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Redress in Aotearoa New Zealand

7.1 Introduction

This chapter focuses on the monetary redress programme operated by the Ministry of Social Development (MSD) between 2006 and 2017. With 2,643 claims and 1,315 settlements, the Historic Claims Process (HCP) was the largest state redress programme in New Zealand (Ministry of Social Development 2018b).[1] While MSD continues to provide redress, this chapter concerns the HCP as it was prior to the 1 February 2018 announcement of a Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care. That inquiry prompted transformative changes to the state's redress strategy.

In 2003 the government learnt that people were approaching the Salvation Army for redress of abuse in care. A number of those survivors had been state wards (NZ Interview 6). Looking for a cost-effective and survivor-focussed alternative to litigation, in 2007, MSD consulted with nine survivors to find out what they might want in a redress process (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 157). That feedback shaped an initial framework offering three key redress outcomes: an understanding of the survivor's experience in care, a formal acknowledgement and/or apology, and monetary payments. That framework coalesced in 2008 into a two-pronged response, the Confidential Listening and Assistance Service (CLAS) and the Crown Litigation Strategy.

CLAS heard survivor testimony with a therapeutic purpose. Its purposes were to listen to survivors, acknowledge their experiences, identify issues with which CLAS could assist, and develop a forward-looking plan that might include access to personal records, counselling, or assistance with housing and employment training (NZ Interview 6). CLAS did not

[1] The Ministries of Education and Health operated analogous but much smaller programmes.

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accept new registrations after 2013 and closed in 2015 having heard testimony from 1,103 survivors (Henwood 2015: 49). The second component to New Zealand's response concerned monetary redress. The Crown Litigation Strategy of 2008 had three points:

(1) [State] agencies will seek to resolve grievances early and directly with an individual to the extent practicable
(2) the Crown will endeavour to settle meritorious claims
(3) claims that do proceed to a court hearing because they cannot be resolved will be defended (Ministry of Social Development 2014: 4).

Point (3) expressed the Crown's commitment to a strong legal defence, which meant that out-of-court resolution was the only effective option for survivors (Cooper 2017). Whereas other exemplars were established to remove the survivors' claims from the courts, MSD's programme developed in dialogue with ongoing litigation, and until the 2014–2015 Fast Track Process (see Section 7.2), did not assume clear remedial responsibility for a defined set of claims. Instead, MSD developed a mutable set of conventional procedures for semi-structured negotiation as an adjunct to litigation. As the number of cases grew, these procedures coalesced into a programme with a quasi-independent remit, which became the responsibility of the MSD's Historic Claims Team (the Team).[2]

7.2 The Historic Claims Process

Founded in 2004, staff numbers in the Team grew slowly in response to the increasing number of claims. Staff turnover was relatively low. In 2017, the Team had slightly fewer than thirty members. These included a programme manager (a lawyer), one senior analyst, eleven senior advisors who managed claims, four administrators, and ten staff working with records (NZ Interview 6). All were permanent civil servants. The Team's location within MSD created significant concerns regarding its impartiality. The former chair of CLAS, Judge Henwood, observes,

> The department [MSD] is the perpetrator and also the person trying to put it right. Some people are very, very anti the department [the Ministry] because of all the harm and the way they've been dealt with over the years. So, I don't think it's satisfactory and it's still not satisfactory. (Quoted in, Smale 2016)

[2] The Team bore many different names throughout the period.

Advisors were often long-serving employees of MSD and lawyers in the programme were employed by MSD to provide it with legal services – the ministry was their client. Meritorious claims appear to have failed due to that lack of impartiality (NZ Interviews 2 and 8) and important evidence was withheld from survivors (Young 2020: 424–25). Moreover, the programme discriminated against survivors when that served political interests. For example, the claims of survivors convicted of serious crimes were delayed for several years because officials were worried the government would be criticised if they were found to be giving money to criminals (Cooper and Hill 2020: 133). There was no effective independent oversight of the process. A review by the New Zealand Human Rights Commission was blocked by the government and its critical 2011 report was never published (Human Rights Commission 2011).[3]

The redress programme had limited public exposure. There was no public advertising and no regular contact with survivor groups (NZ Interviews 1, 6 & 8). A government website was the primary public information source. Most applicants heard about the claims process through survivor networks, from a service agency, or from CLAS (Allen and Clarke Policy and Regulatory Specialists Limited 2018: 2; Ministry of Social Development 2018c: 11). The programme's limited visibility was, in part, a technique to mitigate the ever-growing backlog of claims: the programme did not have the capacity or budget to manage more applicants (NZ Interview 6).

There was no application form. Survivors without legal representation lodged their claims by telephoning the Team and speaking with an advisor. The advisor noted when and where the survivor was in care, what injuries they experienced, and if the claim should be prioritised because the survivor was very ill or suicidal. Alternatively, the survivor's lawyer could engage with MSD directly or file a civil claim in court. A small Wellington firm, Cooper Legal, represented nearly all survivors who retained counsel, representing slightly more than half of all successful claimants. Cooper Legal would first interview the survivor, then notify MSD of the claim and request relevant records pertaining to the survivor – a filed claim would go through a formal process of legal disclosure. After receiving the records, counsel would prepare a 'Letter of Offer' describing the survivor's claim, the supporting evidence, and a desired

[3] Letters between the attorney general and the Commission are on file with the author.

settlement value. Cooper Legal used litigation strategically to help their clients obtain redress. It was not a direct avenue to compensation.

In 2013, MSD was told that incoming claims had peaked and that it could expect a further 482 claims before 2030 – an average of seventeen per year (Webber 2013: 15). This proved inaccurate. The flow of applications has progressively increased. The year 2008 was the first year the programme received more than 100 claims; 200 claims-per year was exceeded in 2011; 300 per year in 2015; and 2017 saw 431 applications (Ministry of Social Development 2018b). During that period, the balance of filed and unfiled claims shifted. Until 2009, claims tended to be filed in court, after that the majority were unfiled: as of 31 December 2017, there were 2,008 unfiled and 635 filed claims (Ministry of Social Development 2018b). I could not find 2017 data on gender; however, 2020 data states that 71 per cent of claimants were male and 22 per cent were female (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2020b: 175). Between 50 to 60 per cent of claimants were Māori (Young 2017: 8).

Without formal eligibility criteria, the programme's conventions developed and changed over time and the Team used different procedures for different claims. Speaking very generally, survivors must have been alive to lodge a claim, but if they died subsequently, their estates could receive payment. Eligible claims were not limited to specific time periods. While New Zealand originally described pre-1993 injuries as historic, the Team used the same procedure for later injuries. Many claimants were placed in residential institutions. However, the HCP also managed claims from survivors of foster care and other situations, potentially covering anyone who had been legally taken into the care, custody, or guardianship of MSD (or its predecessors), or when the person or family had been under state supervision. In short, the ambit of eligibility was determined by a sense of whom MSD was responsible for in social work practice.

The wide ambit of potentially eligible claimants was matched by a relatively narrow ambit of redressable injuries. Only injurious acts were eligible. These tended to be interactional acts of, for example, sexual abuse, or the inappropriate use of isolation. In more recent years, survivors began to claim for violations of New Zealand's Bill of Rights (1990), including, for example, the right not to be subject to torture or to unreasonable search and seizure and those claims are not subject to statutory limits. Most consequential harms were not redressable, which meant that the programme excluded the effects of injurious cultural

removal, loss of personal identity, and the severance of family relationships.[4] Recall that Māori constitute the majority of survivors, and out-of-home care systemically disconnected them from their cultural and family groups (Ministry of Social Development 2018c: 7). This is an extraordinarily significant omission: it is impossible to overstate the importance of family connections (whakapapa) in Māori culture (Collins 2011).

MSD must have been responsible for the injurious act(s) in some way. For example, abuse by MSD staff would be a relevant injury. But injuries inflicted by others, such as another child, were only redressable if they resulted from a practice failure on the part of MSD. The weaker the causal connection between the injury and actions of MSD staff, the harder it was for claimants to obtain redress. Staff actions were judged according to contemporary standards. However, one interviewee stressed that contemporary standards could be what was permitted, even when permitted practice violated contemporary regulations (NZ Interview 2). That form of normalisation could also reduce settlement values.

The programme sought to be highly personalised, holistically assessing claims through a survivor-oriented process that was modelled on social work. The investigation assessed what abuses occurred and whether the state had legal responsibility for the survivor's welfare at the time. The advisor began by compiling the survivor's records. The next phase of the process, for unrepresented claimants, was an evidentiary interview with two advisors.[5] These interviews were central to MSD's understanding of the process as survivor-oriented (Young 2017: 3). Survivors could have a support person and choose where the meeting occurred. Common venues included marae, community meeting halls, prisons, and government offices. Interviews could take several hours, they were audio-recorded and survivors were encouraged to describe their injurious experiences in detail. Ideally, advisors would listen, ask probing questions, and give survivors advice on how to access personal records and where they could get counselling or other support. After the interview, advisors would pursue any further relevant documents and, potentially, interview alleged perpetrators and other informants. If MSD staff were

[4] The exclusion of consequential harms reflected, in part, the role of New Zealand's Accident Compensation Commission (ACC). ACC's public insurance programme provides medical treatment and some money payments that replace the right to sue available in other jurisdictions. All compensatory claims for personal injury occurring after March 1974 are non-justiciable. Many survivors were eligible to access ACC benefits.

[5] Prior to 2012, advisors met represented survivors and their lawyers, but this became less common (NZ Interview 2).

involved as alleged perpetrators, they received NZD$2,000 for legal advice. Survivors were welcome to supply advisors with further information after the meeting.

Advisors needed to identify social work practice that did not meet contemporary legislative and policy standards. To determine what laws and policies applied contemporaneously, MSD contracted Wendy Parker to report on legal and practice standards between 1950 and 1994. Her report was supplemented by dossiers on fifteen institutions. As Parker stresses, she relied on institutional records only and did not use survivor testimony (Parker 2006: 8–9). However, as new claims were received and investigated, the Team progressively developed a database on institutions, survivors, and alleged perpetrators.

The advisor would develop a provisional assessment, including a proposed payment value. That assessment then underwent a secondary review by the programme manager, tertiary review by the chief legal advisor, and, finally, approval by the ministry's deputy chief executive. In filed cases, MSD or Crown lawyers would also be involved. Because assessment was personalised and detailed, and involved multiple reviews, it was also slow: most cases took four to eight weeks to investigate (2020: 533). Staffing limitations led to backlogs (Winter 2018a: 15). By early 2018, claims were taking around four years to process (Allen and Clarke Policy and Regulatory Specialists Limited 2018: 1). Some of these delays also resulted from underfunding. The HCP did not have the budget it needed to resolve claims.

To address the growing backlog, in 2013 MSD developed a supplementary 'Fast Track Process'. The Fast Track Process was optional and only available for claims lodged as of 31 December 2014. The Fast Track Process would accept claims on face value, if advisors could establish that the state was responsible for the survivor at the time of the relevant injuries; that the survivor was where the abuse occurred at the time alleged; and, that any named perpetrator could have been where the injury occurred (Hrstich-Meyer 2020: 22). The Fast Track Process also narrowed the ambit of redress by excluding Bill of Rights claims. The Fast Track Process made 600 payments, 46 per cent of all claims settled before 31 December 2018.

New Zealand's redress programme confronted persistent complaints of non-transparency. Because procedures constantly changed, it was difficult to know how assessment would be conducted (NZ Interview 2). '[T]he rules were always changing and ... there was inconsistency when interpreting the rules' (Ministry of Social Development 2018c: 17).

While represented applicants could get advice from their lawyers, unrepresented survivors were much worse off. In early 2018, Allen and Clarke found

> Most of the claimants had relatively limited understanding or visibility of the claims review process, including how claims were assessed, where claimants fit into the process, and how the claim would be resolved. (Allen and Clarke Policy and Regulatory Specialists Limited 2018: 4)

Evidentiary standards are an example. The investigation sought to verify claims. In general, its evidentiary standard was that 'the Ministry needed to have a reasonable belief' that the survivor was injured and that it was reasonable to hold MSD responsible (Hrstich-Meyer 2020: 8). But the HCP applied evidentiary standards inconsistently (NZ Interview 2). Moreover, it appears that MSD did not always follow the procedure outlined above. For example, some survivors were told that they did not need to describe their injurious experiences during the interview, only to have that lack of detail detract from their payment values (Cooper and Hill 2020: 79).

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Support for survivors was underdeveloped. Until it closed in 2015, CLAS was, apart from Cooper Legal, the primary source of support. CLAS brokered counselling, helped survivors obtain personal records, and supported survivors in reading those files. Survivors could submit recordings of their CLAS interview to the HCP and CLAS referred 514 survivors to the programme (Hrstich-Meyer 2017: 8). MSD did not engage with survivors' organisations as part of its implementation strategy (NZ Interview 6). Indeed, the programme's failure to engage with Māori organisations prompted a 2017 Waitangi Tribunal complaint (Te Mata Law 2017). That complaint criticised the cultural appropriateness of the programme. During the 2006–2017 period, there was only one Māori advisor in the Team and they left prior to 2017 (NZ Interview 6). As a result, Māori survivors did not 'feel their cultural needs were recognised or catered for' (Ministry of Social Development 2018c: 9). That failure 'reinforced [the survivors'] sense of isolation, helplessness, loss of identity and loss of connection that occurred as a result of being in care' (Ministry of Social Development 2018c: 9).

CLAS might refer survivors to Cooper Legal. Better off survivors paid their legal fees, shouldering the risk that the cost of the process would

exceed their settlement (which it sometimes did). However, most survivors relied on legal aid. Each survivor needed to establish their legal aid eligibility independently and funding was not guaranteed. Indeed, after the Crown Litigation Strategy was announced in 2008, New Zealand began to withdraw legal aid from all non-recent claims (Cooper and Hill 2020: 41–52). Cooper Legal fought that decision in the courts until 2013, when it was agreed that MSD would pay around 66 per cent of the reasonable costs of any legal aid debt with the remainder being written-off by Legal Aid (NZ Interview 2). As of 2017, the cost to MSD of this arrangement was slightly more than NZD$3.8 million, a mean average of NZD$10,445 across 365 claims (Ministry of Social Development 2018b).

MSD funded psychological counselling, usually offering six initial sessions, with a total cost (for all survivors) of around NZD$106,000 by 2019 (Hrstich-Meyer 2020: 23). Additional counselling could be obtained through ACC (see footnote 4 in this chapter). However, the offer of counselling might emerge late in the process, and a dearth of suitable counsellors created waiting lists (NZ Interviews 1 and 2). Very few survivors used professional medical or psychological assessments as evidence in their applications (NZ Interview 2). As there was no funding for such components, and redress excluded consequential harms, professional assessment was not cost-effective. There was no dedicated financial advice service for survivors, although advisors might direct survivors to public advice services (NZ Interview 6).

There was no legislative or policy initiative to facilitate records access for survivors (NZ Interview 5). After CLAS closed, Cooper Legal became the only independent service with specialist records expertise. For unrepresented claimants, MSD's Team managed documentary research. A 2017 survey of 422 survivors indicated that 90 per cent of respondents believed that they would benefit from improved support in accessing records (Stanley et al. 2018: unpaginated). Record searches were complex, usually involving multiple organisations and delays were normal and considerable. Although Archives New Zealand held older files, other government records are decentralised and held by each ministry, often at the regional level. Unrepresented survivors might not know what records exist and what they could expect to obtain (NZ Interview 2). And those records were often in poor condition. '[F]iles were often incomplete, irretrievable and in some cases, missing' (Ministry of Social Development 2018c: 13). To illustrate, when MSD sought twenty-eight staff files for a non-recent abuse case in 2006, only six could be found (Young 2020: 294). MSD would destroy more employee records in 2009

(Young 2020: 293). Moreover, there were problems with the records provided, including cases wherein MSD did not provide all relevant records (Cooper 2017; NZ Interview 8). Concerns regarding the redaction of third-party information, including the identities of family members, were prominent and widespread (Ministry of Social Development 2018c: 13). At times, the Team redacted according to the rule 'if in doubt, leave it out' (Young 2020: 441–42). Redaction could make it harder to settle a case or obtain higher settlement figures. Moreover, it prevented the survivor from getting information about their cultural and family background, a point of particular difficulty for Māori survivors seeking cultural reconnections (Ministry of Social Development 2018c: 9).

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The flexible and holistic character of the process meant that outcomes differed. Building on the programme's social work ethos, some survivors received ad hoc assistance with housing and education. In nine cases, when the Team could not substantiate a redress claim, MSD offered a small wellness payment in lieu of a zero award. However, the programme's holistic character diminished as the volume of claims increased (Young 2020: 342). By December 2017, 1,315 survivors had received NZD$25,147,184 in payments, a mean average of NZD$19,123 (Ministry of Social Development 2018a). While a few (152) payments exceeded NZD$30,000, most (89 per cent) were below NZD$20,000 (Personal communication, from Anonymous, 26 July 2017). As the value of the settlement increased, more approvals were needed. Civil servants could make ex gratia payments up to NZD$30,000, but higher figures required ministerial authority – a procedural hurdle that may have depressed some payment values. Administering the programme cost NZD$41,103,134 between 2007 and 2019 (MacPherson 2020: 23).[6]

MSD suggests that settlement values were 'broadly in line with what a court might award' (Hrstich-Meyer 2017: 2). Other observers disagree (Cooper Legal 2013: 2; The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 153). Before 2018, the programme did not publish information on how it determined settlement

[6] I could not find administrative costs for the period ending 31 December 2017. For those interested in comparisons, by 31 December 2019, the HCP had paid NZD$30,220,698 in redress to survivors, which is slightly more than 73 per cent of the administrative costs incurred by that date.

values. It is now known that once the ministry had paid an initial set of claims, subsequent values were derived by comparing new cases with three to five previous offers (Hrstich-Meyer 2020: 10). That practice crystallised in the Fast Track Process's six-row severity matrix (Appendix 3.14), which the Team created by analysing its settlement practice. The Fast Track Process was subject to a forced distribution to cap its expenditure to NZD$26 million ('Linda Ljubica Hrstich-Meyer Transcript' 2020: 585–86). It appears that, on average, payments made through the Fast Track Process were around NZD$5,000 less than those available through the standard process ('Linda Ljubica Hrstich-Meyer Transcript' 2020: 588–89).

Whereas counsel received settlement offers for represented survivors, offers for unrepresented applicants often came through a second face-to-face interview. In the second interview the advisor provided information to help the survivor understand their care experience (NZ Interview 6). The advisor might offer a verbal apology along with the monetary offer. Given the power disparities involved, many survivors experienced this as 'take it or leave it' proposal (NZ Interview 2). If a represented claimant rejected the proposal and subsequent negotiation failed, then the claim might proceed to a judicial settlement conference. In 2015, an Intractable Claims Process, using third party mediation, was to begin, but no claims were heard before the process was cancelled by MSD (Cooper and Hill 2020: 84). In the end, should a survivor disagree with MSD's proposed payment, they might have recourse to the courts, where they were likely to fail. Procedural review was similarly impuissant. A 2016 court ruling concluded that the programme sat within the Crown's prerogative and its processes were non-justiciable (*XY And Others* v. *The Attorney General* 2016).

Unrepresented survivors would receive some money for legal advice at the point of settlement. The total cost of that advice was NZD$311,321 as of 31 December 2017 for 950 survivors, giving a mean average of NZD$889 (Ministry of Social Development 2018b). As intimated above, payments with a value of under NZD$30,000 were ex gratia and sometimes (but not always) were a full and final settlement waiving the survivors' rights. The settlement included an apology letter describing the survivor's care history and the injurious experiences that MSD accepted. Survivors could ask for specific material to be included or excluded from the letter. The apology was usually signed by the chief executive, although the minister of social development would sign the letter if the survivor asked (Price 2016).

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New Zealand's HCP was the least formalised and, consequentially, the least independent of the ten exemplar programmes. And while it avoided some of the budgetary exorbitances associated with larger, more legalistic programmes, it shared common problems with backlogs, partiality, and difficult records access. It was also significantly less efficient than most other programmes. The HCP was the only exemplar that cost more to administer than it paid to survivors.