Rosslyn Noonan

Brief for the Contextual Hearing of the Royal Commission on Abuse in Care

4 November 2019

Introduction

[1] This submission focuses on the State's response since 1999 to claims of abuse in care. It does so for two primary reasons. First it demonstrates the need for a fully independent, well-resourced inquiry with a broad mandate and all the necessary powers to undertake a rigorous investigation and recommend redress and change. Secondly, many of the people who responded so problematically to claims of abuse, in particular the senior government officials in the responsible Ministries, will once again be advising Ministers on whether or not to or to what extent to accept the recommendations of the Royal Commission.

[2] It calls on the Royal Commission to interpret broadly Section 10.1 (b) of the Terms of Reference, which states that:

> the inquiry may, at its discretion, consider issues and experiences prior to 1950. In order to inform its recommendations for the future, *the inquiry may also consider issues and experiences after 1999*. [emphasis added]

[3] The submission highlights what appears to be a pattern of behaviour since 2000 by successive Governments and government agencies to aggressively reject claims of abuse in care. When denial was no longer credible, they rigorously defended the claims often by denigrating claimants and minimising the damage done to them. When the evidence of abuse was incontrovertible, the response was to blame aberrant individual behaviour rather than acknowledge any systemic failings or responsibility.

[4] Examples of this behaviour observed while I was Chief Commissioner at Te Kahui Tika Tangata, the Human Rights Commission, and the key issues they raise for consideration by the Royal Commission, are summarised in this submission.

[5] Further, it suggests that fundamental human rights and New Zealand's international human rights commitments were seldom, if ever, considered in the development of the State's response.

[6] It concludes that abuse of children and vulnerable adults in care will continue unless the State:

- recognises past systemic failings, acknowledges and accepts responsibility for them;
- is prepared to apologise and set up an independent process to compensate those abused;
- works with iwi and Maori urban authorities to develop Treaty of Waitangi-based, human rights-respecting laws, policies and procedures to ensure the dignity, safety and well-being of children and adults in the care of the state or of other institutions and organisations;
- ensures every care-leaver access to full and comprehensive records of their time in care, including by amending the Privacy Act if required; and
- reviews the current independent monitoring mechanisms, including the Human Rights Commission, the Office of the Commissioner for Children, the Office of the Ombudsman, the Health and Disability Commission and the Education Review Office with a view to strengthening their independence, legal mandate, competence and resourcing.

[7] The Royal Commission must:

- identify and hold to account those who enabled the abuse to persist for so long, most recently in the 2000s, by seeking to suppress any public knowledge of what had gone on, and by so zealously defending any civil claims before the Courts;
- investigate whether there were factors other than evidential that limited Police from undertaking prosecutions in the 2000s, for example in relation to complaints about treatment in Lake Alice; and
- review and make recommendations on changes to legislation, regulations, policies and practices in relation to current barriers to civil proceedings claims before the Courts, including the time-bar defence, and aspects of the ACC scheme and restrictions in the Mental Health legislation.

[8] Most importantly, the Royal Commission must explain:

- the extent of the impact of colonialism and the associated systemic racism that has resulted, even today, in disproportionately high numbers of Maori and Pacific Island children and children from low-income families being taken into State care; and
- the pervasive discrimination experienced by people with disabilities and the impact it has on the risks they experience when requiring care and protection.

Brief background of the submitter

[9] I was New Zealand's Chief Human Rights Commissioner from May 2001 until the end of August 2011. From 2010 to 2012, I chaired the Global Alliance of National Human Rights

Institutions (GANHRI). Other relevant experience includes employment at the New Zealand Public Service Association (1981-1986) with responsibilities that involved representing social workers and assistant social workers; being a member of the Royal Commission on Social Policy from late 1986 to May 1988; and my role as National Secretary of NZEI Te Riu Roa, 1988-1996 representing early childhood educators, primary teachers, advisers and educational psychologists.

[10] Currently, I am Director of the New Zealand Centre for Human Rights Law, Policy and Practice (the Human Rights Centre) attached to the Law School at the University of Auckland. Most recently, I chaired the Independent Panel appointed by the Minister of Justice to examine the 2014 family justice reforms. The report *Te Korowai Ture ā-Whānau,* published in June 2019, identified a series of systemic issues that are equally relevant to the issues under examination by the Royal Commission. By academic training an historian, I have a particular focus on the facts, the evidence and on the patterns that the facts form and the trends and themes that emerge from them.

Te Kahui Tika Tangata: Human Rights Commission mandate

[11] In 2001 the Human Rights Act 1993 (HRA) was amended to:

- bring the State wholly within the jurisdiction of the Act;
- merge the Race Relations Office and the Human Rights Commission;
- establish the Human Rights Commission as a fully functioning national human rights institution, rather than the predominantly anti-discrimination body that it had been.

[12] The HRA sets out five primary functions of the Commission, the first of which is "*to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society*; […]"

[13] In fulfilling its functions, the Commission, amongst other things, is required by section 5 of the HRA to:

- promote by research, education, and discussion a better understanding of the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international human rights law;
- inquire generally into any matter, including any enactment or law, or any practice, or any procedure, whether governmental or non-governmental, if it appears to the Commission that the matter involves, or may involve, the infringement of human rights;

- promote and monitor compliance by New Zealand with, and the reporting by New Zealand on, the implementation of international instruments on human rights ratified by New Zealand.

[14] The Commission is also empowered to "in the public interest or in the interests of a person, department, or organisation, publish reports relating generally to the exercise of its functions under this Act or to a particular inquiry by it under this Act, whether or not the matters to be dealt with in a report of that kind have been the subject of a report to the Minister or the Prime Minister" (section 5(3)).

[15] The 2001 amendments also extended the Commission's formal complaints jurisdiction to "[d]iscrimination by Government, related persons and bodies, or persons or bodies acting with legal authority."

[16] As a result of observations and experiences during my term as Chief Human Rights Commissioner, and since, I am convinced that an independent inquiry of the highest status, namely this Royal Commission, was the only way the people of New Zealand would ever know the truth about what happened to many children, and to many children and adults with disabilities, in State care. This Royal Commission is essential if survivors of abuse in State care are to be properly acknowledged and fair, full redress provided for the damage done to them; and if those responsible for failing to protect children and disabled adults in State care and those who failed to respond appropriately when survivors started to make claims for redress are to be identified and held to account.

Structure of the submission

[17] The submission deals with the development of the Human Rights Commission's involvement with claims of abuse in care during my term as Chief Commissioner. It suggests a pattern of the State's response to human rights violations at odds with its human rights obligations.

[18] It highlights a series of issues which, taken together, make a case for cultural, moral and legal change in the approach of State agencies to meeting their obligations to promote, protect and fulfil the human rights of children and young people, of people with disabilities, of everyone in Aotearoa.

[19] It is divided into three parts:

- Part 1 reports on what I characterise as the pattern that emerged in the 2000s in successive Governments' responses to human rights complaints that questioned the law or departmental policies.

- Part 2 covers the final draft of the Human Rights Commission's unpublished 2011 "Review of the State's Response to Historic Claims of Abuse and Mistreatment Suffered While Under the Care of the State", which provides an evidence-based contemporary account of the State's response. The full Review is at Appendix 1.
- Part 3 provides some conclusions.

Part 1: Government responses

[20] The Human Rights Commission's "Review of the State's Response to Historic Claims of Abuse and Mistreatment Suffered While Under the Care of the State" summarised the claims of mistreatment as at 2010:

> The claims predominantly relate to psychiatric hospitals and social welfare homes and institutions. However, there have also been some allegations of abuse in education facilities, in particular residential and military schools.
>
> Overwhelmingly, the claims are from people who experienced ill-treatment when taken under State care as children. In many cases they had already suffered as a result of neglectful, dysfunctional or abusive parents or guardians. The combined impact has left some permanently damaged, all too often vulnerable to mental illness, to drug or alcohol addiction, without basic literacy, numeracy or employment skills. A significant number of people currently in prison were, as children, wards of the State.
>
> As at May 2010 845[1] claims had been lodged in court relating to abuse while in State care. The claims include allegations of:
>
> - assaults by other patients and residents
> - physical beatings and assaults by staff
> - sexual violation and abuse by staff
> - unmodified electro-convulsive therapy (ECT)
> - medication (such as paraldehyde) as punishment
> - solitary confinement as punishment
> - neglect of children.

[21] The report records the Government's description of its approach to the claims as follows:

> - at a systemic level, allegations of ill-treatment in a given institution are thoroughly investigated.
> - for individuals who raise such allegations, court and Police procedures have been supplemented with a Confidential Listening and Assistance Service, which can provide support and other assistance, and with an Alternative Resolution Process, which can provide compensation, apologies and other remedies. The result is an integrated and comprehensive approach to addressing such allegations.

---

1 *Historic Abuse Claims – The Moment of Truth*, Capital Letter, 4 May 2010.

> Comprehensive complaints procedures have been established for contemporary claims including through Child, Youth and Family (in respect of children and young people in the care of the State) and the Health and Disability Commissioner (in respect of health-related complaints).[2]

[22] The various mechanisms available to claimants were:

- Confidential Psychiatric Forum
- Confidential Listening and Assistance Service
- Ministry of Social Development's Care, Claims and Resolution process
- Crown Health Financing Agency
- civil litigation
- judicial settlement conferences
- direct negotiation
- criminal prosecutions.

[23] The approach outlined above was adopted by successive Governments and may seem at first glance comprehensive and wide ranging. While there were some positive outcomes for some claimants and particular benefits from the Confidential Listening and Assistance Service, each of the mechanisms had significant flaws and none dealt comprehensively with the claims, let alone any systemic issues arising from them.

[24] What follows are a very few examples to illustrate the flaws in the Governments' response.

A. **"Kelly's" case** [not her name]

[25] Kelly came to the Human Rights Commission with an age discrimination complaint following the Justice Gallen Lake Alice Compensation Process. Kelly had been a young, vulnerable 21-year-old when committed to Lake Alice and placed in the Adolescent Unit. Because of her age at the time she was there, Kelly was denied access to the compensation process.

[26] The Bill of Rights Act 1990 (BORA), section 19(1), provides that "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". The HRA, section 21(i), prohibits discrimination on the grounds of age "commencing with the age of 16". The BORA allows for some justified limitations: section 5 states that "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

---

[2] Ibid.

[27] The Justice Gallen process was only open to those who were children at the time of their placement in the Adolescent Unit. By being denied the same access to compensation as others who were in the Adolescent Unit simply by virtue of her age at the time, Kelly had an arguable case of unlawful age discrimination.

[28] Confidentiality prevents me going into the details of Kelly's case. In brief, it appears that she was placed in the Adolescent Unit because she was a very young, naïve 21-year-old, almost certainly depressed and lacking in confidence. Coming to the Human Rights Commission was the first time she had ever disclosed the extent and very serious nature of the abuse she was subject to while at Lake Alice.

[29] The mediator who worked with her over many months provided the following summary:

> […] in bringing her complaint to the HRC, she disclosed for the first time, the full details of her experience at the LA adolescent unit.
>
> that happened slowly and as a process to the point where I worked with [K] and her partner to ensure she had support mechanisms in place, counsellor, GP etc and, progressively, after something like 3 months and further disclosure, we notified the comp to Ministry of Health (MoH) and Crown Law (CL). MoH via CL promptly swatted the complaint claiming that because she was 21 at the time, they contended she would not have been in the adolescent unit. They would not enter mediation.
>
> The credibility of [K's] story was very strong. What LA records we did access did not disprove her claims – they provided some corroborative information and at the very least, raised questions deserving a response. Those case notes were incomplete and sometimes indecipherable – records around the time of several specific instances about which she had alleged extreme abuse were missing.
>
> We went back to CL with those records and comments from a counsellor and GP supporting her experience. Their position did not change.

[30] Kelly could not face taking her case to the Human Rights Review Tribunal for fear of having to give details of the abuse she had suffered publicly. As an alternative, the mediator worked with Kelly to write up her experience on the basis of her memories and the documents she had available and she presented that to the Confidential Listening and Assistance Service. An experience she reported as affirming.

[31] The issues that emerged in Kelly's case and were to become all too familiar included:

- unwillingness of the Ministry of Health and Crown Law to acknowledge unlawful age discrimination and mediate a settlement with her, or even to come to the table to discuss the issues with her and the reason for their rejection;

- difficulty accessing her records with various reasons given;
- what records were made available were incomplete;
- complete lack of empathy or acknowledgement of the damage done to her. A Crown Law lawyer did eventually agree to meet Kelly and her partner but the meeting had no formal status and resulted in no action on her complaint.

B. Care-leavers' access to their records

[32] As illustrated by Kelly's case, the importance of care-leavers' records to the care-leavers cannot be under-estimated. Issues of access have come up at every stage of the Governments' various responses to abuse in care.

[33] In February 2017, the Human Rights Centre organised a symposium on the *Rights to Records of Children in Out Of Home Care.* It was co-hosted with the Archives and Records Association of New Zealand and the Records Continuum Research Group. A summary of the day's discussions recorded that:

i. Care leavers may find that the only personal records that exist of their childhood are held by government departments, who often choose to redact much (or most) of the personal information about the people they were surrounded by in childhood - and these redactions are inconsistent. As one person said, care leavers are the only group in society who have to go to a government department to find records of their childhood. Withholding of records of a care leaver's childhood is experienced as abuse or torture: "a beating that leaves no marks".
ii. The records may be complete in terms of legislative requirements, but not in terms of what the children need and want to know (for example, family history, educational achievements, photographs, medical history...).
iii. The impact of insensitive, disrespectful interactions when records were handed over. Many care leavers experience accessing the records of their time in care as a new trauma. Support needs to be in place.
iv. Care leavers accessing records find that information is often misleading, inaccurate, and incomplete. Sometimes libellous statements are made about the child, birth parents or siblings. Often many or most records have disappeared.
v. Many care leavers' files contain little or nothing but negative comments.
vi. Care leavers need to be able to add retrospective statements to information held about them, to provide their point of view.
vii. Children in care should be allowed to make statements at the time about how they are feeling, with photographic / video / sound recordings in support, particularly in cases of abuse.
viii. The average length of time before historic childhood abuse comes before the courts is more than 22 years, which means current retention and disposal

schedules for records need to be revisited, particularly with regard to staff records and police complaints.

ix. Lack of coordination between agencies is a big problem for care leavers and their advocates trying to find records.

x. When government agencies are developing retention and disposal schedules, most people are unaware of this so are unable to comment, although legally this is their right. Need a mechanism to ensure advocates for all interest groups, but particularly vulnerable groups, are consulted effectively.

xi. People looking for records of their time in care need to know what to ask for and where to look. It is very difficult to get all of the information needed. If wanting to follow up regarding abuse suffered, it is very difficult to get staff records - may need to file a case in court. However, may not want to go through a court proceeding.

xii. Legislation relating to records of children in care, as well as adopted children and those born with assisting technologies, needs to acknowledge, meet the needs of and address the rights of those most affected, the children themselves. Perhaps what is needed is an overarching standard relating to what records must be kept about all children in care.

xiii. A central issue that kept coming up was that of agency in records: the children the records are about and the agencies gathering the information both see the records as theirs. Some of these records relate to multiple children, so there are multiple potential holders of rights. However, only the agencies are asked permission if others wish to access, create, destroy or use these records.

xiv. The sense of lack of trust and respect often felt between the agencies and care leavers means that having control over the records kept by the agencies that managed their care is problematic, particularly but not only when abuse was involved.

[34] Following the symposium, in March 2017, the Care-Leavers' Association of New Zealand (CLAN NZ) made a submission to Parliament's Social Services Select Committee considering the *Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill*. That submission is attached as Appendix 2. CLAN NZ is an independent support and advocacy group working for justice and redress for all New Zealanders who grew up in orphanages, institutions or children's homes, as State wards, welfare children or in foster care - or in any other form of what is now known as 'out-of-home-care'. It is part of the Australasian CLAN Network.

[35] The CLAN NZ submission provided detailed accounts of the experiences of care leavers when seeking to access their files under the following headings:

- Insensitive, disrespectful interactions at the point of hand-over
- Insulting, judgemental opinions

- Redactions which are neither consistent nor fair
- Inaccurate, incomplete information and omissions.

[36] The submission then canvasses what records should be created – and how; and the maintenance and disposal of records.

[37] It concluded with a number of recommendations, which I include here as significant issues for the Royal Commission to consider:

1. Biological parents should write a letter that explains why their child has been placed in the Child Welfare System. Whilst this may be hard to enforce, where it can be done, it would contribute to a child's understanding of why they went in to Care.
2. Foster carers should be required to write a letter of explanation if they request that a child is removed from their Care. Obviously, it will be documented in the caseworker's notes, but having words directly from the foster parent themselves can be quite powerful for a Care Leaver who has spent years wondering what they did wrong.
3. Furthermore, all the names of Foster Carer's should be released with Care Leaver's files, as they are essentially public servants earning taxpayers money. All names should be disclosed and transparent.
4. Anyone who accesses a Care Leaver's file for any reason must be recorded, and these particulars need to be recorded in the Care Leaver's file.
5. Children must have all life story material documented and included in their file - anything of importance to that child including drawings at school, personal letters or certificates of achievement. These personal records should be securely stored and placed in their file for collection when they leave 'care' - or at some stage later when they require the information.
6. Children should be given the opportunity at any time to write something to go on their file, whether it is their version of events from an incident, or simply a letter to explain how they are currently feeling at a particular placement.
7. Children need to have an independent advocate write a report about the child at least twice a year.
8. All formal interviews with a child by caseworkers and other significant adults need to be video-recorded and stored on a USB (or similar technology) for future retrieval.
9. CLAN NZ also believes that all children in 'care' should have the ability to assess whether they feel a particular placement is right for them. This may include the child interviewing the foster parents or being given information about the schools, activities and surrounds that may help influence their decision.
10. When government agencies are developing retention and disposal schedules, most people are unaware of this - so are unable to comment, although legally it is their right. A mechanism is needed to ensure that advocates for all interest groups, but particularly vulnerable groups such as Care Leavers, are consulted effectively. Hopefully these recommendations can be implemented so that all children who have spent time away from their biological families in the Child Welfare System will be afforded the opportunity to form an identity, learn important information about themselves, and also have a chance to hold on to items of importance from have.

[38] I strongly recommend that when considering issues relating to the records of those in out-of-home care that the Royal Commission seek the advice, expertise and lived experience of CLAN NZ members.

C. Crown's Litigation Strategy

1. Parents as Caregivers: the *Atkinson et al* case

[39] From as early as 2002 in my term as Chief Human Rights Commissioner, the Commission received complaints of discrimination from a number of parents of severely disabled adult children who were denied payment for the care of their adult children. In these cases families had been prepared to keep them at home, when they were children and now as adults, rather than have them institutionalised. Where outside care or third-party carers had been tried they had proven to be unsatisfactory. In some cases, those in need of care were severely physically but not intellectually disabled and were able to make clear their preference for care by close family members, usually their mother. Had the families not chosen to allow them to live at home, the State would have had to pay for their full-time care in an institution, whether State or charity run.

[40] The disabled adults had in each case been assessed as entitled to State-funded home-based care. That care would be paid for if provided by anyone other than an immediate family member.

[41] The Ministry of Health and Crown Law refused to mediate the complaints.

[42] With the agreement of the complainants, the Human Rights Commission worked with the Ministry of Social Development's Office of Disability Issues to develop policy proposals that would remove the family status discrimination and enable parents to be paid for the care of their children while applying standard contractual arrangements to the care-giving family member. The process resulted in a draft Cabinet paper, which was withdrawn at the insistence of the Ministry of Health.

[43] What followed was a lengthy litigation process, which finally concluded with the Appeal Court decision in 2012, with the complainants succeeding at every level. The Appeal Court decision, on appeal from the Ministry of Health, summarised the decisions of the High Court and Human Rights Review Tribunal – in brief, agreeing that the family members and, in some cases, the disabled adult children themselves were subject to unlawful discrimination on the basis of family status discrimination.[3]

---

[3] *Ministry of Health v Peter Atkinson et al* CA 205/2011 [2012] NZCA 184.

[44] The relevance of the *Atkinson* case to abuse in care issues, however, is not primarily the finding of unlawful discrimination, but rather the lengths the Government would go to defeat claims with a fundamental human rights basis. Having failed in the Courts, the Government then introduced legislation into Parliament under Budget secrecy and urgency that effectively reversed the Court decision and took away from family members rights provided for in the Bill of Rights Act 1990 and the Human Rights Act 1993.

[45] In addition to the ultimate use of State power by legislating over a Court decision, Crown Law and the Ministry of Health used the powers of the State to investigate the lives of the parents seeking to be paid to care for their disabled children, in order to discredit them. The Ministry of Social Development cooperated with Crown Law and the Ministry of Health. This led to one party to the case being charged with social welfare fraud, a charge of which she was subsequently found not guilty by a District Court jury; and a second being accused of knowingly accepting payment to which he knew he was not entitled. In his case the accusations were eventually dropped. The then Minister of Health, the Hon. Tony Ryall, called me, following the High Court decision in favour of the parents, to warn me against them. I had to assure him that they were in fact absolutely genuine, committed totally to the well-being of their children.

[46] In summary, the State consistently:

- rejected the option of a negotiated settlement in favour of litigation;
- used every resource available to the State to zealously defend the complaints;
- attacked the character of the complainants rather than taking a principled approach to litigating solely on the issues;
- lost in the Courts, which it dealt with by legislating to override the Court decision and removing human rights protections.

2. The *White* case

[47] To varying degrees almost all claims of abuse in State care before the Courts have faced causation and evidential issues. *White v A-G*[4] also illustrates a number of issues in relation to the Crown's litigation strategy. It dealt with abuse that two brothers suffered both at the hands of their parents (the neglect of their mother and the abusive practices of their father) and during their stay in State institutions.

[48] The following summary is taken from the Human Rights Commission's report:

> [3.66] The High Court acknowledged there was abuse suffered by the brothers, particularly at the hands of their father as well as at Epuni Boys Home and Hokio Beach School. Specifically,

---

4 Supra note 79 at 139.

the following matters were identified as breaches of duty in relation to the claimant placed at Epuni:

> "(a) [he] was kept in secure custody for three days on his admission to Epuni;
>
> (b) [he] received a medicine ball to the stomach as an 'initiation' and was regularly bullied by other boys at Epuni;
>
> (c) some staff encouraged bullying;
>
> (d) [he] was physically assaulted by two staff members; and
>
> (e) derogatory language was used by a few staff members."[5]

[3.67] The following matters were identified as breaches of duty in relation to his brother:

> "(a) [he] received an 'initiation beating' from other boys at Hokio and was regularly bullied by other boys at Epuni;
>
> (b) at Hokio, [he] was occasionally the subject of violence from other boys and was regularly at risk of it;
>
> (c) some staff encouraged bullying;
>
> (d) [he] was physically assaulted by some staff members at Epuni and at Hokio;
>
> (e) derogatory language was used by staff members at Epuni and at Hokio; and
>
> (f) [he] was sexually abused by the cook at Hokio on at least 13 occasions, each involving mutual masturbation in exchange for cigarettes given by the cook."[6]

[3.68] However, the High Court concluded that substantially if not overwhelmingly their psychological damage was caused by abuse suffered whilst in the care of their parents or as a result of genetics. Accordingly, no remedy was available for any breach of duty of care to either of them. The High Court decision was upheld at both the Court of Appeal and Supreme Court.

[49] A reading of the transcript of the proceedings graphically illustrates the lengths the Crown counsel went to in order to undermine the credibility of the complainants as if they were before the Court on criminal charges. The Judge rarely intervened to protect them. He did at one point when the Crown counsel appeared to be suggesting that a 12-year-old boy consented to being molested in return for cigarettes. But even then he did not stop her. At another point he rejected the submission by the complainant's Counsel of the 1982 report by the Human Rights Commission on abuse in Social Welfare residences.

[50] The Crown's litigation strategy, as demonstrated in the *White* case, could be summed up as "use any means within or outside the legal toolbox to defend the claims". It revealed a legal

---

5 [2010] NZCA 139 at 169.

6 Ibid at 188.

response without moral compass or any human rights considerations. As I discovered once the Human Rights Commission became involved in monitoring the State's response to claims of abuse, amongst the tools used was the denigration not only of the claimants but of those who represented them. I was warned by a senior official against Sonja Cooper, whose law firm represented the largest number of claims.

[51] Both the *White* and *Atkinson* cases raise questions about the way in which the Crown litigates. The *Attorney-General's Values for Crown Civil Litigation* was published in 2013 (attached as Appendix 3).

[52] This document states at paragraphs 1 and 2:

> The Attorney-General is constitutionally responsible for determining the Crown's view of what the law is, and ensuring that the Crown's litigation is properly conducted.
>
> As such, the Attorney-General wishes to ensure that all civil litigation is conducted to a standard of fairness and integrity as befits the Crown.

[53] Section 5 of the Attorney-General's Values lists the elements of a positive, constructive approach to civil litigation. Section 6, however, better reflects the approach that has been all too frequent in response to claims of abuse in care. Section 6 provides that:

> The Crown may take any steps open to a private individual and, without limitation, may:
> […]
> 6.6 Rely on legal professional privilege and other forms of privilege and claims for public interest immunity.
> 6.7 Plead limitation and other defences.[7]

[54] The decision in the *White* case, to my mind, raised serious questions about the possibility of justice from the Courts for survivors of abuse in State care. It was after reading that decision that I recommended that the Human Rights Commission should raise the issue with the United Nations Committee against Torture and monitor the State's response to the claims.

D. Non-legal mechanisms for responding to claims of abuse

1. Confidential Forum for Former In-Patients of Psychiatric Hospitals

[55] Following the Justice Gallen Lake Alice settlements process, numbers of former psychiatric patients not eligible for that process came forward with claims of ill-treatment. As noted above those claims included:

---

[7] Claims from former psychiatric patients faced additional barriers including having to seek leave of the Court to lodge proceedings except in cases of sexual assault. See for example *B and Ors v Crown Health Financing Agency* [2009] NZSC 97.

- assaults by other patients
- physical beatings and assaults by staff
- sexual violation and abuse by staff
- unmodified electro-convulsive therapy (ECT)
- medication (such as paraldehyde) as punishment
- solitary confinement as punishment

[56] The Government's response was to set up a *Confidential Forum for Former In-Patients of Psychiatric Hospitals*. The Forum's final report[8] states that it "was established to provide 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"[9]. The Forum consisted of a panel of (usually) three members. In addition to listening, the Forum was mandated to assist the former psychiatric in-patients by providing information and access to relevant services and agencies, including provision for access to counselling.[10]

[57] The Terms of Reference, signed in March 2005 by then Attorney-General Michael Cullen, contained, however, a series of limitations that were to become even more pronounced when the Confidential Listening and Assistance Service (CLAS) was established. In hindsight they appear to reflect a determined strategy to hide the truth about the mistreatment that survivors had experienced from the public and deny meaningful compensation to those who had been abused.

[58] Under its Terms of Reference, the Forum could not:

- pay, or recommend the payment of, compensation;
- share, or make public any information relating to the stories it heard, or make any public comment about anything presented to it;
- allow Participants to have legal representation at the Forums.

[59] The mandate provided for quarterly reporting to the Attorney-General Ministers of Health, Justice, Treasury and Internal Affairs. The content of the report was limited to "the numbers of Participants heard, the type and amount of information about existing agencies provided to the Participants and the Panel's impression of how useful the process was to Participants and expenditure against budget."

---

8 *Te Aiotanga, Report of the Confidential Forum for Former In-Patients of Psychiatric Hospitals* (2007) at www.dia.govt.nz/diawebsite.nsf/wpg_URL/Agency-Confidential-Forum-for-Former-In-Patients-of-Psychiatric-Hospitals-Index.

9 The current Mental Health legislation came into effect at this date.

10 See www.dia.govt.nz/diawebsite.nsf/wpg_URL/Agency-Confidential-Forum-for-Former-In-Patients-of-Psychiatric-Hospitals-Terms-of-Reference?OpenDocument.

2. Confidential Listening and Assistance Service

[60] Based on the perceived success of the Confidential Forum, the Confidential Listening and Assistance Service (CLAS) was established in late 2008. Both the Forum and CLAS were limited to experiences prior to 1992.

[61] The Terms of Reference for CLAS were as restrictive as those of the Forum. The CLAS reporting requirement, initially without any mandate to report on substance, was amended to provide that the Chair could report on the "consistent themes reported to the panel by participants" and "the perceived legacy of the impact on participants' lives".

[62] The Forum and CLAS provided many participants with significant support. They listened and heard what participants had experienced; connected people to services that could assist them and their families, and helped them access information held about them by the State.

[63] From a human rights perspective, however, the Terms of Reference appeared to have been formulated to prevent systemic issues and possible State liability being identified and publicised. Denying participants the right to bring legal representation to the Forum and CLAS reinforced that perception.

E. Monitoring Mechanisms

[64] Both in justifying the 1992 cut-off date for the Confidential Forum and the Confidential Listening and Assistance Service, and then the 1999 cut-off date for this Royal Commission, Ministers and officials claimed that improved legislation and a raft of monitoring mechanisms are now sufficient to prevent abuse of those in detention.

[65] Reference has been made to the Office of the Children's Commissioner, the Health and Disability Commissioner, Independent Complaints Authority, the Office of the Ombudsman and the Human Rights Commission. The Education Review Office had also been established as an independent monitoring mechanism for all education services. To implement the Optional Protocol to the Convention against Torture (OPCAT), the Crimes of Torture Act 1989 was amended to provide for a Central Preventive Mechanism and four National Preventive Mechanisms: the Human Rights Commission, the Children's Commissioner, the Inspector of Service Penal Establishments, the Independent Police Conduct Authority and the Ombudsmen.

[66] With the exception of the Ombudsman's Office and a token increase for the Human Rights Commission, none of the other Mechanisms were provided with additional resources to enable them to carry out the scale of preventive visits envisaged by OPCAT.

[67] There are legitimate questions to be asked about how effective the independent monitoring mechanisms have been, the extent to which they have succeeded in identifying systemic failures that have enabled abuse to persist and the barriers to their greater effectiveness.

PART 2: Human Rights Commission Report August 2011

[68] In May 2009, the United Nations Committee against Torture stated that:

> [New Zealand] should take appropriate measures to ensure that allegations of cruel, inhuman or degrading treatment on the "historic" cases are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation.[11]

[69] The recommendation formed part of the Committee's Concluding Observations on New Zealand's fifth periodic report on compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). It followed submissions made to CAT by the Human Rights Commission and by Sonja Cooper of Cooper Legal.

[70] The Human Rights Commission has a responsibility to monitor New Zealand's implementation of international human rights standards and to provide advice to the Government, to individuals affected and to the wider community on what further is required.

[71] In view of the Committee against Torture's recommendation and the representations received, the Commission determined to undertake a review of the State's response to historic claims of abuse and mistreatment while under the care of the State and to report on the extent to which they met the relevant international human rights standards.

[72] The Review was conducted under section 5 of the Human Rights Act 1993, which provides, among other things, the power "to inquire generally into any matter, including any enactment or law, or any practice, or any procedures, whether governmental or non-governmental, if it appears to the Commission that the matter involved, or may involve, the infringement of human rights".

[73] The scope of the review was set out in its Terms of Reference[12] as an examination of:

---

11 CAT/C/NZL/CO/5, 14 May 2009, para 11. See www2.ohchr.org/english/bodies/cat/docs/cobs/CAT.C.NZL.CO.5.pdf

12 A copy of the Terms of Reference is attached at Appendix 1.

(a) New Zealand's responsibility to investigate promptly and impartially, prosecute and accord redress in claims of abuse and mistreatment while under the care of the State;
(b) the nature and extent of measures taken by the New Zealand Government to investigate, prosecute and accord redress in claims of abuse and mistreatment while under the care of the State;
(c) the nature and extent of measures taken by other jurisdictions (including, but not limited to, Ireland, Scotland and Australia) to investigate, prosecute and accord redress in respect of claims of abuse and mistreatment while under the care of the State; and
(d) the extent to which such measures meet international human rights standards.

[74] The Terms of Reference provided that mechanisms to better deal with historic claims of abuse and mistreatment be identified and that recommendations be made in relation to changes to legislation, regulations, policies and practices.

[75] The Review focused entirely on the processes and procedures for responding to historic claims of abuse and mistreatment. The merits of individual claims were outside its scope and were not considered.

A. Structure of the Review report

[76] The Review first sets out the international human rights standards applicable to historic claims of abuse. It canvasses the extent of State liability, the nature of cruel, inhuman treatment or punishment, and the positive duty to treat all persons deprived of their liberty "with humanity and with respect for the inherent dignity of the human person".[13] This section concludes with a focus on the right to an effective remedy and the duty of response.

[77] International human rights standards require that people with claims of human rights violations while detained by or under the care of the State have access to an effective remedy. New Zealand has a duty to ensure that historic claims are investigated promptly, impartially and effectively, perpetrators where appropriate duly prosecuted, and victims accorded redress, including adequate compensation and rehabilitation.

[78] The response by the New Zealand Government to the historic claims of abuse is detailed in section 3 of the Report with summaries of the various available mechanisms.

[79] This is followed by a brief outline of the nature and extent of measures taken by other jurisdictions, which is developed in more detail in Appendix 2.

---

[13] International Covenant on Civil and Political Rights, Art 10, para 1.

[80] The Review then assesses the extent to which the various New Zealand responses meet international human rights standards and best practice. It concludes with recommendations that if implemented would significantly strengthen New Zealand's compliance with international human rights standards and provide a greater measure of resolution for the victims.

B. Review conclusions

[81] The Review concluded that, taken together, the various responses of the State to claims of abuse at best only partially met the international human rights standards for prompt and impartial investigation and in provision of redress including adequate compensation and rehabilitation.

[82] The Review recommended:

> Building on the strengths of the Confidential Listening and Assistance Service and the MSD Care, Claims and Resolution Team, and the lessons learnt from the direct negotiations undertaken by both MSD and CHFA, the priority must be to establish an independent and impartial (in the fullest sense of the word) process to hear, investigate, evaluate and offer redress to claimants.
>
> The process must apply to all claimants regardless of whether their claim relates to psychiatric hospitals, social welfare homes or institutions, foster care arrangements or education facilities.
>
> It must be one that:
>
> - gives the Crown reasonable assurance that allegations have substance
> - operates fairly and demonstrates good faith
> - provides claimants with access to an impartial advisory service
> - does not leave claimants disadvantaged if there is no settlement
> - meets the various needs of claimants, including those looking for redress other than financial compensation, and those who cannot readily take part in traditional dispute resolution processes
> - leaves open the possibility of civil litigation where there is no settlement
> - allows individuals to be prosecuted
> - is not so rigorous or time-consuming as to render the process unattractive
> - uses public resources efficiently. Drawing on international experience, the fiscal risk to government could be mitigated by following the Irish or Queensland examples of determining scale of payments and by a time limit for registering of claims.
>
> All findings must be published, at least, in general terms, so that victims are able to learn that they were not alone in their experience and that the abuse experienced was not their fault. Acknowledging that the exact structure of any framework will be dependent on a number of factors, attached as Appendix 4 is a possible framework for resolving historic claims of abuse in line with international obligations and best practice.

> Finally, it is crucial that victims of abuse and ill-treatment while in State care have access to the courts if they are unable to resolve their claim through the alternative process. The use of time-bar in historic abuse cases renders the right to an effective remedy through the courts a nullity. For that reason, the Crown should cease, as far as is possible, invoking time-bar defences in relation to claims of historic abuse and ill-treatment whilst in the care of the State.

[83] The Human Rights Commission then recommended that the Government:

1. Commit to resolving all historic claims of abuse within 5 years by establishing an independent body with the power to provide support for rehabilitation, compensation and an apology.

2. Cease the use of time-bar defences in relation to civil proceedings relating to allegations of abuse and ill-treatment whilst in the care of the State.

[84] The Review report was never published. The Human Rights Commission had provided a series of drafts to all the agencies involved. Only when the final draft was circulated did the Commission receive a response from Crown Law.

[85] Crown Law representatives at a meeting with the Commission claimed the report contained a number of errors, specifically that:

- international human rights standards did not require an independent process, only that it be impartial; and that
- there were no systemic issues arising from the claims of abuse meriting independent investigation as asserted in the report.

[86] With the delay caused by the late intervention by Crown Law, the report was not able to be published before my term as Chief Human Rights Commissioner came to an end. Subsequent correspondence from the Attorney-General to my successor could be read as a further effort by the State to prevent publication of any evidence that it was meeting international human rights standards in its response to claims of abuse in State care. In any event the report was never made public.

PART 3: CONCLUSIONS

[87] This Royal Commission has only come about because of the persistent and courageous advocacy of survivors like Keith Wiffen, the determination and professionalism of two investigative journalists, Aaron Smale and Mike Wesley-Smith, a very few lawyers, especially Sonja Cooper and her colleagues at Cooper Legal, and two academics Dr Elizabeth Stanley and Dr Anaru Erueti. The efforts of the Human Rights Commission up until 2012 and then from 2016,

have also contributed. I particularly want to acknowledge the advocacy of then Disability Rights Commissioner Paul Gibson and Race Relations Commissioner Dame Susan Devoy and the staff who supported them.

[88] The State has not hesitated to use it powers and greater resources to oppose and minimise the claims from of who have been abused and ill-treated in its care. The Courts have not been able to right the massive imbalance between the State and the survivors. Government agencies have consistently advised against any need for an independent inquiry such as this Royal Commission. Although there is some flexibility, they have succeeded in having its time frame formally limited to pre-1999.

[89] The challenge for this Royal Commission is not to perpetuate that imbalance.

[90] If government agencies and their Ministers are not held to account for their failure since 1999 to meet New Zealand's human rights obligations in responding to claims of abuse there is little chance they will acknowledge and address the entrenched racism, the conscious or unconscious biases that still permeate the public sector and which have led to so much misery for so many Maori children and young people and their families.

[91] Nor is there as yet any evidence that government agencies are willing to acknowledge the raft of systemic failings revealed by the claims of those who have been abused in care.

[92] Over more than 50 years of claims of abuse in care, to my knowledge, no one in a senior position in any of responsible agencies has been held to account.

[93] There is still no regular or comprehensive incorporation of New Zealand's international human rights standards into the development of our laws, policies and practices.

[94] This then is the context in which the Royal Commission came to be established. A decision for which the present Government deserves acknowledgement.

APPENDIX 1

New Zealand Human Rights Commission Report

DRAFT AS AT AUGUST 2011

Review of the State's Response to Historic Claims of Abuse and Mistreatment Suffered While Under the Care of the State

1. Introduction

[1.1] In May 2009 the United Nations Committee against Torture stated that:

> "[New Zealand] should take appropriate measures to ensure that allegations of cruel, inhuman or degrading treatment on the "historic" cases are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation."[14]

[1.2] The recommendation formed part of the Committee's Concluding Observations on New Zealand's fifth periodic report on compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

[1.3] In May 2010 the Government supplied information to the Committee setting out how it was responding to historic cases of abuse and mistreatment while in State care. It emphasised that it was committed

[14] CAT/C/NZL/CO/5, 14 May 2009, para 11. http://www2.ohchr.org/english/bodies/cat/docs/cobs/CAT.C.NZL.CO.5.pdf

to the investigation and resolution of allegations of torture or ill-treatment by the State:

> ".... In respect of the current "historic abuse" cases, which encompass a broad range of allegations of ill-treatment while in children's homes, psychiatric institutions and other forms of State care in periods ranging from 1950 to 1992, the Government has engaged with the claims both systemically and in each individual case.[15]

[1.4] The response to the Committee described the approach being taken to the allegations as "integrated and comprehensive".[16]

[1.5] Lawyers for the claimants, however, told the Human Rights Commission (Commission) that victims of historic abuse faced significant barriers to fair and just resolution of their claims.

[1.6] The claims predominantly relate to psychiatric hospitals and social welfare homes and institutions. However, there have also been some allegations of abuse in education facilities, in particular residential and military schools.

[1.7] Overwhelmingly, the claims are from people who experienced ill-treatment when taken under State care as children. In many cases they had already suffered as a result of neglectful, dysfunctional or abusive parents or guardians. The combined impact has left some permanently damaged, all too often vulnerable to mental illness, to drug or alcohol addiction, without basic literacy, numeracy or employment skills. A significant number of people currently in prison were, as children, wards of the State.

[1.8] As at May 2010 845[17] claims had been lodged in court relating to abuse while in State care. The claims include allegations of:

- assaults by other patients and residents
- physical beatings and assaults by staff

---

15 CAT/C/NZL/CO/5/Add.1, 3 March 2001, para 20. http://www2.ohchr.org/english/bodies/cat/docs/followup/CAT-C-NZL-CO-5-Add1.pdf

16 Ibid, para 22

17 *Historic Abuse Claims – The Moment of Truth*, Capital Letter, 4 May 2010

- sexual violation and abuse by staff
- unmodified electro-convulsive therapy (ECT)
- medication (such as paraldehyde) as punishment
- solitary confinement as punishment
- neglect of children.

[1.9] By 2011, the courts had heard nine civil cases, the majority of which have failed primarily because of evidential difficulties, statutory legal defences such as time-bar, and the bar to proceedings under the Accident Compensation scheme. As at 10 January 2011 some 45 settlements had been made by the Ministry of Social Development (MSD) and ten by the Crown Health Financing Agency (CHFA).

[1.10] Two hundred and fifty-seven claims have been made directly to MSD outside of the court process. Seventy five of those have been settled.

Background

[1.11] A catalyst for the emergence of these claims was undoubtedly the settlement reached in 2002 with people who had been patients in the Child and Adolescent Unit at Lake Alice Hospital between 1972 and 1978.[18] Having determined that the records provided sufficient evidence of the allegations relating to treatment by Dr Leeks of patients in the Child and Adolescent Unit, the Government appointed retired High Court Judge Sir Rodney Gallen to administer a compensation fund. As a result, some former patients received a written apology signed by the Prime Minister and the Minister of Health, and a compensation payment from the Crown.

[1.12] This settlement, and the corresponding media coverage brought to public attention the fact that the State had not always adequately protected those under its formal care. The Lake Alice settlement stimulated former residents and patients of other psychiatric, psychopedic and social welfare facilities to raise their experiences; to question, often for the first

[18] Lake Alice Hospital was a psychiatric institution near Marton, parts of which closed in the mid-1990s and all of which closed by 2000.

time, whether what had been done to them was acceptable; and to seek redress.

[1.13] From the late 1960s, as a result of growing concerns about aspects of their operations, there was a series of inquiries and investigations into both psychiatric institutions and children's residences.

[1.14] More than 16 inquiries were held into Auckland mental hospitals between 1969 and the landmark 1988 Mason Report.[19] The reports identified various short comings in the institutions. A second Mason Report in 1996[20] identified six further Inquiries of national significance between 1988 and 1996.

[1.15] The 1983 Gallen Report on Oakley Hospital[21] gave credence to claims of assault by staff but found that none passed the criminal-court test of proof beyond reasonable doubt. The report also criticised the overuse of drugs and solitary confinement.

[1.16] A number of inquiries were also undertaken into residential care facilities and homes. In 1978, the Auckland Committee on Racism and Discrimination (ACORD) conducted an inquiry into allegations of cruel and inhuman punishment of young people in Auckland Social Welfare homes. [22] ACORD's allegations centred on specific complaints: that young women were given compulsory and unnecessary examinations for venereal disease; that excessive and arbitrary forms of punishment were employed in the boys' homes, with secure cells used too frequently; that the forms of communication were impersonal; that the physical conditions in the homes were unhygienic; and that they failed to address the cultural needs of their residents.

[1.17] The Human Rights Commission investigated the alleged breaches of human rights identified by ACORD, and reported in 1982. The Commission described the issues raised as "certainly the most extensive representations yet made [in New Zealand] on a matter affecting human rights."[23] The Commission's report acknowledged that some of the alleged practices had

---

19 Mason, Report of Committee on Inquiry into procedures used in Certain Psychiatric Hospitals in relation to admission, discharge or release or leave of certain classes of patients, 1988.

20 Mason, Inquiry under Section 47 of the Health and disability Services Act 1993 in Respect of Certain Mental Health Services: Report of the Ministerial Inquiry to the Minister of Health, Hon Jenny Shipley, Christchurch 1996 p.19.

21 Gallen, R.G., Report of Committee of Inquiry into procedures at Oakley Hospital and related matters, Wellington, 1983.

22 ACCORD, 'Social Welfare children's homes: Report on an Inquiry held on June 11 1978', Department of Social Welfare Library, Wellington 1978.

23 Report on Children and Young Persons Homes, *Human Rights Commission*, 1982.

occurred, including intense exercise as punishment, standing in line, and the use of stirrups on girls being tested for venereal disease, but stated that most had ceased by 1982

[1.18] Collectively these and subsequent inquiries[24] and reports were the first into homes for children and young people since the inquiry into the Te Oranga Reformatory 70 years earlier, and were an important catalyst for the improvement of practices and policies governing the care of children and young people.

[1.19] While acknowledging that these inquiries and reports provide only a partial view of State institutions covering the period of the current historic abuse claims, they do offer some insight into the basis for those claims.

Scope of the Review

[1.20] The Human Rights Commission has a responsibility to monitor New Zealand's implementation of international standards and to provide advice to the Government, to individuals affected and to the wider community on what further is required. In view of the Committee against Torture's recommendation and the representations received, the Commission determined to undertake a review of the State's response to historic claims of abuse and mistreatment while under the care of the State and to report on the extent to which they meet the relevant international human rights standards.

[1.21] The Review is conducted under section 5 of the Human Rights Act 1993, which provides, among other things, the power "to inquire generally into any matter, including any enactment or law, or any practice, or any procedures, whether governmental or non-governmental, if it appears to

---

[24] Report on Current Practices and Procedures Followed in Institutions of the Department of Social Welfare in Auckland – *Rev. AH Johnston* (October 2982)
New Horizons – A Review of the Residential Services of the Department of Social Welfare – *Department of Social Welfare* - (October 1982)
Review of Lockable Time Out in Residential Facilities – *Department of Social Welfare Working Party* – (March 1987)
Review on the use of Secure Care and Related Matters in Social Welfare Institutions – *Human Rights Commission* (June 1989)
Review of Residential Services – *Department of Social Welfare* (1990)

the Commission that the matter involved, or may involve, the infringement of human rights"[25];

[1.22] The scope of the review is set out in its Terms of Reference[26] as an examination of:

(a) New Zealand's responsibility to investigate promptly and impartially, prosecute and accord redress in claims of abuse and mistreatment while under the care of the State
(b) the nature and extent of measures taken by the New Zealand Government to investigate, prosecute and accord redress in claims of abuse and mistreatment while under the care of the State
(c) the nature and extent of measures taken by other jurisdictions (including, but not limited to, Ireland, Scotland and Australia) to investigate, prosecute and accord redress in respect of claims of abuse and mistreatment while under the care of the State and
(d) the extent to which such measures meet international human rights standards.

[1.23] The Terms of Reference provide that mechanisms to better deal with historic claims of abuse and mistreatment be identified and that recommendations be made in relation to changes to legislation, regulations, policies and practices.

[1.24] This Review focuses entirely on the processes and procedures for responding to historic claims of abuse and mistreatment. The merits of individual claims are outside its scope and have not been considered.

Structure of the Review

[1.25] The Review first sets out the international human rights standards applicable to historic claims of abuse. It canvasses the extent of State liability, the nature of cruel, inhuman treatment or punishment; and the positive duty to treat all persons deprived of their liberty "with humanity and with respect for the inherent dignity of the human person"[27]. This

---

25 Section 5(2)(h).

26 A copy of the Terms of Reference is attached at Appendix 1.

27 International Covenant on Civil and Political Rights, Art 10, para 1

section concludes with a focus on the right to an effective remedy and the duty of response.

[1.26] The response by the New Zealand Government to the historic claims of abuse is detailed in section 3 with summaries of the various available mechanisms.

[1.27] This is followed by a brief outline of the nature and extent of measures taken by other jurisdictions, which is developed in more detail in Appendix 2.

[1.28] Allegations about abuse have been made in most Western countries. Some, for example those in Wales, Ireland, Australia and Canada, have since been substantiated by formal inquiries. Abuse and mistreatment of vulnerable people in care, including children and people who were mentally ill, was relatively widespread in Western communities particularly during the 1960s, 1970s and 1980s. Recent Government Inquiries in Australia, Canada, Ireland and England into the treatment of children in residential institutions have found patterns of widespread and systemic abuse extending over many years. Governments around the world are addressing the issue in a variety of ways – including by establishing mechanisms outside the court system for recognising the harm done by providing redress to victims.

[1.29] The Review then assesses the extent to which the various New Zealand responses meet international human rights standards and best practice. It concludes with recommendations that if implemented would significantly strengthen New Zealand's compliance with international human rights standards and provide a greater measure of resolution for the victims.

Consultation

[1.30] The Commission has consulted widely with government agencies and with lawyers and other persons involved in claims of mistreatment and abuse suffered while under the care of the State. The government agencies consulted are:

- Ministry of Social Development
- Ministry of Health
- Crown Health Financing Agency
- Ministry of Justice
- Department of Internal Affairs
- Confidential Listening and Assistance Service
- New Zealand Police
- Ombudsmen's Office
- Crown Law Office
- Legal Aid Services/Legal Services Agency.[28]

[28] During the course of this review the Legal Services Agency was disestablished by the Legal Services Act 2011. The administration of the legal aid system was transferred to the Ministry of Justice. Certain independent functions such as the granting of legal aid come within the responsibility of the newly created Legal Services Commissioner.

2. International Human Rights Standards

Introduction

[2.1] New Zealand has ratified key human rights covenants and conventions, including the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), and the Convention on the Rights of the Child (CRC), that commit the State to specific legal duties and responsibilities.

[2.2] New Zealand is required to prohibit and prevent torture, cruel, inhuman and degrading treatment or punishment.[29] Anyone deprived of their liberty must be treated "with humanity and with respect for the inherent dignity of the person" [30]

[2.3] If there are reasonable grounds to believe such treatment has occurred, then there must be a prompt and impartial investigation[31]; the legal system must provide for the victim to obtain redress, including fair and adequate compensation; and support should be available for as full a rehabilitation as possible.[32]

[2.4] New Zealand has specific obligations in relation to children and young persons. It is required to "take all appropriate, legislative, administrative social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has care of the child.[33]

[2.5] New Zealand ratified the ICCPR in 1978[34], the CAT in 1989 and the CRC in 1993. A number of claims relate to events that occurred prior to New Zealand ratifying the ICCPR or the CAT and well before ratification of the CRC. In these cases customary international law and the Universal Declaration on Human Rights (Universal Declaration) are relevant.

---

29 ICCPR, Article 7; CAT, Article 2, 16

30 ICCPR, Article 10, para 1; CRC, Article 37 asserts the child's right to be treated with humanity and respect for the inherent dignity of the human person, and "in a manner which takes into account the needs of persons of his or her age".

31 CAT, Article 12

32 CAT, Article 14

33 CRC, Article 19, para 1

34 New Zealand also acceded to the Optional Protocol to the ICCPR in 1989, the second Protocol to the same covenant in 1990 and the operational Protocol to CAT in 2003.

[2.6] The Universal Declaration[35] refers to the right to life, liberty and security, freedom from torture, cruel, inhuman treatment or punishment and rights to due process and to a remedy,[36] among what might now be described as the core rights and freedoms accorded to citizens.[37] Despite the lack of agreement on the content of an international minimum treatment standard, the protections applied in the cases of State responsibility for injury to foreign nationals since the 1920s provide a useful benchmark of a desirable standard of treatment[38] and would include a positive obligation to protect individuals from injury,[39] apprehend and punish those responsible for causing such injury,[40] provide compensation and ensure the protection of due process rights.[41]

[2.7] While not binding, the 1924 League of Nations Declaration on the Rights of the Child (the Geneva Declaration) demonstrates the genesis of a child rights perspective at the international level. In addition to setting out clearly an understanding that all organs of society, including private enterprises and individuals have human rights responsibilities the Geneva Declaration contains the following general principle: "... the orphan and the waif must be sheltered and succored; the child must be ... protected against every form of exploitation".[42]

[2.8] This section of the Review sets out the relevant international human rights standards and related jurisprudence.

---

35 The Declaration was a Resolution of the United Nations General Assembly. Such resolutions cannot create binding legal obligations even if they are unanimously adopted and States do not have a legal obligation to comply with their provisions. E.g. *Case Concerning East Timor,* (Portugal v Australia) judgment of 30 June 1995, paragraph 32. They may play a role in the creation of norms of customary international law.
While it is possible that articles 55 and 56 of the UN Charter (1946) create a legal obligation to engage in efforts to promote human rights which if violated might be actionable by other State Parties, the Charter cannot be said to have created legal obligations of States to individuals.

36 The right to a remedy in the Universal Declaration related to remedies for "*acts violating his fundamental rights granted him by the Constitution or by law*" (article 7) indicating that the right to a remedy depended on the rights already forming part of the national law.

37 In the sense that they soon formed a core of non-derogable rights in the major regional and international treaties.

38 An "international minimum standard" of treatment of foreign nationals emerged as a benchmark by which to judge whether a state has failed to do due diligence and so violated international law (e.g. *The Chattin Claim* (1927) 4 RIAA 282).

39 *The Youmans Claim* United States v Mexico (1926) R RIAA 110

40 *The Janes Claim* United States v Mexico (1926) 4 RIAA 82; *The Noyes Claim* US v Panama

41 *The Chattin Claim* (1927) 4 RIAA282

42 The Scottish Human Rights Commission has undertaken a comprehensive review of the rights of the law applicable to survivors of childhood abuse. For more information see wttp://www.scottishhumanrights.com

State liability

[2.9] Under international law, States can be liable only for acts or omissions which are attributable to the State and which violate the State's international obligations.[43] States can be responsible in three main ways:

- by causing the harm itself
- by failing in certain circumstances to take measures to prevent the harm or
- by failing to take appropriate measures after the fact.

[2.10] Human rights law will generally attribute an act or omission to a State if it is an act or omission of an agent of a State, or of a person acting with the consent or acquiescence of a public official.[44]

Cruel, inhuman treatment or punishment

[2.11] The ICCPR in article 7 prohibits cruel, inhuman treatment or punishment and the CAT requires states to prevent it.[45] The UN Human Rights Committee in its General Comments in 1982 stated that the ill-treatment prohibition extended to chastisement or disciplining of children, and to individuals in educational and medical institutions, as well as arrested or imprisoned individuals.[46]

[2.12] The prohibition in article 7 of the ICCPR is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that:

> "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

[2.13] These international standards are reflected domestically in particular through the New Zealand Bill of Rights Act 1990 (BORA). Section 9 of the BORA provides that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. The Crimes of Torture Act 1989 (COTA) provides for the prosecution of crimes of torture. Acts of cruel, inhuman or degrading

---

43 The international law of state responsibility referred to here is customary, to a large extent reflected in the ICC 2001 Draft Articles; see especially Articles 4-11.

44 See for example *European Court, Nilsen and Johnson v Norway* (2000) 30 HERR878. The UNCAT includes a detailed expression of attribution *"inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."*

45 Article 16.

46 No. 7 16th session.

treatment or punishment that do not amount to torture are punishable under the general criminal law.

Right to effective remedy

[2.14] Article 2 of the ICCPR[47] provides that every State party to the Covenant undertakes:

(a) to ensure that any person whose rights and freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and

(c) to ensure that the competent authorities shall enforce such remedies when granted.

[2.15] The Human Rights Committee has stated that:

> "Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, State parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective."[48]

[2.16] The CAT spells out how the State should respond to victims alleging acts prohibited by the Convention. Article 12 provides: Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

[2.17] Article 13 provides:

> Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all

---

47 See also CAT Article 14, CRPD Article 16(4) and CRC Article 39.

48 No. 20, 44th session, 1992

ill treatment or intimidation as a consequence of his complaint or any evidence given.

[2.18] Article 16 extends Articles 12 and 13 to cover "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture".

[2.19] It goes on to require "identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment heretofore, and, as appropriate, for judicial involvement".[49] Domestic jurisprudence has confirmed that the right to an effective remedy is guaranteed under the BORA.[50] However the BORA only provides an effective remedy where abuse or mistreatment occurred after September 1990. The High Court ruled in *Marsh v Attorney-General*[51] against damages being available in relation to the 1688 Bill of Rights Act.[52] In *P v Attorney- General*[53] the High Court again ruled against civil remedies being available in relation to the same Act. In addition the High Court found that there was no public law remedy available either under the Universal Declaration or the ICCPR.

[2.20] The right to an effective remedy invokes three corresponding duties:

- investigate promptly and impartially
- prosecute
- accord redress.

[2.21] Nowak and McArthur state "Article 12 [of CAT] does not require an investigation by an independent body, much less by a judicial body. But the investigation must be prompt and impartial, i.e. serious, effective and not biased."[54]

[2.22] Although independence is not expressly required by Article 12, this does not mean that it is not a desirable and in some cases necessary feature of an investigation. The lack of independence is commonly seen as an

---

49 CRC, Article 19, para 2

50 See for example *Simpson v Attorney-General* [1994] 3 NZLR 667 (Also known as *Baigent's case)* where Hardie Boys J held stated: "Everyone has the right to an effective remedy by the competent national authorities for acts violating the fundamental rights granted him by the constitution or by law." However the High Court recently ruled against damages being available in

51 [2009]NZHC 2463

52 The Court in that case also held that the Limitation Act time-bar would also apply to such damages, if they were available.

53 16/06/2010, Mallon J, HC WN CIV-2006-485-874

54 Nowak & McArthur, *The United Nations Convention against Torture: A commentary* (oup, 2008) 435f.

indicator of partiality. [55] Proper structural independence, whereby the investigators are not seen to be linked to the alleged perpetrators is important for the victims and for public confidence.[56]

[2.23] *The Manual on the Effective Investigation and Documentation of Torure and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol 2004)* reflects the existing obligations of States under international treaty and customary international law and it may "be applied as a legitimate, normative source that identifies specific legal obligations stemming from the prohibition against torture..."[57] The Protocol confirms that States must ensure that complaints and reports of torture and ill-treatment are promptly and effectively investigated and provides guidelines for the investigation process. "The fundamental principles of any viable investigation...are competence, impartiality, independence, promptness and thoroughness."[58]

[2.24] More specifically the Protocol requires that where investigative procedures are inadequate because of the appearance of bias[59], States must pursue investigations through an independent commission of inquiry or similar procedure. "Members of that commission must be chosen for their recognized impartiality, competence and independence as individuals. In particular, they must be independent of any institution, agency or person that may be the subject of the inquiry."[60] At the conclusion of investigations any reports must be made public.[61]

[2.25] The obligation to investigate is both an element of a victim's right to an effective remedy as well as being a separate procedural duty of the State.[62] Where the State is responsible for a serious violation such as cruel, inhuman

---

55 Nowak & McArthur acknowledge that in some circumstances independence will be necessary; *R v Lippe* [1991] 2SCR 114.

56 The BORA recognises the clear link between independence and impartiality in relation to the judiciary and in s25(a), for example, refers to both concepts.

57 International Rehabilitation Council for Torture Victims, *Shedding light on a dark practice – Using the Istanbul Protocol to document torture,* 2009; The European Court of Human Rights has referred to the Istanbul Protocol as "...the first set of guidelines to have been produced for the investigation of torture. The Protocol contains full practical instructions for assessing persons who claim to have been the victims of torture or ill-treatment, for investigating suspected cases of torture and for reporting the investigations's findings to the relevant authorities." *Bati and others v Turkey* [2008] ECHR 246, para 100.

58 *Istanbul Protocol*, para 75.

59 Or because of insufficient resources or expertise, because of the apparent existence of a pattern of abuse, or for other substantial reasons.

60 Supra note 45, at 75, 82.

61 Ibid at 82.

62 Under Articles 7 and 10 of the ICCPR, and Article 2(1) of CAT

and degrading treatment, a criminal investigation will generally be required.[63] Where the State has failed to protect a complainant, there has to be some credible mechanism whereby victims and their relatives can establish any liability.

[2.26] The obligation of a State to provide redress where it has violated international law is a longstanding rule of customary law, with redress taking the form of financial compensation[64] or in situations where financial compensation is inappropriate, apology and acknowledgement should be given.[65] The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse[66] sets out reparation measures as restitution, compensation and assistance (including medical, psychological and social assistance).

---

63 *Assenov v Bulgaria,* (90/1997/874/1086) ECHR, citing *McCann ECHR. Assenov* also established that a duty of investigation exists where a complainant made an "arguable claim" that he or she has been seriously ill-treated by an agent of the state.

64 *Factory at Chorzow*, PCIJ (Permanent Court of International Justice), Ser A, No 17 (1928). See also Inter-American Court of Human Rights, *Aloeboetoe et al. Case, Reparations* (Art. 63(1) American Convention on Human Rights) Judgment of September 10, 1993, Inter-Am Ct HR (Ser C) No 15 (1994).

65 *I'm Alone (Canada v Unites States)* 3 R.I.AA. 1609, 1993, *Rainbow Warrior Arbitration* (New Zealand v France) 82 ILR 499.

66 UN General Assembly Resolution 40/34 of 29 November 1985.

3. Measures Taken by New Zealand

Introduction

[3.1] In its response to the Committee against Torture's concluding observations on New Zealand's implementation of CAT, the Government in May 2010, outlined the current procedures for the resolution of allegations of torture or ill-treatment by the State. The Government stated that "such allegations can be pursued through civil claims against the Government or against individuals through criminal complaint to the New Zealand Police and through a range of other and more specialised procedures, including the Office of the Ombudsmen and Independent Police Conduct Authority, which are designed as national preventive mechanisms under the Optional Protocol to the Convention against Torture."[67]

[3.2] Current claims of historical abuse or mistreatment have been and are being dealt with through a variety of mechanisms:

- Confidential Forum
- Confidential Listening and Assistance Service
- Ministry of Social Development's Care, Claims and Resolution process
- Crown Health Financing Agency
- civil litigation
- judicial settlement conferences
- direct negotiation
- criminal prosecutions.

[3.3] The Government has described its approach to these cases as follows:

- "at a systemic level, allegations of ill-treatment in a given institution are thoroughly investigated
- for individuals who raise such allegations, court and Police procedures have been supplemented with a Confidential Listening and Assistance Service, which can provide support and other assistance, and with an Alternative Resolution Process, which can provide compensation, apologies and other remedies. The result is an integrated and comprehensive approach to addressing such allegations."[68]

[3.4] Comprehensive complaints procedures have been established for contemporary claims including through Child, Youth and Family (in respect of children and young people in the care of the State) and the

---

67 http;//www2.ohchr.org/English/bodies/cat/docs/followup/CAT-C-NZL-CO-5-Add1.pdf

68 Ibid

Health and Disability Commissioner (in respect of health-related complaints).

[3.5] This section provides a summary account of how each of the various mechanisms operates, particularly in relation to prompt and impartial investigation, prosecution of perpetrators, redress accorded to victims including adequate compensation and rehabilitation. Section 5 then analyses the extent to which, either individually or collectively, these procedures meet the international human rights standards.

Listening and Assistance Services

Confidential Forum for Former in-Patients of Psychiatric Hospitals

[3.6] In 2005 the Government established the *Confidential Forum for Former In-Patients of Psychiatric Hospitals* (Forum). The Forum's final report[69] states that it "was established to provide 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"[70]. The Forum consisted of a panel of (usually) three members.

[3.7] In addition to listening, the Forum was mandated to assist the former psychiatric in-patients by providing information and access to relevant services and agencies, including provision for access to counselling.[71]

[3.8] Its terms of reference also set out what it was not designed or intended to do. It could not determine liability, nor the truth of participants' experiences, pay or recommend compensation, make public any information relating to what it heard, or allow participants to have legal representation at Forums.

---

69 *Te Aiotanga, Report of the Confidential Forum for Former In-Patients of Psychiatric Hospitals*, 2007 http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Agency-Confidential-Forum-for-Former-In-Patients-of-Psychiatric-Hospitals-Index

70 The current Mental Health legislation came into effect at this date.

71 http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Agency-Confidential-Forum-for-Former-In-Patients-of-Psychiatric-Hospitals-Terms-of-Reference?OpenDocument

> "The individual narratives revealed certain themes in common, mostly negative in nature, concerning institutional culture and treatment regimes. Examples include experiences of fear and distress at admission; unsanitary, overcrowded conditions; unanswered questions arising from lack of communication between health professionals and patients and family members; occurrences of physical violence and sexual misconduct; inadequate complaints mechanisms; fear and humiliation when held in seclusion; extreme distress caused by the use of electroconvulsive therapy (ECT) and some other treatments no longer in use such as deep sleep therapy; doubts over use of particular medications and treatment regimes, and the possible lasting effects; and lack of support on discharge from institutions."
>
> *Te Aiotanga, Report of the Confidential Forum for Former In-Patients of Psychiatric Hospitals*, 2007, p2.

[3.9] Five hundred and fifty-four people registered with the Forum. Hearings were held throughout New Zealand between July 2005 and April 2007. Four hundred and ninety-three people attended a meeting with the Forum.

[3.10] The Forum offered assistance as appropriate to each participant, including:

- referrals for counselling (eligible participants could receive up to ten free sessions). Counselling services were arranged for 136 participants
- individually-tailored information about local and national support services and networks that might be of assistance to participants
- a freephone telephone service allowed participants to contact the Forum in the weeks after their meeting
- linkages and information about other government agencies that could be of assistance, such as the Health and Disability Commissioner, Accident Compensation Corporation, and New Zealand Police
- information on patient rights and pathways in the medical system (for example: Advance Directives, access to clinical records)
- information on how to seek legal advice.[72]

[3.11] The Forum in its final report recorded that "the formalized listening process [of the Forum] ... as well as the availability of counselling and the individualised follow-up actions taken, provided a useful vehicle for many people who participated."[73]

---

[72] Supra note 43 at 3.

[73] Ibid at 39.

Confidential Listening and Assistance Service

[3.12] Following the response from former psychiatric hospital patients to the Forum, and its perceived value to them, the approach was extended to a wide group of people who had been in State care. In late 2008, the Government established the Confidential Listening and Assistance Service ("the Service"). The Service was set up "to provide assistance to people (participants) who allege abuse or neglect or have concerns about their time in State care in health residential facilities (for example; psychiatric hospitals and wards, and health camps, but excluding general hospital admissions), child welfare or residential special education [homes] prior to 1992."[74]

[3.13] By 1992 the health and child welfare sectors had modernised their standards and improved mechanisms for the management of complaints.[75] For this reason the Service was not mandated to provide assistance in relation to allegations relating to events after 1992.

[3.14] The Department of Internal Affairs provides the Service with administrative and financial services and support. The service is thus able to operate independently from the Ministries of Social Development, Health, and Education. The panel comprises prominent New Zealanders and is chaired by a Judge.

[3.15] The service is available to listen, give assistance on how to get help for problems caused by the abuse/neglect and obtain the person's files if necessary. Meetings are recorded but the records cannot be used by anyone but the person. With the individual's consent records may be provided to another agency such as MSD, so as to avoid the person having to re-tell their story.

[3.16] As of November 2010, 651 people have registered with the Service. The Service has met with and provided assistance to 426 participants since May 2009.

---

[74] Terms of Reference, *Confidential Listening and Assistance Service,* http://www.listening.govt.nz/web/RCCMS_cla.nsf/weblive/ITSO-7KUSQ6?OpenDocument

[75] For example the introduction of District Inspectors and the establishment of complaints procedures such as through the Health and Disability Commissioner.

[3.17] An increasing number of prisoners have also registered with the Service. The Service has 43 prisoners registered and had met with 13 by the end of November 2010.

[3.18] Examples of assistance that the Service has provided include:

- listening
- taking people through their files
- counselling[76]
- employment assistance
- housing assistance
- assistance in making complaints to police
- assistance in drafting correspondence to Chief Executives of relevant Departments
- connecting people with families
- referrals to Crown Health Financing Agency and Care, Claims and Resolution Unit
- providing letters of referral for urgent dental and medical assistance
- advocacy with Work and Income regarding benefit entitlement
- facilitating cultural contact and Kaumātua support.

[3.19] The Service facilitates assistance through a number of Agencies including:

- Ministry of Social Development (of which Work and Income, and the Care Claims and Resolution Unit are a part)
- Work Bridge
- New Zealand Police
- Ministry of Health
- Mental Health Commission
- Health and Disability Commissioner
- Crown Health Financing Agency
- Accident Compensation Corporation
- Ombudsmen's Office.

[3.20] Claimants have reported that the Service treats them with dignity and respect, and that it is genuinely interested both in their experience and in providing assistance.

[3.21] However, the effectiveness of the Service (as with its predecessor, the Forum) is significantly constrained by its Terms of Reference. It is outside the scope of the Service to determine liability, or truth; pay or recommend compensation; acknowledge liability or make an apology; or to allow participants to have legal representation at meetings. It may not

[76] Nearly 59% of all participants have sought counselling.

share or make public any information relating to the stories it hears or make any public comment about anything presented to it. Its annual report is limited to providing numbers of participants; the sectors in which they were in care; types of service and assistance provided; the level of assistance provided by agencies to the Service; the estimated further up-take of the Service; and what is needed to meet this demand.[77]

[3.22] Recently, MSD has agreed amendments to the Terms of Reference with the Service and other relevant government agencies to help resolve claims more effectively.[78]

MSD'S Claims and Resolution Process

[3.23] In 2006 the government established a team within the Ministry of Social Development to investigate and resolve claims of historic abuse and mistreatment out of Court. MSD will respond to a direct approach from any affected person and will consider making an apology and providing some compensation.

[3.24] The Care Claims and Resolution Team (Team) can consider complaints or claims where:

a) the claimant is **not a current** client of Child, Youth and Family;
b) the claimant was in the care, custody or guardianship of Child, Youth and Family, the Department of Social Welfare, or Child Welfare; or was under the supervision of a Child Welfare officer or social worker at some point in the past;
c) the claimant believes he or she was abused, mistreated or neglected while in care;
d) the claimant believes that the treatment complained of has harmed or damaged the claimant in some way; and
e) the claimant wants the MSD to do something about the mistreatment complained of.[79]

[3.25] The Team investigates every claim, regardless of whether it is lodged in court or is a direct application by the person to MSD. People with claims filed in court can use this process without discontinuing their court claim,

---

77 http://www.listening.govt.nz/web/RCCMS_cla.nsf/weblive/ITSO-7KUSQ6?OpenDocument

78 The Department of Internal Affairs (which is department responsible for the Service) is currently seeking the required approvals from cabinet for the change.

79 https://www.msd.govt.nz/about-msd-and-our-work/contact-us/complaints/cyf-historic-claims.html

or can choose, through their lawyer, to use parts of it. The investigation process is a 'direct process', that works from the claimant's own account of what happened to them and what they believe is important to resolve their sense of grievance and help them move on.

[3.26] The Team operates on the basis of six principles:

- natural justice
- each person's story is taken on its face value
- the focus is on facts and what is probable and credible
- moral rather than legalistic approach
- responsibility being accepted for wrong doing
- working with claimants to right the wrong for them and move on.

> Garth Young, who heads the Care, Claims and Resolution Team says "MSD is owning its mistakes and doing whatever it can to put things right. When we have got it wrong, we acknowledge that and apologise and if there is good reason to offer a financial settlement then we do that too."

[3.27] Three hundred and seventy-six people have approached the Team directly. The Team has so far considered 44% of these claims, the majority of which relate to foster care. One hundred and twenty-eight have been resolved.

As at 30 June 2011	**Filed in Court**	**Lodged with the MSD**
Received	477	376
Claims Settled **Court claims struck out or discontinued**	63 45	128 n/a
Offers rejected/not resolved	4	17*
Claims heard in court	2**	n/a
Active claims	385	209
Average time between filing and settlement	38 months	10 months

* 3 went on to file claims in Court – 1 subsequently settled

**decision in favour of the Crown – settlement offers had been made

[3.28] The Team may provide a claimant with a payment, an unreserved apology and other assistance. A payment will be made where MSD believes that the claimant suffered harm because of a failure in the care provided by the State. MSD has stated that the assessments are arrived at on a moral rather than a legal basis.

[3.29] Where payment is an appropriate way to respond to a claim, MSD establishes the amount based on three factors:

- the nature of the State's responsibility to the person
- how the State failed
- what the impact has been for the victim.

[3.30] The amount paid will generally reflect the overall circumstances of the claim, including an assessment of the amount that has been awarded in similar cases by MSD, Child Youth and Family, ACC and the courts.

[3.31] MSD has said that the amount to be paid to each person is determined in the same way regardless of whether it is a court settlement payment. The Ministry meets claimants' legal aid costs, and if the person does not have a claim filed in court or does not have a lawyer then it does not require them to waive any legal remedies he or she may have.

[3.32] In some cases people may have come to harm while in State care but do not have a strong legal claim (for example, where a claim does not have a realistic chance of success in the Courts - often because of time-bar or evidential issues). In these cases a payment may nevertheless be made to acknowledge MSD's moral obligation and the harm done to the claimant.

[3.33] Assistance is also offered by the Team through existing services, including:

- listening
- taking people through their files
- counseling and therapy
- access to education
- alcohol and drug counseling
- access to information and records
- retrieving childhood photographs and belongings
- employment assistance
- housing assistance
- advocacy with Work and Income regarding benefit entitlement
- assistance with employment, housing and any other government or community based services they may be entitled to
- assistance in making complaints to police
- connecting people with families
- facilitating cultural contact and Kaumatua support.

[3.34] Assistance can be made available prior to the investigation of a claim, and subsequently regardless of the outcome.

[3.35] The Team has so far made 66 settlement payments to those who have lodged claims in the courts. Payments have ranged from $1,150 to $80,000.

[3.36] The Team has also resolved 128 other complaints from people who have been in care, a number of which have included a financial payment. Payments have ranged from $3,000 to $50,000.

	Claims / Applications Made	**Yet to be investigated**	**Range of payments made**	**Average**
Non Filed	376	209	$3,000-$50,000	$18,200
Filed	477	385	$1,150-$80,000	$20,500

[3.37] MSD has stated that about 80% of claims that they deal with directly have been resolved to the satisfaction of the claimant. In the remaining 20% of claims the Team may not have been able to fully resolve the claim but the person may still have had access their records, obtained answers to their questions, and been provided with counselling or other assistance.

One person recently received a settlement and apology from the MSD and wrote to the Care, Claims and Resolution Team to thank them for their kind and understanding response. 'It was a hard thing for me to do, to touch on all those painful things again, but it was worth it all. I feel that receiving an apology has gone a great way towards my healing.'

Another person received counseling immediately after making contact with the MSD because he was so affected by his past. The Care, Claims and Resolution Team was also able to retrieve some of this person's childhood belongings and put a photograph album together for him. He recently told the Team he has been feeling "progressively better over the past 6 months. My health issues are almost gone and I'm ready to look for a full-time job and relocate."

[3.38] Legal Aid Services (LAS), formerly the Legal Services Agency is able to fund legal representation for claimants wishing to use the Team. It has approved funding on at least 60 claims to investigate the possibility of resolving claims outside the formal Court proceedings. Owing to the lower thresholds used by the Team in assessing claims, aid is more likely to be granted for such proceedings than it would if the same applicant were seeking funding to file a claim in the High Court.[80]

[3.39] Claimants are provided with facts about their specific care, including those MSD has used to determine the merits of their claim. This information is provided at a feedback meeting and includes:

- an explanation of their own personal circumstances at the time
- an explanation of what happened to them in care, and why they were taken into care if this is known
- an explanation of the services and care that they received
- where MSD considers there were failures, how these occurred.

[3.40] In addition claimants are provided with written information, if requested, including a copy of the "practice review", MSD's internal document that sets out the information that has been used to assess the person's claim and which can also provide other information they have asked MSD to find for them.[81] MSD also makes primary information available to researchers, and meets the costs and manages the requirements of seeking information for individual claimants who want to do their own research into the time they spent in care.

[3.41] MSD has commissioned some research by external researchers to understand how the child welfare system (including institutions) operated, what the environment was like for children and young people, and in respect of one particular residence – the former Kohitere Boys Training School in Levin – what residents and former staff recalled. This has helped MSD draw conclusions about care and practice in particular places at particular times, confirming the nature and frequency of assaults and mistreatment where these had occurred. In a broader sense this information informs investigations for the purposes of determining the extent of any failing by the Department.

---

[80] In particular, the statutory hurdles raised by the Limitation Act, ACC legislation and other similar requirements are largely irrelevant to the Unit's process.

[81] A practice review sets out the person's circumstances, the care that was provided, and where there were any failings.

[3.42] Individual claims have largely been resolved on the basis of specific investigations into the allegations they make. However, MSD says that the research has helped it to understand, when read alongside other information like contemporaneous reviews, whether the claims point to serious or endemic failings.

[3.43] When this Review started in January 2010 MSD had not made the information from this research available to the Commission or to any of the claimants because of litigation privilege. In late 2010 MSD made all its research publicly available on its website, including a detailed summary of its research into the Kohitere Boys Home. A summary was released because the research was very broadly commissioned and included reporting on allegations made by any of the former residents and staff interviewed, regardless of whether they could be substantiated.

[3.44] Making this information available is a particularly positive step and enables claimants to access important information to assist them to better understand what may have happened to them and in some cases to provide them with validation and evidential support for their claims.

[3.45] A very small number of claims (about 1.75%) include allegations against current Child, Youth and Family staff members. In such cases MSD has established a process which reflects both its obligations as a guardian of vulnerable children, and as an employer. Staff have the right not to have allegations pre-judged, and children and young people should not be at risk. All staff named in a claim are entitled to receive full information about the claim, the detail of allegations and how the organisation will manage them during the period of the investigation of the claim and any trial process. Individual support plans are developed for each named staff member which includes:

- details of assistance that will be provided to the staff member
- the manner in which the staff member will be informed of the claim
- where any interview with the staff member should take place
- the responsibilities of the staff member
- access to external support
- access to independent legal advice in relation to the initial claim up to $2000. Additional assistance is considered on a case by case basis
- the impact (if any) on the current role the staff member is employed in

- who else in MSD will know about the claim
- how regularly the staff member will receive updates on the claim.

[3.46] In certain cases the nature of the allegations may be so serious that the named staff member should not continue to work directly with families or children and young people. In this situation MSD considers whether an alternative position can be found for the named staff member during the period of the investigation and any subsequent trial.

[3.47] Where claims allege criminal behavior MSD encourages complainants to lay a complaint with the Police No current staff members are subject to criminal investigation or prosecution.

Civil litigation

Lawyers acting for claimants have suggested that traditional litigation, negotiation and Alternative Dispute Resolution procedures are unlikely to be satisfactory for some claimants.

[3.48] As at June 2011, 200 former psychiatric and psychopaedic hospital patients had filed proceedings in the High Court.[82] Their complaints include:

- physical beatings and assaults by hospital staff
- sexual violation and abuse by staff
- unmodified electroconvulsive therapy (ECT)
- ECT given as punishment
- medication (such as paraldehyde) given as punishment
- solitary confinement as punishment
- aversion therapy
- unlawful detention of informal patients
- over-medication and inappropriate medication to control behaviour
- threats of punishment (for example by ECT) to control behaviour
- unpaid labour

[82] A number of claims have been discontinued, for example where claimants have dies or become frustrated with the litigation process, or where legal aid funding has been withdrawn. In 2010 40 claims were discontinued. In each of these cases CHFA has agreed not to seek costs.

- neglect of education
- assaults by other patients.

[3.49] Almost 500 claims have been lodged against MSD by those who were at home with known abusive or neglectful parents, were placed in abusive foster care placements and/or who were former residents of social welfare homes and residences. Of these, some are jointly filed with claims for abuse suffered while in psychiatric hospitals and/or church institutions. For example 85 of the 339 claims filed in the Wellington High Court are joint claims.

Claims Filed by Time Period			
	Filed *	**Number of Residences**	**Number of Residents**
Pre 1960	22	13	15,500
1960 -1964	44	16	10,200
1965-1969	107	17	12,800
1970-1974	167	22	17,600
1975-1979	193	24	20,900
1980-1984	192	24	17,600
1985-1989	138	19	11,500
1990 – 1994	47	5	3,200
1995-1999	26	5	3,300
2000-2004	3	6	2,272

***Some claimants allege abuse in numerous time periods.

[3.50] A number of factors have impacted on the Courts' potential to provide effective remedies including:

- time bar
- bar to proceedings under the ACC scheme

- delays
- lack of funding for claimants
- causation and evidential issues.

Time Bar

[3.51] Virtually all claims before the courts face immense limitation problems with their claims being potentially time-barred under the Limitation Act 1950 or the Mental Health Act 1969. In one case the Supreme Court stated:

> "While the applicants have undoubtedly undergone regrettable suffering during their childhood and adolescence, the Limitation Act operates to preclude them seeking legal redress."[83]

[3.52] Likewise in *J v CHFA*[84]*,* despite finding that a number of assaults had occurred, the claim was dismissed primarily owing to the Limitation Act time-bar.

[3.53] The general application of the Limitation Act 1950 to historic abuse claims means that any such proceeding must normally be commenced, at the latest, before the end of the sixth year following the plaintiff's reaching the age of majority. This period is often inadequate to allow a plaintiff to understand what has happened and be in a position to take legal action.[85]

Accident compensation scheme

[3.54] Accident compensation legislation first came into force on 1 April 1974. It provides cover for physical injury or mental injury arising from an accident (which can include physical assaults and some sexual crimes) and because of this it is relevant to many historic claims. Under the ACC scheme no proceedings for compensatory damages may be brought in the courts for damages arising from an injury which would otherwise be

---

83 *W & W v Attorney-General* [2010] NZSC 69 at 2.

84 CIV 2000-485-876, 8 February 2008.

85 Andrew Beck, *Limitation an Historic Abuse,* New Zealand Law Journal, August 2010.

covered by the ACC scheme. This means that persons claiming abuse whilst under the care of the State after 1974, and arguably before that date in relation to sexual abuse claims, may be precluded from bringing proceedings in court relating to that abuse, even if they have not at any time applied for, or received cover for the alleged abuse under the ACC scheme[86]. This leaves a group with no adequate legal remedy through the courts.

Delays

[3.55] There are significant delays in the litigation process. Courts are hearing about one to two claims per year at the moment, with over 500 cases waiting to be heard.

[3.56] A number of claimants have withdrawn their claims out of frustration over the apparent inaction, as well as the negative effect the prolonged process had been having on their well-being. In addition, a number of claims have been withdrawn as a result of legal aid funding being withdrawn. A further group of claimants have died while their claims have languished.

Funding

[3.57] Only about 10% of claimants are self-funding. The rest have to rely on legal aid. When a person applies for legal aid, they are means tested to ensure that they are financially eligible for legal aid, and to assess what, if any , financial contribution towards their legal costs they will be required to make by way of a condition of the grant.

[3.58] The 2009 Legal Aid Review discussion paper noted that: "Civil claims of historic abuse against government care agencies and psychiatric institutions were some of the most expensive civil legal aid cases in 2007/08."[87] In total $11.277m has been paid in legal aid. A number of

---

[86] Or where they received some cover under earlier legislation but were unable or not entitled to receive cover under the 1974 Act.

[87] *Improving the Legal Aid System*, discussion paper, 32 TCL 34/1.

early cases[88] were fully-funded to trial including bringing witnesses from overseas. These cases failed on evidential deficiencies or due to the Limitation Act or the ACC scheme.

[3.59] In assessing whether legal aid should be granted, the grounds in section 10 of the Legal Services Act 2011 (LS Act) must be considered. This includes an assessment of:

- whether the applicant is financially eligible for legal aid
- whether there are reasonable grounds for taking or defending proceedings
- the likely prospects of success of proceedings.

[3.60] Ongoing eligibility for legal aid is periodically reassessed. In doing so the Legal Aid Services scrutinises each application individually based upon the material presented, and in light of the evolving case law in this area. The LS Act provides that LAS may, and in some cases must, cease providing funding. According to s 30(2)(d)[89] if the Agency is satisfied that that the aided person no longer has reasonable grounds for taking, defending, or being a party to the proceedings, or that it is unreasonable or undesirable in the particular circumstances for the person to continue to receive legal aid the agency is justified in ceasing to fund that person. In addition, according to s 9(4) (d) (i) the statute dictates that funding may be refused if the applicant's prospects of success are not sufficient to justify the grant of legal aid.[90]

[3.61] In January 2008, prompted by the decisions in *White*[91]*, Knight*[92] *and J*[93]*,* the Legal Services Agency (LSA), LAS's predecessor, initiated a review of all historic abuse claims. Claimants were required to provide a full analysis of the facts, and the law relating to each claim including submissions stating why aid should not be withdrawn.

---

88 Some of these cases are discussed above.

89 Formerly s 26(2)(d) of the Legal Sercices Act 2000

90 In *Legal Services Agency v LAE* & ORS (HC 6/8/2009, Dobson J, Wellington, CIV 2009-404-3399-3401.) the High Court noted that the Agency's discretion is vital, so as not to open the floodgates to force the LSA to fund everyone with a potential claim. It was held that "there can be no hard and fast rule precluding the Agency from undertaking an assessment of the prospects of success and determining its consideration as to whether legal aid should be withdrawn in a particular case, merely because it is obliged to acknowledge that there are arguable cases for both sides."

91 *White v A-G* CIV-1999-485-85,2001-485-864, 28 November 2007, and [2010] NZCA

92 *K v CHFA* CIV-2005-485-2678, 16 November 2007

93 Supra note 72

[3.62] Since April 2008 in excess of 900 notices of intention to withdraw aid have been issued. Four hundred and ninety three cases have been considered for withdrawal and aid has been continued in 145 of those cases.

[3.63] Due to the importance of the outcome of this process to each legally aided person and their claim, parties are taking some time to carefully consider both the legal precedents and the individual and factual arguments raised.

[3.64] Based on current jurisprudence and opinions from independent barristers 49 recent applications for legal aid to commence court proceedings have been declined. However, aid has been granted for a number of those claimants to engage with MSD's Care Claims and Resolution process.

Causation and evidential issues

[3.65] To varying degrees almost all claims before the courts face causation and evidential issues. For example, *White v A-G*[94] dealt with abuse that two brothers suffered both at the hands of their parents (the neglect of their mother and the abusive practices of their father) and during their stay in State institutions.

[3.66] The High Court acknowledged there was abuse suffered by the brothers, particularly at the hands of their father as well as at Epuni Boys Home and Hokio Beach School. Specifically, the following matters were identified as breaches of duty in relation to the claimant placed at Epuni:

> "(a) [he] was kept in secure custody for three days on his admission to Epuni;
>
> (b) [he] received a medicine ball to the stomach as an 'initiation' and was regularly bullied by other boys at Epuni;
>
> (c) some staff encouraged bullying;
>
> (d) [he] was physically assaulted by two staff members; and

94 Supra note 79 at 139.

(e) derogatory language was used by a few staff members."[95]

[3.67] The following matters were identified as breaches of duty in relation to his brother:

> "(a) [he] received an 'initiation beating' from other boys at Hokio and was regularly bullied by other boys at Epuni;
>
> (b) at Hokio, [he] was occasionally the subject of violence from other boys and was regularly at risk of it;
> (c) some staff encouraged bullying;
> (d) [he] was physically assaulted by some staff members at Epuni and at Hokio;
> (e) derogatory language was used by staff members at Epuni and at Hokio; and
> (f) [he] was sexually abused by the cook at Hokio on at least 13 occasions, each involving mutual masturbation in exchange for cigarettes given by the cook."[96]

[3.68] However, the High Court concluded that substantially if not overwhelmingly their psychological damage was caused by abuse suffered whilst in the care of their parents or as a result of genetics. Accordingly, no remedy was available for any breach of duty of care to either of them. The High Court decision was upheld at both the Court of Appeal and Supreme Court.

[3.69] Subsequently MSD made ex gratia payments to both men and acknowledged that they were victims of assaults by Ministry staff. The Chief Executive also wrote them letters of apology.

Practice of the day

[3.70] In *J v CHFA*[97], the High Court held that the State would not be liable for what was considered to be practice of the day. The Court noted that harsh treatments, such as committing emotionally unstable teenagers, was the norm in the 1950s and held that people could not be

---

95 [2010] NZCA 139 at 169

96 Ibid at 188.

97 Supra note 72.

retrospectively compensated for practices that were later prohibited or discontinued.

[3.71] These barriers have rendered the courts generally inappropriate and often inaccessible. Dame Margaret Bazley in *Transforming the Legal Aid System* urged the Crown to find an alternative way to address the claims, identifying not only costs but other unsatisfactory aspects:

> "The historic abuse claims in particular have the potential to place enormous pressure on the LSA's granting process and on legal aid expenditure, both because of the large number of claims and the high cost involved. Urgent consideration should be given to alternative ways of resolving these claims: the Crown's strategy of addressing these cases through the courts places pressure on the courts and benefits lawyers rather than claimants. It also leaves the problem to fester: the claimants are likely to consider that the Crown has won on a legal technicality. They will be left feeling aggrieved and that the Crown is not prepared to treat them or their claims with respect and compassion."[98]

[3.72] Currently extensive efforts are being made to resolve claims outside the court process. As at the beginning of 2011, 45 claims against MSD had been settled. MSD has stated that about 80% of offers made in respect of Court claims are accepted. In addition a total of 25 claimants had either left the court process to work with MSD directly through the Care Claims and Resolution Team or have chosen to work with MSD while simultaneously having a claim lodged through a lawyer.

[3.73] Since 2010 there has been an increased use of Judicial Settlement conferences to resolve claims. Judicial settlement conferences offer claimants a forum for 'having their day in court', without the stress and trauma of being cross-examined, and provides them with an opportunity to hear a Judge's perspective as to the merits of their case. Following the early success of this process Judicial settlement conferences have, in relation to claims against MSD, been replaced with settlement meetings which have no direct court involvement.[99]

---

98 November 2009, para 103.

99 MSD and Counsel have also agreed to an alternative to the court process where an investigation into an individual claim can be initiated. This process has agreed timeframes for both parties to meet.

[3.74] MSD has signed an agreement that confirms in writing its commitment not to use a time-bar as a way to avoid dealing with claims on their facts, and to 'stop the clock' for people who approach the Ministry directly without having filed a claim in court.

[3.75] At the time of writing a draft agreement was under discussion between claimants' lawyers and the Legal Services and Treaty Division of the Ministry of Justice that if agreed would suspend the court process and progress existing and new claims through the Care Claims and Resolution process. No claims are proceeding to court at the present time.

[3.76] The Solicitor-General has stated that CHFA is anxious to settle meritorious claims.[100] Ten claims have been settled to date[101]. In 2011 two claims were settled through the use of judicial settlement conferences, one in preparation for a judicial settlement conference and two through direct engagement between the claimant and CHFA. In addition at the time of writing a further three settlement offers are under consideration by the parties. All of these claims have been settled notwithstanding potential time-bar and ACC barriers.

[3.77] Settlements have included facilitating the claimant reviewing his or her files, and organising the undertaking of a psychological review and report to assist the claimant to understand what had happened whilst under the care of the State. In some cases compensation has also been available.

[3.78] In order to resolve claims more expediently, CHFA has recently engaged with claimants' lawyers to negotiate a settlement package for each of the existing claimants. It is expected that a settlement package will be offered to all current psychiatric hospital claimants this year.

---

100 *B v CHFA,* SC 72/2008, 2 April 2009

101 A number of early settlement related to the Lake Alice Child and Adolescent Unit between 1972 and 1978..

Criminal Prosecutions

[3.79] Claims that there has been abuse or mistreatment whilst under the care of the State often involve allegations of criminal misconduct. MSD has stated "the correct and proper action for any person who believes that someone has committed a criminal offence against them, for which they require them to be held accountable, is to lay a complaint with the Police. They are the correct authority to investigate matters involving criminal misconduct." The Ministry says this does not prevent them from investigating any allegation of abuse and doing what is right for victims, but that it takes police involvement to hold a perpetrator to account for what they have done.[102]

[3.80] The Police have expressed an interest in investigating staff who assaulted former recipients of State care. The number of prosecutions has increased over the past few years as victims have become more prepared to come forward with complaints. There have been at least three successful prosecutions in the past 12 months. The New Zealand Police were unable to provide exact data about the number of people who have been charged and/or convicted in relation to historical claims of abuse or mistreatment whilst under the care of the State. This is due primarily to the way in which data is classified requiring extensive manual searching in order to obtain this data.

[3.81] Criticisms have been made about the time taken for Police to act on allegations of abuse whilst in State care. In at least one case where a man made a complaint in 1996 - no prosecution was commenced until a decade later, when another complaint came to light. Given the high evidential burden (beyond a reasonable doubt) in criminal proceedings, Police are generally only able to prosecute historic abuse cases where there is strong corroborating evidence.

---

[102] There have been several cases where the Ministry has resolved a claim in the person's favour even though the alleged offender was not convicted or charged following a criminal investigation

4. The Nature and Extent of Measures Taken by Other Jurisdictions

Introduction

[4.1] In a number of comparable jurisdictions a reconciliation/compensation model has been developed following significant numbers of people filing legal proceedings against the State claiming abuse while in institutional care. The response developed in those countries may not necessarily be appropriate for the New Zealand situation. As Justice Kaufman QC, appointed by the Nova Scotia government to conduct an independent review into allegations, of abuse and mistreatment, cautioned "one must recognise that there are significant variables that prevent a government from simply superimposing one program – however successful – upon a different factual situation".[103]

[4.2] However, international experience can still provide useful guidance in developing a robust and comprehensive response. The responses developed in Ireland, Canada and Australia are of particular interest. What follows is a summary of key aspects of the Irish, Australian and Canadian responses. Further detail is provided in Appendix 2.

[4.3] In 2000, the Canadian Law Commission following a request from the Minister of Justice to report on processes to deal with institutional child physical and sexual abuse, published *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* [104]. The Report identified eight primary areas of need:

- the establishment of a historical record
- acknowledgement
- apology
- accountability
- access to therapy or counselling
- access to education or training
- financial compensation
- prevention and public awareness.

---

[103] The Honourable Fred Kaufman, C.M., Q.C., D.C.L., *Searching for Justice, An independent review of Novia Scotia's response to reports of institutional abuse,* 2002, at 331

http://www.gov.ns.ca/Just/kaufmanreport/fullreport.pdf

[104] http://dalspace.library.dal.ca/bitstream/handle/10222/10277/Restoring%20Dignity%20Report%20EN.pdf?sequence=1

[4.4] The Law Commission considered a number of resolution approaches, but did not identify a preferred option.

[4.5] The Australian, Canadian and Irish responses all include most of those elements, albeit through a variety of mechanisms. In Australia, for example, there has been a mix of Federal and State-level responses in relation to child abuse while in the care of the State. Individual compensation has generally been available only through State mechanisms.

[4.6] Common features of the Australian, Canadian and Irish responses have included:

- official inquiries to investigate the allegations of abuse and make public their findings
- changes to the law on limitations to extend the period in which claims could be brought
- a non-adversarial forum for victims to recount their stories without being re-victimised
- public acknowledgement and apologies for what had happened
- establishment of mechanisms to assess individual claims and provide for financial compensation and access to services for rehabilitation
- establishment of a historical record.

Ireland

[4.7] The Irish example is probably the most comprehensive response to historic claims of abuse to date, involving:

- inquiries and reports
- an apology from the Government[105]
- the establishment of committees, commissions and boards
- a process for compensation
- legislative reform[106] .

[4.8] In May 1999 the Government established a Commission to Inquire into Child Abuse (the Laftoy Commission). The Commission was set up to hear people's stories relating to institutional abuse from 1940 onwards.

[4.9] The Laftoy Commission could not provide compensation. To devise a compensation scheme that was fair and responsible the Irish government set up the Compensation Advisory Committee (CAC). The CAC

---

[105] In 1999, following an increasing number of reports of abuse and corresponding media attention, the Irish Prime Minister (Taoiseach) made a public apology for the abuse people suffered in state care.

[106] In 2000 the Irish Statute of Limitations was amended to allow people to bring claims who otherwise would have had no recourse in a court.

recommended claimants be eligible for up to E300,000 in compensation. It proposed that compensation be awarded on a scale of 0-100. Points were awarded under four categories: severity of abuse, severity of medically verified physical/psychiatric illness, the severity of psycho-social consequences, and, finally, how the abuse caused loss of opportunities.

[4.10] A Residential Institutions Redress Board (RIRD) was then set up to administer the compensation scheme. Applicants had to establish four matters in order to be considered by the RIRB: their identity; their residence during childhood (they had to have resided at an institution mentioned in the Act); that they were abused as a resident of the State; and lastly, that injury is consistent with any abuse alleged to have occurred while resident.

[4.11] The board does not make findings of fault or negligence – applicants are not required to provide evidence of negligence by a person, their employer or a public body. Payments made by the RIRB are on an *ex gratia* basis and do not establish any liability on the part of State bodies. Payments are intended to provide some solace to the victim rather than an attempt to put right the wrong they have suffered.

Australia

[4.12] In the case of Australia, there have been three major Federal Senate inquiries. In 1985, the Senate Standing Committee on Social Welfare tabled a *Report on Children in Institutional and Other Forms of Care – A National Perspective*. In 2002 the Senate Committee initiated an inquiry into child migration during the twentieth century. In 2004 a further study was undertaken in to the abuse that children suffered in State care. In 1977 the Human Rights and Equal Opportunities Commission (HREOC) published *Bring Them Home*, the findings of a major investigation into the removal of Indigenous children from their families.

[4.13] The Federal Government then led by Prime Minister John Howard responded to the HREOC Inquiry recommendations by establishing a $63 million fund to support programmes to index and preserve files, provide family support and establish projects for Indigenous culture and language maintenance and oral histories. In relation to the child migrants' findings, the Federal Government each year for three years contributed $120,000 to the Child Migrant Trust (for family tracing and counselling), $100,000 for memorials and $1 million to assist former migrants to reunite with their families.

[4.14] In 2009 on separate occasions, then Prime Minister Kevin Rudd apologised in Parliament to the Indigenous children and their families; to the children who were migrants and ill-treated; and to the victims of childhood abuse in the country's orphanages and government–run institutional facilities.

[4.15] In the 1980s and 1990s there were a number of State inquiries and reports. The *Report of the Queensland Commission of Inquiry into Abuse of Children in Queensland Institutions* led to an official apology; a review of legislation to ensure better protection of the young and vulnerable; funding of services for former residents; a fund of $100 million for compensation.

Canada

[4.16] In Canada the1996 Royal Commission on Aboriginal Peoples and the Law Commission Report roused particular concerns for First Nation children who had been in the residential care system. By 2006 some 15,000 cases relating to Indian Residential Schools had been filed.

[4.17] In response the Government developed a three-pronged system of redress:

- an apology in which the Government acknowledged its responsibilities in relation to abuses that occurred in residential schools and apologised to those affected
- the creation of a healing fund ($350 million) and a community-based healing strategy to assist those affected
- an Alternative Dispute Resolution (ADR) process.

[4.18] In 2006 the Indian Residential School agreement set aside $2 billion for compensation. Common experience payments were to be available for victims of abuse at residential schools – being $10,000 and $3,000 for each additional year spent at a residential school. In addition, former students who claim some form of physical, sexual or psychological abuse can file separate claims for additional compensation through the "Independent Assessment process". This is capped at $275,000.

[4.19] In June 2008, the Prime Minister of Canada, Stephen Harper, apologised for Residential Schools in the Canadian House of Commons. A Trust and Reconciliation Commission has been established to document the truth of what happened. The Truth and Reconciliation Commission was given $60 million and a five-year mandate. It was also tasked with a$20 million commemoration fund and $125 million Aboriginal Healing Fund.

New Zealand

[4.20] The extent of the abuse of children in State care in New Zealand prior to 1992 may well not have been on the scale of that which occurred in Australia, Canada and Ireland. In the absence of any independent national inquiry, however, there is no way to know. In all three countries major Inquiries have provided the evidential basis for the State's subsequent action.

[4.21] In Australia, Canada and Ireland political leadership at a high level has been a feature of the State's response. In Canada and Ireland a willingness to acknowledge failings by the State has resulted in the establishment of pathways to acknowledgement, compensation and rehabilitation without having to resort to the Courts, although court action remains an option. In Australia where they exist for individuals, those pathways have been established at State, rather than Federal, level. The Federal response has been focused rather on the collective, on the abused community as a whole.

[4.22] The next section analyses the extent to which the New Zealand response meets international human rights standards and how it measures up against other similar jurisdictions.

5 Extent to Which New Zealand Measures Meet International Human Rights Standards

[5.1] International human rights standards require that people with claims of human rights violations while detained by or under the care of the State have access to an effective remedy. New Zealand has a duty to ensure that historic claims are investigated promptly, impartially and effectively, perpetrators where appropriate duly prosecuted, and victims accorded redress, including adequate compensation and rehabilitation.

[5.2] Effectiveness is likely to be jeopardised where claimants have lost confidence in the process. The need for actual or perceived independence lies at the heart of historic abuse claims. Claimants are vulnerable and have suffered at the hands of the State. They have to be assured that the established processes are open and honest, and that things have changed.

Prompt and impartial investigation

[5.3] Despite a raft of inquiries and reports dating back to the late 1960s , there has been no comprehensive, independent investigation of the claims of historic abuse.[107]There has been no authoritative review of the system or services that had responsibility for children and young people in State care, nor of psychiatric institutions, which could provide a reliable evidential basis on which to address claims of historic abuse.

[5.4] Neither of the current agencies with authority to investigate and settle claims is independent. The one independent mechanism, the Confidential Listening and Assistance services is barred from investigating and has no mandate to settle.

[5.5] While the Courts are independent and offer an avenue to test the validity of claims, a number of factors have contributed to limiting their utility in historic abuse cases.

[5.6] The Government considers that a public inquiry is not an appropriate mechanism as they believe that claims generally do not involve broad

[107] Some claims, predominantly those relating to sexual assault identify the fact that an investigation was undertaken at the time of the abuse. However in the majority of cases there appears to have been no effective avenue for complaint available at the time of abuse.

systemic or institutional failure but are, predominantly, concerned with particular incidents and experiences of individuals. MSD has said that in their experience the undertaking of broad research has been helpful in understanding the context for the claims, but that the information gained from such research has not tended to help with resolving the individual allegations that are important to claimants.

Confidential Listening Assistance Service

[5.6] The Confidential Listening and Assistance Services is not mandated either to investigate claims, or determine liability or the truth of the participants' experiences or stories. What it does is assist a participant to compile as much official information about his or her situation as can be located. Such an action would be the first step in any investigation. The service can and does make referrals directly to MSD's Care, Claims and Resolution unit for investigation and resolution of individual cases. As at 29 July 2011 the Service has made 120such referrals. Six referrals have been made directly to CHFA.

MSD Care, Claims and Resolution Team

[5.7] MSD through the Team investigates all claims made to it. An assessment is made as to whether a claim is supported by facts (contemporaneous or by interviewing relevant people) and/or whether the MSD failed the claimant in some way.

[5.8] MSD consider that the Team is impartial and complies with the CAT. The Team is located outside Child Youth and Family (CYF), as part of a team that has as its sole focus the provision of access to justice for current and past claimants of MSD's service lines (one of which is CYF). MSD considers that there are advantages to having the Team sit within MSD but separate from Child, Youth and Family for the following reasons:

- Many claimants have told MSD that it is important to them that the department that they feel wronged them admits its mistakes and apologises to them personally
- The public expects that State agencies should own their mistakes, fix them and learn from them, and doing this is important to building trust
- MSD considers it important that current day services learn from historic claims – the claims have led to new complaints processes being established within Child, Youth and Family, and the Team presents to frontline Child, Youth and Family staff about what they have learned on a monthly basis
- MSD has been able to recruit and retain some of New Zealand's most experience social workers to investigate and resolve these claims.

[5.9] However, the placement of the Team within MSD means that MSD is investigating claims against itself and members of its staff and determining any liability for those claims. Independence (actual or perceived) is clearly called into question. As a result the perception of impartiality may be undermined.

[5.10] The Team provides claimants with the information used to decide their claim through the *practice review.* However research that MSD has commissioned into specific institutions and the *practices of the day* had, until late 2010, been withheld on the basis of litigation privilege. This made it impossible to assess either the accuracy or impartiality of the research. It raised significant questions of denial of natural justice when the claimant could not access, check or challenge important information.

[5.11] In a welcome development MSD is now completing its investigations into residences and is sharing this information with claimants. Findings from all research that the Ministry has commissioned has now been made publicly available.

Civil litigation

[5.12] A number of factors have impacted on the Court's potential to provide prompt and impartial investigation. The use of statutory defences, the bar to proceedings under the ACC scheme, and causation and evidential difficulties which are prevalent in these cases, effectively circumscribe any investigation of the claims being undertaken by the Courts.

[5.13] Further there are significant delays in the litigation process. Since April 2008, the the grant of legal aid in all historic abuse claims has been under review. The volume of cases and limited resources on both sides, and the ongoing appeals have resulted in further delays. Attached as Appendix 3 is a summary of the progress of legal aid applications for one group of claimants.[108]

[108] The LSA has acknowledged that a number of applications for legal aid have not been dealt with in a timely manner and is working with counsel to resolve this.

Progress of Litigation	
S v AG	
23 September 1998	first claim filed
5-16 November 2001	High Court hearing
1 February 2002	Judgment delivered
7-9 April 2003	Appeal heard in Court of Appeal
15 July 2003	Decision delivered by the Court of Appeal
22 December 2005	Final settlement negotiated
W v AG	
15 December 1999	*EW v AG – first claim filed*
12 October 2001	*PW v AG – first claim filed*
26 June-8 August 2007 and 29 October-1 November 2007	High Court hearing
28 November 2007	Judgment delivered
3-5 August 2009	Court of Appeal hearing
23 April 2010	Judgment delivered
18 May 2010	Application for leave to Supreme Court filed
29 June 2010	Judgment delivered

5.15] It is generally accepted that the courts have not provided an appropriate mechanism for the resolution of historic claims of abuse and extensive efforts are being made to resolve claims outside the court process. No claims are proceeding to court at the present time and some legal aid is now available to progress claims through MSD's Care Claims and Resolution Team.

Prosecution

[5.16] Although the Police are empowered to prosecute in relation to claims that someone has committed a criminal offence while acting on behalf of the State, there are substantial evidential issues which prevent Police from exercising this power to its full extent in relation to historic abuse claims.

[5.17] Many of the claimants are still fragile or unwell, and find it difficult to recall specific facts sufficiently fully and accurately to reach the standards necessary for prosecution. As a result, although the Police are committed to investigate historic abuse claims, they claim they are often unable to prosecute complaints as there is not enough evidence to satisfy the burden of proof required in criminal matters.

[5.18] Claimants' lawyers have suggested that in their experience, it has become clear that there is only a sufficient basis for criminal proceedings of such an historic nature once there are 4-5 complainants who have come forward and are prepared to go through the rigours of a criminal prosecution of a person who abused them as a child.

Redress including adequate compensation and rehabilitation

[5.19] The Courts in response to civil litigation have the power to provide redress, including compensation and support for rehabilitation. For a range of reasons this has not proven to be the case in practice.

[5.20] Outside of the Courts, both the MSD Care Claims and Resolution Team and CHFA have a mandate to provide redress including compensation and rehabilitation.

[5.21] The Confidential Listening and Assistance Service is precluded from acknowledging liability or making an apology for past actions of any official; or reporting to the Government (or anybody else) on the stories it has heard from participants. What it can do is provide some advice and assistance that may contribute to rehabilitation.

Confidential Listening and Assistance Service

[5.22] The Service treats claimants with dignity and respect and has a record of contributing to rehabilitation through the quality of its own processes and by brokering assistance from a range of government and community agencies.

[5.23] Generally the Service tries to tailor an assistance package for each participant (if they want assistance) that reflects their specific needs. Some of this assistance is provided by existing services and accessed with the help of a facilitator, and some is directly provided by the Service.[109]

CHFA

[5.24] Recently CHFA has settled a number of claims alleging abuse while in psychiatric care. At the time of writing CHFA was engaging with Counsel to agree a settlement package for existing claimants. It is anticipated that all claims will be resolved outside the court process by the end of 2011.

MSD Care, Claims and Resolution Team

[5.25] The MSD's Care Claims and Resolution process provides the only significant source of access to apologies and compensation. The Team also offers counselling and other services to claimants to assist with rehabilitation, alongside the investigation into their claim, and regardless of the results of that investigation.

---

[109] For example listening, drafting correspondence to Ombudsman etc, connecting people with families, arranging cultural support and contacts, advocacy with Work and Income New Zealand and other agencies and services.

[5.26] Claims made directly to the Team have increased markedly since mid 2009 and MSD has dedicated considerable resources to the Team, which now includes nine senior social workers to manage the increasing number of direct referrals..

[5.27] When the review started it was taking, on average, about 11 months to resolve a claim. Since then MSD has done a number of things to try to progress claims more quickly:

- by making offers to court claims based on a lower evidential burden, for example based on the claimant's own personal account of events, and without consideration of legal hurdles
- by offering an alternative process
- by grouping allegations together and investigating them based on common places and times, with most investigations into residences due to be completed within six months.

[5.28] Because the steps to investigate and resolve a claim may take some time, and these are not necessarily related to claimants' needs for help and support, the Ministry also offers a range of help and support to claimants prior to investigation of their claim and irrespective of its merits.

[5.29] MSD meets every person who approaches it within six to eight weeks of them coming forward. This may enable early resolution of their claim, sometimes based on the person's own account of events. However, some cases require detailed investigation of their own unique facts and MSD advises claimants that this may take 18 months or more.

[5.30] Currently MSD is resolving about 10 to 15 claims per month and estimates that all currently known claims will be resolved in less than five years.

Civil litigation

[5.31] Although no claims are proceeding to court at the present time, where a claim were to ultimately come before the courts for determination, time–

bar, the bar to proceedings under the ACC scheme, and evidential issues make it unlikely that an effective remedy will emerge.

[5.32] Most claimants are socially and economically disadvantaged, poorly educated and inarticulate. They struggle to comprehend legal proceedings and to participate fully in them. Many are or have been in prison (in relation to claims against MSD approximately 47% are in prison at any one time), are in receipt of sickness or invalids benefits, are under Compulsory Treatment Orders or receiving mental health treatment. The majority have long histories of alcohol and/or drug addiction. Many of the claimants are still fragile or unwell, and find it difficult to recall – at least sufficiently fully or accurately to satisfy the court – the names of abusers, the details of what happened or the dates (even approximate) when events occurred.

[5.33] Given the evidential standards required for successful court action and the adversarial nature of the process, litigation can result in claimants being re-traumatised by having to tell their story a number of times.

[5.34] They must disclose abuse to a lawyer to establish that they have a valid claim and disclose their story again in more detail at a formal interview. They must read through documents which have been prepared for the case (statement of claim, affidavit and all briefs of evidence prepared for the trial). From this, more detailed questions are posed in preparation for trial. They are seen by a psychiatrist (sometimes on several occasions) instructed by their lawyer, and up to two instructed by the Crown Law Office where they must disclose abuse in detail. They must work through briefs of evidence to ensure details are correct. They are shown documents from records to which they have to respond. They must give evidence in Court and be subject to cross-examination.

[5.35] Where a claim has been filed in court, a settlement payment may be offered. MSD has said that it will not use legal defences as a reason not to make a fair offer on any claim, and that it considers each claim based on its facts. MSD says it offers the same for court and out-of-court claims. Significant efforts have been made to reach out of court settlements through the Care Claims and Resolution Team and direct negotiations.

[5.36] However, claimants' lawyers have indicated that often only some aspects of the claim are accepted in settlement and claimants are required to waive other aspects of their claims. In particular, claimants have been required to waive all BORA actions before settlement will be made.

[5.37] MSD has advised that any aspect of a person's claim that is factually supported or believed to have merit will be subject to a settlement offer. The only aspect of a claim the Crown requires to be waived to enable settlement is a claim of torture. Claims of torture can not be settled by the Crown and must be heard by the court.

6. Conclusions

[6.1] Those who claim abuse whilst in State care have a number of options available to them. They can complain to the New Zealand Police, seek informal resolution through either MSD's Care Claims and Resolution Team or through CHFA, in some cases call on the State's no-fault Accident Compensation scheme, engage with the Confidential Listening and Assistance Service or bring civil proceedings

[6.2] In this regard New Zealand generally meets the human rights standards that apply to historic claims of abuse and mistreatment while under the care of the State. However, this review has shown that some concerns remain around certain aspects of the current framework.

Prompt and Impartial Investigation

[6.3] With respect to prompt and impartial investigation, there has been no comprehensive, independent investigation into the services for children or young people, or the mental health services covering the period of the claims.

[6.4] In the past there have been a number of inquiries into particular institutions, specific events and even aspects of the services as a whole. Taken together they are suggestive of conditions that could give rise to the abuse and mistreatment being claimed.

[6.5] More recently, the research by the Ministry of Social Development into both the policies and practices of the period from which the claims originate; and the management and operations of individual institutions, provides information that could form the basis of a comprehensive independent investigation in relation to the treatment of children and young people in State care from the 1960's through to 2000.

[6.6] Regrettably, there is little equivalent research available to claimants who had been patients of psychiatric institutions.

[6.7] There is sufficient material in relation to both children's services and psychiatric institutions in the historic inquiries and current research to at least question the Government's perception that the claims generally cannot be taken as indicative of systemic or institutional failure. It is not unreasonable to question whether the abuse and mistreatment that is acknowledged by Government to have occurred can be dismissed as

simply the work of a few bad or misguided individuals or an unfortunate product of generally accepted practices of the day. Or whether it is, at least in part, the result of poor policy, or a failure of the State to meet its fundamental duty of care through inadequate oversight at the national, regional or institutional level.

Prosecution

[6.8] With respect to prosecution, historical claims of abuse clearly present particular difficulties for the Police. While it is understandably frustrating for a complainant, the standard of proof required for a criminal charge means that the Police may be reluctant to proceed in the absence of corroborating evidence in the complainant's official records, other complainants with similar experiences or very persuasive circumstantial evidence.

Redress Including adequate compensation and rehabilitation

[6.9] There are currently four mechanisms available in New Zealand through which victims of historic abuse and mistreatment while in State care may seek redress. Of those, two work in ways, and offer services that, may assist rehabilitation: The Confidential Listening and Assistance Service and the MSD Care, Claims and Resolution Team. Three mechanisms: civil litigation (and associated settlement processes), the MSD Care Claims and Resolution Team and the Crown Health Financing Agency may provide compensation.

[6.10] As the Review has shown there are a number of barriers to fair settlement of historic claims of abuse through the Courts, the most obvious being the adversarial nature of the process, the evidential standards required, the existence of time-bar defences, and New Zealand's accident compensation regime.

[6.11] For these reasons, it is generally accepted that the courts have not proven to be an appropriate forum for the resolution of historic claims of abuse. In *J* Gendall J said:

> "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."[110]

Increased efforts are now being made to resolve claims outside the court process and at the current time no claims are proceeding to the courts.

[6.12] The two mechanisms with the most constructive outcomes for claimants are the Confidential Listening and Assistance Service and the MSD's Care, Claims and Resolution Team.

[6.13] The Service meets international best practice in a number of respects:

- it is independent and chaired by a Judge
- it treats people with dignity and respect
- it is entirely victim-focused; and
- it tailors assistance to a person's individual needs.

[6.14] However, the Service is precluded from acknowledging liability; making an apology for the past actions of any official; paying compensation or recommending that compensation be paid; and reporting to the Government (or anybody else) on the stories it has heard from participants. This is a significant limitation.

[6.15] In December 2009 the Service provided a report to the Ministers of Justice, Health, Education, Welfare and Internal Affairs as per its Terms of Reference[111]. The report noted that:

> "The Confidential Listening and Assistance Service is only one arm of a whole of government response with regard to those who allege abuse and neglect in State care prior to 1992. The Service cannot on its own be a complete answer to the needs of the participants; it does not collate or publish stories and is therefore limited as a truth and reconciliation model."

[6.16] MSD's Care, Claims and Resolution process provides an alternative mechanism to resolve claims which is broadly based on natural justice principles. Like the Service it also meets international best practice in a number of respects. It treats claimants with dignity and respect, is

---

110 See also *J v CHFA* CIV 2000-485-876, 8 February 2008

111 The Commission obtained a copy of this report under the Official Information Act 1982. However the Services' recommendations were redacted from the report on the grounds that they were "under consideration" by Joint Minsters.

victim-focused and generally reflects MSD's commitment to take responsibility for any wrongdoing.

[6.17] The Team has made significant progress in resolving claims and is the only mechanism currently available in New Zealand which provides claimants with a full range of support services, the opportunity to be heard and where appropriate access to an apology and/or compensation. As a result, virtually all claims have been moved from the court process into a process of direct resolution with MSD.

[6.18] Despite this progress, claimants' lawyers continue to have concerns about the evidential threshold relied upon by MSD, their inability to challenge that threshold and the potential lack of independence of the Team's investigations. In addition concerns have been raised about the lack of an impartial advisory service for claimants without legal representation.

[6.19] The Team operates within MSD - it is funded and staffed by the very Department it investigates. Due to this structure it is unlikely that it will ever be perceived as truly impartial by claimants, their lawyers and the New Zealand public.

[6.20] There is no equivalent process available to claimants who had been patients of psychiatric institutions

Moving to full compliance with international human rights standards

[6.21] Given the experience of the past decade in responding to historic claims of abuse and the developments that have occurred over the two years since the Committee against Torture issued its Concluding Observations, New Zealand could build on the best aspects of current practice to become fully compliant with international human rights standards and better provide justice for victims of historic cases of abuse.

[6.22] Building on the strengths of the Confidential Listening and Assistance Service and the MSD Care, Claims and Resolution Team, and the lessons learnt from the direct negotiations undertaken by both MSD and CHFA, the priority must be to establish an independent and impartial (in the

fullest sense of the word) process to hear, investigate, evaluate and offer redress to claimants.

[6.23] The process must apply to all claimants regardless of whether their claim relates to psychiatric hospitals, social welfare homes or institutions, foster care arrangements or education facilities.

[6.24] It must be one that:

- gives the Crown reasonable assurance that allegations have substance
- operates fairly and demonstrates good faith
- provides claimants with access to an impartial advisory service
- does not leave claimants disadvantaged if there is no settlement
- meets the various needs of claimants, including those looking for redress other than financial compensation, and those who cannot readily take part in traditional dispute resolution processes
- leaves open the possibility of civil litigation where there is no settlement
- allows individuals to be prosecuted
- is not so rigorous or time-consuming as to render the process unattractive
- uses public resources efficiently. Drawing on international experience, the fiscal risk to government could be mitigated by following the Irish or Queensland examples of determining scale of payments and by a time limit for registering of claims.

[6.25] All findings must be published, at least, in general terms, so that victims are able to learn that they were not alone in their experience and that the abuse experienced was not their fault. Acknowledging that the exact structure of any framework will be dependent on a number of factors, attached as Appendix 4 is a possible framework for resolving historic claims of abuse in line with international obligations and best practice.

[6.26] Finally, it is crucial that victims of abuse and ill-treatment while in State care have access to the courts if they are unable to resolve their claim through the alternative process. The use of time-bar in historic abuse cases renders the right to an effective remedy through the courts a nullity. For that reason the Crown should cease, as far as is possible,

invoking time-bar defences in relation to claims of historic abuse and ill-treatment whilst in the care of the State.

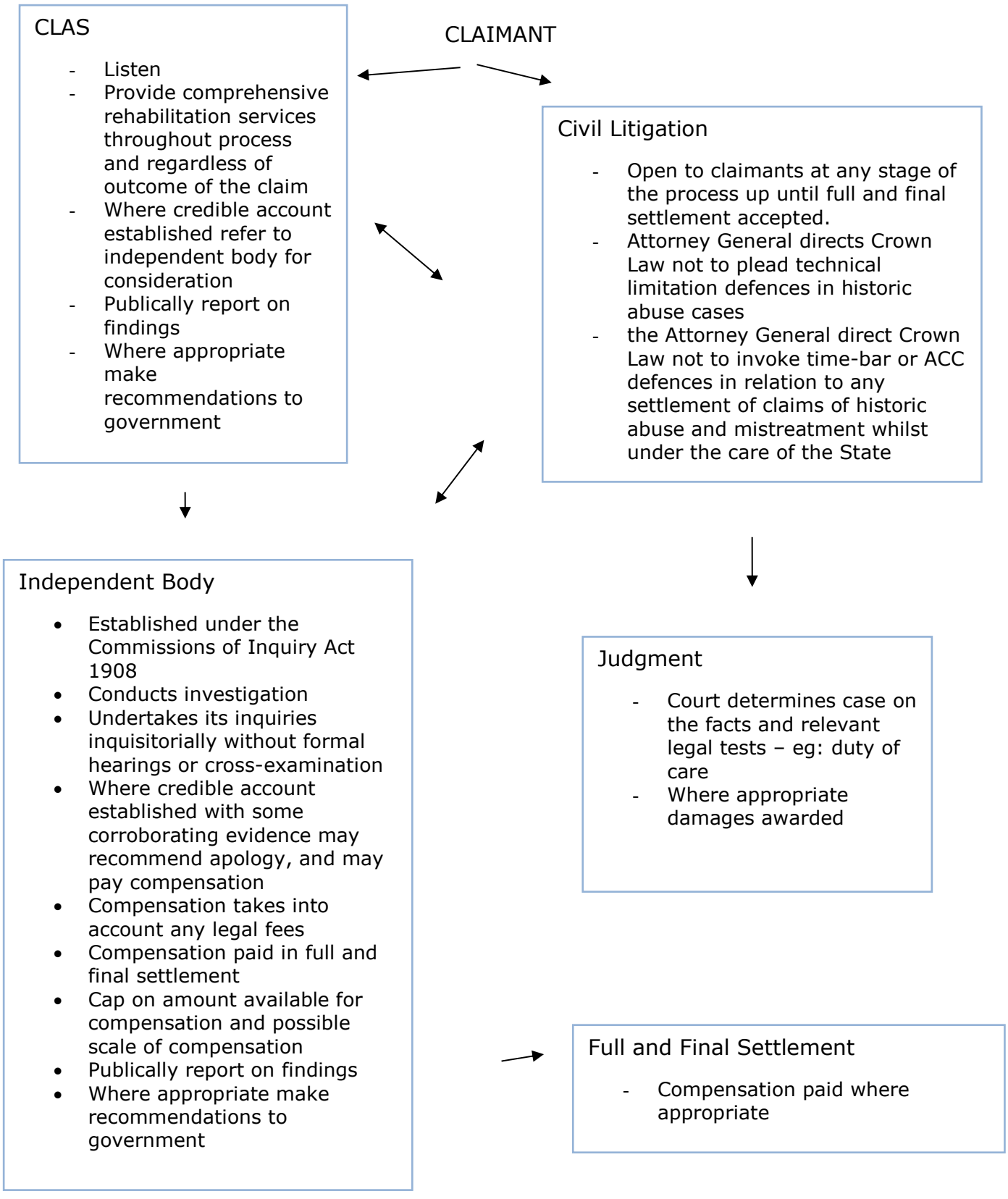
Recommendations

The Human Rights Commission recommends that the Government:

1. Commit to resolving all historic claims of abuse within 5 years by establishing an independent body with the power to provide support for rehabilitation, compensation and an apology.

2. Cease the use of time-bar defences in relation to civil proceedings relating to allegations of abuse and ill-treatment whilst in the care of the State.

APPENDIX 4: Possible framework for resolving claims of historic abuse



APPENDIX 1 – TERMS OF REFERENCE

REVIEW OF THE STATE'S RESPONSE TO HISTORIC CLAIMS OF ABUSE AND MISTREATMENT SUFFERED WHILE UNDER THE CARE OF THE STATE

TERMS OF REFERENCE

Background

1 Claims have been brought by upwards of 500 claimants in respect of alleged abuse in Social Welfare homes and other State institutions during the 1970s, 1980s and earlier. In the period 2002 – 2009 the Commission received 38 complaints from persons alleging abuse or maltreatment whilst under the care of the State.

2 Currently allegations of historical abuse are being dealt with through a variety of mechanisms. These include:

(a) the existing social security regime;

(b) the Accident Compensation framework;

(c) the Ministry of Social Development's Care, Claims and Resolution process;

(d) the listening and assistance service (and before that the confidential forum); and

(e) the Courts.

3 The International Covenant on Civil and Political Rights provides in Article 7 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 10 states that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Article 2 provides that every State party to the covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding

that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

4 Furthermore, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment elaborates on the State's responsibility to prevent such treatment and then in Articles 13 and 14 spells out how the State should respond to victims alleging such treatment.

5 These international standards are reflected domestically, in particular through the New Zealand Bill of Rights Act 1990 (BORA). Section 9 of the BORA provides that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. Domestic jurisprudence has confirmed that there is a general right to an effective remedy under the BORA

6 In 2009 the United Nations Committee against Torture (UNCAT) stated in its concluding observations on New Zealand's fifth periodic report:

> [New Zealand] should take appropriate measures to ensure that allegations of cruel, inhuman or degrading treatment in the "historic" cases are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation.

7 UNCAT has requested that New Zealand, provide within one year, information on measures taken to respond to this recommendation.

8 Representations made to the Commission raise questions about the extent to which the range of mechanisms available to people with historic claims of abuse meet the required international human rights standards and about whether any or all of them are capable of providing the required redress in proven cases.

9 With New Zealand's report back to UNCAT due in May 2010, it is timely that the Commission undertake a review of the measures taken by the State to investigate, prosecute and accord redress in claims of abuse suffered while under the care of the State.

10 The Commission's findings will be reported in the first instance to the Minister of Justice and subject to the findings, the Commission may make a report to the Prime Minister, as provided for in the Human Rights Act S5(2)(k) .

11 The Commission's findings will be made available to the UNCAT.

12 The review will be conducted under the powers granted to the Commission pursuant to section 5 of the Human Rights Act 1993 including, but not limited to the following:

(a) to inquire generally into any matter, including any enactment or law, or any practice, or any procedure, whether governmental or non-governmental, if it appears to the Commission that the matter involved, or may involve, the infringement of human rights (section 5(2)(h); and

(b) to publish reports s5(3).

Review

13 The Commission will examine—

(a) New Zealand's responsibility to investigate promptly and impartially, prosecute and accord redress in claims of abuse and mistreatment while under the care of the State;
(b) the nature and extent of measures taken by the New Zealand Government to investigate, prosecute and accord redress in claims of abuse and mistreatment while under the care of the State
(c) the extent to which such measures meet international human rights standards and
(d) the nature and extent of measures taken by other jurisdictions (including but not limited to Ireland, Scotland and Australia) to investigate, prosecute and accord redress in respect of claims of abuse and mistreatment while under the care of the State;

14 The Commission will consider, as a result of this examination, whether to make recommendations on:

(a) changes to legislation, regulations, policies and practices; and
(b) other steps required to address the abuse of persons while under State care.

Engagement with Government

15 The Commission will seek information from government, including but not limited to the—

a. Ministry of Social Development;
b. Ministry of Health;
c. Crown Health Financing Agency;
d. Ministry of Justice;
e. Crown Law office; and
f. The Legal Services Agency.

16 The Commission will brief the Minister of Justice, seek his comments on the draft Terms of Reference and request cooperation from the Ministry of Justice, the Legal Services Agency and other relevant government agencies.

Engagement with Claimants, their lawyers and others

17 The Commission will also seek information from lawyers and other persons involved in claims of abuse and mistreatment suffered while under the care of the State.

18 However the merits of individual claims are outside the scope of this review and will not be considered by the Commission. The review will focus entirely on the processes and procedures for responding to historic claims of abuse and mistreatment suffered while under the care of the State

Timeframe

19 The Commission will use its best endeavours to conduct this review according to the following timeframe:

a. October – December 2009: Information gathering, analysis of situation in New Zealand – consultation as appropriate;
b. January – February 2010: comparative research –undertaken with assistance from two interns from the University of Ottawa, Canada;
c. February –March 2010:Report writing - consultation as appropriate;
d. March 2010: Draft final report circulated for comment;
e. May 2010: Final report and any recommendations published.

Confidentiality

20 The review will receive confidential evidence if this is necessary, for instance, to protect personal privacy. Every reasonable step will be taken to ensure such evidence remains confidential.

APPENDIX 2 – APPROACHES ADOPTED IN OTHER JURISDICTIONS

---

1 IRELAND

In the 1970s the Irish government issued the Kennedy Report which identified the horrible conditions that children faced in state-run residential schools. In the 1990s individuals began bringing claims against their former abusers. In 1999 a three-part documentary was broadcast, 'States of Fear.' Soon after that broadcast the Irish Taoiseach (Prime Minister), Bertie Ahern, apologized over the abuse people suffered in state care.

Soon after this apology the Irish *Statute of Limitations (Amendments) Act 2000* was passed to take into account the delay in people reporting claims of abuse. The Act allowed people to bring claims who otherwise would have no recourse in a court. The Act specifies that if a person suffers from a psychological injury due to child abuse, the normal three-year period of limitations does not commence until they overcome the psychological injury.

1.1 COMMISION TO INQUIRE INTO CHILD ABUSE

In May 1999 the Commission to Inquire into Child Abuse (the Laffoy Commission) was established. The Laffoy Commission's inquiry was restricted to institutional abuse from 1940 onwards. The three principal functions of the Laffoy Commission were:

- to listen to victims of childhood abuse who want to recount their experiences to a sympathetic forum;
- to fully investigate all allegations of abuse made to it, except where the victim does not wish for an investigation; and
- to publish a report on its findings to the general public.

Victims and survivors were able to choose how they wished to tell their stories – either to a confidential committee or an investigative committee.

The Confidential Committee

The Confidential Committee was a non-adversarial forum where victims of abuse had the opportunity to recount their stories. Evidence was not tested and alleged perpetrators had no right to challenge the evidence. The Confidential

Committee was to report in general terms, its findings as to occurrences of abuse.[112]

[112] No identifying information that could lead to the identification of persons alleged to have suffered abuse or persons alleged to have committed abuse was to be included, and no findings in relation to particular instances of abuse was to be made.

The Investigation Committee

The Investigation Committee had the power to investigate and make findings against alleged perpetrators. In accordance with due process, prior to any finding the alleged perpetrator must be heard and given the right of reply. The Investigation Committee was to:

- identify the institution and the person who committed the abuse, where the committee is satisfied that abuse of children occurred in a particular institution; and
- report any findings[113] in relation to the management, administration, operation and supervision of an institution.

The Investigation Committee had no power to award compensation.

1.2 COMPENSATION ADVISORY COMMITTEE

As a result of the Laffoy Committee's inability to provide compensation, the Irish Government set up the Compensation Advisory Committee (CAC) to devise a compensation scheme that was fair and responsible. The CAC produced the Ryan Report which noted the importance of providing redress to "allow many of those victims to pass the remainder of their years with a degree of physical and mental comfort which would otherwise not be readily obtainable." In the Report the CAC recommended that claimants be eligible for up to €300,000 in compensation.[114] It was suggested that compensation be measured from a scale of 0-100. The higher one is on the scale the more compensation they are eligible to receive.

Constitutive elements of redress	Severity of abuse	Severity of injury resulting from abuse		
		Medically verified physical/psychiatric illness	Psycho-social sequelae	Loss of oppotTeamy
Weighting	1-25	1-30	1-30	1-15

Redress Band	***Total Weighting for severity of abuse and injury/effects of abuse***	***Award payable by way of redress***
V	70 or more	€200,000 - €300,000

[113] In making findings of fact the Committee applies standard of proof applicable in civil proceedings, proof on the balance of probabilities. Hearsay evidence is not admissible.

[114] More if there are aggravating and other mitigating circumstances.

IV	55-69	€150,000 - €200,000
III	40-54	€100,000 - €150,000
II	25-39	€50,000 - €100,000
I	Less than 25	Up to €50,000

The four categories used to assess where a person may fit on the scale are: the severity of abuse, severity of a medically verified physical/psychiatric illness, the severity of psycho-social consequences and, finally, how the abuse caused loss of opportunities.

1.3 RESIDENTIAL INSTITUTIONS REDRESS BOARD

The *Residential Institutions Redress Act 2002* set up the Residential Institutions Redress Board (RIRB) to administer the compensation scheme envisaged by the Ryan report to those who were abused as children in state-run institutions. The RIRB is independent and is chaired by a judge. From December 2002 to December 2005 the RIRB collected applications and advertised in the Irish media, generating over 14,541 applications.

Applicants had to establish four matters in order to be considered by the RIRB: their identity; their residence during childhood (they had to have resided at an institution mentioned in the Act); that they were abused as a resident of the State; and lastly, that injury is consistent with any abuse alleged to have occurred while resident.

Payments made by the RIRB are on an *ex gratia* basis and do not establish any liability on the part of state bodies. Payments are intended to provide some solace to the victim rather than an attempt to put right the wrong they have suffered.

It is important to note that the board does not make findings of fault or negligence – applicants are not required to produce evidence of negligence by a person, their employer or a public body. Moreover, when there is a conflict of evidence, the making of an award does not constitute a finding of fact or fault. The fact that applicants do not have to prove fault makes the RIRB distinct from litigation where proof of fault and negligence is the key to success or failure.

The CAC concluded that "no amount of money can truly compensate those who have been abused [and] … that it is vital that a comprehensive package of services and other forms of assistance is put in place for the benefit of survivors."[115] The RIRB has set up a Money and Budgeting service to provide financial advice to applicants who receive awards. [116]

2 AUSTRALIA

Throughout the 1980s and 1990s, a growing number of concerns about the welfare of children who had been, or were still, in institutions and other child care arrangements were investigated. In 1985, the Senate Standing Committee on Social Welfare tabled a *Report on Children in Institutional and other Forms of Care - a National Perspective*. State reports prepared during this period on aspects of children in care included:

[115] The Compensation Advisory Committee (2002) *Towards Redress and Recovery: Report to the Minister for Education and Science,* Ireland: pp v-vi.

[116] The National Counselling Service, a free, confidential, community based service for adults who were hurt by childhood abuse in Ireland operates throughout Ireland through its 10 health boards.

- New South Wales: Report to the Minister for Health and Community Services from the committee established to review substitute care (1992); the report by Cashmore, Dolby and Brennan on systems abuse (1994);
- Victoria: Family and Children's Council, review of the redevelopment of protective services for children in Victoria (1990);
- South Australia: Position Paper from the Department of Family and Community Services, *Breach of duty: a new paradigm for the abuse of children and adolescents in care* (1995);
- Western Australia: Department of Community Welfare report, Children in limbo: an investigation into the circumstances and needs of children in long term care in Western Australia (1981);
- Tasmania: Legislative Select Committee report on child and youth deprivation (1984);
- Queensland: Report from the Commission of Inquiry into Abuse of Children in Queensland Institutions (the Forde Commission) (1999).

More recently governments, usually at the state level, have conducted several high profile inquiries into this abuse.

2.1 BRINGING THEM HOME

In May 1995, Sir Robert Wilson chaired a Commonwealth Human Rights and Opportunity Commission (HREOC) investigation into the history of indigenous children who were removed from their families. Legislation allowed the removal of indigenous children from their homes and promoted their assimilation. The report found that many of the indigenous children were abused, often sexually. Several recommendations were made:

- apologies from the Australian government, police forces and churches;
- monetary compensation;
- rehabilitation, counselling and principles to allow indigenous communities to have control over their own children.

As a result of this report the Australian Prime Minister at the time, John Howard, delivered a statement of regret in Parliament. The Federal government set up a $63 million assistance fund including funds for programs for indexing and preserving files, providing family support, providing for indigenous family support programs and establishing projects for culture and language maintenance and oral histories.

2.2 FORDE REPORT

In 1998 the Queensland government established a Commission of Inquiry chaired by Ms Leneen Forde to examine:

- if there had been any abuse, mistreatment or neglect of children in Queensland institutions; and
- if there had been any breaches of relevant statutory obligations during the course of the care.

The inquiry considered more than 150 institutions and examined the period from 1935 to the late 1990s. It looked at child welfare, care for indigenous children placed in homes by the state, the youth criminal justice system, and those placed in foster homes. These children experienced significant abuse, including, but not limited to, mental, emotional, sexual and physical. Furthermore, institutions were often poorly managed and under-staffed, leaving vulnerable children exposed to abuse. Often these institutions were managed the churches, such as the Catholic and Anglican Church.

The report recommended a series of measures to correct the existing situation in institutions and foster homes. Furthermore, the report noted measures should be taken so that the Churches and the Queensland government can compensate those who were abused.

The Queensland government agreed to:

- make an apology in conjunction with the Anglican and Catholic Church;
- look at its existing legislation and to develop new legislation to protect the young and vulnerable;
- fund other resources and organisations to help provide services for former residents; and
- commit $100 million to compensation.

People who were abused are eligible for a payment of $7000. In addition, a second payment of $33,000 is payable in more serious cases of abuse and neglect. The Queensland government is also providing access to legal & financial services and practical assistance in completing applications for compensation.

2.3 LOST INNOCENTS: RIGHTING THE RECORD

In June 2000, the Senate, on the motion of Senator Andrew Murray, referred the issue of child migration to the Senate Committee for inquiry and report. The Committee was to consider "Child migration to Australia under approved

schemes during the twentieth century, with particular reference to the role and responsibilities of Australian governments and to whether any unsafe, improper, or unlawful care or treatment of children occurred in such institutions."

The Senate Committee found that many of these child migrants were abused – emotionally, physically and sexually - and made 33 recommendations. Included in the recommendations was money for a support fund and various measures to assist former child migrants, such as ensuring they are provided with services and have proper access to their records.

In 2002 the federal government responded to the Senate Committee report by giving $120,000 a year to the Child Migrant Trust (a fund for family tracing and counselling), $100,000 for memorials and $1,000,000 per year for three years in funding to help assist former migrants reunite with their families.

In November 2009 Prime Minister Kevin Rudd officially apologised.

2.4 TASMANIAN INQUIRY INTO ABUSE OF CHILDREN IN STATE CARE

In July 2003, the Tasmanian Department of Health and Human Services became aware of allegations of abuse in the early/mid 1960s. The Ombudsman conducted an investigation and opened a hotline, which lead to over 200 claims of abuse in foster homes and in church-run institutions being reported.

The Ombudsman recommended ongoing counselling and medical fees for the claimants to be paid by the Tasmanian government.

A redress scheme was established whereby people who were abused were eligible for up to $60,000 in compensation. The redress scheme was closed in 2005 and then reopened in 2008.

2.5 SENATE INQUIRY INTO CHILDREN IN INSTITUTIONAL CARE

In 2004 the Australian Senate Committee undertook a study into abuse that children suffered in State care.

The committee noted in its 2004 report that the Government of Australia should apologise. The Australian government responded by noting that it would not be appropriate for it to apologise, it saw this as the responsibility of the states and territories.

The Committee also recommended that the federal government establish a national reconciliation fund. Again the federal government deferred this matter to the states, territories, agencies and churches who were directly involved in these matters.

The Federal government did however express interest in developing whistleblower legislation, supporting literacy programs, and setting up memorials.

In November 2009 Prime Minister Kevin Rudd formally apologised to the victims of childhood abuse in the country's orphanages and government-run institutional facilities.

3 CANADA

Over the last decade a number of the provinces have enacted specific statutory limitation regimes to respond to cases of childhood sexual abuse. For example British Columbia, Saskatchewan and Newfoundland have abolished limitation periods in respect of sexual abuse claims.

In 1997 the Minister of Justice instructed the Law Commission to prepare a report addressing processes for dealing with institutional child physical and sexual abuse. In 2000 the Law Commission issued its report *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*[117]. The Report identified eight primary areas of need:

- the establishment of a historical record;
- acknowledgement;
- apology;
- accountability;
- access to therapy or counselling;
- access to education or training;
- financial compensation; and
- prevention and public awareness.

The Law Commission considered a number of resolution approaches, but did not identify a preferred option.

3.1 Residential Schools

The 1996 Royal Commission on Aboriginal Peoples and the Law Commission Report had raised particular concerns for First Nations children who had been through the residential care system. The number of individual cases being filed

117 The report considered not only physical and sexual abuse, but also emotional abuse.

relating to Indian Residential Schools had been growing rapidly since the early 2000s. By 2006 there were some 15,000 cases.

In response the Government developed a three-pronged system of redress:

- an apology in which the Government acknowledged its responsibilities in relation to abuses that occurred in residential schools and apologised to those affected;[118]
- the creation of a healing fund ($350 million) and a community-based healing strategy to assist those affected; and
- an Alternative Dispute resolution (ADR) process.

The ADR process was split into Models A and B: Model A was for people claiming for abuse that was more serious; model B was for less serious cases. Once applications are accepted they will appear before a decision-maker who will decide if their claim is valid and what compensation should be awarded. Claimants can either accept or reject the decision, but the compensation amount is non-negotiable.

In 2006 the Indian Residential School agreement set aside $2 billion for compensation. Common experience payments were to be available for victims of abuse at residential schools – being $10,000 and $3,000 for each additional year spent at a residential school. In addition, former students who claim some form of physical, sexual or psychological abuse can file separate claims for additional compensation through the "Independent Assessment process". This is capped at $275,000. Claims filed in the initial ADR scheme will still be processed, but no further claims are being received.

The 'common experience payment' is available to any former student and the claimants are not required to evidence harm or damage. Claims through the "Independent Assessment process" do require evidence and the standard of proof is on the balance of probabilities. Alleged perpetrators do not have a role as a party but are to be heard.

If claimants are awarded compensation and accept it then they must sign a release waiving the right to sue the Government for claims relating to their residential school experiences.

118 In some cases individual apologies have been made.

In June 2008, the current Prime Minister of Canada, Stephen Harper, apologised for Residential Schools in the Canadian House of Commons. His apology was historic and leaders of the aboriginal community of Canada were present in the House of Commons for the apology. This led to the Truth and Reconciliation Commission being established to document the truth of what happened by relying on records held by those who operated and funded the schools, testimony from officials of the institutions that operated the schools, and experiences reported by survivors, their families, communities and anyone personally affected by the residential school experience and its subsequent impacts. The Truth and Reconciliation Commission was given $60 million and a five-year mandate. It was also tasked with a $20 million commemoration fund and $125 million Aboriginal Healing Fund.

APPENDIX 3 – PROGRESS OF LEGAL AID APPLICATIONS

The table below[119] shows the progress of legal aid applications in relation to one group of claimants

Chronology	
January – March 2008	The Legal Services Agency ("the Agency") advises Counsel that as a result of the failures of the plaintiffs in the *White, J and Knight* matters, the Agency is implementing a withdrawal of aid process whereby: - Counsel is to provide an analysis of each claim and advise the Agency as to whether there is any reason they should *not* withdraw aid from each client. - The only work that will be funded in respect of the historic claims is court-timetabled work.
April – June 2008	Notices of intention to withdraw aid on each file are forwarded to Counsel and their clients. Analyses are forwarded to the Agency as arranged, with particular emphasis on files where urgent work needs to be undertaken. The Agency undertakes to respond to each analysis within 15 days of receipt and asserts that it has the resources to deal with the analysis process. However, the Agency immediately falls into default of its self-imposed timetable.
June – July 2008	Counsel applies to the Agency for funding to undertake an ADR process, as opposed to the High Court litigation process, in respect of some clients' files. The Agency requires that Counsel provide evidence that the Crown will waive its defences in looking to achieve a resolution. Counsel communicates its view that the Agency is making the continuation of the claims impossible as no defendant would waive their legal defences before an ADR process has taken

[119] Correct as at August 2010

	place. Counsel also expresses concern at the quality of the letters withdrawing aid.
January - September 2008	The Agency withdraws aid for approximately 35 clients, some of whom have multiple files. Most of the decisions are reviewed to LARP. By this time, the Agency is in considerable default of its obligations in terms of making submissions and releasing files to LARP. The Agency repeatedly asks for extensions and/or simply breaches timetables imposed by LARP.
September 2008	Counsel requests a meeting with the CEO of the Agency, expressing concern that the Agency has decided in advance to withdraw aid and was now attempting to find reasons to justify its decision, and points out that: - for most of that year Counsel had had to deal with the analysis process and the resources it has consumed; - since May 2008, 350 analyses had been submitted, yet the Agency had only responded to about 50 of these and in all but a few where further information was requested, aid was withdrawn; - the Agency had on a number of occasions made elementary errors of law and there had been several occasions where the Agency acted contrary to earlier agreements or understandings, and/or simply misstated facts. The CEO of the Agency declines to attend such a meeting.
November 2008	LARP directs that the Agency's submissions in respect of the outstanding LARP applications from Counsel are to be completed by the end of November 2008. The Agency defaults on this timetable.
September – December 2008	The Agency withdraws aid for approximately 20 clients. Most of the decisions are reviewed to LARP.
March – April 2009	The Agency continues to default on LARP timetables.
January – April 2009	The Agency withdraws aid for approximately 12 clients. Most of the decisions are reviewed to LARP.

Early May 2009	LARP releases its first decisions, reversing the withdrawal of aid for 14 clients
May 2009	Counsel suggest to the Agency that, in light of the decisions of LARP, the Agency should reconsider its approach to the cases. Instead, the Agency appeals the decisions of LARP to the High Court. This appeal is heard in July 2009. The total cost of two external senior counsel for the Agency for this first appeal alone is $107,750.00.
July 2009	In response to a further complaint from LARP about the Agency's timetable defaults, the Agency suggests that LARP await the outcome of the High Court appeal before making any further progress on applications currently before it.
August 2009	Decision issued in respect of the Agency appeal. One appeal was unsuccessful, all others were sent back to LARP for reconsideration of various issues.

October 2009	LARP issues a reconsidered decision on *W*'s file. Again, the Agency's decision is reversed. The Agency again appeals LARP's decision to the High Court ("the *W* appeal").
November 2009	LARP releases two decisions, one reversing the Agency's decision and one upholding it. The Agency appeals the first decision ("the *B* appeal").
May – December 2009	The Agency withdraws aid for approximately 13 clients. Most of the decisions are reviewed to LARP. The Agency also declines to grant funding in respect of 33 new applications for. Applications are made to LARP for review of those decisions.
March 2010	LARP releases 4 decisions overturning the Agency's decisions to decline aid for 4 new clients.The Agency appeals these 4 decisions ("the *G et al* appeal"). The *W* and *B* appeals are heard together. The total cost of two external senior counsel for the Agency for this appeal, combined with 'general work' in respect of the withdrawal process is a further $192,000. The Agency continues to default on the agreed timetables without apology or explanation.
April – May 2010	The decision in the *W* and *B* appeals is issued – the *W* decision is upheld and the *B* decision reversed. LARP directs a further teleconference in light of the High Court decision and in light of the Agency's continuing breaches of timetables. The day before the teleconference the Agency advises, without apology or explanation, that it will no longer be attending.
January – April 2010	The Legal Services Agency withdraws aid for approximately 20 clients. Most of the decisions are reviewed to LARP.

May – June 2010	The Legal Services Agency withdraws aid for approximately 46 clients in the space of just two months. Most of the decisions are reviewed, or will be reviewed, to LARP.
December 2009 to June 2010	Approximately 50 applications for legal aid made in respect of historic claims. As at 30 June 2010, none of the applications have even been processed.
June – August 2010	The Agency withdraws aid for approximately 17 clients. Most of the decisions are reviewed to LARP.
General statistics as at 31 August 2010	(NB these statistics are in respect of files, not individual clients – many clients have up to three files, relating to abuse in Social Welfare, psychiatric hospital and/or church care) There are: • 32 files still before LARP in respect of which legal aid was declined and Counsel made applications for review of those decisions. • 130 files at various stages before LARP in respect of which legal aid has been withdrawn. Since the first LARP applications were lodged in May 2008 (over two years ago), 31 LARP decisions have been released. In 9 of those decisions, LARP reversed the Agency's decision to withdraw or decline aid. The Agency has appealed to the High Court in every case, except one, where its decision has been reversed. Counsel has now appealed, or intends to appeal, a number of LARP's recent decisions where the Agency's decision to withdraw aid has been confirmed.
August 2010	The *G et al* appeals are heard. At the time of writinghe High Court had not yet issued a decision. The Legal Services Agency lodged another appeal against LARP's decision to modify the Legal Services Agency's decision in August 2010.
Since 2009, Counsel has settled, or will settle, the claims of some 45 clients (and growing) bringing historic abuse claims, the majority of whom are	

legally aided. The Legal Services Agency has been reimbursed approximately $500,000 in costs, a figure which will also grow.

APPENDIX 2

Submission of CLAN NZ to the Social Services Committee

3 March 2017

Submission on: The Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill

Personal details: This submission is from Pat McNair in Hamilton on behalf of CLAN NZ. I am a Committee Member and the NZ Representative of the Australian-based Care Leavers Australasia Network (CLAN). I wish to appear before the committee to speak to my submission. I can be contacted at: clan.nz@actrix.co.nz or 07 855 8162.

Submission

CLAN NZ opposes the intent of this bill. CLAN NZ is an independent support and advocacy group working for justice and redress for all New Zealanders who grew up in orphanages, institutions or children's homes, as State wards, welfare children or in foster care - or in any other form of what is now known as 'out-of-home-care'. For the purposes of this submission, we will refer collectively to these various placements as the 'Child Welfare System'.

Our CLAN NZ Care Leaver members are all 18 years or over and have all 'left care'. Therefore, we refer to them and others who were in 'care' as 'Care Leavers.'

Our submission, therefore, is focused on Clause 38 (the information sharing and information disclosure clauses) of the proposed Bill, specifically in the context of Care Leavers' records. It is written from the perspective of adult Care Leavers.

Introduction

Care Leavers are the only people in New Zealand society who have to go to a Government Department in order to get their personal and family histories. It needs to be remembered that it is their history and their right to have their full history.

For a Care Leaver, records are of the utmost importance. Being able to access their personal files and records usually represents their only hope in finding answers to the many questions that they have carried with them for a lifetime. Care Leavers deserve to find the full and complete truth about their past. However, the reality is a disgrace. Care Leavers are often initially lied to and told that the records have been destroyed, often in a fire. After many frustrating months or even years of similar repeated fob offs and lengthy delays, their tenacity is sometimes rewarded with the news that the files have finally been located. These are the lucky ones - we have many members in our organisation who have not been able to access any information about themselves at all. It has to be remembered that these records form a part of New Zealand history. Not only do they contain information about the practices of the time, but also they can hold key information for Care Leavers' immediate families and descendants. Many children and grandchildren not only want to understand their family history, but also want a greater sense of their own identity, as well as a better understanding

as to why their parent or grandparent may have behaved or treated them in certain ways. Therefore, CLAN strongly recommends that all Care Leavers' records be kept in perpetuity.

We have not yet met a Care Leaver who knew, as a child, that records were being compiled about them, let alone their siblings and their parents. In that sense, these records were essentially secret documents. Consequently, it follows that Care Leavers were never given the opportunity to contribute to their personal records - so what now passes as an account of their childhood is a one-sided and often misleading narrative. Furthermore, some records from their time in the Child Welfare System hold important information which is often needed when reporting abuse which has occurred or in pursuing civil claims.

It is clear that the writers of these records never imagined that the subject of their writings might one day read what was written about them and their families. And so the writers of these records were able to record opinions masquerading as facts, without ever being held accountable for their value judgements. Records are of the utmost importance to Care Leavers, and will continue to be important in the future to those children who are in 'care' today. It is imperative that organisations working with vulnerable children in the current Child Welfare System are subject to stringent recordkeeping practices to ensure that all children in the future have access to their own information, and that all current adult Care Leavers have access to everything that hasn't been destroyed already.

Background

Up until now, the creation, maintenance and disposal of historical records in the Child Welfare System has been a disgrace. There have been systemic failures in record-keeping by the organisations charged with 'caring' for children and many of them still fail to understand the importance of these records and do not respond adequately to requests from adult Care Leavers for access.

An issue that keeps coming up is that of agency in records: The children that the records are about and the agencies gathering the information both see the records as theirs. Some of these records relate to multiple children, so there could be multiple potential holders of rights to records. However, only the agencies are asked permission if others wish to access, create, destroy or use these records. The resulting sense of lack of trust and respect often felt by Care Leavers about the very agencies that managed their 'care' means that having the records kept and controlled by these same agencies is problematic, particularly but not only, when abuse is involved. CLAN NZ believes it is the subject of the records (or, if deceased, that person's closest living blood relative or by agreement another blood relative) that has the right to determine who should have access to those records and the terms of that access. Lack of coordination between agencies is a big problem for Care Leavers and their advocates trying to find records. People looking for records of their time in 'care' need to know what to ask for, and where to look. It is very difficult to get all of the information needed.

What Care Leavers experience when they access their files:

1. **Insensitive, disrespectful interactions at the point of hand-over**

Right from the start, to add insult to injury, it is routinely made abundantly clear that the institutions concerned consider that file ownership lies with them - and so the actual hand-over is often carried out with an extreme lack of sensitivity and with obvious ill humour. We consider that hand-over staff should be Care Leaver-informed as well as trauma-informed, and they must understand the importance of their job when releasing a Care Leaver's personal and family information. Offering emotional support from the first point of contact and respecting the Care Leaver's wishes in this regard are essential.

We also believe, that contrary to the present official viewpoint, that these records are the property of the Care Leaver, not the organisation. Therefore, we believe it follows that the originals should be given to the Care Leaver and that the copies are kept by the organisation.

2. **Insulting, judgemental opinions**

Most Care Leavers' files contain exclusively negative comments, with no positive or favourable comments at all. The continual, slanderous, derogatory remarks and judgemental sentiments made about a child's family, their wellbeing, behaviour, attitudes or intelligence do nothing but exacerbate the Care Leaver's own perception that they were indeed a 'bad kid' and not at all lovable or wanted. The most tragic consequence of this is that these damning, defamatory documents were, and are, accepted without question, and often form the basis for the management of the child's case.

We understand that for some Care Leavers the language and the subjectivity of the caseworkers who have written their records can be very shocking and immensely distressing. This is worsened when the information is blatantly wrong. Therefore, there should be no limitation or exception that prevents any child or Care Leaver from amending their records at any time.

CLAN NZ believes a lot more training needs to go in to writing records and documenting a child's life, not just recording the negative things within it. The United Nations Convention on the Rights of the Child gives every child the right to an identity, not just those brought up with their own biological family. Therefore, these records play a vital role for Care Leavers in understanding their childhood and forming an identity. It would contribute to creating some sense of self-worth, if something positive was routinely noted, which is not what happens.

3. **Redactions which are neither consistent nor fair**

CLAN considers that Care Leavers are entitled to their whole file, un-redacted. Anything short of this is not acceptable. Heavy redaction of more than 50% of a file is not uncommon. One of our members had 75% of his pages fully redacted (completely blank), with another 18 pages containing numerous smaller redactions. These huge blanks in a Care Leaver's records are deeply worrying, distressing and re-traumatising - as it makes it impossible for the Care Leaver to piece together any coherent narrative about their childhood, which they have been

craving for, for so long. Withholding of records of a Care Leaver's childhood is experienced as further abuse or torture: "a beating that leaves no marks".

Redactions are also applied inconsistently. What is redacted at one time is not redacted at another time - showing the obvious subjectiveness of individual caseworkers. Care Leaver information is redacted under the veil of the Privacy Act and the Official Information Act. However, we argue that if the information is in a Care Leaver's record, it is obviously related to and pertinent to their experiences as a child. If it had no relevance to them - it would not be in their file.

CLAN believes that the rights of the child - and any Care Leaver- are paramount; and that those rights are greater than the rights to privacy of adults who came into a child's life while they were in 'care'. Many Care Leavers find that names of foster parents and other adults are redacted; names of foster siblings are redacted and even names of biological family members are redacted. The notion that Care Leavers are not entitled to this information, when they have lived through it, is preposterous.

The very reason Care Leavers want this information is that if they were an adult at the time, they would have been able to remember. However, young and traumatised children do not have the ability to remember this information as adults do. This sort of information can also be important to enable a Care Leaver to report their abuse, as any one of these people could have been a perpetrator.

A consistent standard should be that there are no redactions at all, except where the record holder forms a reasonable belief that the release of information about a third party could lead to serious harm to that third party. In many cases, record holders adopt a knee-jerk reaction: if any third party is mentioned, information about that third party is always redacted, whether it is reasonable to do so or not. This is sometimes applied even when the third party is a close relative of the person seeking access to their personal records.

Care Leavers who make applications for personal information usually do so for the very purpose of finding out about their family, from which they were arbitrarily separated in their childhood. In this context, it is reasonable to assert that information about close relatives such as parents, siblings and other direct family members is the personal information of the applicant.

4. Inaccurate, incomplete information and omissions

Most Care Leavers are disappointed to find their records are grossly inadequate - many are short on real facts, and are inaccurate, unbalanced, and misleading. They do not contain all the information they had expected and they sometimes even contain libellous untruths. Care Leavers should be encouraged to challenge the records and to know that they have the right to submit retrospective, alternative, relevant material for inclusion in their file.

We believe that all children while in 'care' should be given opportunities to make statements (whether in writing, verbally, or in some other age-appropriate format) about their wellbeing or how they are feeling or adjusting to a situation. We also feel that all interviews with

children should be recorded and preferably filmed. This produces the most accurate account of a child's experience. In terms of removal of children and how this is documented in records, CLAN NZ feels it may be worth considering having photographic evidence of a child's environment, and also, if there is abuse, having photographs of their assaults or injuries placed on file. It is important for all Care Leavers to understand what has happened in their lives, both good and bad. The more accurate their records are with first-hand information, the more they will be able to make sense of their experience.

What records should be created – and how?

With regard to creating records which accurately reflect a child's experience, we support the introduction of a child advocate separate to a 'caseworker'. The advocate's sole purpose would be to hear the voice and point of view of the child. Records need to be created frequently by this advocate so that the child's voice is heard on file. Similarly, we also advocate that all children in 'care' see counsellors or psychologists on a regular basis, to keep track of their mental health. These reports should also be kept on file. We also believe that all records should be reviewed by another worker, preferably a senior officer who is able to make sure the right amount of detail, as well as the correct sort of information, is documented in files at all times. We strongly believe that new graduates should not be the ones writing case notes in files, rather they should be working alongside a more senior caseworker who can teach them and guide them through the process for their first year.

CLAN NZ also recommends that the person writing the report should include their full name and ID number, to be followed up with ease if anything requires that to happen in the future. CLAN NZ believes that the greatest care needs to be taken in documenting ANY type of abuse, not just sexual abuse. The records need to contain as much information as is available to be documented, the information needs to be factual, and it should be constantly updated, to include any details of corresponding police reports, charges and details of their investigation. Similarly, if a court case ensues, any details of the court case and those involved should also be included. This would mean that a child, who may have no memory of the follow up events after abuse, will be able to track down information from the police and the courts with much more ease than they currently can.

CLAN NZ believes that, in acknowledgement of the importance of childhood records into the future, all agencies and organisations that take children into their custody, from this time forward, must create official records comprising key documents including:

> *The child's birth certificate; the names and last-known addresses of members of the child's family; any court orders or documents related to the reasons for the child's placement; all medical and educational histories;*
> *the names of all people who visit the child during their time in custody; all documents related to transfers to other institutions (including foster families) and any other official documents that relate to the child's time in 'care'.*

Furthermore, there may also need to be more focus on the handover between caseworkers. We are aware child protection departments can have high turnover and, undoubtedly, this has the potential to impact records creation and maintenance. Again, it is also important to

make sure records cover both positive and negative aspects of a child's experience and of their life in care. Continual derogatory remarks about a child's family, wellbeing, attitudes or intelligence do nothing to help anybody.

Maintaining Records

The maintenance of records is just as important as the creation of records. If they aren't maintained correctly, there is no point in putting the time and effort into creating them. As mentioned previously in this submission, CLAN NZ has many members who for one reason or another have not been able to access any files. For many people it is because records have not been stored or maintained correctly and their files have been lost or destroyed over the years. CLAN NZ has been informed this has happened due to fires, floods, rats, carelessness, no longer to be found and so on.

A major effort needs to go in to indexing historical records from both State and private agencies. Whilst this will, of course, have negative resourcing implications, it is something that must be done. Once indexing is completed, it will also have positive resourcing implications, as it will take less time and effort on the other end to find records and files. Workers who may have at one time spent countless hours scouring through records, will now only spend a fraction of the time, if they are organised and maintained properly. When indexing, records that are over 100 years old should not be a high priority.

By contrast, records likely to refer to individuals who are alive, should be prioritised, as all Care Leavers deserve to see their records before they die. If the file contains reports of abuse of any sort where criminal charges can be, or have been, laid – they should be flagged with some sort of notification on the front of the file, indicating that it contains information pertinent to abuse. Whilst they should all be indexed alphabetically regardless of content, it will be important in the release stage that the worker understands that this file contains information on abuse. If an institution closes down, all files should be given to Archives NZ.

ALL records should be retrieved from the institution which is closing down and all relevant services must be notified about the relocation of the files. This includes record advocacy services such as CLAN NZ as well as any Child Welfare Agency. If the institution changes ownership, but is conducting the same business, it is imperative that they continue maintaining the records which are already there. It is part of the job they took over and an important part of their business.

Disposal of Records

Firstly, it must be stated that CLAN NZ does not condone or advocate for any Care Leavers' records to ever be destroyed. As previously mentioned, many Care Leavers have missed out on receiving their files because someone has taken it upon themselves, to arbitrarily destroy files. Care Leavers who have never had a chance to read their files, to find out about their biological families, or who have no supportive evidence for a criminal or civil case (let alone proof of being in 'care'), will tell you the importance of not disposing of records. If we destroyed records so descendants of Care Leavers could never access their family history we would be denying future generations of this very right.

CLAN NZ strongly recommends that all records regarding Care Leavers - not just those which contain abuse - be subject to mandatory retention. The likely possibility that sometime in the future the Statute of Limitation in New Zealand will be abolished with regard to child sexual abuse, makes it all the more imperative that records be retained. These records can provide important information for those pursuing civil claims and they could also be of great importance in a potential future Inquiry such as a Royal Commission. We know that in the past, records have been culled without due process and without regard for the consequences to Care Leavers and their families.

CLAN NZ recommends that the Government compiles a register of records that have been culled in the past (what records have been culled and what years), so as to make this information publicly available.

Conclusions

Care Leavers are continually faced with barriers that various organisations put up, usually because they do not properly understand the legislation and guiding principles under which they are releasing information. Furthermore, many seem to lack a basic understanding of the Care Leaver experience and have no empathy for their plight and the importance of records and documentation to the individuals that we work with.

Training must be provided to all staff of all organisations which deal with record-keeping. Staff need to be Care Leaver-informed as well as trauma-informed, in order to understand the importance of their job when they are releasing Care Leaver's personal and family information. As said previously, this is not a luxury for Care Leavers; it should be their right to access ALL their information in its entirety and with no redactions.

As evidenced above, it is clear that there have been little to no record-keeping practices in the past, let alone good ones. The culture and understanding of records creation, maintenance and disposal needs to change in order for future Care Leavers to have what they should be entitled to – which is an identity. The average length of time before historic childhood abuse is first disclosed or comes before the courts is more than 22 years, which means current retention and disposal schedules for records need to be revisited, particularly in regards to staff records and police complaints.

There should be a sharper focus on educating future workers in the Child Welfare sector (and any other vocations that work with children) on the importance of good recordkeeping practices. University and training institutions should introduce requirements around learning record-keeping practices and making them 'Care Leaver and trauma-informed' so as to promote and foster good record-keeping practice from the beginning. It is also of the utmost importance that parents, foster parents and children also contribute to the creation of records.

CLAN NZ believes that too many Care Leavers have little or no understanding of what happened with their biological family, which resulted in them being placed in the Child Welfare System in the first place. The most common question Care Leavers ask is "Why was I

put in an Orphanage / Home?" Similarly, many Care Leavers do not understand why they were 'returned' from foster parents or moved on to another placement, leaving them to feel abandoned all over again and blaming themselves and wondering what they had done wrong. It is imperative that those creating records understand and think of these scenarios and the impact that instability has on these already fragile and vulnerable children's psychological wellbeing.

Recommendations

CLAN NZ proposes a number of recommendations to address these issues:

11. Biological parents should write a letter that explains why their child has been placed in the Child Welfare System. Whilst this may be hard to enforce, where it can be done, it would contribute to a child's understanding of why they went in to Care.
12. Foster carers should be required to write a letter of explanation if they request that a child is removed from their Care. Obviously, it will be documented in the caseworker's notes, but having words directly from the foster parent themselves can be quite powerful for a Care Leaver who has spent years wondering what they did wrong.
13. Furthermore, all the names of Foster Carer's should be released with Care Leaver's files, as they are essentially public servants earning taxpayers money. All names should be disclosed and transparent.
14. Anyone who accesses a Care Leaver's file for any reason must be recorded, and these particulars need to be recorded in the Care Leaver's file.
15. Children must have all life story material documented and included in their file - anything of importance to that child including drawings at school, personal letters or certificates of achievement. These personal records should be securely stored and placed in their file for collection when they leave 'care' - or at some stage later when they require the information.
16. Children should be given the opportunity at any time to write something to go on their file, whether it is their version of events from an incident, or simply a letter to explain how they are currently feeling at a particular placement.
17. Children need to have an independent advocate write a report about the child at least twice a year.
18. All formal interviews with a child by caseworkers and other significant adults need to be video-recorded and stored on a USB (or similar technology) for future retrieval.
19. CLAN NZ also believes that all children in 'care' should have the ability to assess whether they feel a particular placement is right for them. This may include the child interviewing the foster parents or being given information about the schools, activities and surrounds that may help influence their decision.
20. When government agencies are developing retention and disposal schedules, most people are unaware of this - so are unable to comment, although legally it is their right. A mechanism is needed to ensure that advocates for all interest groups, but particularly vulnerable groups such as Care Leavers, are consulted effectively. Hopefully these recommendations can be implemented so that all children who have spent time away from their biological families in the Child Welfare System will be afforded the opportunity to form an identity, learn important information about

themselves, and also have a chance to hold on to items of importance from their childhood. This is certainly something that the majority of current Care Leavers do not have. We trust you are able to use this information and our suggestions to form recommendations which will allow both current and future Care Leavers greater and easier access to their own records and family history.

CLAN NZ
www.clan.org.au
clan.nz@actrix.co.nz

APPENDIX 3

Attorney-General's Values for Crown Civil Litigation 2013

1. The Attorney-General is constitutionally responsible for determining the Crown's view of what the law is, and ensuring that the Crown's litigation is properly conducted.

2. As such, the Attorney-General wishes to ensure that all civil litigation is conducted to a standard of fairness and integrity as befits the Crown. The Solicitor-General's Prosecution Guidelines 2013 address relevant standards for Crown prosecutions.

3. The Attorney-General's Values for Crown Civil Litigation apply to all civil litigation (or proposed litigation) before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes conducted on behalf of Crown departments, officers, and Ministers. They apply whether or not the counsel instructed is employed by the Crown. They have no legal effect and are not enforceable in any court.

4. There is only one Crown in New Zealand. Accordingly, the Crown needs to be able to have a single and consistent view, and speak with one voice, on questions of law. There is no conflict of interest if a government lawyer is instructed by different government departments.

5. The Crown will:

5.1 Take and defend litigation in accordance with the rule of law, ensuring the Government is able to pursue its objectives and responsibilities lawfully and effectively.

5.2 Deal with litigation promptly and efficiently and without causing unnecessary delays or expense, and seek to have cases resolved as early as is appropriate and on such terms as are appropriate.

5.3 Apply a fair and objective approach in the handling of litigation, promoting the just and fair application of the law to all.

5.4 Consider the possibilities for, and initiate where appropriate, alternative means of avoiding or resolving litigation, including by cooperation or other agreed resolution.

5.5 Responsibly spend public funds in relation to litigation.

5.6 Not take inappropriate or unfair advantage of an impecunious or unrepresented opponent.

5.7 Not contest matters which it accepts as correct.

5.8 Not take unmeritorious points for tactical reasons.

5.9 Not pursue appeals unless it considers that it has reasonable prospects of success or the appeal is otherwise justified in the public interest.

6. The Crown may take any steps open to a private individual and, without limitation,

may:

6.1 Test and defend claims which are made against it.

6.2 Oppose unreasonable, oppressive or vexatious claims or processes.

6.3 Decline to settle litigation when settlement will not satisfy the Crown's objectives.

6.4 Move to strike out untenable causes of action, defences or proceedings.

6.5 Enforce costs orders and seek to recover costs.

6.6 Rely on legal professional privilege and other forms of privilege and claims for public interest immunity.

6.7 Plead limitation and other defences.

6.8 Seek security for costs.

6.9 Oppose applications for leave to appeal, or leave applications arising from a party's failure to comply with the Court's rules or directions.

6.10 Require opposing litigants to comply with procedural obligations.

Approved by the Attorney-General
31 July 2013