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BEFORE THE WAITANGI TRIBUNAL

WAI 2615  
WAI 1247

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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

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**AFFIDAVIT OF ERNEST GARTH YOUNG**

Sworn 13 April 2017

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I, Ernest Garth Young, of Wellington, public servant, swear:

### **Introduction**

1. I am employed by the Ministry of Social Development (“the Ministry”) as Chief Analyst, Historic Claims. In this role I am responsible for developing strategy and policy for claims resolution and acting as consultant and advisor to the claims resolution team<sup>1</sup> and manager.
2. I have worked for the Ministry in a variety of social work and management roles for over 30 years. I have a postgraduate diploma in social sciences. I was instrumental in setting up the historic claims team in 2004, and have been involved ever since. I was manager of the historic claims team before I started in my current role.
3. I am providing this affidavit 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 operation of the Ministry’s internal claims resolution process for historic claims of abuse and neglect in state care (“the MSD process”);
  - 3.2 explains how the process accommodates tikanga Māori, and responds to some of the specific concerns raised by the applicants about the operation of the process; and
  - 3.3 explains how the Ministry has engaged with one of the applicants in Wai 1247, Ms Mitchell, regarding her individual claim.

### **Outline of the MSD process**

4. The MSD 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

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<sup>1</sup> The claims resolution team has previously been called the “care, claims and resolution team” and the “historic claims team”.

the supervision of a Child Welfare Officer or a Department of Social Welfare social worker before 1 January 2008.

5. Claims arising from pre-1993 are described within the Ministry as “historic claims” while those from 1993 to 2007 inclusive are described within the Ministry as “contemporary claims”. The MSD process applies to both groups of claims. The Ministry received 2,070 historic claims between 1 January 2004 and 31 March 2017.<sup>2</sup>
6. The Ministry does not deal with abuse or neglect that is alleged to have occurred in state care after 1 January 2008. Those claims are dealt with by the Ministry for Vulnerable Children Oranga Tamariki (“Oranga Tamariki”).
7. Before Oranga Tamariki was established (on 1 April 2017), those claims were dealt with by Child, Youth and Family (“CYF”), a service line of the Ministry. It was, and remains, more appropriate that those more “current” claims be dealt with by the body that is responsible for providing social work and care services because that body is able to address any issues arising from the complaint that impact on current staff or caregivers and on current practice. The rationale for the date of 1 January 2008 is because it was from that date that CYF introduced a more formal and comprehensive complaints process, which included a Chief Executives’ review panel. Since the establishment of Oranga Tamariki, CYF no longer exists.
8. Historic claims enter the MSD process in one of three main ways:
  - 8.1 By entering the MSD process directly on the initiative of the claimant (“Direct Claims”);
  - 8.2 By entering the MSD process directly on the initiative of the claimant’s solicitor or advocate (“Represented Claims”); and
  - 8.3 By proceedings filed in the District Court or High Court (“Filed Claims”). For Filed Claims, the Ministry works with the claimant’s solicitor to achieve an out-of-court settlement where possible.

<sup>2</sup> Of these, 862 were made directly by the claimant; 116 were referred by a solicitor; 500 were referred through an advocate or advocate agency (primarily the Confidential Listening and Assistance Service); and 592 were filed in a court.

9. Claims are dealt with by the Ministry's claims resolution team. The team is currently made up of a manager and 11 senior social work advisors ("advisors").
10. Broadly, claims in each group go through the same steps, but with some procedural differences to accommodate the different ways that each claim enters the process. The key steps are:
  - 10.1 **Entry of the claim into the process, as described above.** The Ministry publicises the contact details of the claims resolution team and information about the MSD process on the Ministry's website and in a brochure. While it was operating, the Confidential Listening and Assistance Service (discussed in the affidavit of Linda Hrstich-Meyer) provided another route through which many claimants accessed the MSD process.
  - 10.2 **A meeting between the claimant and two advisors from the claims resolution team.** This meeting is an integral step for Direct Claims, which enter the MSD process by the claimant contacting the Ministry. Represented Claims enter the MSD process by referral, and if the solicitor sets out the claim in writing in detail there may be no need for the claims resolution team to meet with the claimant for an interview. Filed Claims enter the process after the claimant has filed a statement of claim, and an interview may not be required. In both cases the claimant is given the opportunity to meet if they wish (with their solicitor present). The meeting is almost always held in the claimant's home town or city at a venue with which the claimant is comfortable. They are encouraged to bring a support person or persons with them and many choose to do so. Support persons are often family/whānau members, friends or in some cases professionals such as counsellors or therapists.
  - 10.3 The importance and value of the meeting to the claimant cannot be overstated. The main purpose of the meeting is for claimants to tell their "story", raise concerns about their time in care and ask questions they may have. For many it is the first opportunity they have had to talk directly with a senior representative of the Ministry about their



experiences and for some it may be the first time they have disclosed to anyone the details of those experiences. The fact that those experiences, and the impact they have had, have been heard and acknowledged is, for many, profound and the beginning of a process that allows them to put them in the past and to look forward more positively. The meeting provides the opportunity for the advisors to talk about the MSD process in more detail and to answer — to the extent possible — questions the claimant may have. The advisors will also explain that the claimant is entitled to receive a copy of any records the Ministry holds from the claimant's time in care. They will arrange for a copy to be made if requested and will provide assistance and support for the claimant to look through their records where that is necessary. They will also talk with claimants about whether or not they would like any support or assistance while going through the process and will provide contact details should the claimants want to talk further following the meeting. The Ministry will fund an initial six sessions of counselling for a claimant and may provide more on a case-by-case basis. Each claimant is able to contact the claims resolution team throughout the process if they have any questions or concerns or if they have further information to provide.

10.4 **Investigation and assessment of the claims.** The Ministry follows the same investigation and assessment process for the three types of claim. The investigation seeks to identify any information that is relevant to each allegation to enable findings to be made. The investigation also includes an assessment of the social work practices put in issue by the claimant and identifies any other practice that did not meet the legislative and policy standards of the time. This investigation and assessment process draws on all available information — primarily, the claimant's oral account and/or written statement, a thorough consideration of their social work files, and any additional information that the Ministry may have about placements at which the claimant resided.

10.5 **Discussion of the findings and outcome of the investigation with the claimant.** This part of the process seeks to ensure that the

claimant has a clear understanding of the outcome of the investigation and, where possible, the events that occurred during his or her time in care. It is also, importantly, an opportunity to bring some closure or resolution or at least to work towards that, and to discuss how the Ministry can acknowledge and apologise for its failures.

- 10.6 For Direct Claims, the Ministry arranges a second discussion with the claimant. In most instances this will be another face to face meeting with two advisors — one of them being the author of the investigation and assessment — but may be through a phone conversation. The way in which the second discussion progresses is very much dictated by the needs and wishes of the individual claimant, but typically includes three key parts.
- 10.7 The first is talking with the claimant in detail about the outcome of the investigation and assessment and the conclusions that the advisor has come to, both about specific allegations and about any practice failures confirmed or identified.
- 10.8 The second is sharing with the claimant a timeline of their involvement with the Ministry and any other information that may assist the claimant to understand the context of their care, and an opportunity for the claimant to have any questions about that answered. This is important because usually the events happened a long time ago, and the claimant may not have a clear memory or understanding of particular decisions made or processes that applied in the context of their care and in that period of their life.
- 10.9 The third is the opportunity for the advisor to make a verbal, face-to-face apology to the claimant for the abuses and failures identified and to make the offer of a formal written apology from the Chief Executive and a financial payment. As for the first meeting, the importance and significance of the claimants having their experiences heard, validated and acknowledged in a tangible way cannot be overstated.

- 10.10 For Represented and Filed Claims, the Ministry sends a letter to the claimant's solicitor setting out the investigation findings and (if required) making a settlement offer that includes a written apology from the Chief Executive. If requested by the claimant, the Ministry holds a meeting with the claimant and the claimant's solicitor to discuss any aspect of the Ministry's findings or the claimant's time in care.
- 10.11 If no findings of fault or harm are made, the claimant receives a clear explanation of the basis on which those findings are made. If legal aid has been required or legal costs have been incurred in bringing the claim, then the Ministry will offer to make a contribution to those costs even in the absence of findings of fault or harm.
- 10.12 If findings of fault or harm are made, a formal written acknowledgement and apology for those failures and abuses is made from the Chief Executive. A financial payment to acknowledge those failures and abuses is also made along with a contribution to any legal aid debt or legal costs the claimant has incurred. Our approach to date has been that the claimant should be able to have their claim resolved and have the full payment available for their personal use without any call being made on it for legal costs.
11. Of the 1,388 claims resolved in the period up to 31 March 2017, payments and letters of apology have been made to 1,140 claimants.
12. If a Filed Claim is not able to be settled through the process described above, the Court may direct that a Judicial Settlement Conference be held in an effort to reach agreement. If the claim cannot be settled by Judicial Settlement Conference, the claimant has all of his or her legal remedies available, such as proceeding to trial. If settlement is reached, a condition of settlement is that the claimant must immediately discontinue the proceeding.
13. Any claimant who is not happy with the outcome of the MSD process may make a complaint to the Office of the Ombudsman or may seek legal advice about possible next steps.



14. To date, of the claims brought to the Ministry since 2004 that have been resolved, all have been resolved without proceeding to trial. However, there have been a number of interlocutory hearings and judicial settlement conferences.
15. An important part of the claims resolution process for some, if not many, claimants is their wish that children in care today and in the future should not be subject to the same kind of maltreatment that they were. Equally, it is incumbent on the Ministry to learn from past mistakes to improve social work practice and the care and service that our clients receive. To that end, there were various feedback loops to CYF, and now to Oranga Tamariki. The team's advisors have held numerous workshops with social work staff to talk about the kinds of practice issues that have been identified in claims and how they can ensure their practice today meets the required standards. Key case assessments that identified specific practice issues that may have implications for today's practice are shared with operational staff and/or the Office of the Chief Social Worker.
16. Where a claim implicates the conduct of current staff or caregivers, the claims resolution team works with the relevant senior staff to address those concerns. When CYF was in operation, a monthly report of claims case assessments and findings was provided to it. With the creation of Oranga Tamariki, claims resolution is in the process of confirming its feedback loops with Oranga Tamariki.

**Ways that the MSD process accommodates tikanga Māori**

17. The MSD process puts the claimant at the centre of the process. Where the claimant wishes to express tikanga within that process, the MSD process does not limit that, and will seek to accommodate it wherever possible. The Ministry has received feedback from Māori claimants who have spoken positively about their experience with the MSD process.
18. For example, the advisors can provide for a Māori social worker if requested; can hold interviews on marae; and can arrange for the interview to be opened with a karakia. The Ministry can fund counselling or therapy to support the claimant throughout the process and the advisors always consider cultural



needs in respect of this support. This may include the funding of support that is culturally important to the claimant rather than counselling.

19. The MSD process emphasises face-to-face contact. The interview gives the claimant an opportunity to talk with the advisors about their experiences in care and to have those experiences heard and acknowledged in a personal way.
20. Finally, the advisors who conduct the process must, by the qualifications required to fill the role, demonstrate competence in and knowledge of tikanga Māori and the Treaty of Waitangi. The impression of the advisors is that somewhere between 50 and 60 per cent of claimants in the MSD process present as Māori.
21. The advisors have extensive experience working with Māori in many different settings and have attended training opportunities to further their knowledge and understanding of tikanga Māori. They are required to hold qualifications and certification that involves demonstrating knowledge of tikanga.
22. The advisors are all registered social workers with the New Zealand Social Workers Registration Board (“the Board”). The Board requires all registered social workers to demonstrate competence across a number of areas, including competence to practise social work with Māori. The social worker meets this standard by:<sup>3</sup>
  - demonstrating knowledge of the Treaty of Waitangi, te reo Māori and tikanga Māori;
  - articulating how the wider context of Aotearoa New Zealand both historically and currently can impact on practice;
  - Te Rangatiratanga: maintaining relationships that are Mana enhancing, self-determining, respectful, mindful of cultural uniqueness, and acknowledge cultural identity;
  - Te Manaakitanga: utilising practice behaviours that ensure mauri ora by ensuring safe space, being mana enhancing and respectful, acknowledge boundaries and meet obligations; [and]

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<sup>3</sup> Social Workers Registration Board “Core Competence Standards” <[www.swrb.govt.nz/competence-assessment/core-competence-standards](http://www.swrb.govt.nz/competence-assessment/core-competence-standards)>.

- Te Whanaungatanga: engaging in practice that is culturally sustaining, strengthens relationships, is mutually contributing and connecting and encourages warmth.
23. The advisors are bound by the Code of Conduct for registered social workers. The Code of Conduct sets out minimum professional standards, including the principles that registered social workers:<sup>4</sup>
- 23.1 respect the status of Māori as tangata whenua; and
- 23.2 respect the cultural needs and values of the client.
24. To respect the status of Māori as tangata whenua, registered social workers are expected to:<sup>5</sup>
- 2.1 work in partnership with Māori clients and their family/whanau;
- 2.2 work in a culturally appropriate manner while recognising the diversity within the Māori population;
- 2.3 have an understanding of Te Ao Māori and be able to state and use bicultural practice models;
- 2.4 promote the rights of Māori to use Māori social work and/or bicultural models of practice to protect the integrity of Māori as tangata whenua;
- 2.5 promote access to services that meet the needs of Māori clients;
- 2.6 as a supervisor, endeavour to ensure supervision is culturally relevant if the supervisee is Māori; and
- 2.7 as a supervisor, endeavour to ensure supervision is culturally relevant, safe, and responsive to Māori clients.
25. All advisors are members of the Aotearoa New Zealand Association of Social Workers (“the Association”). Members have an obligation to adhere to the Association’s code of ethics, which includes the following principles regarding responsibility for a Te Tiriti o Waitangi-based society:<sup>6</sup>
- 1.1 In all relationships with Tangata Whenua, members make ethical decisions and stand by these, in accordance with this Code.
- 1.2 Te Tiriti of Waitangi is a required subject in the education of members both upon entry into social work and ongoing. This

<sup>4</sup> Social Workers Registration Board *Code of Conduct* (March 2016), principles 2 and 3.

<sup>5</sup> At 7.

<sup>6</sup> Aotearoa New Zealand Association of Social Workers *The Code of Ethics of the Aotearoa New Zealand Association of Social Workers* (November 2007) at 1.

includes a knowledge and understanding of their own ethnicity and the Tangata Whenua and Tauivi histories of Aotearoa New Zealand.

- 1.3 Ideally, members will work with agencies and organisations whose policies, procedures and practices are based on Te Tiriti o Waitangi, and actively and constructively promote change in those agencies and organisations that operate from a mono-cultural base.
- 1.4 Appropriate social work requires members to seek to understand differing Tangata Whenua perspectives. Members and social service agencies and organisations respect these differences and at all times avoid imposing mono-cultural values and concepts on Tangata Whenua.
- 1.5 Mono-cultural control over power and resources must be relinquished so that Tangata Whenua can achieve Tino Rangatiratanga. Members relinquish control over their discretionary power and those resources available, so far as that is appropriate within the realities of their workplace.
- 1.6 Members actively promote the rights of Tangata Whenua to utilise Tangata Whenua social work models of practice and ensure the protection of the integrity of Tangata Whenua in a manner which is culturally appropriate.
- 1.7 Members accept the responsibility of their status and are actively anti-racist in their practice.

### **Specific concerns raised by the applicants**

#### ***The two-path approach***

26. The applicants in Wai 2615 state that the two-path approach involves a “cursory examination” of the allegations and a “basic fact check” and that the claims are put into “pre-determined categories”.<sup>7</sup> The applicants in Wai 1247 say that Ms Mitchell views the two-path approach as impersonal.<sup>8</sup>
27. The reason for the development of the two-path approach is explained in the affidavit of Linda Hrstich-Meyer. While it has a focus on the timely resolution of claims, the Ministry does not agree that the two-path approach operates in an impersonal or pre-determined way. Most of the claimants who have received two-path approach offers had already been interviewed sometime in the past. It is always open to the claimant to decline the offer and opt instead for the longer route of having a more detailed consideration of their claim and full feedback process.

<sup>7</sup> Wai 2615 #1.1.1 statement of claim dated 20 March 2017 at [199] and [200].

<sup>8</sup> Wai 1247 #1.1(b) amended statement of claim dated 14 March 2017 at [49].

***Impartial operation of the MSD process***

28. The applicants in Wai 2615 raise concerns that the MSD process is funded and staffed by the department it investigates and is not independent.<sup>9</sup>
29. Where a conflict of interest arises in dealing with a claim, either because an advisor had some prior involvement with the claimant or their family, or the advisor had a past professional relationship with a staff member implicated in the claim, the advisor will declare a conflict of interest and will not have any involvement in the claim.
30. There are policies in place for managing situations where allegations are made against current Ministry staff or caregivers. In these situations, clarity of role and responsibility is critical. The policy is clear that the manager of the current employee is responsible for managing any human resources issues and decisions. Previously, CYF, and now Oranga Tamariki, is responsible for managing contact with a caregiver and making decisions about their status. The claims resolution team is responsible for interviewing the employee (if agreed) and making final decisions about the outcome of the claim itself.

**How the Ministry is dealing with Ms Mitchell in the MSD process**

31. Ms Mitchell approached the Confidential Listening and Assistance Service (referred to in paragraph 10.1 above) and had an interview with that service in January 2012. She was referred to the Ministry and had a meeting with two staff members from the claims resolution team in February 2012.
32. An offer was made to Ms Mitchell in May 2015 under the two-path approach. In August 2015 Ms Mitchell declined the offer and advised that she had instructed a lawyer.
33. In July 2016 a full investigation and assessment of her claims was completed, with a further offer being made to her in September. Subsequently Ms Mitchell, through her lawyer, advised that she would like to hui with Ministry staff prior to deciding on the offer. The Ministry asked where she would like to have the meeting and was then advised she would like it held on the Auckland Unitec Marae campus. The Ministry was happy to accommodate this and we were continuing to liaise with Ms Mitchell on

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<sup>9</sup> Wai 2615 #1.1.1 statement of claim dated 20 March 2017 at [213].



arrangements for the meeting at the time Ms Mitchell filed her claim with the Waitangi Tribunal.

34. In the meantime, because the advisor who had undertaken the July assessment was no longer available, another advisor was allocated to familiarise herself with and thoroughly review the file before the expected meeting. The Ministry remains open to meeting with Ms Mitchell when this review is complete.

**SWORN**

at Wellington this 13<sup>th</sup> day of  
April 2017  
before me:

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ERNEST GARTH YOUNG.

*A Hassard*  
Alexandra Hassard

A Deputy Registrar of the High Court of New Zealand