider lawful pursuant to the Privacy Act 1993[95] and/or s 15 of the Oranga Tamariki Act 1989 (which authorises any person who believes a child has been or is likely to be harmed to report the matter to Oranga Tamariki or Police).

16.11 The Crown submitted the material before the Court did not justify the non-disclosure order sought. In particular with respect to urgent safety referrals, the Crown was concerned that a requirement to seek the Court's leave may lead to delays that could result in harm to children today. The Crown also submitted there were legal impediments to the non-disclosure order, including that a requirement for leave to make reports under s 15 of the Oranga Tamariki Act would be contrary to the terms and purpose of that Act.[96]

16.12 The High Court concluded that it had power to make a non-disclosure order and that it should do so in this case, including in light of the vulnerability of claimants and their legitimate expectation of privacy and/or confidentiality at this stage of their proceedings (prior to trial). The Court ordered that the Crown was not to disclose information contained in documents on the Court file to a non-party without leave of the Court, except in specified situations —namely, where the disclosure is for the purpose of the conduct or settlement of the litigation; where a plaintiff consents; or where the disclosure is between MSD, Oranga Tamariki or MOE or within those organisations for the purposes of ensuring the safety of children. (The Court's leave is required for urgent safety referrals to other agencies, such as Police and NGO care providers, absent plaintiff consent).

16.13 The Crown appealed the High Court decision. The Court of Appeal dismissed the appeal, finding that the non-disclosure order did not exceed the Court's inherent powers, and that the making of the order was an appropriate exercise of the Court's inherent power in this case.[97]

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93 *J v Attorney-General* [2018] NZHC 1331. **Crown Bundle - Tab 84**

94 Prior to the plaintiffs' application, MSD had provided information relating to a small number of claimants represented by Cooper Legal to Police.

95 Specifically, information privacy principle 11(e)(i), concerning disclosures to avoid prejudice to the maintenance of the law, and information privacy principle 11(f), concerning disclosures to prevent or lessen a serious threat to public safety or the life or health of another individual.

96 This section authorises any person who believes that a child or young person has been, or is likely to be, harmed.

97 *Attorney-General v J* [2019] NZCA 499. **Crown Bundle - Tab 94**

17 Current litigation

17.1 I understand that spreadsheets have been provided to the Royal Commission which set out the current position in relation to claims filed since circa 2004, including those that have settled. Further, I have described above the ongoing approach taken by the Court to managing these claims. There is currently one case progressing to a hearing in August 2020.

18 Further matters

International law obligations

18.1 I understand that the Royal Commission is interested in the extent to which the Crown's policies, procedures, processes, strategies or outcomes conformed to international human rights obligations which were binding on New Zealand throughout the relevant timeframe.[98]

18.2 New Zealand is required to report to the United Nations Committee against Torture every four years on the steps and measures that New Zealand has taken in order to give effect to its obligations under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

18.3 In terms of the Government's general reporting on UNCAT, I understand that MFAT had responsibility for the 1st to 4th Periodic Reports to UNCAT, and this responsibility was transferred to MoJ from the 5th report. The 7th report is currently underway.

18.4 There have been a number of specific complaints relating to historic abuse laid with the United Nations under the United Nations Convention Against Torture (UNCAT). I summarise below the Government's response to these. Crown Law's role in relation to individual communications to UNCAT is primarily one of co-ordination and advocacy. That is, Crown Law works with agencies that have policy responsibility in relation to the matter that is the subject of the communication (e.g. in the case of *Zentveld*, the Ministry of Health and New Zealand Police) to collect relevant information, and present that information to UNCAT as New Zealand's observations on the communication.

18.5 Mr Zentveld was a patient in the Child and Adolescent Unit of the Lake Alice Psychiatric Hospital in the 1970s. His Communication to UNCAT alleges in the main that he was subjected to inappropriate use of electro convulsive therapy. In 2006 Mr Zentveld received an ex gratia payment and apology from the Crown acknowledging the abuse he had suffered in the Unit. In the same year, he complained to New Zealand Police regarding his treatment in the Child and Adolescent Unit.

18.6 A key point of the Communication is that the New Zealand Government has not done enough to hold Dr Leeks to account. The Government responded with submissions filed on 21 May 2018. The submissions emphasised that numerous investigations have been undertaken by the New Zealand Police, starting in the 1970s and more recently in the 2000s, to determine both the nature and

[98] Abuse in Care Royal Commission of Inquiry *Investigation into Redress Processes First Redress Process Public Hearing Scoping Paper - Civil Claims and Litigation – State Care,* September 2019.

circumstances of alleged criminal offending at Lake Alice Psychiatric Hospital, and to establish the identity of any person who may have been involved. Mr Zentveld's complaint to Police in 2006 was investigated but a prosecution was ruled out on the basis that there was no realistic prospect that a criminal prosecution would be successful against Dr Leeks, and there was no countervailing public interest in proceeding with a prosecution, having regard to the guidelines for prosecution. The submissions noted current investigation by Police of recent allegations of sexual assault at Lake Alice Psychiatric Hospital. At the same time the Government observed that the Convention does not oblige a State party to prosecute for alleged torture when doing so is not in the public interest, and pointed to significant changes in the statutory and regulatory regime surrounding mental health since the 1970s.

18.7 On 27 December 2019 UNCAT released its finding in Mr Zentveld's case, stating that the New Zealand Government has failed to conduct an effective investigation into the circumstances surrounding the acts of torture and ill-treatment suffered by Mr Zentveld while he was a patient at the Lake Alice Child and Adolescent Unit and that, subsequently, New Zealand was in violation of articles 12, 13 and 14 of UNCAT.

18.8 A response to the UNCAT report is required by New Zealand within 90 days.

18.9 Mr Richards was also a patient in the Child and Adolescent Unit of the Lake Alice Psychiatric Hospital in the 1970s. His communication to UNCAT was largely based on Mr Zentveld's. Mr Richards alleges that he inappropriately received electroconvulsive therapy, electric shocks to the genitals, and drugs in the Unit, and that the New Zealand Government has not done enough to hold Dr Leeks to account. He alleges breaches of Articles 2, 10, 11, 12 and 13 of UNCAT. He also alleges that he has not been provided with sufficient rehabilitation by the New Zealand Government, which may lead to the Committee considering Article 14 of UNCAT, even though it is not expressly mentioned in the communication.

18.10 The Government filed its response to Mr Richards' communication on 27 November 2019. On admissibility, the Government Stated that: the allegations of breach of the UNCAT prior to 9 January 1990, when the UNCAT entered into force in New Zealand, are inadmissible; the aspects of the complaint that impugn the actions of agents outside the New Zealand Government's jurisdiction are inadmissible; and Mr Richards has not exhausted his domestic remedies, as Police are currently investigating his complaint about Lake Alice and he is likely to have the opportunity to participate in the Royal Commission.

18.11 On the merits, the Government has submitted that it has satisfied its obligations under the Convention through the numerous reviews and investigations of the Child and Adolescent Unit, including two prior and one current Police investigation, and through the compensation and apology issued by the Government to former patients of the Child and Adolescent Unit in the early 2000s, including Mr Richards. The Government has also pointed to the Royal Commission which is highly likely to consider the events at the Unit. The Government has submitted that advancements in medical practice in New Zealand mean that what occurred is exceedingly unlikely to occur again.

State Services Commission investigation into the use of external security consultants

18.12 In December 2018, a State Services Commission investigation into the use of external security consultants by government agencies uncovered breaches of the State Service Code of Conduct across the public service. The investigators found that Crown Law had breached the Code of Conduct by providing broad instructions to a private investigator in the *White* case. The inquiry found the broad nature of the instructions to the private investigators, without explicit controls to protect privacy interests, breached the Code of Conduct requirement to respect individual privacy and avoid activities that might harm the reputation of the State Service. Critically, no evidence of surveillance of the plaintiffs' witnesses in the *White* litigation was found by the investigators, although it was noted that Crown Law did not rule out low-level surveillance in the lead up to the trial and there were indications in the file that the investigators did use techniques involving low-level surveillance, or something close to it, together with a covert approach for at least one person of interest, but that it was not possible to make a definitive finding.[99]

18.13 Specifically, the Inquiry found that, in 2007, Crown Law instructed private investigators to assist with the case in the lead-up to trial. Crown Law's instructions to the private investigators were found to be broad, including seeking any information that could be used to cross-examine a group of similar fact witnesses to be called by the claimants.[100]

18.14 The Crown Law Statement on the Inquiry[101] sets out Crown Law's response. I told the Inquiry the conduct at issue fell short of my expectations and that I intended to put in place guidelines to meet the concerns expressed by the Inquiry. I consider the use of private investigators to be acceptable in some circumstances, but here there was a shortfall. The Inquiry properly held the Crown to high standards in the conduct of the sensitive *White* litigation and I acknowledged that the broad terms of Crown Law's instructions to the private investigation firm fell short. I expressed my regret for that and advised I would take steps to ensure that for the future Crown Law has an effective framework in place to guide any instruction to investigators in information gathering for civil litigation.

18.15 A policy relating to information gathering at Crown Law (including procedures for instructing external security consultants) was finalised in April 2019 (with the next review date set for April 2024).[102] The information gathering activities covered by the policy are:

(a) information provided by clients when instructing Crown Law, or in the course of civil litigation, or passed to Crown Law by Crown Solicitors or public prosecutors;

(b) Court processes for information gathering/sharing between each party to a litigation (e.g. discovery);

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99 Para 1.22 and 1.23 of the *Report of the Inquiry into the Use of External Security Consultants by Government Agencies*, 18 December 2018 (the **Security Report**). **Crown Bundle - Tab 90**

100 Para 1.22 of the Security Report.

101 https://www.crownlaw.govt.nz/assets/Uploads/Media-Statements/Statement-from-Crown-Law.pdf

102 Crown Law Office "Information Gathering – Policy" 30 April 2019. **Crown Bundle - Tab 92**

(c) information provided voluntarily by the person who is the subject of the information (or their counsel);

(d) information from public sources such as public records – e.g. the register of companies;

(e) information provided by third parties such as witnesses; and

(f) information gathered by any other means.

18.16 The policy notes that Crown Law may, from time to time, engage external security consultants for operational reasons (generally for routine tasks such as serving documents, or tasks requiring contact/location of third parties such as witnesses) but may also require information gathering on behalf of Crown Law. All instructions to such consultants, aside from business as usual service of documents to known addresses, must be authorised by a Deputy Solicitor-General or the Deputy Chief Executive as set out in the policy.

18.17 All information gathering by Crown Law is expressly required to be carried out in compliance with relevant legal requirements, the SSC Code of Conduct and the SSC model standards. Further, all information gathering must meet all applicable ethical requirements, and information will not be gathered using deceptive techniques. Once it is identified that a method of information gathering is lawful, consideration must also be given to whether the Crown should, in the particular circumstances, gather information by this method. Information gathering from social media and other online sources must be approached with caution and restricted to what is publicly available.

18.18 Information gathering by Crown Law staff which is beyond the scope of the information gathering activities I have listed above, and which may compromise privacy interests, is treated as exceptional and must be authorised on a case-by-case basis by a Deputy Solicitor-General or the Deputy Chief Executive (applying the considerations set out in the policy).

18.19 The policy sets out requirements for instructing external security consultants. Further, the policy recognises that, in exceptional circumstances, in the context of civil litigation conducted by Crown Law, there may be a requirement for information to be gathered by means of surveillance. Any proposed surveillance or infringement of privacy interests must be specifically authorised by a Deputy Solicitor-General or the Deputy Chief Executive (applying the considerations set out in the policy). Surveillance activities instructed by Crown Law must not include any unlawful conduct.

18.20 The policy also allows for complaints to be raised about Crown Law's information gathering activity, with review to take place by the Professional Standards Committee. I may also review concerns or complaints at any time.

19 Concluding Comments

19.1 Today litigation plays a very small part in the resolution of historic abuse claims against the State. Since 2007, the large majority of resolutions of historic claims have been through the Crown's informal resolution processes and, indeed, the central role of informal resolution processes is now formally recognised through the most recent Crown Resolution Strategy.

19.2 The Crown will be assisted in any future policy decisions by the recommendations of the Royal Commission into redress and rehabilitation.

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APPENDIX A – SUMMARIES OF PRE-WHITE LITIGATION

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

19.3 S was the victim of abuse, including sexual abuse, committed by foster parents with whom he was placed by the Superintendent of Social Welfare under the Child Welfare Act 1925. The abuse occurred before 1 April 1974 and hence before the first accident compensation legislation came into force. S sought compensatory and exemplary damages from the Crown, through the Department of Social Welfare, on the basis it was vicariously liable for the tortious acts of the foster parents. The proceedings were issued in September 1996.

19.4 The High Court found that S's claim for assault and battery committed by the foster parents was statute-barred under the Limitation Act 1950, that S had cover under the 1992 accident compensation legislation for his mental injuries and so was barred from bringing any claim for compensatory damages for personal injury (including mental injury), that there was no breach of fiduciary duty by the Crown, and that the Crown was not liable for exemplary damages.

19.5 S appealed the High Court decision. The High Court had also held that, but for the accident compensation bar, the Crown would have been liable for the negligence of the foster parents, and the Crown cross-appealed against that aspect of the judgment.

19.6 S's appeal was allowed, and the Crown's cross-appeal dismissed. The Court of Appeal held:

(a) that the 1992 accident compensation legislation was not a bar to the claim because the mental injury provision in that legislation was not intended to apply unless the relevant mental injury or nervous shock occurred after the 1992 Act came into force. Except in the case of gradual process injuries, there was no intention by Parliament to deal with pre-accident compensation scheme accidents or take away vested common law rights.

(b) that the limitation period in a case alleging vicarious liability for assault and battery involving child abuse commenced running at the same time it would commence running if the claim was directly against those committing the abuse – that is, when the victim first realised he or she had not given considered and free consent to the abuse. The High Court Judge was correct in concluding that realisation for S must have occurred by the early 1980s. But the evidence supported a conclusion that S was under a disability which prevented him under the Limitation Act from bringing proceedings until 1995 so the proceedings were brought in time.

(c) that the Crown was vicariously liable for the negligence of the foster parents via an agency relationship.

(d) that although the Superintendent was a fiduciary for a child placed in foster care, there was no proof in this case of any breach of a duty which could properly be characterised as fiduciary.

(e) that the Crown was not vicariously liable for exemplary damages, the primary purpose of which was to punish a flagrant wrongdoer, not to provide additional compensation.

W v Attorney-General CA 227/02, 15 July 2003

19.7 The *W* Court of Appeal judgment was delivered at the same time as *S* above, and the Court of Appeal Stated the decisions should be read in conjunction.

19.8 *W* had appealed a decision of the High Court denying her claim for compensatory and exemplary damages from the Department of Social Welfare for the mental consequences of physical and emotional abuse by her foster parents, and in particular, sexual abuse by a foster father. The High Court had held that W was sexually abused by her foster father and that the Department had breached its duties in that regard in several ways but that, by the standard of the day, other treatment of her did not amount to a breach of duty which could justify the award of damages.

19.9 The Court of Appeal allowed the appeal, making similar findings on accident compensation, limitation, exemplary damages and vicarious liability as for *S.*

K v CHFA HC Wellington CIV-2005-485-2678, 16 November 2007

19.10 *K v CHFA* went to trial in the Wellington High Court in October 2007. Mr K was a patient at Ngawhatu Psychiatric Hospital near Nelson between August 1967 and February 1982. K claimed general and exemplary damages for abuse he says occurred to him at the hospital during that time. His causes of action pleaded breach of fiduciary duty, negligence (whether through direct or vicarious liability), and assault and battery (through vicarious liability).

19.11 The Crown contended in defence that the allegations of sexual abuse by Mr K were false and his evidence in that regard was manufactured. The Crown also relied on Limitation Act, accident compensation and Mental Health Act defences.

19.12 The High Court held that:

(a) K failed to meet the standard of proof in establishing his claims of sexual abuse by a wide margin. The Judge did not accept his evidence and his claim therefore failed.

(b) In any case, the claim fell outside Limitation Act periods.

(c) The accident compensation question did not need to be determined because the claim had failed.

J v Crown Health Financing Agency HC Wellington CIV-2000-485-876, 8 February 2008 (*J v CHFA)*

19.13 *J v CHFA* was a claim in the Wellington High Court in November 2007. J had been a patient at Porirua Hospital 50 years previously. She claimed exemplary and special damages for abuse allegedly suffered while she was a patient at Porirua between November 1954 and March 1960 (the alleged abuse consisting of seclusion for punishment purposes, sexual assaults by nurses, physical assaults by nurses and patients, witnessing abuse of other patients, ECT as punishment). Similar causes of action were pleaded by J as for *K*.

19.14 The Crown again relied on Limitation Act, accident compensation and Mental Health Act bars.

19.15 After a long and detailed analysis of the evidence heard, the High Court held:

(a) The case was not about whether ECT was a valid and suitable treatment. It was a lawful treatment at the time and remains such. But it has to be used for a proper purpose, and not for malicious motives of punishment, or as a threat of punishment. If ECT treatment and insulin therapy treatment were accepted procedures at the time, which was the evidence, then examination of the appropriateness of these procedures now is outside the ambit of this case.

(b) The pleaded allegations of assault and battery by junior staff and the witnessing of assaults on other patients were made out.

(c) The remaining factual allegations (including sexual assaults, assaults by other patients, threats of ECT as punishment, being sent to F Ward as punishment, seclusion as punishment, being stripped naked in seclusion, and allowing the plaintiff to witness ECT) were not established.

(d) The cause of action in assault and battery accrued for limitation purposes when the acts occurred and for negligence when the plaintiff made the link with her mental injuries and the treatment she had undergone at Porirua (the Judge found this to be by July 1993). J was found not to be under disability, and the claims were therefore statute barred for being out of time.

(e) This was not a case where exemplary damages would have been appropriate.

(f) (observation) The Crown was entitled to Mental Health Act immunity for the giving of insulin treatment, transfer to F Ward and seclusion if they were acts of treatment done in good faith and without lack of care. But acts done as punishment would be outside that immunity.

19.16 The Judge in the *J* case made some concluding remarks, including:

(a) An acknowledgement that many patients hold deep grievances over conditions as they were in the past. But because of the passage of time, the plaintiff (with others) has the insurmountable hurdle of the Limitation Act to overcome.

(b) The Court system may not be amenable to dealing with damages claims for grievances held by former patients. If any remedy is thought proper, it might preferably be addressed through the executive branch of Government.

APPENDIX B – SUMMARY OF WHITE LITIGATION

19.17 The original statement of claim by Earl White (**EW**)[103] against the Attorney-General acting through the Department of Social Welfare was dated 15 December 1999 and was filed and served on 17 December 1999. It contained allegations arising from various times between 1965 and 1978 that EW claimed he was under the control of the Superintendent of the Child Welfare Division appointed under the Child Welfare Act 1925 (the **Superintendent**), and those acting with his authority, and the control of the Director-General of Social Welfare (the **Director-General**), and those acting with his authority.

19.18 The original statement of claim pleaded, in summary:

(a) From the time of his birth in 1961 until 1974, EW was in the custody of his father (albeit under preventative supervision in terms of s 20 of the Child Welfare Act 1925 and also in the temporary care of the Presbyterian Children's Home for approximately one year). The Superintendent, and later the Director-General knew or should have known of the physical, verbal and emotional abuse suffered by EW and his brother at the hands of their father.

(b) Once in the care and guardianship of the Department of Social Welfare from 1974, and while in placements in the Hokio and Epuni Boys' Homes, EW was subject to physical and sexual assault by staff members.

19.19 The statement of claim pleaded causes of action in:

(a) first, breach of fiduciary duty by the Superintendent and the Director-General and those acting with their authority;

(b) second, breach of statutory duty by the Superintendent and the Director-General and those acting with their authority; and

(c) third, negligence against the Superintendent and those acting with his authority.

19.20 After pleading the damage he had allegedly suffered as a result of the above pleaded breaches, EW claimed special damages of pecuniary loss in a sum to be quantified at trial, general damages in the sum of $250,000, exemplary damages in the sum of $85,000, and costs.

19.21 The Attorney-General's defence on behalf of the Department of Social Welfare was filed on 7 March 2000. The statement of defence largely denied the allegations in the statement of claim or put EW to the proof.[104]. The statement at defence noted that the Attorney-General would refer at trial to the sections of the Department of Social Welfare Act 1971, the Child Welfare Act 1925 and the Education Act 1964 for their full term and effect.

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[103] Court-directed pseudonyms are used in this brief.

[104] A form of pleading in which a defendant pleads he or she has insufficient knowledge and therefore denies an allegation.

19.22 On 4 April 2000, the Attorney-General filed and served her verified list of documents.[105] This included a number of files from the DSW individual file records. Privilege was claimed for documents consisting of communications between solicitor and client for the purpose of obtaining or giving legal advice, as well as for Crown Counsel's file and research notes and draft documents.

19.23 The plaintiff filed his list of documents on 28 April 2000 and then an amended list of documents on 11 May 2000.

19.24 On 12 October 2001, Paul White (**PW**) filed a statement of claim against the Attorney-General acting through the Department of Social Welfare. PW's statement of claim pleaded the same three causes of action as the statement of claim for EW. PW's claim made the same allegations in respect of lack of monitoring for the time period he was in his father's care (from 1959 to 1962 and 1965 to 1972).

19.25 PW alleged that, on 25 October 1972, by order under section 13(4) of the Child Welfare Act 1925, he was committed into the care of the Director-General and while being transported by a staff member of the Epuni Boys' Home, he was indecently assaulted by a trainee social worker.

19.26 After pleading the damage he had allegedly suffered as a result of the pleaded breaches, PW claimed general damages in the sum of $500,000, exemplary damages in the sum of $200,000, and costs.

19.27 The Attorney-General's defence on behalf of the Department of Social Welfare was filed on 12 November 2001, with Chris Mathieson the Crown Counsel acting. The statement of defence largely denied the allegations in the statement of claim or put PW to the proof.

19.28 The Attorney-General filed her verified list of documents in the PW claim on 19 February 2002. It was a more substantial set of documents than in the EW claim. PW filed his list of documents on 17 October 2002. His list was also longer than that of EW.

19.29 In response to a notice for further particulars filed by the Attorney-General on 19 April 2000, on 21 August 2002, EW filed further particulars of his statement of claim of 15 December 1999. The response provided further details of particular background aspects of the statement of claim. EW also clarified[106] that he did not allege that physical, emotional, or psychological abuse was witnessed by child welfare officers of social workers, but that they were aware that he was being physically and psychologically abused (including after a direct report from a police officer who witnessed the abuse of EW by his father on 13 June 1972).

19.30 The notice for further particulars also alleged that EW was indecently assaulted by a cook at Hokio Boys Home, Mr Ansell, on 8 separate occasions, once at Mr Ansell's home and the other times in the storeroom at Hokio.[107]

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105 The Attorney-General at the time was the Hon. Margaret Wilson, Attorney-General in the 5th Labour Coalition Government.

106 Para 7.1 of the further particulars.

107 Para 13 of the notice for further particulars.

19.31 EW filed an amended statement of claim on 16 December 2005. The amended statement of claim provided further particulars of the alleged abuse suffered by EW at the Epuni Boys' Home between 10 April and 4 September 1974, including by naming various staff members. EW also raised the allegations of the 'no narking culture', and the use of solitary confinement at Epuni. The amended Statement of claim also incorporated the further particulars given in the response to the notice of further particulars.

19.32 The amended statement of claim pleaded four causes of action:

(a) Negligence by the Superintendent and the Director-General, claiming general damages of $500,000 for mental injury not covered by ACC, exemplary damages in the sum of $45,000, special damages for pecuniary loss in a sum to be quantified at trial, and costs.

(b) Negligence (vicarious liability) in respect of servants and/or agents of the Superintendent and the Director-General, claiming general damages of $500,000 for mental injury not covered by ACC, exemplary damages in the sum of $45,000, special damages for pecuniary loss in a sum to be quantified at trial, and costs.

(c) Breach by the Superintendent and the Director-General of a non-delegable duty of care, claiming general damages of $500,000 for mental injury not covered by ACC, exemplary damages in the sum of $45,000, special damages for pecuniary loss in a sum to be quantified at trial, and costs.

(d) Assault and battery (vicarious liability) in respect of representatives of the Superintendent and the Director-General, claiming general damages of $500,000 for mental injury not covered by ACC, exemplary damages in the sum of $45,000, special damages for pecuniary loss in a sum to be quantified at trial, and costs.

19.33 The amended pleading pre-empted a limitation defence by the Crown by pleading EW was a minor until 9 March 1981 and, until early 1999, did not have sufficient information to understand that he had a cause of action against the Attorney-General and had not made the link between the abuse he had suffered as a child, and the physiological[108] conditions he suffered as an adult. EW also pleaded that he had been under disability in that he suffered from PTSD and Poly-Substance Abuse, which disabilities prevented him from bringing proceedings earlier.

19.34 A similar amended statement of claim dated 16 December 2005 was filed by PW, with the same amounts and types of documents claimed.

19.35 The trial was originally scheduled to commence on 31 July 2006 in the Wellington High Court before his Honour Mackenzie J. By Minute dated 15 February 2006, on agreement of both parties, the Judge vacated that fixture date and the setting down order. The Judge noted that there were "*considerable pleading and discovery issues which have not yet been fully addressed.*"

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[108] Assumed typographical error in judgement: should be psychological.

19.36 On 6 April 2006, both PW and EW filed a further amended statement of claim providing further details and particulars. The same causes of action and damages claimed as for the December 2005 amended statements of claim remained.

19.37 On 16 May 2006 the Attorney-General filed statements of defence to both April 2006 further amended statements of claim. The statements of defence pleaded more extensive admissions and denials than the first statements of defence filed. Certain allegations in both remained pleaded as putting the plaintiffs to the proof.

19.38 The statements of defence introduced two affirmative defences:

(a) The accident compensation legislative bar, namely that the plaintiffs' claims for damages, other than exemplary damages, were barred by the provisions of the Accident Compensation Act 1972, the Accident Compensation Act 1982, the Accident Rehabilitation and Compensation Insurance Act 1992, the Accident Insurance Act 1998, and the Injury Prevention, Rehabilitation and Compensation Act 2001, to the extent that they are claims:

(i) arising directly or indirectly out of personal injury suffered by the plaintiffs on or after 1 April 1974;

(ii) for mental injury caused by certain criminal acts for which the plaintiffs have cover under the Accident Insurance Act 1998, whenever the criminal acts took place, if the plaintiffs first received treatment for the mental injury as that mental injury between 1 July 1999 and 31 March 2002; and

(iii) for mental injury caused by certain criminal acts for which the plaintiffs have cover under the Injury Prevention, Rehabilitation and Compensation Act 2001, whenever the criminal acts took place, if the plaintiffs first received treatment for the mental injury as that mental injury after 31 March 2002.

(b) The Limitation Act 1950, namely that the plaintiffs' claims were in respect of bodily injury and section 4(7) of the Limitation Act therefore applied. Section 4(7) required that any action for bodily injury must be brought within two years of the date the cause of action accrued, or within six years of that date with leave. The alleged causes of action accrued when the alleged negligence or assault and batteries occurred. The accrual of the causes of action was delayed until the plaintiffs turned 20, but the two year and eight-year periods had expired by the time the proceedings were brought. This affirmative defence also pleaded that the plaintiffs had not been delayed in bringing proceedings by any mistake of fact or mistake of law or by any other reasonable cause, the plaintiffs had not been suffering under any relevant disability and the defendant would be materially prejudiced in his[109] defence by the plaintiffs' delay.

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[109] The Hon. Michael Cullen was the Attorney-General by this point in time (still in the Fifth Labour led coalition Government).

19.39 PW and EW filed a supplementary list of documents on 15 September 2006, after making inquiries friends and family and of the Capital and Coast District Health Board, his doctors and schools, the ACC, Department of Corrections, MSD, Work and Income, Ministry of Justice and Archives New Zealand.

19.40 Further amended statements of claim were filed by EW and PW on 22 September 2006. These added a fifth cause of action against the Superintendent and Director-General for false imprisonment and claimed general damages of $500,000, exemplary damages of $45,000, special damages for pecuniary loss of past earning capacity of $250,000 or such other sum as may be quantified by the plaintiffs' expert, general damages for loss of further earning capacity in the sum of $150,000 or such other sum as may be quantified by the plaintiffs' expert, and costs.

19.41 The Attorney-General filed statements of defence to the above further amended statements of claim on 27 October 2006 (PW) and 30 October 2006 (EW). The same two affirmative defences were pleaded (albeit in a different order) and the new fifth cause of action in false imprisonment was denied as far as it contained allegations of fact, and not pleaded to as far as it contained allegations of law.

19.42 Further amended statements of claim were filed by both EW and PW on 27 February 2007. These quantified the claims for special damages for pecuniary loss of past earning capacity to $340,000 (PW) and $840,000 (EW), general damages for loss of future earning capacity to $214,000 (PW) and $294,000 (EW), and added interest at the Judicature Act rate from the date of judgment to the date of payment to the special damages sum.

19.43 After the exchange of evidence by the parties in early 2007, the Crown filed an application objecting to admissibility, largely on similar fact grounds, of parts of the evidence of 17 of the plaintiffs' fact witnesses. At the same time, the plaintiffs applied for suppression orders in relation to those fact witnesses and the plaintiffs themselves.

19.44 Miller J gave judgment on the above applications on 24 April 2007, holding, in summary:

(a) certain specified passages of the plaintiffs' evidence were inadmissible; and

(b) continuing interim suppression over the names of the plaintiffs, their sisters and brothers and the 14 witnesses named in the judgment, on the ground that they alleged sexual abuse against them.

19.45 EW filed a notice of appeal to the Court of Appeal on 17 May 2007 to part of the decision of Miller J dated 24 April 2007, making interim suppression orders to subsist only until the commencement of trial and in granting an order under then High Court Rule 66 that court files may be searched by leave of a Judge. The appeal was Stated to be funded by the Legal Services Agency.

19.46 Leading up to trial, Miller J continued to make administrative directions and rulings. In a Minute of 8 June 2007, his Honour noted that, unless there was something unusual about them, he proposed to grant media applications on the basis that recording of the evidence of particular witnesses could be dealt with at the time.

19.47 On 13 June 2007 the Attorney-General filed statements of defence to the above further amended statements of claim. Three further affirmative defences were pleaded in addition to the limitation and ACC affirmative defences:

(a) Abuse of process, namely that significant events in these proceedings took place between the early 1960s and the mid-1970s, a number of the witnesses who might have been able to give evidence to the Court to refute or respond to the plaintiffs' allegations were deceased or unable to be located. Where they were able to be located, they are in some cases elderly and/or have serious medical conditions and their recollections of factual matters have faded over time. Documents from the Child Welfare Division and DSW files that might have assisted in refuting or responding to the plaintiffs' allegations had been lost or destroyed during the decades since the alleged events took place. As a result, the defendant was severely prejudiced in his ability to conduct a defence of the proceedings and they were no longer capable of being fairly tried.

(b) Failure to mitigate, namely that the plaintiffs had failed to mitigate their loss and damage by failing at all material times to obtain appropriate medical treatment for their alleged psychological and psychiatric harm.

(c) Contributory negligence, namely that the plaintiffs had caused or contributed to their loss and damage by failing at all material times to obtain appropriate medical treatment for their alleged psychological and psychiatric harm, so that if the defendant is liable for some of all the alleged loss or damage, the quantum of that damage should be reduced to reflect the plaintiffs' contribution to their loss in accordance with section 3 of the Contributory Negligence Act 1947.

19.48 Amended statements of defence were filed by the Attorney-General in the EW and PW proceedings on 26 June 2007, removing the fifth affirmative defence above.

19.49 EW and PW both filed a further supplementary list of documents on 7 June 2007.

19.50 The Court of Appeal decision was issued on 14 June 2007, dismissing both appeals.

19.51 The Crown obtained an order for non-party discovery from Presbyterian Support Central and Dr George Barton QC on 18 June 2007. This was in relation to Dr Barton QC's appointment in July 2005 to act as an independent and impartial investigator and reviewer with reference to matters in connection with allegations of abuse of children alleged to have occurred in the Berhampore Children's Home. Dr Barton QC provided an affidavit on 19 June 2007, preserving the confidentiality of documents covered by an obligation of confidence imposed upon him under the Terms of Reference for his review.

19.52 On 26 June 2007, the first day of trial, Miller J issued Ruling No. 1 continuing interim suppression orders for the plaintiffs and their siblings, as well as those witnesses giving evidence of sexual abuse, but discharging the orders in respect of all other witnesses (namely those who speak of other physical abuse or ill-treatment at Epuni or Hokio, and the defendant's witnesses). The Judge also held that the Crown's contributory negligence defence appeared "*untenable*"

since the plaintiffs were children at the time of the alleged injuries to them.[110] The Judge also noted (*obiter*) that it may also be that the failure to mitigate defence is redundant, in that it presumably has little prospect of success if the limitation period is to be extended on account of disability, and is unnecessary if the limitation defence succeeds.[111] Finally, the Judge disallowed evidence to be adduced of sexual assaults on other boys by staff not accused by the plaintiffs.[112]

19.53 EW filed a notice of appeal to the Court of Appeal on 27 June 2007 appealing against part of the decision of Miller J of 26 June 2007 lifting previous name suppression orders in respect to similar fact witnesses because they would not be giving evidence of sexual assaults and excluding evidence of sexual assaults in specific cases on the basis that the victims of those assaults did not report the incidents at the time. That appeal was eventually abandoned by EW by notice of 12 July 2007.

19.54 The Court of Appeal issued its judgment on 23 August 2007, adjourning the appeals to a later date subsequent to the delivery of substantive judgment in the High Court.

19.55 The trial adjourned part heard in July and resumed in October 2007.

19.56 In his substantive judgment of 28 November, Miller J held there would be judgment for the Attorney-General on all causes of action in both proceedings. His Honour held (in summary):

(a) There was a breach of the duty of inquiry by the social workers over the period between August 1966 and January 1969. In particular, PW and EW should have been spoken to in private to ascertain their wishes. Breach of the duty to inquire would not attract more than nominal damages.

(b) The Superintendent did not have a duty to commence proceedings but, if he did, there was a breach after PW and EW left a particular foster home in August 1966. Had an application been made to the then Children's Court at that time Child Welfare officers would have made inquiries and would have learnt of Mr White's ill-treatment of the boys and a reasonable social worker would have taken actions.

(c) Placement with Mrs White and her partner were not unreasonable, and PW and EW were monitored.

(d) There was a breach of the duty of care by the Superintendent whilst PW and EW were at Epuni and Hokio in that some staff members assaulted them and used derogatory language. In addition, the actions of individual staff contributed to the bullying and the use of violence to which PW and EW were subjected by other boys.

(e) EW was sexually assaulted by a staff member whilst at Hokio. PW's claim of sexual assault by a trainee social worker, whilst being driven to Epuni was not made out.

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110 Para [8] of Judgment of 26 June 2007.
111 Para [9] of Judgment of 26 June 2007.
112 Para [14] of Judgment of 26 June 2007.

(f) The Superintendent was not vicariously liable for the acts of PW and EW's parents before PW and EW were committed to his care or after they were returned to their care after becoming State wards.

(g) The non-delegable duty of care claim added nothing to the other pleadings.

(h) Neither PW nor EW established that any of the breaches of duties of care had a material impact on them. Rather, the dominant, if not overwhelming cause of their difficulties was their early childhood experiences and/or genetics.

(i) The claims were made outside the period provided in the Limitation Act 1950. The arguments that the claims were not time-barred either because EW and PW did not have the capacity to conduct litigation or because the doctrine of reasonable discoverability applied were both rejected by the Judge. The Judge found that PW and EW had the capacity to conduct litigation and had always done so and the doctrine of reasonable discoverability did not apply. The impetus for the claims was not a new awareness of the link between their injuries and the role of the Superintendent, but rather a new awareness that their known circumstances could be the basis of a claim.

(j) PW and EW were aware at all material times since reaching their majority that they did not consent to the assaults on them.

(k) The finding of false imprisonment relating to the placement of PW and EW in secure custody was not made out.

(l) There was no basis for an award of exemplary damages.

(m) EW's claim relating to the period after 1 April 1974 is ACC-barred.

19.57 EW and PW filed a notice of appeal to the Court of Appeal on 21 December 2007.

19.58 On 28 January 2008, the Attorney-General filed in the Court of Appeal a notice of intention to support the High Court decision on another ground, namely that the social worker's breach of duty in not interviewing the plaintiffs during 1966 and 1969 and/or in not commencing complaint proceedings during that period (if such a duty was held to exist) did not cause the plaintiffs' damage because the evidence shows that their circumstances were not such to satisfy the Children's Court that they should be committed to care.

19.59 On 18 April 2008, the Legal Services Agency (the **LSA**) filed a notice of intention to appear and be heard on the question of costs in the EW and PW cases in the High Court.

19.60 On 30 May 2008, his Honour Miller J indicated that, with respect to issues raised by the LSA on costs, he wished to hear from counsel on the criteria for the exercise of the discretion in the then section 40 of the Legal Services Act 2000, to declare what costs would have been awarded against a legally aided person but for the grant of legal aid (known as a "but for" order).

19.61 The LSA on 14 March 2008 declined to grant legal aid for the Court of Appeal and this decision was upheld by the Legal Aid Review Panel in a decision released on 10 June 2008.

19.62 On 3 July 2008 EW and PW filed in the Supreme Court a notice of application for leave to appeal against those parts of the decision of the High Court of 28 November 2008 in which the Court held there would be judgment for the Attorney-General on all causes of action in both proceedings. The notice argued there were exceptional circumstances justifying the Supreme Court granting leave to appeal directly from the High Court, namely that:

(a) The appeal was of public importance and affected not only the plaintiffs' rights but the rights of hundreds of other plaintiffs with High Court proceedings filed in respect of abuse while under the charge of the State.

(b) The High Court decision had a far reaching impact on the rights of access to justice for a large group of people entitled to legal aid as the LSA had used the High Court judgment (alongside others)[113] as a basis for the review of legal aid for most civil proceedings in relation to historic abuse.

(c) An appeal was lodged in the Court of Appeal on the expectation that legal aid would be granted to fund that appeal. While a limited grant of legal aid was made, funding had not been provided to progress the appeal.

(d) The appellants were beneficiaries and not able to fund the appeal, which was being advanced pro bono by counsel for the plaintiffs.

(e) The legal issues required prompt clarification and it would take considerable time for two levels of appeal to be heard and decided.

(f) The law related to a developing area of jurisprudence in New Zealand.

19.63 The Supreme Court dismissed the Whites' application for leave to appeal in a judgment dated 15 August 2008. The Supreme Court noted that if the legal aid process had not operated properly, that could be challenged by the Whites by appeal or judicial review but that if the legal aid process was not flawed, there was no principled basis for the Court to intervene. The Court Stated that, whatever the position, the difficulties in relation to the appeal do not justify the Supreme Court granting leave to bring a direct appeal.[114]

19.64 On 25 September 2008, Miller J issued his judgment on costs. This was in relation to the Crown's application for a "but for" order under section 40(5) of the Legal Services Act 2000 and application for an order that "*exceptional circumstances*" existed[115] such that one of the Whites should be liable to pay costs in excess of his contribution to the legal aid fund. This was due to the Crown being put to the cost of seeking third party discovery from Presbyterian Support Services and Dr Barton QC). The Crown wished to know what costs the Crown would have been entitled to without legal aid, in order to apply to the

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113 The *K* and *J* cases discussed in Appendix A.

114 Para [6] of Supreme Court judgment of 15 August 2008.

115 Under section 40(2) of the Legal Services Act 2000

Legal Services Agency under section 41 of the 2000 Act to recover some of the costs owed.

19.65 The LSA also appeared on the but for application, on the basis that the quantum sought by the Crown ($811,631.82) amounts to 0.8% of the country's legal aid budget for a year. The Judge awarded the first application for a but for order (in the amount of $811,631.82) and declined to grant the "exceptional circumstances" order.

19.66 On 24 July 2009, the Attorney-General filed in the Court of Appeal its list of issues for determination on appeal, namely:

(a) the Limitation Act issues;

(b) the applicability in sexual assaults of the Supreme Court decision in *Trustees Executors v Murray & Morel* [2007] 3 NZLR 721;

(c) whether the Judge was wrong to find on the facts that the appellants' experiences in institutions in their teenage years were not a material contributing factor to their psychological conditions;

(d) the ACC bar;

(e) whether a breach of the duty to inquire, as described by the Privy Council in *B v Attorney-General* [2004] 3 NZLR 145, may attract more than nominal damages in appropriate cases, without there being a duty imposed to commence care and protection proceedings;

(f) whether the Attorney-General can be vicariously liable for the acts and omissions of parents or other family members in circumstances where wards have been returned to the care of parents or other family members;

(g) exemplary damages;

(h) non-delegable duties;

(i) false imprisonment; and

(j) whether the Judge was wrong to address alternative care options for EW and PW in the context of assessing whether decisions made by social workers were reasonable.

19.67 EW and PW filed their list of issues on 27 July 2009. It was broadly similar to that filed by the Attorney-General but also added in an issue of whether the High Court was wrong in law to find that EW and PW were required to prove a "counter-factual" in order to justify an award of damages.

19.68 The Court of Appeal issued its decision on 23 April 2010, dismissing the Whites' appeal and reserving costs. Key points in the Court of Appeal's decision were (in summary):

(a) In the absence of a trigger, there was no basis to say that PW and EW had no understanding of the link between their injuries and the role of the Superintendent or were disabled.[116]

(b) Miller J correctly applied the principles relevant to disability and reasonable discoverability in the context of limitation.[117]

(c) Review of the evidence concerning both EW and PW led the Court to the same conclusions as those reached by Miller J on disability and reasonable discoverability.

(d) The reasonable discoverability doctrine should not be extended to cases beyond sexual abuse.

(e) The Court reserved its position on the correct position as to the accrual of a cause of action for assault and battery not involving sexual abuse.

(f) Whatever the fairness of the accident compensation bar provision, the Court was obliged to apply it, meaning that some of EW's claims are also ACC-barred.

19.69 The Court went on to make other tentative observations, despite finding that PW's and EW's claims are barred by the Limitation Act and that some of EW's claims are ACC-barred.[118] In so doing, the Court noted that:[119]

> [But] it is the case that the events complained of took place between 30 and 50 years ago. Some witnesses for the defence were dead by the time the matter came to trial. One of the social workers who gave evidence was by then aged 76 and had not practised as a social worker for some 40 years. Standards for caregivers and social workers have evolved. These sorts of concerns of course underpin the existence of limitation periods but are worth emphasising in this context.

19.70 The other issues the Court commented on were:

(a) The extent of scope of any duty to commence proceedings was not resolved.[120]

(b) Nothing advanced on appeal by counsel for the appellants would lead the Court to depart from the High Court Judge's evidential findings as to causation.[121]

(c) There was no breach of duty established for which the Crown could be vicariously liable (applying the Court of Appeal decision in *A v Roman Catholic Archdiocese of Wellington* [2008] NZCA 49, [2008] 3 NZLR 289).

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116 Para [25] Court of Appeal judgment of 23 April 2010. **Crown Bundle - Tab 50**
117 Para [34] Court of Appeal judgment of 23 April 2010.
118 Para [162] and [163] Court of Appeal judgment of 23 April 2010.
119 Para [164] Court of Appeal judgment of 23 April 2010.
120 Para [185] Court of Appeal judgment of 23 April 2010.
121 Para [195] Court of Appeal judgment of 23 April 2010.

(d) Subject to the question of exemplary damages, the notion of a non-delegable duty adds nothing to the appellants' case.[122]

(e) The standard of conduct for an award of exemplary damages was not established.[123]

(f) The tentative view of the Court was that the actions of the staff at Epuni in placing PW in secure detention would not have amounted to false imprisonment.[124]

19.71 EW and PW filed a notice of application for leave to appeal the Court of Appeal decision on 15 May 2010. The grounds for seeking leave were:

(a) this was the first case in New Zealand involving the legal liability of the State for children placed in institutions and who were abused by their parents while "under status";

(b) there were important issues of law to be clarified and/or settled;

(c) the extent and scope of legal duties of the State, particularly to children placed in their care was of significant importance and required determination by the Supreme Court;

(d) the legal issues affected not only the rights of EW and PW but also those of 600 other plaintiffs (and growing) who had filed historic abuse proceedings in the Wellington High Court;

(e) there were a number of relevant Court of Appeal and Commonwealth decisions and the proposed appeal required a review of New Zealand's approach to historic abuse claims generally;

(f) the application to appeal (and any appeal) was being advanced on a pro bono basis, due to the large scale withdrawal of legal aid for historic abuse claimants as a result of the High Court decision and compounded by the Court of Appeal decision so the appeal would provide certainty as to the approach to be taken in historic abuse cases; and

(g) there was considerable domestic and international interest in the progress of these claims, including from the United Nations Committee Against Torture, the Human Rights Commission, Dame Margaret Bazley (in her review of legal aid) and from the judiciary, which demonstrates the wider public interest in the Supreme Court hearing the appeal.

19.72 The Supreme Court declined to grant leave to appeal, holding that the claims had been disposed of in both the High Court and the Court of Appeal essentially on the basis of factual findings adverse to the appellants".[125] The Court went on to state in that paragraph that the decisions of the lower courts on the Limitation Act questions which the appellants sought to raise in the Supreme Court were based on concurrent findings of fact as to the credibility and reliability of the applicants' evidence, and no good reasons arose from the

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122 Para [212] Court of Appeal judgment of 23 April 2010.
123 Para [214] Court of Appeal judgment of 23 April 2010.
124 Para [229] Court of Appeal judgment of 23 April 2010.
125 *W & W v Attorney-General* [2010] NZSC 69; (2010) 19 PRNZ 921 at [2]. **Crown Bundle - Tab 52**

appellants' submissions for leave to suggest that the Supreme Court would disturb those findings. The Supreme Court noted that, while the applicants had undoubtedly undergone regrettable suffering during their childhood and adolescence, the Limitation Act operated to preclude them from seeking legal redress.