



Abuse in Care

Royal Commission of Inquiry

PUBLIC HEARING – MARCH 2020
**CIVIL CLAIMS AND CIVIL LITIGATION REDRESS PROCESSES RELATING
TO ABUSE IN STATE CARE**

BRIEFING PAPER:
REDRESS IN INTERNATIONAL AND DOMESTIC HUMAN RIGHTS LAW

INTRODUCTION

1. The Inquiry's terms of reference provide that it "will consider relevant domestic and international law, including international human rights law".¹ Relevant law is that applicable between 1 January 1950 and 31 December 1999. In line with the temporal period provided for in the Inquiry's terms of reference, it may include, at the Inquiry's discretion, law before 1950 and after 1999.²
2. This paper sets out a high-level overview of relevant international and domestic human rights law on redress. The paper is not comprehensive. Rather, it provides a summary and a starting point for discussion and consideration. There is a significant amount of international and domestic law relevant to redress, and expert evidence will be given on redress during the Inquiry. Also, in some cases the law is not clear or there are conflicting or divergent interpretations of it.³ All interested parties, including survivors, the Crown, faith-based institutions, and academics, are encouraged to make submissions on this paper and the topic more generally.
3. The information in this paper comes from publicly available sources, or information disclosed to the Royal Commission and available for publication. It has been produced to provide context or other information that may be relevant to the public hearing into civil claims and civil litigation redress processes relating to abuse in State care to be held in March 2020, as well as the wider work into redress under the terms of reference.

OUTLINE

4. Part A of this paper sets out a definition of redress.
5. Part B first provides a summary of key principles relevant to redress in international law. It then refers to international treaties and declarations which establish or are relevant to New Zealand's international human rights obligations and commitments. Following that, key concepts in the international law on redress are set out.
6. Part C refers to New Zealand law relevant to human rights, with a particular focus on the law pertaining to redress.
7. Appendix A to this paper sets out examples of the rights and obligations recognised by the international treaties and declarations referred to above. It also refers to the committees established by these treaties to monitor their implementation, and the authoritative interpretations of human rights they and

¹ Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Order 2018, cl 16.

² Clauses 10.1(a)-(c).

³ See for example Dinah Shelton *Remedies in International Human Rights Law* (3rd ed, Oxford University Press, New York, 2015), who states at 17 that "[b]oth the right of access to justice and to substantive redress are now widely recognized. [...] Not everyone agrees, however, that substantive redress is a requirement of human rights law. [...] [H]uman rights tribunals insist on remedies that are real, adequate and effective. It is less clear that 'full' or 'integral' reparations are always required."

international human rights courts produce. These interpretations are relevant to redress and are relied on in this paper.

8. There is an ongoing dialogue between these treaty committees and New Zealand on abuse in State care. Examples are set out in Appendix B to this paper.

PART A: A DEFINITION OF REDRESS

9. The Inquiry's terms of reference refer to redress in a number of different ways. Clause 10.7 refers to "redress and rehabilitation processes for individuals who claim, or who have claimed, abuse while in care...". Clause 17.6 defines "Redress processes" as including:

Monetary processes (for example, historic claims and compensation or settlement processes), as well as non-monetary processes (for example, rehabilitation and counselling).

10. Clause 32(b) refers to the Inquiry reporting and making recommendations on various matters, including "appropriate changes to existing processes for redress, rehabilitation, and compensation processes [...]".
11. For the purposes of this paper, "redress" means any one or more of the following: restitution, rehabilitation, compensation, and measures of satisfaction (including the cessation of any ongoing violation and guarantees of non-repetition). These concepts are explained in further detail below.

PART B: INTERNATIONAL LAW ON REDRESS

KEY PRINCIPLES

12. The following principles can be drawn from international law on redress:
 - (a) An obligation to make redress arises when a legal right or obligation has been violated, and that violation causes harm.
 - (b) A claim for redress must therefore identify a relevant human right or related obligation, legally binding on the relevant State at the time violation is alleged.⁴
 - (c) The State must be responsible for the breach.
 - (d) Once violation, resulting harm, and responsibility is shown, there is generally an obligation on the State to provide redress. So far as is reasonably possible, the redress provided needs to put the person who suffered the violation in the position they would have been in if the violation had not occurred. Future violations also need to be deterred, and the fundamental values and interests that human rights reflect at the individual and societal level need to be vindicated. What is required to

⁴ Note in this regard the discussion of "continuing violations" at [42] of the main text below. See also footnote 43 below.

achieve these outcomes (i.e. the form or forms of redress required) needs to be assessed on a case by case basis.

- (e) Limitation periods may be justifiable in some circumstances.
- (f) A failure to provide redress may amount to a separate human rights violation.

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS RELEVANT TO NEW ZEALAND'S HUMAN RIGHTS OBLIGATIONS AND COMMITMENTS

United Nations Charter

13. New Zealand signed the United Nations Charter (**the Charter**) on 26 June 1945. The Charter is an international treaty. It came into force for New Zealand on 24 October 1945. This means the obligations in the Charter were binding on New Zealand from then.
14. Article 2(2) of the Charter provides that all UN members (including New Zealand) will fulfil their obligations under the Charter in good faith. Article 55 states that the UN will promote, amongst other matters, “universal respect for, and observance of, human rights and fundamental freedoms for all [...]”. Article 56 states that UN members will take action to achieve these and other UN purposes.

Universal Declaration on Human Rights (UDHR)

15. The UDHR was adopted by the United Nations General Assembly on 10 December 1948. New Zealand had a key role in drafting the UDHR.⁵
16. The UDHR proclaims a wide range of rights. Examples are set out in Appendix A to this paper.
17. When the UDHR was adopted, it did not impose legal obligations on States.⁶ It is not a treaty and rather than setting obligations,⁷ it was to serve as “a common standard of achievement for all peoples and all nations”.⁸ However, it is argued that many of the rights referred to in the UDHR are now part of customary international law.⁹ That is, such rights are generally accepted by States as being part of international law and they constitute legally binding obligations on all States, whether or not a particular State is a party to treaties which recognise them.¹⁰
18. If that is accepted, however, it is not clear when such rights became part of customary international law.

⁵ Human Rights Commission “International Reporting” <www.hrc.co.nz>.

⁶ Hurst Hannum “The UDHR in National and International Law” (1998) 3(2) *Health and Human Rights: An International Journal* 144 at 147.

⁷ At 147.

⁸ UDHR, Preamble.

⁹ See for example Hannum, above n 6, at 147-149.

¹⁰ For an explanation of customary international law, see James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Great Britain, 2012) at 23-30.

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

19. This Declaration was adopted by the UN General Assembly in 1985. Like the UDHR, it is not a treaty. The Declaration defines “victims” as persons who have suffered harm (including physical or mental injury) through acts or omissions that are defined as criminal in UN Member States, or are violations of “internationally recognized norms relating to human rights.”¹¹ Amongst other matters, it states that victims should be treated compassionately and with respect for their dignity,¹² and that mechanisms should be available which allow victims to obtain redress through procedures that are “expeditious, fair, inexpensive and accessible.”¹³
20. In addition, the Declaration affirms that victims should receive restitution, compensation and assistance (including medical, psychological and social assistance) in certain circumstances.¹⁴

International human rights treaties

21. Since the UDHR’s adoption, a series of international human rights treaties have been made. A purpose of these treaties is to carry out the Charter obligations of UN Member States in relation to human rights, as referred to above. They include, draw on and in some cases develop the rights proclaimed in the UDHR.
22. New Zealand is a State Party to the following relevant human rights treaties:
- International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**) (ratified by New Zealand on 22 November 1972).
 - International Covenant on Civil and Political Rights (**ICCPR**) (ratified by New Zealand on 28 December 1978).
 - International Covenant on Economic, Social and Cultural Rights (**ICESCR**) (ratified by New Zealand on 28 December 1978).
 - Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**) (ratified by New Zealand on 10 January 1985).
 - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**) (ratified by New Zealand on 10 December 1989).
 - Convention on the Rights of the Child (**CROC**) (ratified by New Zealand on 6 April 1993).
 - Convention on the Rights of Persons with Disabilities (**CRPD**) (ratified by New Zealand on 25 September 2008).

¹¹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, arts 1 and 18.

¹² Article 4.

¹³ Article 5.

¹⁴ Articles 8-17.

23. International law requires New Zealand to comply with these treaties. Article 26 of the Vienna Convention on the Law of Treaties provides that parties to a treaty must perform their obligations under it in good faith.¹⁵ Article 27 states that a party to a treaty cannot use its domestic law as justification for any failure to perform its obligations under that treaty.¹⁶
24. As set out in article 28 of the Vienna Convention, treaties do not apply retrospectively other than in limited circumstances. In other words, they do not apply to acts which took place or situations which ceased to exist before the relevant treaty became binding on the State Party concerned.

United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP)

25. UNDRIP was adopted by the United Nations General Assembly on 13 September 2007. New Zealand voted against UNDRIP in 2007 but in 2010 changed its position to one of support.¹⁷
26. UNDRIP is not a treaty and therefore does not create legal obligations. However, it refers to some rights which are in treaties to which New Zealand is a State Party, and/or rights which may be part of customary international law (e.g. the rights to self-determination, freedom from discrimination, and to life, liberty and security of the person). Those rights are legally binding on States Parties to the relevant treaties, including New Zealand or, if the particular right is part of customary international law, on all States.
27. Appendix A provides examples of the rights proclaimed in UNDRIP.
28. In its report *Whaia te Mana Motuhake*, the Waitangi Tribunal stated that UNDRIP had “significant normative weight”,¹⁸ and recorded acceptance by claimants and the Crown that UNDRIP is relevant to interpreting the principles of the Treaty of Waitangi.¹⁹ The Waitangi Tribunal also considered that UNDRIP can be taken into account in assessing the Crown’s actions against Treaty principles.²⁰
29. The Inquiry’s terms of reference require that it will give appropriate recognition to Māori interests, and that its work will be underpinned by the Treaty of Waitangi and its principles. A summary of expectations arising from the Treaty of Waitangi principles, with a focus on consultation with Māori, is set out in a separate Inquiry briefing paper (“Findings on Application of Te Tiriti o Waitangi Principles, Māori Consultation and Information Gathering Identified in Recent Reports, Reviews or Inquiries”), which should be read in conjunction with the rights proclaimed in UNDRIP.

¹⁵ New Zealand ratified the Vienna Convention on the Law of Treaties on 4 August 1971.

¹⁶ See Vienna Convention on the Law of Treaties, art 46 for the exception to this rule.

¹⁷ (20 April 2010) 662 NZPD 10229.

¹⁸ Waitangi Tribunal *Whaia te Mana Motuhake - In Pursuit of Mana Motuhake: Report on the Maori Community Development Act Claim* (Legislation Direct, Lower Hutt, 2015) at 34.

¹⁹ At 38.

²⁰ At 39.

REDRESS IN INTERNATIONAL HUMAN RIGHTS LAW

Violation, harm and causation

30. The obligation to provide redress under international law arises when:
- (a) an international obligation, including an international human rights obligation, has been violated;
 - (b) a State is responsible for that violation;
 - (c) the violation has caused harm.²¹
31. A State may violate human rights by commission, i.e. by being responsible for an act that violates human rights. It may also violate rights by omission. This may include, for example, not taking effective measures to prevent violations, or to investigate, punish, and redress the harm caused by such violations (including in some circumstances violations by private persons or entities).²²
32. There must be a causal connection between the violation and harm claimed. A common test is whether the violation is the “proximate cause” of that harm.²³
33. “Harm” has a wide meaning. It can encompass the violation’s effect on the individual victim/survivor as well as on society more generally: “[e]ven if wrongful conduct does not cause provable material injury, it nonetheless concerns the public because it attacks core values by which the society defines itself.”²⁴ In some cases, harm may be presumed from all the circumstances of the case, including the nature of the violation.²⁵
34. Where a violation affects a group as well as individual members of that group, it can be considered as both collective and individual.²⁶ Immediate family members or dependants of a victim/survivor may be found to have suffered harm as the result of a violation,²⁷ including emotional and financial harm.²⁸

²¹ *Responsibility of States for Internationally Wrongful Acts* GA Res A/RES/56/83 (2002), art 2 and pt 2 [ILC Articles]. The ILC Articles “have been relied on extensively by international courts and tribunals as an authoritative statement of the law on international responsibility”: see Crawford, above n 10, at 44. State responsibility extends “to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State” (see the International Law Commission’s commentary on prior draft ILC articles, contained in the *Report of the International Law Commission on the work of its fifty-third session* [2001] vol 2, pt 2 YILC 1 at 87-88 [Draft ILC Articles Commentary]). See also in this regard Shelton, above n 3, at 43: “Applied to human rights law, the ILC Articles can mean that any attributable violation of a human rights obligation gives rise to state responsibility, engaging the duty to cease the wrong and make reparations”.

²² CCPR *General Comment No 31* CCPR/C/21/Rev.1/Add. 13 (2004) at [8]. See also CESCR *General Comment 19* E/C.12/GC/19 (2008) at [64]-[65].

²³ Shelton, above n 3, at 14, 165, 279 and 355.

²⁴ Shelton, above n 3, at 14.

²⁵ Shelton, above n 3, at 355-356.

²⁶ Shelton, above n 3, at 14. See also CAT *General Comment No 3* CAT/C/GC/3 (2012) at [3].

²⁷ CAT *General Comment No 3*, above n 26, at [3].

²⁸ Shelton, above n 3, at 16.

Investigations, immunities and limitations

35. The United Nations Human Rights Committee considers that there is a general obligation under the ICCPR to “investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”²⁹ In other instances, the obligation to investigate is referred to as an obligation to investigate complaints “promptly and impartially by competent authorities,”³⁰ or to undertake “prompt, effective and impartial investigations”.³¹
36. If an investigation shows that a violation of certain rights has occurred, particularly violations recognised as criminal under domestic or international law, States Parties “must ensure that those responsible are brought to justice”.³²
37. UN treaty committees have considered that where torture, cruel, inhuman or degrading treatment or punishment, summary or arbitrary killing, or enforced disappearance has occurred, amnesties for perpetrators or other complete legal immunities from criminal and civil liability are impermissible.³³
38. Where other rights, or civil rather than criminal proceedings are concerned, limitation periods may be permissible. The European Court of Human Rights has found in a number of cases that a time or other bar on civil claims is not inconsistent with the European Convention on Human Rights, where:
 - (a) the bar does not restrict or reduce access to the courts “in such a way or to such an extent that the very essence of the right is impaired”;
 - (b) the bar pursues a legitimate aim; and

²⁹ CCPR *General Comment No 31*, above n 22, at [15]. Contrast the view of the European Court of Human Rights in *Z and others v United Kingdom* (2002) 34 EHRR 3 (Grand Chamber) at [109]: “Where alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 [of the European Convention on Human Rights] may not always require that the authorities undertake the responsibility for investigating the allegations.”

³⁰ CCPR *General Comment No 20 A/44/40* (1992) at [14]. See also, for example, the decision of the Committee Against Torture in *Yrusta and others v Argentina* CAT/C/65/D/778/2016 (2019), where at [9(a)] the Committee “urged” Argentina to “[c]onduct a prompt, impartial and independent investigation into all allegations of torture made by Mr. Yrusta and by the authors of the present complaint, including, where appropriate, the filing of specific torture charges against perpetrators, and the application of the corresponding penalties under domestic law”.

³¹ CAT *General Comment No 3*, above n 26, at [23], consistent with the wording of articles 12 and 13 of CAT. See also *Zentveld v New Zealand* CAT/C/68/D/852/2017 (2019), summarised in Appendix B below. At [11(a)] of this decision, the Committee Against Torture urged New Zealand to conduct “a prompt, impartial and independent investigation into all allegations of torture and ill-treatment made by the complainant [...]”. At [11(b)], it further urged New Zealand to “Provide the complainant with access to appropriate redress, including fair compensation and access to the truth, in line with the outcome of the investigation”.

³² CCPR *General Comment No 31*, above n 22, at [18].

³³ CCPR *General Comment No 31*, above n 22, at [18]. See also CCPR *General Comment No 20*, above n 30, at [15], Shelton, above n 3, at 97, and CAT *General Comment No 3*, above n 26, at [40]-[41]. At [40], the Committee Against Torture states: “On account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them. For many victims, passage of time does not attenuate the harm and in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those whom have not received redress. States parties shall ensure that all victims of torture or ill-treatment, regardless of when the violation occurred or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to remedy and to obtain redress.”

- (c) there is “a reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.³⁴

39. Limitation periods regulate what can be a conflict between rights: on the one hand, the rights of a plaintiff to have access to a Court to determine his or her rights, and to an effective remedy if those rights have been violated; and on the other, the right of a defendant to a fair trial. The European Court has stated:³⁵

[L]imitation periods in personal injury cases are a common feature of the domestic legal systems of the Contracting States. They serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.

40. In deciding whether a particular limitation is permissible, relevant considerations may include whether it applies to criminal and civil proceedings, or only to civil, and whether compensation orders may be made in any criminal proceedings.³⁶

Types of redress

41. Once a violation attributable to a State has been shown, and causation established, the State must make redress for the harm caused.³⁷ This may consist of restitution, rehabilitation, compensation, and satisfaction as necessary (including where appropriate guarantees of non-repetition).³⁸ The State is also obliged to cease the violation if it is ongoing.³⁹ Sometimes cessation and/or

³⁴ See for example *Stubbings and others v United Kingdom* (1997) 23 EHRR 213 (ECHR) at [50], concerning limitation periods preventing certain proceedings in the United Kingdom courts relating to alleged sexual abuse. Contrast *Stubbings* with *Z and others v United Kingdom*, above n 29, and *O’Keeffe v Ireland* (2014) 59 EHRR 15 (Grand Chamber).

³⁵ *Stubbings and others v United Kingdom*, above n 34, at [51]. See also CCPR *General Comment No 31*, above n 22, at [18], which states that obstacles to the establishment of legal responsibility should be removed, including amongst other matters “unreasonably short periods of statutory limitation in cases where such limitations are applicable.”

³⁶ *Stubbings and others v United Kingdom*, above n 34, at [52].

³⁷ ILC Articles, above n 21, art 31(1). Note that the obligations set out in pt 2 of the ILC Articles, including with regard to redress, are owed by States to other States or to the international community, rather than to individuals (see art 33(1) and the Draft ILC Articles Commentary, above n 21, at 88). However, where a human rights obligation is concerned, “a State’s responsibility for the breach of [such an obligation] may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.” (Draft ILC Articles Commentary at 95). Also, art 33(2) of the ILC Articles states that art 33(1) is “without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.” Human rights treaties such as the ICCPR provide individuals with rights to invoke State responsibility in case of violation, including the right to an “effective remedy” (and see in this regard the Draft ILC Articles Commentary at 95). In deciding what may amount to an effective remedy for individuals, pt 2 of the ILC Articles is instructive. The types of redress referred to in pt 2 are ordered or recommended by human rights courts and treaty committees. They are also referred to in General Comments and other United Nations publications (see for example CAT *General Comment No 3*, above n 26, at [6]-[18] and CCPR *Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights* CCPR/C/158 (2016) at [2]).

³⁸ ILC Articles, above n 21, arts 31 and 34. See also CCPR *General Comment No 31*, above n 22, at [16] and [17]. In *Chernev v Russian Federation* CCPR/C/125/D/2322/2013 (2019) at [14] and *Ribeiro v Mexico* CCPR/C/123/D/2767/2016 (2018) at [11], the Human Rights Committee referred to States Parties to the ICCPR being obliged to make “full reparation” to individuals who had suffered a violation of their rights.

³⁹ ILC Articles, above n 21, art 30.

guarantees of non-repetition are referred to as part of redress,⁴⁰ while others consider them to be separate to redress.⁴¹ For ease of reference, and because these obligations arise when a violation has occurred, this paper includes them within its definition of redress.

42. A failure to provide effective redress may amount to another human rights violation.⁴² Also, a failure to provide effective redress in relation to an event which occurred before the entry into force of a relevant human rights treaty may amount to a continuing violation. That is, the event itself may be outside the jurisdiction of the relevant court or tribunal (meaning that it cannot provide the basis for a finding that a right has been violated), but the failure to provide a remedy may be able to be considered, and a finding of violation made in respect of it.⁴³
43. In deciding what redress is required in a particular case, relevant considerations include what remedy or remedies are required to address the harm caused, deter repetition,⁴⁴ and vindicate the importance of the right(s) at both an individual and societal level. “[S]ociety as well as the individual victim is injured when state agents violate human rights.”⁴⁵

Restitution and rehabilitation

44. The purpose of restitution is to restore to the victim/survivor that which has been unlawfully taken from her or him.⁴⁶ Put another way, it is to “re-establish the situation which existed before the wrongful act was committed”.⁴⁷ Examples include the return of property wrongfully taken, the restoration of one’s family to how it was before an arbitrary or unlawful interference with it, or the reinstatement of a victim in employment wrongfully terminated.⁴⁸
45. Where possible, restitution should be granted.⁴⁹ Restitution may not be possible, however, for many human rights violations. For example, full restitution cannot be achieved where violations of the right to life or to security of the person, or the right not to be subject to torture, have occurred.⁵⁰
46. Rehabilitation may be considered as part of restitution, although again full rehabilitation may not be possible. Rehabilitation may include the provision of

⁴⁰ See for example CCPR *General Comment No 31*, above n 22, at [15]-[16], and CAT *General Comment No 3*, above n 26, at [2].

⁴¹ See for example the discussion by Shelton, above n 3, at 75, and art 30 of the ILC Articles (above n 21), which refers to cessation and guarantees of non-repetition as separate to reparation (as referred to in art 34 of the ILC Articles).

⁴² Shelton, above n 3, at 85.

⁴³ See Shelton's discussion of "continuing violations", above n 3, at 261 and 262, including that this concept "has mitigated the effect of the rule against retroactivity, as has the independent requirement that a remedy be provided even for violations that took place prior to entry into force of the human rights treaty."

⁴⁴ Shelton, above n 3, at 18-22.

⁴⁵ Shelton, above n 3, at 60.

⁴⁶ Shelton, above n 3, at 298.

⁴⁷ ILC Articles, above n 21, art 35. Article 35 also states that restitution is not required where it is "materially impossible" or involves "a burden out of all proportion to the benefit deriving from restitution instead of compensation".

⁴⁸ Shelton, above n 3, at 298.

⁴⁹ Shelton, above n 3, at 298.

⁵⁰ Shelton, above n 3, at 298.

medical and psychological treatment and other health and social services, as well as measures aimed at restoring a victim's reputation.⁵¹

Compensation

47. Where restitution is not possible or does not provide an effective remedy, compensation must be paid.⁵² Again, there must be a "clear causal connection" between the harm claimed and the violation.⁵³ If the person in question has not suffered any harm due to the violation, or would have suffered the same harm even if the violation had not occurred, then arguably no obligation to pay compensation arises.⁵⁴
48. That noted, it is difficult to see how a person who has suffered a violation of human rights could have suffered no harm as a result. The nature and extent of harm suffered, however, will depend on all the circumstances of the case. These will include the person's particular characteristics, the nature of the right violated, the gravity of the violation, and any other potential causes of the harm claimed. Further, it may be that even if a person has suffered no personal harm (whether emotional or otherwise), an amount should still be awarded to vindicate the right violated and deter future violations.⁵⁵
49. Assessing how much should be paid as compensation in a given case can be complex.⁵⁶
50. The European Court of Human Rights has awarded compensation for financial losses and non-financial losses (i.e. emotional harm), as well as costs and expenses incurred by the claimant in bringing the case.⁵⁷ Such financial losses have included loss of past and future earnings, past and future medical expenses, and lost business opportunities.⁵⁸ Factors the Court has considered relevant to

⁵¹ Shelton, above n 3, at 394-396. See also, and for example, CAT *General Comment No 3*, above n 26, at [11] to [15].

⁵² ILC Articles, above n 21, art 36.

⁵³ *Z and others v United Kingdom*, above n 29, at [119].

⁵⁴ Shelton, above n 3, at 355.

⁵⁵ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 1539. See also *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [368] per McGrath J.

⁵⁶ Shelton, above n 3, at 316. In *Z and others v United Kingdom*, above n 29, the European Court of Human Rights states at [120]: "A precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered by the applicants may be prevented by the inherently uncertain character of the damage flowing from a violation [...] An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved, the more uncertain the link becomes between the breach and the damage. The question to be decided in such cases is the level of just satisfaction, in respect of both past and future pecuniary losses, which it is necessary to award each applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable."

⁵⁷ Shelton, above n 3, at 321.

⁵⁸ Shelton, above n 3, at 324. Shelton cites *Z and others v United Kingdom*, above n 29, in which the European Court of Human Rights found amongst other matters that a local authority had failed to protect the applicants (children at the relevant times) from inhuman and degrading treatment inflicted on them by their parents, in violation of Article 3 of the European Convention on Human Rights. The awards made by the European Court included awards for future medical costs for all of the applicants, and for loss of employment opportunities to two of the applicants.

the amount of compensation awarded include the severity of the violation and the claimant's conduct.⁵⁹

51. The Inter-American Court of Human Rights has also made awards for financial and non-financial losses, and costs.⁶⁰
52. Both Courts have considered that deductions may be made to take into account amounts the victim/survivor has already received (e.g. as the result of domestic proceedings).⁶¹ Compensation will not be awarded if the Court considers that an amount already received is sufficient.⁶² On the other hand, the Court may make an award if it considers that an amount received through domestic proceedings or otherwise is inadequate.⁶³
53. It has been argued that remedies awarded by the Courts, including compensation, lack consistency and give insufficient guidance on how much should be awarded for emotional harm.⁶⁴ Similarly, when United Nations treaty committees call on States Parties to pay compensation, they refer more generally to the payment of "adequate" or "fair" compensation,⁶⁵ rather than specifying amounts.⁶⁶

Satisfaction (including cessation and guarantees of non-repetition)

54. A State responsible for an internationally wrongful act, including a violation of human rights, must cease the act if it is ongoing. It must also provide guarantees of non-repetition if required by the circumstances.⁶⁷
55. To provide satisfaction, the State may need to accept responsibility for the violation and publicly apologise.⁶⁸ A public memorial may be appropriate in some cases. Amongst other matters, the State may also need to carry out investigations into allegations of human rights violations and prosecutions of alleged perpetrators,⁶⁹ and make changes in laws and practices.⁷⁰ Such investigations, prosecutions and changes can also be considered as part of offering appropriate guarantees of non-repetition.

⁵⁹ Shelton, above n 3, at 323.

⁶⁰ Shelton, above n 3, at 327-329.

⁶¹ Shelton above n 3, at 325, 329-330.

⁶² Shelton, above n 3, at 325.

⁶³ Shelton, above n 3, at 325.

⁶⁴ Shelton, above n 3, at 376 and 440.

⁶⁵ See for example the Views of the Human Rights Committee in *Chernev v Russian Federation*, above n 38, in which the Committee stated at [14] that the Russian Federation was "obligated to, inter alia, provide Vladimir Chernev with adequate compensation" and the decision of the Committee Against Torture in *Yrusta et al v Argentina*, above n 30, where at [9(c)] the Committee "urged" Argentina to provide "appropriate redress, including fair compensation [...]".

⁶⁶ See Shelton, above n 3, at 201 and 321, and CCPR *Guidelines on measures of reparation*, above n 37, at [9].

⁶⁷ ILC Articles, above n 21, art 30.

⁶⁸ Shelton, above n 3, at 396, and ILC Articles, above n 21, art 37.

⁶⁹ See for example CCPR, *Guidelines on measures of reparation*, above n 37, at [11(b)].

⁷⁰ CCPR, *General Comment No 31*, above n 22, at [16]. See also CCPR *Guidelines on measures of reparation*, above n 37, at [12]-[13].

Declarations

56. A declaration that a State has violated a human right, whether by a court or other appropriate body (e.g. an international committee, such as the UN Human Rights Committee), may be a form of satisfaction.
57. The European Court of Human Rights has often found in cases before it that a finding of violation is sufficient to provide satisfaction and therefore no award of compensation is required (although costs may be obtained).⁷¹ Also, the European Court's practice until recently has been to limit relief to a finding of violation and, in some cases, an award of compensation. That practice does however appear to be changing.⁷²
58. United Nations treaty committees have also found in certain cases that no remedy is required beyond the finding of a violation, although they mostly also recommend other remedies.⁷³ According to Shelton, the Inter-American Court of Human Rights has not limited relief to a declaration in any case before it. This may be because the cases before the Inter-American Court have generally involved serious violations.⁷⁴

⁷¹ Shelton, above n 3, at 287 to 295.

⁷² Shelton, above n 3, at 385 to 388.

⁷³ Shelton, above n 3, at 296.

⁷⁴ Shelton, above n 3, at 295-296.

PART C: HUMAN RIGHTS LAW IN NEW ZEALAND

59. This Part first refers to the legal status of international human rights and obligations in New Zealand law. Following that, a summary is provided of:

- (a) human rights protections and their sources (e.g. statute and common law) in New Zealand;
- (b) redress that may be provided under the New Zealand Bill of Rights Act 1990 (**NZBORA**), and by the Human Rights Review Tribunal (**HRRT**).

60. A brief reference to limitation periods is also made. This should be read in conjunction with the separate Inquiry briefing paper (“Legal Frameworks Applying to Litigation of Civil Claims of Abuse in Care”), which also briefly outlines issues relating to limitation periods.

61. These summaries are necessarily incomplete. At the end of this paper there is a reference to recommended further assessment which would assist the Inquiry.

Status of international human rights and obligations in domestic law

62. In New Zealand’s legal system, international rights and obligations can be relevant considerations in administrative decision-making, and they are taken into account by the Courts in interpreting the NZBORA and other domestic human rights statutes. There is also a presumption of statutory interpretation that statutes should be interpreted consistently with New Zealand’s international obligations where possible.⁷⁵ However, international rights and obligations cannot be directly relied on in New Zealand courts unless they have been incorporated into a New Zealand statute.

Human rights protection in New Zealand

Different forms of protection

63. Human rights protections in New Zealand can be characterised as “piecemeal.”⁷⁶ They have developed and changed incrementally over time, and are set out in a variety of statutes and the common (i.e. judge-made) law. This means they cannot be found in one place.

64. Policy and practice (e.g. the way government operates, the entitlements it provides or does not provide through policy, and the institutions it establishes) are also relevant to the extent to which internationally recognised human rights are realised in New Zealand.

⁷⁵ See Joss Opie “A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990” (2012) 43 VUWLR 471 at 512.

⁷⁶ Justice Susan Glazebrook, Natalie Baird and Sasha Holden “New Zealand: Country Report on Human Rights” (2009) 40 VUWLR 57 at 58.

Statute

65. The NZBORA and the Human Rights Act 1993 (**HRA**) contain important human rights protections.
66. Other enactments relevant to human rights include the Bill of Rights 1688 (Imp), the Crimes Act 1961, the Ombudsmen Act 1975, the Official Information Act 1982, the Crimes of Torture Act 1989, the Privacy Act 1993, the Oranga Tamariki Act 1989, and the Health and Disability Commissioner Act 1994.⁷⁷ There are many others to which reference could be made.⁷⁸
67. For this Inquiry, relevant legislation includes the former and current accident compensation legislation. For example, the Accident Compensation Act 2001 provides cover on the conditions set out in that Act for “mental injury” caused by certain criminal acts, including sexual offences.⁷⁹ A person who has cover may access entitlements including rehabilitation and compensation, subject to meeting eligibility conditions.⁸⁰ If a person has cover, he or she may not take a case seeking compensatory damages for the injury outside of the accident compensation scheme.⁸¹

Common law

68. Many of the rights affirmed in the NZBORA “have long been recognised by the common law”.⁸² This means that before the NZBORA’s enactment, rights now affirmed in it could be upheld by using the common law. The same applies following the NZBORA’s enactment. Further, in many cases where a breach (i.e. violation) of the NZBORA can be shown, there will also be a claim in part of the common law known as tort law.⁸³

THE NZBORA

69. The rights affirmed in the NZBORA can broadly be defined as civil and political rights (e.g. the right not to be deprived of life, not to be subjected to torture or cruel treatment, electoral rights, and freedom of expression, association, and from discrimination). One of the NZBORA’s purposes is to affirm New Zealand’s commitment to the ICCPR. However, a number of rights recognised in the ICCPR are not in the NZBORA.⁸⁴

⁷⁷ Glazebrook, Baird and Holden, above n 76, at 59.

⁷⁸ See Butler and Butler, above n 55, at 3.4.1-3.4.37.

⁷⁹ Accident Compensation Act 2001, ss 21 and 21A.

⁸⁰ Accident Compensation Act 2001, ss 67 and 69.

⁸¹ Accident Compensation Act 2001, s 317. Section 319 provides that proceedings for exemplary damages may be brought. Note also the power under s 32(5) of the Sentencing Act 2002 to make an order of reparation in respect of certain types of loss resulting from criminal offending (including emotional harm, or loss or damage consequential on any emotional or physical harm), over and above the entitlements provided for in the Accident Compensation Act 2001: see *Oceana Gold (New Zealand) Limited v WorkSafe New Zealand* [2019] NZHC 365, [2019] 3 NZLR 137.

⁸² Butler and Butler, above n 55, at 3.3.1-3.3.28.

⁸³ *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) at [38] per Keith J. See also Butler and Butler, above n 55, at 1692-1693, who refer to tort claims such as assault and false imprisonment. Claims for breach of statutory duty may also be relevant.

⁸⁴ As stated by Geoffrey Palmer in “A Bill of Rights for New Zealand: A White Paper” [1984-1985] 1 AJHR A6 at [10.12], “Generally, the text of the Bill departs considerably from that of the Covenant both in

70. In a New Zealand Supreme Court case, *Taunoa v Attorney-General*,⁸⁵ Justice Blanchard stated that in some cases a New Zealand Court “may consider it appropriate to require of New Zealand authorities a higher standard of behaviour than might have been required” under, for example, the ICCPR. Justice Blanchard considered that in New Zealand “more may be required of persons in authority than adherence to minimum standards that can realistically be applied and enforced internationally.”⁸⁶
71. Although there is no express power to grant remedies in the NZBORA, the Courts have determined that they have this power when a breach has been demonstrated.⁸⁷ In deciding what remedies to grant in a particular case, relevant considerations include what is required to vindicate (i.e. uphold and defend) the right, what is a proportionate response to the breach, and what is required to repair or compensate for the resulting harm (i.e. what is an effective remedy).⁸⁸
72. A brief summary of remedies that may be awarded follows.

Compensation

73. Compensation may be awarded for breach of the NZBORA, at the Court’s discretion (i.e. it is not available as of right).⁸⁹
74. Whether compensation is granted and how much will depend to a large extent on the facts of the case.⁹⁰ The Court will not award compensation if it considers that non-monetary remedies, such as a declaration or exclusion of evidence, provide sufficient vindication in all the circumstances.⁹¹ If compensation is awarded, it is generally likely to be “moderate.”⁹²
75. Matters relevant to whether compensation is awarded once a breach is shown, and how much, include which right has been breached, the seriousness of the breach, the harm caused by it, and any other remedies the victim/survivor has been awarded.⁹³
76. The way the defendant has responded may also be relevant. In *Taunoa*, Justice Blanchard considered the following factors may impact on how much should be awarded as compensation: whether the State had acknowledged the breach, whether and how quickly it had ended the breach and implemented measures to

phraseology and arrangement [...] [M]any of the Articles in the Covenant have no corresponding provision in the Bill of Rights.”

⁸⁵ *Taunoa*, above n 55.

⁸⁶ *Taunoa*, above n 55, at [179]. See also in this regard *Martin v Tauranga District Court* [1995] 2 NZLR 419 at 430 per Hardie Boys J.

⁸⁷ Butler and Butler, above n 55, at 1518-1519.

⁸⁸ Butler and Butler, above n 55, at 1520 to 1523.

⁸⁹ Butler and Butler, above n 55, at 1531-1532.

⁹⁰ Butler and Butler, above n 55, at 1590.

⁹¹ Butler and Butler, above n 55, at 1565.

⁹² Butler and Butler, above n 55, at 1590, quoting Blanchard J in *Taunoa*, above n 55, at [265]. For a critique of the approach of the majority in *Taunoa*, see Dr Rodney Harrison “Remedies for Breach of the New Zealand Bill of Rights Act 1990: The New Zealand Experience – Recognising Rights while Withholding Meaningful Remedies” (paper presented to the New Zealand Law Society Using Human Rights Law in Litigation Intensive Conference, June 2014) 107. Dr Harrison argues at 116 that the sums awarded as compensation by the Supreme Court majority in *Taunoa* “are so small as to be derisory”.

⁹³ Butler and Butler, above n 55, at 1532.

avoid repetition, and whether it had apologised appropriately and publicly to the victim.⁹⁴

77. No compensation may be awarded for harm which is covered by the accident compensation legislation.⁹⁵ Where a breach of the NZBORA has resulted in covered personal injury, compensation may only be awarded for “the affront” to the right, not for the breach’s physical consequences (or for any other covered consequence including “mental injury” as defined in the accident compensation legislation).⁹⁶
78. NZBORA compensation may be awarded for “all the usual heads of loss recognised by the civil law”.⁹⁷ Financial and non-financial loss may be compensated for, including impact on future earning capacity.⁹⁸

Other remedies

79. The other remedies the Court may grant include:⁹⁹
- (a) A declaration that an action is in breach of the NZBORA. While the Crown is not legally required to comply with such a declaration, compliance “is expected and occurs”;¹⁰⁰
 - (b) A declaration that legislation is inconsistent with the NZBORA.¹⁰¹

Developing remedies

80. The extent of the Court’s power to grant remedies under the NZBORA, including non-monetary remedies, is not clear. In *Taunoa*, for example, the appellants sought an order from the Court that there be an inquiry into a programme operated in Auckland Prison by the Department of Corrections. The order was not granted on the basis that it had not been sought in a timely manner, and the Court left open the issue of whether it could make such an order.¹⁰²
81. In a judgment of the New Zealand Court of Appeal, *Baigent’s Case*, Justice Casey considered that there had to be “an adequate public law remedy for infringement [of the NZBORA] obtainable through the Courts [...]”.¹⁰³ What was adequate had to be determined on a case-by-case basis, and in some cases such a remedy may be obtainable through existing legislation or the common law. Where that was not the case, however, Justice Casey considered that the Court could award

⁹⁴ *Taunoa*, above n 55, at [262] per Blanchard J.

⁹⁵ Butler and Butler, above n 55, at 1532 and 1575.

⁹⁶ *Wilding v Attorney-General* [2003] 3 NZLR 787 (CA) at [16]. See also *Falwasser v Attorney-General* [2010] NZAR 445 (HC) at [124].

⁹⁷ Butler and Butler, above n 55, at 1533.

⁹⁸ Butler and Butler, above n 55, at 1538 and 1586. The Butlers state that it is an open question whether exemplary damages can be awarded, and argue that they should be available (see 1587-1590).

⁹⁹ For a summary of other remedies, including extraordinary remedies, specific performance, judicial review, habeas corpus, and torts, see Butler and Butler, above n 55, at 1657-1694.

¹⁰⁰ Butler and Butler, above n 55, at 1687.

¹⁰¹ *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

¹⁰² *Taunoa*, above n 55, at [103]-[104] per Elias CJ and at [222]-[228] per Blanchard J.

¹⁰³ *Simpson v Attorney-General (Baigent’s Case)* [1994] 3 NZLR 667 (CA) at 692 per Casey J.

compensation “or settle on some non-monetary option as appropriate”.¹⁰⁴ It would be for the Court to select the remedy “which will best vindicate the right infringed.”¹⁰⁵

82. The then President, Justice Cooke, referred to New Zealand’s international obligations under the ICCPR to ensure an effective remedy for rights breaches, and to “develop the possibilities of judicial remedy”.¹⁰⁶ He went on to state that the NZBORA was binding on the judiciary, and that the judiciary would fail in its duty “if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed.”¹⁰⁷

Costs

83. A costs award may be made in favour of a successful party in a civil¹⁰⁸ NZBORA action.¹⁰⁹ In *Taunoa*, one of the judges, Justice Tipping, stated that a successful plaintiff may be awarded all of the legal costs he or she has incurred in bringing the case.¹¹⁰

Human Rights Act 1993 (HRA), Privacy Act 1993, Health and Disability Commissioner Act 1994, and the HRRT

84. The HRA is principally concerned with discrimination. It replaced the Race Relations Act 1971 and the Human Rights Commission Act 1977. Both of these enactments provided statutory protections and processes relating to freedom from discrimination.
85. The HRA continued the Human Rights Review Tribunal (**HRRT**). The HRRT’s functions include deciding cases concerning alleged breaches of the HRA. It also has powers under:
- (a) the Privacy Act 1993, to determine cases alleging that an action is an interference with an individual’s privacy;
 - (b) the Health and Disability Commissioner Act 1994 (**HDCA**), to determine cases alleging that the Code of Health and Disability Services Consumers’ Rights has been breached.
86. The remedies the HRRT may award where it finds a breach or an interference include:
- (a) a declaration of the breach¹¹¹ or interference;¹¹²

¹⁰⁴ At 692.

¹⁰⁵ At 692.

¹⁰⁶ ICCPR, arts 2(3)(a) and (b).

¹⁰⁷ *Baigent’s Case*, above n 103, at 676 per Cooke P. He also stated at 676 that “the long title [of the NZBORA] shows that, in affirming the rights and freedoms contained in the Bill of Rights, the Act requires development of the law when necessary. Such a measure is not to be approached as if it did no more than preserve the status quo.”

¹⁰⁸ For a discussion of costs in criminal proceedings, see *Butler and Butler*, above n 55, at 1713-1719.

¹⁰⁹ *Butler and Butler*, above n 55, at 1720-1728.

¹¹⁰ *Taunoa*, above n 55, at [334] per Tipping J.

¹¹¹ HRA, s 92(3)(a), and HDCA, s 54(1)(a).

¹¹² Privacy Act, s 85(1)(a).

- (b) an order requiring the defendant not to continue or repeat the breach, and/or to carry out other remedial acts;¹¹³
- (c) compensation (i.e. damages). These can be awarded for financial and non-financial loss resulting from the breach or interference, including “humiliation, loss of dignity, and injury to feelings [...]”;¹¹⁴
- (d) any other remedy the HRRT thinks fit.¹¹⁵

Declaration of inconsistency

87. The HRRT has the power under the HRA to find that an enactment is inconsistent with the right to freedom from discrimination affirmed by the NZBORA.¹¹⁶ In that case, however, the only remedy it may grant is a declaration.

Remedies awarded by the HRRT

88. The HRRT has awarded compensation in many cases brought before it, including relatively substantial compensation for emotional harm and lost earnings.¹¹⁷ It has also ordered non-monetary remedies. These have included requiring that a defendant make an apology, and restraining and training orders.

89. In assessing how much to award as compensation for emotional harm, factors considered relevant by the HRRT include the need for the amount to be adequate to provide an effective remedy, as well as the need to take into account the facts of the specific case and the personality of the claimant.¹¹⁸

90. The HRRT has adopted a banding approach as a "rough guide" for assessing compensation for emotional harm. The appropriate amount must be determined on the facts of each case. However, as a guide, less serious cases may attract an award of up to \$10,000, more serious cases between \$10,000 and \$50,000, and the most serious cases over \$50,000.¹¹⁹

Costs

91. The HRRT may award costs,¹²⁰ and costs are regularly awarded to successful plaintiffs. On the other hand, HRRT has decided in a number of cases not to award costs against unsuccessful plaintiffs.¹²¹ The reasons for this include not

¹¹³ HRA, s 92I(3)(b) and (d); HDCA, s 54(1)(b) and (d); and Privacy Act, s 85(1)(a) and (d).

¹¹⁴ HRA, ss 92I(3)(c) and 92M-O; HDCA, s 57(1); and Privacy Act, s 88(1). Note also that s 57(1)(d) of the HDCA allows the HRRT to award punitive damages. Section 52(2) however provides that with the exception of such punitive damages, no damages may be awarded for personal injury covered by the accident compensation legislation.

¹¹⁵ HRA, s 92I(3)(h); HDCA, s 54(1)(e); and Privacy Act, s 85(1)(e).

¹¹⁶ HRA, s 92J. The effect of such a declaration is set out in s 92K of the HRA.

¹¹⁷ See for example *Hammond v Credit Union Baywide* [2015] NZHRRT 6.

¹¹⁸ *Hammond v Credit Union Baywide*, above n 117, at [170.5]-[170.9].

¹¹⁹ *Hammond v Credit Union Baywide*, above n 117, at [176]. See also for example *Mills v Capital and Coast District Health Board & Anor* [2019] NZHRRT 47 at [154].

¹²⁰ HRA, s 92L; HDCA, s 54(2); and Privacy Act, s 85(2).

¹²¹ For example, see *Wall v Fairfax & Ors* [2017] NZHRRT 28. For an example of case in which costs were awarded against a plaintiff, see *Apostolakis v Attorney-General & Ors* [2019] NZHRRT 11.

detering individuals from bringing a case to the HRRT, and promoting human rights protection in New Zealand.¹²²

Limitation periods

92. The issue of limitation periods for human rights and other cases in New Zealand is complex.
93. For example, where NZBORA compensation is sought, different rules may apply depending on whether the relevant act or omission for which compensation is claimed occurred before or after 1 January 2011, and what the claimed harm is.¹²³ 1 January 2011 is when the Limitation Act 2010 (**2010 Act**) came into force. The 2010 Act repealed the previous law on limitation periods, the Limitation Act 1950.¹²⁴
94. The 2010 Act has changed the previous law on limitations in various respects. For example, s 17 of this Act gives the Court a discretion to allow a claim relating to sexual or non-sexual abuse of an under-18 year old, despite there being a limitation defence available (i.e. despite the claim otherwise being time-barred). The matters the Court has to take into account in deciding whether or not to allow the claim include any hardship that would be caused to the defendant if the claim were allowed, any hardship to the claimant if it were not, the reasons for the delay in bringing the claim, and the effects of the delay on the defendant's ability to defend the claim.¹²⁵
95. Note also that under the HDCA, the Health and Disability Commissioner may investigate an act by a health practitioner at any time before 1 July 1996. The power may be exercised if it appears that the act affected a health consumer and, when it occurred, was a basis for disciplinary proceedings against the health practitioner.¹²⁶ Following such an investigation the steps that may be taken include disciplinary proceedings against the health practitioner.¹²⁷
96. However, it appears that proceedings as referred to in paragraph 85(b) above may not be brought in the HRRT in relation to such an act.¹²⁸ On this basis, the HRRT's powers to grant remedies as summarised above could not be exercised in favour of a person harmed by such a health practitioner (although there may be other remedies available to such a person).
97. Limitation periods will be further explored during the Inquiry.

¹²² See *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 at [49] and [53].

¹²³ Butler and Butler, above n 55, at 1532, 1581-1583.

¹²⁴ Limitation Act 2010, s 57, subject to the saving set out in s 59 of that Act relating to "actions based on acts or omissions before 1 January 2011".

¹²⁵ Limitation Act 2010, ss 17 and 18. See also ss 23A to 23D of the Limitation Act 1950 (inserted from 1 January 2011 by the Limitation Act 2010). It appears however that this discretion is subject to the bar in the Accident Compensation Act 2001 against proceedings for damages arising directly or indirectly out of personal injury covered by the accident compensation scheme. This point will need to be considered further during the Inquiry so that a definitive view can be reached.

¹²⁶ HDCA, s 40.

¹²⁷ HDCA, ss 45(2)(f) and 49.

¹²⁸ HDCA, s 45(4) and s 51. This point will also need to be considered further so that a definitive view can be reached.

FURTHER ASSESSMENT

98. As already stated, the relevant time period for the Inquiry is between 1 January 1950 and 31 December 1999 (and, at the Inquiry's discretion, before 1950 and after 1999). The Inquiry's terms of reference require it to consider relevant domestic and international law, including international human rights law.
99. This means the Inquiry will need to consider the nature and scope of New Zealand's human rights obligations under the Charter before New Zealand became a State Party to the human rights treaties referred to in Part B of this paper. Relevant to this may be instruments such as the 1924 Geneva Declaration of the Rights of the Child and the Declaration of the Rights of the Child adopted by the UN General Assembly on 20 November 1959 (both referred to in the preamble to CROC). It was not possible to undertake this review within the timeframe for this briefing paper.
100. Also, the view set out in the document which proposed a Bill of Rights for New Zealand was that the rights in the Bill were "almost all firmly based on the existing law", including statute and common law then in place. It was further considered that the Bill reflected public policy that was then widely accepted.¹²⁹ It may be useful to undertake an assessment of protections in New Zealand before 1990 for internationally recognised human rights (relevant to the matters under consideration in this Inquiry) to confirm the basis and accuracy of that view. Such an assessment would consider relevant domestic legislation and common law over that period. The prevailing policy and practice may also need to be ascertained and taken into account.
101. In addition, the protections available from 1990 in New Zealand statute law other than the NZBORA, HRA, Privacy Act and HDCA, and in common law, should be assessed (up to 31 December 1999, and beyond at the Inquiry's discretion). Relevant policy and practice in that period may need to be taken into account. Further analysis of the statutes referred to in this paper will be required, as well as of international human rights law. This will include relevant international case law. It may also include documents which are not treaties but which have a significant status in the international community.¹³⁰
102. The Inquiry will seek expert evidence, as required.

¹²⁹ Palmer, above n 84, at [3.6]. See also *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [95]-[96] per Baragwanath J.

¹³⁰ For example, the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

APPENDIX A

EXAMPLES OF HUMAN RIGHTS AND RELATED OBLIGATIONS REFERRED TO IN INTERNATIONAL INSTRUMENTS

Universal Declaration of Human Rights

1. The UDHR proclaims a wide range of rights, including the right:
 - to security of the person¹³¹ (i.e. freedom from the intentional infliction of injury to the body or to the mind, or bodily and mental integrity).¹³²
 - not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹³³
 - to equal protection of the law, without any discrimination.¹³⁴
 - to an effective remedy by the competent national tribunals for acts violating fundamental rights granted by law.¹³⁵
 - not to be subjected to arbitrary arrest or detention.¹³⁶
 - to a fair hearing by an independent and impartial tribunal, including in the determination of a person's rights and obligations.¹³⁷
 - not to be subjected to arbitrary interference with one's privacy, family, or home.¹³⁸
 - to economic, social and cultural rights, such as the right to social security;¹³⁹ to a standard of living adequate for one's health and wellbeing, and that of one's family;¹⁴⁰ to education;¹⁴¹ and to participate freely in the community's cultural life.¹⁴²
 - to enjoy the rights set forth in the UDHR, without discrimination.¹⁴³

¹³¹ Article 3.

¹³² CCPR *General Comment No 35* CCPR/C/GC/35 (2014) at [3] and [9]. Paragraph 9 states: "The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained."

¹³³ Article 5.

¹³⁴ Article 7.

¹³⁵ Article 8.

¹³⁶ Article 9.

¹³⁷ Article 10.

¹³⁸ Article 12.

¹³⁹ Article 22.

¹⁴⁰ Article 25(1).

¹⁴¹ Article 26.

¹⁴² Article 27(1).

¹⁴³ Article 2.

2. The UDHR also proclaims that:

- the family is “the natural and fundamental group unit of society and is entitled to protection by society and the State.”¹⁴⁴
- motherhood and childhood are entitled to special care and assistance.¹⁴⁵
- all children will enjoy the same social protection.¹⁴⁶

Examples of international treaty rights and obligations

3. The treaties referred to in Part B above recognise a wide range of rights and set out obligations for States Parties including New Zealand. These differ from treaty to treaty. Examples include:

- The right of peoples to self-determination, by virtue of which “they freely determine their political status and freely pursue their economic, social and cultural development”.¹⁴⁷
- Rights to freedom from discrimination;¹⁴⁸ from torture and cruel, inhuman or degrading treatment or punishment;¹⁴⁹ to security of the person;¹⁵⁰ when deprived of liberty, to be treated with humanity and respect for one’s inherent dignity as a human person;¹⁵¹ to equality before the courts and tribunals;¹⁵² to a fair and public hearing by a competent, independent and impartial tribunal in the determination of a person’s rights and obligations;¹⁵³ and not to be subjected to arbitrary or unlawful interference with one’s privacy, family, or home.¹⁵⁴
- Recognition that the family is the natural and fundamental group unit of society, and is entitled to protection by society and the State.¹⁵⁵
- The right of the child to, without discrimination, “such measures of protection as are required by his [or her] status as a minor, on the part of his [or her] family, society and the State”;¹⁵⁶ to “as far as possible [...] know and be cared for by his or her parents;”¹⁵⁷ not to be separated from the child’s parents against the child’s will other than when a lawful determination is made that this is necessary for the child’s best interests;¹⁵⁸ when separated from one or both parents, to maintain relations and direct contact with both

¹⁴⁴ Article 16(3).

¹⁴⁵ Article 25(2).

¹⁴⁶ Article 25(2).

¹⁴⁷ ICCPR, art 1(1).

¹⁴⁸ CERD, art 2(1) and ICCPR, art 26.

¹⁴⁹ ICCPR, art 7.

¹⁵⁰ ICCPR, art 9(1).

¹⁵¹ ICCPR, art 10(1).

¹⁵² ICCPR, art 14(1).

¹⁵³ ICCPR, art 14(1).

¹⁵⁴ ICCPR, art 17(1).

¹⁵⁵ ICCPR, art 23(1).

¹⁵⁶ ICCPR, art 24(1).

¹⁵⁷ CROC, art 7(1).

¹⁵⁸ CROC, art 9(1).

parents other than when that is contrary to the child's best interests;¹⁵⁹ and to "special protection and assistance provided by the State" when the child is "temporarily or permanently deprived of his or her family environment" or removed from that environment for his or her best interests.¹⁶⁰

- The right of people belonging to "ethnic, religious or linguistic minorities" not to be "denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."¹⁶¹
- The right to social security, an adequate standard of living, the "highest attainable standard of physical and mental health", and to education.¹⁶²
- Obligations to "ensure to the maximum extent possible the survival and development of the child";¹⁶³ "take all appropriate legislative, administrative, social and educational measures to protect the child 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 the care of the child";¹⁶⁴ and to take "all appropriate measures to promote physical and psychological recovery and social integration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment [...]".¹⁶⁵
- Obligations to "take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs."¹⁶⁶
- Recognition that people with disabilities "enjoy legal capacity on an equal basis with others in all aspects of life", an obligation to "take appropriate measures" to provide people with disabilities access to the support they may need to exercise this legal capacity, and an obligation to "ensure effective access to justice for persons with disabilities on an equal basis with others".¹⁶⁷

¹⁵⁹ CROC, art 9(3).

¹⁶⁰ CROC, art 20(1).

¹⁶¹ ICCPR, art 27.

¹⁶² As recognised in ICESCR, arts 9, 11, 12 and 13. Under art 2(1), States Parties undertake to realise these rights progressively by "all appropriate means" and "to the maximum of [their] available resources".

¹⁶³ CROC, art 6(2).

¹⁶⁴ CROC, art 19(1).

¹⁶⁵ CROC, art 39.

¹⁶⁶ CRPD, art 16(4).

¹⁶⁷ CRPD, art 12(2) and (3), and art 13(1).

- Obligations to respect and ensure rights,¹⁶⁸ including the taking of “necessary”, “effective” or “all appropriate” measures to achieve this.¹⁶⁹
- Obligations to carry out investigations to determine whether a violation of rights has occurred. For example, CAT provides that a State Party must carry out “a prompt and impartial investigation” where there is a reasonable basis for believing that an act of torture has been committed in the territory under that State Party’s jurisdiction (i.e. control).¹⁷⁰ CRPD requires each State Party to have “effective legislation and policies” “to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted”.¹⁷¹
- Obligations to provide effective remedies for violation.¹⁷² These include obligations such as developing “the possibilities of judicial remedy” for any person claiming that his or her rights as recognised in the ICCPR have been violated.¹⁷³ The UN Human Rights Committee considers that States Parties must ensure that remedies are “accessible and effective”, as well as being “appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children.”¹⁷⁴

UNDRIP

4. UNDRIP’s preamble states that it is a solemn proclamation, and a “standard of achievement to be pursued in a spirit of partnership and mutual respect”. The rights and obligations proclaimed in it include that:
 - indigenous peoples have the right, as a collective or individuals, to the full enjoyment of “all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.”¹⁷⁵
 - indigenous peoples “are free and equal to all other peoples and individuals, and have the right to be free from any kind of discrimination, in the exercise of their rights [...]”.¹⁷⁶

¹⁶⁸ ICCPR, art 2(1).

¹⁶⁹ ICCPR, art 2(2); CERD, art 2(1)(c); CAT, art 2(1); and ICESCR, art 2(1).

¹⁷⁰ CAT, art 12.

¹⁷¹ CRPD, art 16(5).

¹⁷² See for example ICCPR, art 2(3)(a); CERD, art 6; and CAT, art 14(1). New Zealand has however entered the following reservation to art 14(1) of CAT: “The Government of New Zealand reserves the right to award compensation to torture victims referred to in article 14 of the Convention Against Torture only at the discretion of the Attorney-General of New Zealand.” In its *Concluding observations on the sixth periodic report of New Zealand CAT/C/NZL/CO/6* (2015), the Committee Against Torture recommended that New Zealand withdraw this reservation, considering it incompatible with New Zealand’s obligations under art 14 of CAT. The Committee also urged New Zealand at [20] to “ensure the provision of fair and adequate compensation through its civil jurisdiction to all victims of torture”. New Zealand has entered a similar reservation in relation to ICCPR, art 14(6) (which concerns compensation for miscarriages of justice).

¹⁷³ ICCPR, art 2(3)(b).

¹⁷⁴ CCPR *General Comment No 31*, above n 22, at [15].

¹⁷⁵ Article 1.

¹⁷⁶ Article 2.

- in exercising their right to self-determination, indigenous peoples have the right to “autonomy or self-government in matters relating to their internal and local affairs”, as well as means for financing this autonomy.¹⁷⁷
- “indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.”¹⁷⁸
- “indigenous peoples have the right to practice and revitalize their cultural traditions and customs.”¹⁷⁹
- “indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies [...]”¹⁸⁰
- indigenous peoples have the right to participate in decision-making on matters affecting their rights.¹⁸¹
- states will “consult and cooperate in good faith” with indigenous peoples “to obtain their free, prior and informed consent” before the adoption and implementation of legislative or administrative measures which may affect them.¹⁸²
- indigenous peoples have the right to the improvement of their economic and social conditions.¹⁸³ States will take “effective” measures to ensure the continuing improvement of indigenous peoples’ economic and social conditions, as well as “special” measures where appropriate.¹⁸⁴
- in implementing UNDRIP, “particular attention” will be paid to the “rights and special needs of indigenous elders, women, youth, children and persons with disabilities.”¹⁸⁵
- states will take measures, together with indigenous peoples, “to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”¹⁸⁶
- “indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development.”¹⁸⁷

177 Article 4.

178 Article 7(1).

179 Article 11(1).

180 Article 12(1).

181 Article 18.

182 Article 19.

183 Article 21(1).

184 Article 21(2).

185 Article 22(1).

186 Article 22(2).

187 Article 23.

- “effective measures” will be taken by states to ensure that, as required, “programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented”.¹⁸⁸
- in consultation and cooperation with indigenous peoples, states will take “the appropriate measures, including legislative measures, to achieve the ends of” UNDRIP.¹⁸⁹
- indigenous peoples have the right to “effective remedies for all infringements of their individual and collective rights.”¹⁹⁰

TREATY COMMITTEES AND INTERNATIONAL COURTS

5. The international treaties referred to in Part B above each established independent, expert committees to monitor their implementation by States Parties (e.g. the Committee on the Elimination of Racial Discrimination under CERD, the Human Rights Committee under the ICCPR, and the Committee Against Torture under CAT). These committees receive reports from States on implementation and make recommendations to States.
6. The committees also produce authoritative interpretations of treaty rights and obligations in “General Comments”. Where accepted by a State Party to the relevant treaty, some committees can receive and consider communications alleging that treaty rights have been violated. The committees’ views on these communications also produce authoritative interpretations. New Zealand has recognised the competence in this regard of the Human Rights Committee under the ICCPR, the Committee Against Torture under CAT, the Committee on the Elimination of Discrimination against Women under CEDAW, and Committee on the Rights of Persons with Disabilities under CRPD.¹⁹¹
7. In addition, international and regional courts produce authoritative interpretations of human rights treaties and legal principles relevant to human rights. These include the International Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights.
8. Interpretations of treaty rights and obligations by these expert treaty bodies and courts are important because human rights are often expressed in broad terms. In addition, it is common for treaties not to state explicitly what redress has to be provided for a violation. Therefore, these and other expert interpretations, including work by academics, are relevant in determining the nature and scope of human rights and related obligations with which New Zealand must comply.
9. This is recognised by New Zealand courts. Moreover, even though New Zealand is not a State Party to the treaties interpreted by the European and Inter-American

¹⁸⁸ Article 29(3).

¹⁸⁹ Article 38.

¹⁹⁰ Article 40.

¹⁹¹ United Nations Office of the High Commissioner for Human Rights “Acceptance of individual complaints procedures for New Zealand” <[tinternet.ohchr.org](http://internet.ohchr.org)>.

Courts, their interpretations of those treaties have been taken into account by New Zealand courts in domestic human rights cases.¹⁹²

UNIVERSAL PERIODIC REVIEW

10. New Zealand's human rights situation is also monitored through the United Nations' Universal Periodic Review, during which other UN Member States can make recommendations to New Zealand on human rights.¹⁹³

¹⁹² For example, in *Taunoa*, above n 55, the Supreme Court took into account judgments of the European Court of Human Rights and the views of UN treaty committees, as well as judgments from other jurisdictions.

¹⁹³ Ministry of Foreign Affairs and Trade "Universal Periodic Review 2019" www.mfat.govt.nz.

APPENDIX B

EXAMPLES OF THE DIALOGUE BETWEEN TREATY COMMITTEES AND NEW ZEALAND REGARDING ABUSE IN CARE

CAT

2009-2010

1. In 2009, the Committee Against Torture expressed concern that allegations of cruel, inhuman or degrading treatment inflicted by persons who were acting in an official capacity against children in State institutions, and against patients in psychiatric institutions, had not been investigated, prosecutions had not been brought against perpetrators, and victims had not been given redress, including "adequate compensation and rehabilitation." The Committee recommended that New Zealand carry out "prompt and impartial investigations", prosecute perpetrators, and provide victims with appropriate redress.¹⁹⁴
2. In its response to the Committee in 2010, New Zealand stated allegations had been made in relation to children's homes, psychiatric institutions, and other types of State care, in periods ranging from 1950 to 1992. New Zealand advised that allegations of abuse had been engaged with systematically and on a case by case basis, and that thorough investigations were carried out of allegations of ill-treatment where those related to particular institutions. It referred to the possibility of criminal complaints being made to the Police, civil claims being taken in the Courts, and various other procedures. It also referred to the Confidential Listening and Assistance Service, and an Alternative Resolution Process that "can provide compensation, apologies and other remedies."¹⁹⁵
3. New Zealand further stated that allegations made in civil claims which had by then proceeded to trial had not been upheld, and that while limitation defences were not raised as a barrier to settlement they were raised if claims proceeded to Court. It also referred to the possibility of legal aid for civil claims, and that such aid could be withdrawn if the claim did not have sufficient prospects of success. New Zealand further stated that with the exception of the claims relating to Lake Alice Hospital, there was at that time "no evidence of systemic failure". In addition, New Zealand advised that as "the claims generally do not involve claims of broad systemic or institutional failure", it did not consider it appropriate to hold a public inquiry. It stated that it would however continue to review its approach to claims resolution.¹⁹⁶

2013-2016

4. In its sixth periodic report under CAT in 2013, New Zealand provided data to the Committee on civil claims for historic abuse, including data relating to settlements then reached. New Zealand also provided information regarding the Ministry of

¹⁹⁴ CAT *Concluding Observations on the fifth periodic report of New Zealand*, CAT/C/NZL/CO/5 (2009) at [11].

¹⁹⁵ *Follow-up responses by New Zealand to the concluding observations of the Committee against Torture*, (CAT/C/NZL/CO/5), CAT/C/NZL/CO/5/Add.1 (2010) at [19]-[22].

¹⁹⁶ At [23]-[28].

Social Development's Historic Claims team and delays then being experienced with claims resolution, and stated that the Ministry had committed to closing all historic claims by 31 December 2020. Further, New Zealand advised that Ministry staff encouraged and supported claimants whose allegations raised issues of criminal offending against them to complain to the Police. It referred to one prosecution/conviction relating to pre-1992 treatment in a psychiatric facility (Carrington Hospital), and advised that no disciplinary action had been taken against Ministry staff in respect of historic abuse claims. Information was provided about settlements for psychiatric patients whose claims were barred by the Mental Health Act 1969, and payments to Lake Alice claimants. In addition, New Zealand referred to a police investigation into complaints relating to Lake Alice Hospital, and advised that no charges had been laid following that investigation.¹⁹⁷

5. In its concluding observations on New Zealand's sixth periodic report in 2015, the Committee set out its view that New Zealand had "failed to investigate or hold any individual accountable for the nearly 200 allegations of torture and ill-treatment against minors at Lake Alice Hospital."¹⁹⁸ It recommended that New Zealand conduct "prompt, impartial and thorough investigations" into all allegations of ill-treatment in State care, that prosecutions be brought against suspected perpetrators of ill-treatment, that those found guilty of such acts be punished in a manner consistent with the gravity of their conduct, and that victims be provided with effective redress.¹⁹⁹
6. The Committee "welcomed" New Zealand's commitment to compensate victims of historic abuse, but stated it was "concerned at the fact" that such victims had not been provided "full redress".²⁰⁰ The Committee recommended that New Zealand take legislative and other measures required to ensure that all those who suffered torture are provided redress, "including medical and psychological assistance, full compensation and the means for full rehabilitation."²⁰¹
7. In 2016, New Zealand provided information in response to some of the Committee's observations. With regard to historic abuse, New Zealand advised that there were nearly 200 claims about ill-treatment at Lake Alice Hospital which related "to the civil resolution process", and that individuals had the option of complaining to the Police. New Zealand also advised that after complaints were made, the Police considered whether there was sufficient evidence to charge the alleged perpetrators, and decided not to lay charges.²⁰²

2017-2019

8. In 2017, the Committee requested that New Zealand provide information relating to the recommendations referred to in paragraph 6 above.²⁰³ In its seventh

¹⁹⁷ *Sixth periodic reports of States parties due in 2013- New Zealand CAT/C/NZL/6*, (2013) at [228]-[246].

¹⁹⁸ *CAT Concluding observations on the sixth periodic report of New Zealand*, above n 172, at [15].

¹⁹⁹ At [15](c).

²⁰⁰ At [19].

²⁰¹ At [19].

²⁰² *Information received from New Zealand in follow-up to the concluding observations CAT/C/NZL/CO/6/Add.1* (2016) at [31].

²⁰³ *CAT List of issues prior to submission of the seventh periodic report of New Zealand CAT/C/NZL/QPR/7* (2017) at [28].

periodic report, New Zealand referred to the establishment of this Inquiry, and stated this was an acknowledgment that historic abuse had occurred.²⁰⁴ It also referred to the Inquiry's terms of reference, including that the Inquiry will make recommendations on redress.²⁰⁵ In addition, New Zealand referred to:

- (a) payments and apologies made by the Ministry of Social Development's Historic Claims Team, and endeavours to resolve claims more quickly;²⁰⁶
 - (b) payments made by the Ministry of Health's Historic Abuse Resolution Service, and related apologies;²⁰⁷
 - (c) new claims, and related settlements, concerning Lake Alice Hospital.²⁰⁸
9. New Zealand also referred to a communication to the Committee regarding Lake Alice Hospital by Paul Zentveld.²⁰⁹ New Zealand has recognised the Committee's competence to receive and consider communications from individuals under New Zealand's jurisdiction alleging that New Zealand has violated their rights under CAT.²¹⁰ The Committee's decision on this communication was adopted on 4 December 2019, and is summarised below.

Zentveld v New Zealand²¹¹

10. Mr Zentveld was first admitted to Lake Alice Hospital in 1974 at age 13, and spent a total period of two years and 10 months in the Hospital. His treatment at the Hospital, then being operated under Dr Selwyn Leeks, included unmodified electro-convulsive therapy (ECT), drugs, and solitary confinement. Mr Zentveld was one of the Lake Alice claimants who reached a settlement with the New Zealand Government. As part of this, Mr Zentveld received a letter of apology and a \$115,000 *ex gratia* payment.²¹²
11. In his communication to CAT, Mr Zentveld claimed that New Zealand had violated a number of his rights and its obligations under CAT. These included:
- (a) the obligation to carry out a "prompt and impartial investigation" when there are reasonable grounds to believe that an act of torture has occurred in New Zealand;²¹³
 - (b) the right of an individual alleging he or she has been subjected to torture to complain to, and have one's case promptly and impartially examined by, competent authorities;²¹⁴ and

²⁰⁴ Seventh periodic report submitted by New Zealand under article 19 of the Convention pursuant to the optional reporting procedure, due in 2019 (advance unedited version) (2019) at [301].

²⁰⁵ At [303]-[304].

²⁰⁶ At [305]-[306].

²⁰⁷ At [307]-[308].

²⁰⁸ At [309].

²⁰⁹ At [310].

²¹⁰ Article 22(1) of CAT.

²¹¹ Above n 31.

²¹² At [2.3] and fn 6.

²¹³ Article 12 of CAT.

²¹⁴ Article 13 of CAT.

- (c) the right of a victim of torture to obtain redress.²¹⁵
12. The Committee decided that New Zealand had breached the above rights and obligations. The Committee referred to complaints by Mr Zentveld and others to the Police, and the subsequent Police investigation. Amongst other matters, the Committee considered that:
- (a) the Police’s investigation was deficient because it did not determine whether alleged treatment had been administered as a punishment, despite findings in 2001 by retired High Court judge Sir Rodney Gallen that unmodified ECT had been administered for this purpose;²¹⁶
 - (b) New Zealand authorities had not made “consistent efforts to establish the facts of such a sensitive historical issue involving abuse of children in State care”.²¹⁷
 - (c) New Zealand had not provided a convincing explanation of why, as the Police had decided, there was no countervailing public interest in proceeding with a prosecution against Dr Leeks (the Police having also decided that there was unlikely to be sufficient evidence to prosecute him under the Crimes Act 1961 for wilfully ill-treating a child).²¹⁸ In this regard, the Committee considered it significant that the allegations concerned “violence in State care inflicted upon a vulnerable group”.²¹⁹
 - (d) New Zealand authorities had not attempted to determine whether anybody other than Dr Leeks could be prosecuted, which in the Committee’s view raised doubts about the effectiveness of the Police’s investigation.²²⁰
13. Earlier in its decision, the Committee referred to the establishment of this Inquiry. It noted however that the Inquiry has no power to determine criminal liability (and could not therefore replace a Police investigation into Mr Zentveld’s allegations).²²¹
14. Amongst other matters, the Committee “urged” New Zealand to carry out “a prompt, impartial and independent investigation” of Mr Zentveld’s allegations and “where appropriate, the filing of specific torture and/or ill-treatment charges against perpetrators [...]”.²²² It also urged New Zealand to provide Mr Zentveld with “appropriate redress, including fair compensation and access to the truth, in line with the outcome of the investigation”.²²³

²¹⁵ Article 14 of CAT.

²¹⁶ At [9.4]. While not stated by the Committee, this point may have been significant because “torture” is defined in art 1(1) of CAT as meaning “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as [...] punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person [...]”.

²¹⁷ At [9.4].

²¹⁸ At [4.8] and [9.5].

²¹⁹ At [9.5].

²²⁰ At [9.6].

²²¹ At [8.5].

²²² At [11(a)].

²²³ At [11(b)].

CERD

15. In 2017, the Committee on the Elimination of Racial Discrimination stated that it was alarmed about allegations of abuse of children in foster and state care, noting that the majority of children in care over the relevant period were Māori. The Committee stated its understanding that New Zealand intended to compensate victims, but went on to say that it was concerned the approach being taken would not expose any systemic problems. It recommended that New Zealand establish an independent inquiry into alleged abuse in State care of children and adults with disabilities from 1950 to 1990. It also recommended that the inquiry have the power to “determine redress, rehabilitation and reparations for victims, including an apology from the State party”.²²⁴ Further, the Committee recommended that New Zealand adopt effective measures to reduce the numbers of Māori and Pasifika children in State care, including by implementing a “whanau-first” placement policy for Māori children.²²⁵
16. New Zealand’s response to those recommendations included reference to the establishment of this Inquiry and the Inquiry’s then draft terms of reference, as well as stating that the Inquiry will make recommendations on redress.²²⁶ The response also referred to the establishment of Oranga Tamariki, and goals and obligations of Oranga Tamariki in relation to Māori and Pasifika children.²²⁷

CRPD

17. In 2018 the Committee on the Rights of Persons with Disabilities requested that New Zealand provide it with information about steps it was taking to prevent abuse in State care, address complaints and provide redress for survivors of historic abuse in State care. It also asked New Zealand to advise the Committee of any criminal investigations carried out in relation to allegations of abuse in State care.²²⁸
18. New Zealand’s response referred to this Inquiry’s establishment, and to the Health and Disability Commissioner, the Office of the Ombudsman, and the Office of the Inspectorate. It was not able to advise the Committee of any relevant criminal investigations, including because its data did not differentiate complaints about abuse in state care from investigations relating to historic physical or sexual abuse.²²⁹

ICESCR

19. Also in 2018, the Committee on Economic, Social and Cultural Rights expressed concern that allegations of abuse against children in State care had not been effectively investigated. It recommended that New Zealand ensure that this

²²⁴ CERD *Concluding observations on the combined twenty-first and twenty-second periodic reports of New Zealand* CERD/C/NZL/CO/21-22 (2017) at [33]-[34(a)].

²²⁵ At [34(b)].

²²⁶ CERD *Information received from New Zealand on follow-up to the concluding observations* CERD/C/NZL/CO/21-22/Add.1 (2018) at [18]-[28].

²²⁷ At [29]-[34].

²²⁸ CRPD *List of issues prior to submission of the combined second and third periodic reports of New Zealand* CRPD/C/NZL/QPR/2-3 (2018) at [7(d)].

²²⁹ *Combined second and third periodic reports submitted by New Zealand under article 35 of the Convention pursuant to the optional reporting procedure, due in 2019* CRPD/C/NZL/2-3 (2019) at [72]-[77].

occur, that it “operationalize” this Inquiry, and that it ensure the Inquiry had the necessary resources to carry out its mandate efficiently.²³⁰

²³⁰ CESCR *Concluding observations on the fourth periodic report of New Zealand E/C.12/NZL/CO/4* (2018) at [12] and [13(e)].