
BEFORE THE WAITANGI TRIBUNAL

WAI 2615
WAI 1247

IN THE MATTER OF

The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

applications for urgent hearing in relation to
the settlement of grievances of Māori
children put into state care

AFFIDAVIT OF LINDA LJUBICA HRSTICH-MEYER

13 April 2017

RECEIVED Waitangi Tribunal
19 Apr 2017
Ministry of Justice WELLINGTON

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I, Linda Ljubica Hrstich-Meyer, of Wellington, public servant, swear:

Introduction

1. I have been employed by the Ministry of Social Development (“the Ministry”) in a variety of roles over the past 20 years. I am currently acting as Programme Manager of the claims resolution team and have had that position since January 2017. In this role I am responsible for the strategic oversight and management of the claims resolution area, which deals with claims of abuse and neglect prior to 2008. My substantive role is Principal Solicitor of Historic Claims.
2. I was not involved in all of the events that are referred to in these proceedings. However, I have read the material presented by the applicants and the Ministry’s files relevant to issues contained in this affidavit.
3. I am providing this evidence as part of the Crown’s response to the applications for an urgent inquiry into Wai 2615 and Wai 1247. This affidavit:
 - 3.1 describes the design and development of the Ministry’s internal claims resolution process for historic claims of abuse and neglect in state care (“the MSD process”) and the driving principles that underpin it;
 - 3.2 notes planning underway within the Ministry to seek to further, and more explicitly, incorporate tikanga into the design of the MSD process; and responds to some of the other specific concerns raised by the applicants in the Tribunal proceedings about the design of the MSD process; and
 - 3.3 provides a brief description of the Confidential Listening and Assistance Service (“CLAS”), which the applicants in Wai 2615 raise in their statement of claim (but which is no longer in operation).

Design, development and driving principles of the MSD process

4. The Ministry was established in 2006, and Child, Youth and Family (“CYF”) was integrated into it. At that time, historic claims of abuse were dealt with by the “historic claims team”, which sat within the corporate and governance arm of the Ministry.



5. The broad form of the MSD process that is currently operating today was developed in 2006/2007, and is carried out by the claims resolution team within the Ministry.
6. The process deals with claims of abuse or neglect made by a person who was placed in the care, custody or guardianship, or who came to the notice, of the Child Welfare Division of the Department of Education, the Department of Social Welfare or the Children and Young Persons Service before 1 January 2008, or where the person or their family was placed under the supervision of a Child Welfare Officer or a Department of Social Welfare social worker before 1 January 2008. The process is described in detail in the affidavit of Ernest Garth Young.

An individualised, non-legalistic approach

7. The MSD process is built on principles of showing respect for the claimant, acknowledging where the Ministry or its predecessors has done wrong, putting that wrong right to the extent possible, and taking a non-legalistic approach. As such, while a claimant is going through the MSD alternative dispute resolution process we do not rely on legal defences or limitation periods, and do not apply legal criteria such as causation in the same way that a court would. However, we do take into account natural justice elements (where appropriate) and ensure that settlement payments are consistent with offers previously made and they are broadly in line with what a court might award if it went to a hearing.
8. The non-legalistic approach of the MSD process is reflected in its design. It is primarily influenced not by legal principles, but by the principles and practices found in the field of social work. Those are concerned with responding to an individual's circumstances and addressing that individual's grievances. This is made clear in the way the process operates, with its strong emphasis on responding to the claimant's needs and on delivering information and providing services to the claimant in a way that takes account of those needs. The way those principles find expression in the operation of the process is explained in the affidavit of Ernest Garth Young.

Part of the Crown Historic Claims Litigation Strategy

9. The MSD process forms part of the Crown Historic Claims Litigation Strategy (“Crown Litigation Strategy”). The Crown Litigation Strategy was created in 2008 to develop a whole-of-government approach to effectively and efficiently resolve historic claims of abuse and neglect in state care. It is underpinned by the recognition that formal legal proceedings are often not the best, or should not be the only, way to resolve historical claims of abuse and that the Crown should also provide processes for resolving claims directly with claimants, in a way that promotes early resolution. The Crown Litigation Strategy directs agencies to resolve grievances early and directly with a claimant to the extent practicable; to attempt to settle any meritorious claims; and to defend any claims that cannot be resolved by agreement.

Previous reviews of and feedback on the process

10. In late 2009 at the request of the Solicitor-General, former High Court Judge Sir Rodney Gallen reviewed the MSD process. Sir Rodney Gallen considered a number of files dealing with particular claims and the outcomes arrived at in respect of each. He found the Ministry operated “with a degree of sensitivity, which is commendable, and with sympathy for the complainants” and that payments made to claimants were consistent.
11. In September and October 2012, the Ministry’s Centre for Social Research and Evaluation interviewed 34 people with completed historic claims and published a report in December 2012. The majority of direct claimants interviewed found it was helpful to tell their story and felt that they were heard and treated with respect. The Centre received comments about the “valuable tailoring of [the care, claims and resolution] responses to accommodate claimants’ situations when they had special needs”. Completing the claims process made a positive difference for half of the claimants interviewed and almost all of the claimants interviewed said they would recommend or had recommended the process to others.
12. In 2012, the Ministry (jointly with the Ministry of Education and the Department of Internal Affairs) received the Prime Minister’s Supreme Award for the way in which they jointly resolve historic claims of abuse in state care and residential special schools. The award was given in recognition of the

“absolute commitment to resolving a highly sensitive and challenging issue in a way that provided the best result for claimants and the government”.¹

Expression of tikanga within the process

13. As noted at paragraphs 7 to 8 above, the MSD process puts a strong emphasis on responding to a claimant’s individual needs, in accordance with social work principles. The Ministry sees social work principles as being an integral part of the design of the MSD process, and considers those principles allow for the expression of tikanga Māori where raised by individual claimants.
14. However, the Ministry realises that Māori claimants may wish to engage with a process that not only allows the expression of tikanga within its operation, but that is also informed by tikanga Māori in its design. The Ministry accepts that principles from tikanga Māori need to have a more central place in the design of the process than they do currently. That is so particularly since one can expect the need for the process to be higher among Māori, given Māori were historically overrepresented in the child welfare system, and remain so today.
15. Consideration was given, to some extent, to tikanga Māori in developing the MSD process and throughout its existence. In the course of its development, for instance, Ministry representatives met with lawyer, Sonja Cooper (whose practice represents the majority of those claimants who are legally represented) and with nine historic abuse claimants she was representing. Six of the claimants were of Māori descent. The Ministry discussed the claimants’ expectations for and possible concerns about an out-of-court resolution process, and these were used to inform the design of the MSD process. For example, the Ministry incorporated an option for providing counselling services in response to a concern that claimants’ issues could affect their families and put them at risk.
16. In 2013, when the Ministry developed the “two-path approach” to deal with a significant backlog of unresolved claims, the Ministry again engaged with Ms Cooper of Cooper Legal. The two-path approach was introduced in order to help resolve claims in a more timely manner, in recognition that the backlog was not in the best interests of the claimants or the Ministry. Under the

¹ Gen-I press release on the 2012 IPANZ Gen-i Public Sector Excellence Awards, accessible at <www.wellington.scoop.nz>.

two-path approach, the Ministry can make an accelerated settlement offer to a claimant. This involves the Ministry assessing the key elements of the claim to place it into one of six categories. The claim is subjected to a basic fact check. There is a payment band for each category and the offers are moderated. A claimant is always entitled not to accept the accelerated settlement offer, and can ask for a full investigation under the standard MSD process.

17. The two-path approach recognises that the timely and equitable resolution of historic abuse claims is in the interest of both the claimants and the Ministry. It recognises that delays under the standard MSD process are likely to be undesirable for many claimants and accordingly provides them with a meaningful alternative for faster resolution in a way that still addresses the underlying issues arising from their experience in state care. The two-path approach continues to provide a restorative process that acknowledges harm caused to an individual and offers an apology and reasonable financial redress.
18. The claims resolution team has also been aware of the need to obtain expert assistance from time to time about how to engage with Māori claimants. For example, in 2016 the social work advisors who sit within the claims resolution team, and who conduct the MSD process with claimants, approached the Office of the Chief Social Worker within the Ministry to discuss ways the advisors could build on their skills in engaging with Māori claimants. The Office of the Chief Social Worker is made up of a team of advisors with knowledge and expertise across social work practice, including practice with Māori and Pacific clients. This meeting provided an opportunity for the advisors in the claims resolution team to reflect on their engagement with Māori and take steps to build their skills by way of ongoing professional development. For example, one advisor is now undertaking a course in Te Reo.
19. In summary, the Ministry accepts that the design of the MSD process and its underpinning principles could more consciously, and more explicitly, draw on values and principles from tikanga Māori. The Ministry is making a plan for how to do that, as described in the following paragraphs.

Steps that the Ministry is planning to take to incorporate tikanga more explicitly into the design of the MSD process

20. Up until the filing of the Wai 2615 and amended Wai 1247 claims, the Ministry had not been made aware by any individuals who used the MSD process that they considered it to be deficient in tikanga terms. As noted above, the social work principles underpinning the process mean that the process allows for the expression of tikanga where that is sought by an individual claimant. And, as described in the affidavit of Ernest Garth Young, the advisors who are responsible for running the process must, as part of their professional qualifications, demonstrate tikanga competency and knowledge of the Treaty of Waitangi.
21. However, since these proceedings, the Ministry has given further consideration to the underpinning principles of the MSD process. The Ministry accepts that alongside social work principles and practices, the process should also incorporate principles and practices of tikanga Māori in a way that may help Māori using the process to feel more comfortable, and that may help encourage Māori who are considering using the process to do so.
22. The Ministry recognises that a considered plan is required in order to bring about meaningful change. The first step, which is currently in train, is to identify external experts who can advise the Ministry on tikanga practice and principles, and how they may be appropriately integrated into the MSD process.

Other concerns raised by the applicants about the design of the MSD process

Independence of the MSD process

23. The applicants in Wai 2615 raise concerns that the MSD process is funded and staffed by the department it investigates and is not independent.²
24. The Ministry's organisational structure ensures that, when a claim is being dealt with in the MSD process, there is an appropriate level of separation between the relevant sections of the Ministry. All historic claims are dealt with by the Ministry's claims resolution team, and since the establishment of the Ministry in July 2006, that team has sat within the corporate and governance arm of the Ministry, which is separate from the social work service line. Social work

² Wai 2615 #1.1.1 statement of claim dated 20 March 2017 at [213].

services were delivered through CYF until 1 April 2017 and are now delivered through the Ministry for Vulnerable Children Oranga Tamariki. This further separates the claims resolution team from the social work service line.

25. While the advisors within the claims resolution team have all been social workers for CYF at some point, they are impartial advocates for the wellbeing of children and for maintaining the highest standards and professionalism in social work. They have not in any instance shied away from critiquing practice, be it the practice of an individual or practice that has come about as a consequence of organisational failure. The team has a record of upholding some 80 per cent of claims, indicating they are able to acknowledge and expose the failures of the past in an impartial manner.

Quantum of payments

26. In their statement of claim the applicants in Wai 2615 also raise a concern about quantum of payments.³
27. The Ministry seeks to ensure any payments made to acknowledge wrongdoing are fair and consistent with other claims of similar facts that have been lodged with the Ministry. The Ministry takes legal advice in order to reach appropriate settlement figures and has built up a large database of comparators.

Confidential Listening and Assistance Service

28. The applicants in Wai 2615 also raise some issues with CLAS, which is no longer operating.⁴
29. CLAS was established in 2008 as an independent agency to provide assistance for people who had suffered abuse and neglect in state care before 1992. The service aimed to provide a forum for people with concerns about their treatment in state care to come forward for assistance. CLAS was chaired by Judge Carolyn Henwood.
30. CLAS picked up and extended the functions that were, until 2007, being carried out by the Confidential Forum for Former In-Patients of Psychiatric Hospitals (the **Forum**). The details of how the Forum operated while it was in

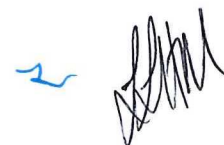
³ Wai 2615 #1.1.1 statement of claim dated 20 March 2017 at [207]. The applicants refer to the content of a 2016 submission made to the United Nations Committee on the Rights of the Child.

⁴ Wai 2615 #1.1.1 statement of claim dated 20 March 2017 at [172].

existence are discussed in the affidavit of Philip Blair Knipe. Because of the success of the Forum, the government of the time decided to extend the listening and assistance service to all forms of residential state care — psychiatric hospitals and wards, health camps, child welfare care and special education homes before 1992. CLAS was established to provide that service. Where a person who approached CLAS had already attended the Forum, the chair would decide whether that person was also entitled to participate in CLAS.

31. CLAS was originally intended to operate for five years and was funded until 30 June 2013. In February 2012, 230 individuals were waiting to meet with CLAS and the service was receiving registrations at an average of five per week. It was unlikely that all persons who wished to appear before the service would be able to do so by 2013. In April 2012 Cabinet approved an extension of CLAS until June 2015 to respond to the high demand for the service.
32. CLAS referred 514 participants to the Ministry, 87 to the Ministry of Health and the Crown Health Financing Agency, and 28 to the Ministry of Education. About 37 per cent of the CLAS participants were of Māori descent.
33. The final report of CLAS referred to criticism at the time it was set up that it would be “toothless”.⁵ Judge Henwood explained CLAS was determined this would not be the case and expressed her pride in the service and in the assistance provided over its lifetime.⁶
34. CLAS developed innovative packages of assistance unique to the individual circumstances of each participant. Assistance included providing recordings of panel hearings to individuals, arranging counselling, assisting the participant to obtain official files, referring participants to government agencies, referring participants to the police to take action against individuals, and offering help regarding employment, housing and food.
35. A survey of participant satisfaction showed that, overall, CLAS was helpful in improving the well-being of participants. The majority of participants surveyed felt their interactions with CLAS were very positive, that they were treated with

⁵ Confidential Listening and Assistance Service *Final Report of the Confidential Listening and Assistance Service 2015* (June 2015) at 10.



dignity and respect, and that the assistance provided (especially counselling) was helpful in achieving closure.⁷

36. The Government considered and responded to the recommendations in the CLAS final report in September 2016.⁸ The Minister noted the recommendations relating to future oversight of state care arrangements had been considered and responded to by the Modernising Child, Youth and Family Expert Advisory Panel.⁹

SWORN

at Wellington this 19th day of
 April 2017
 before me:

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) *L. L. Hrstich-Meyer*
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 L. L. HRSTICH-MEYER

Jo Carrell

Jo Carrell

 A Deputy Registrar of the High Court of New Zealand

⁶ At 22.

⁷ At 62.

⁸ Minister for Social Development Hon Anne Tolley “Government Response to the Final Report of the Confidential Listening and Assistance Service” (8 September 2016).

⁹ At [46].