

## STATEMENT OF TRISH GRANT

- 1 My name is Trish Grant and I am Director of Advocacy at IHC, an NGO that advocates for the rights, inclusion and welfare of all people with intellectual disabilities in New Zealand and which supports them to lead satisfying lives in the community.<sup>1</sup>
- 2 I have been the person responsible for progressing a human rights claim taken by IHC against the Government (Minister and Secretary of Education) under Part 1A of the Human Rights Act 1993. The claim alleges unlawful discrimination against primary, intermediate and secondary school aged children in State schools who have disabilities needing accommodations to learn. The claim concerns between 84,000 and 106,000 New Zealand children.
- 3 It is difficult to describe the poor outcomes that intellectually disabled children experience when they are denied an education or the education they receive neglects to provide what they need to learn. IHC has a huge number of stories detailing the discrimination and neglect disabled children and adults have experienced in the New Zealand education system.
- 4 Children are unable to learn the basic skills they need to live good lives if they are excluded from education. Every measure of well-being is diminished by exclusion from education. These skills range from reading and writing skills, to the social skills that they will need to live in communities. This impacts on

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<sup>1</sup>IHC was founded over 70 years ago in 1949 by a group of parents who wanted equal treatment from the education, health and social service systems for their children with intellectual disability. Today IHC is still working for these same outcomes and is committed to advocating for the rights, welfare and inclusion of all people with an intellectual disability throughout their lives. IHC supports people with intellectual disability to lead satisfying lives and have a genuine place in the community as citizens. It believes that the foundations for inclusion of people with intellectual disability in society are built on integrated, across-government and community-linked support to families of children with intellectual disability and access to inclusive early childhood, primary, secondary and tertiary education. Underpinning its work is the principle that intellectually disabled children and young people are part of the community of all children and young people – they are entitled to full enjoyment of their human rights and fundamental freedoms on an equal basis with other children and young people.

their ability to work, leaving them to rely on the benefit system for their entire life, unable to afford housing – least of all housing that is accessible for them. Children feel ostracized and neglected when they are denied the ability to enjoy an education alongside their peers. They are denied the opportunity to gain social skills, make friends, and enter into romantic relationships. This leads to life-long isolation for disabled adults. If parents and caregivers want their children to learn, they need to give up or reduce employment to look after their children if the school has imposed restrictions on attendance or home-school their children. This leads families down an unavoidable path to poverty, stress and isolation.

- 5 Adults who later learn the skills they should have at school, spend their entire lives on benefits or in low-paying jobs as they lack the confidence and skills to enter the workforce or seek higher-paid positions. Most individuals forever lack the confidence to pursue and protect their own rights, are afraid of authority and concerned that people think they are cannot learn due to their lack of schooling.
- 6 Individuals who did attend school, but were not adequately supported or included, have experienced diverse traumas. Parents tell of their children having meltdowns, ceasing to communicate with people, experiencing high levels of loneliness and bullying, being restrained, secluded, stood down, suspended or expelled due to behaviours caused by their disability.
- 7 These are the most vulnerable children in New Zealand and they consistently experience the worst outcomes. The denial of their right to education starts them on the journey to these poor outcomes.

## Overview of my evidence

- 8 IHC claims that successive governments and the Ministry have neglected the education of children with disabilities needing accommodations to learn in state primary, intermediate and secondary mainstream state schools.<sup>2</sup>
- 9 Though the historic treatment of children in the education setting in the period prior to 1999 has been very poor, for the purposes of this evidence IHC focuses on the period 1999 to 2020 and asks the Royal Commission to exercise its discretion to consider the issues and experiences after 1999 in this redress hearing. This is because it was in this period that IHC decided to use Human Rights legislation to seek a legal remedy by filing civil proceedings in the Human Rights Review Tribunal (claim) against the government for its discriminatory policies and practices against children with disabilities needing accommodations to learn in school. That remedy has been entirely ineffective.
- 10 It is now 12 years since IHC first notified the then Minister of Education of its intention to lodge this claim, which alleged unjustified (and hence unlawful) discrimination by the government against children with disabilities who needed accommodations to learn and were being educated in mainstream state primary and secondary schools. IHC has been waiting for five years for a decision from the Tribunal in relation to the Crown's claim to strike out part

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<sup>2</sup> As such this meets the Terms of Reference for the Inquiry: Royal Commission of Inquiry into Historical Abuse in State care and in the Care of Faith Based Institutions Order 2018: See in particular: The purpose of this Inquiry is to identify, examine and report on matters in scope. (10) The scope includes a consideration of the nature and extent of abuse that occurred in State care. The terms recognise that structural, systemic or practical factors may have caused or contributed to abuse of individuals in State care. (10). 'Abuse' in state care is defined to include 'neglect' 17.1 and includes inadequate or improper treatment or care that resulted in serious harm to the individual (whether mental or physical). (17.1) 'State care' is defined to include educational settings such as primary, intermediate, and secondary State schools. (17.3 (c) (iii)).

of the IHC claim.<sup>3</sup> The final hearing day on this preliminary application was 23 February 2015. The substantive claim is yet to be heard.

- 11 IHC says that this Part 1A remedy has failed children with disabilities needing accommodations to learn. Reasons, in its opinion, for this failure include:
- the technical, adversarial and oppositional approach adopted by the Ministry and its legal advisers, Crown Law, from the beginning.
  - the gross and chronic under resourcing of the Tribunal until last year, to hear and deliver decisions in a timely way.
- 12 In this evidence I provide:
- (i) An explanation of who IHC is and what it does.
  - (ii) An explanation of Part 1A of the Human Rights Act 1993.
  - (ii) Background to taking the complaint to the Human Rights Commission and then Human Rights Review Tribunal.
  - (iii) The claim itself.
  - (iv) How the claim progressed.
  - (iv) The current situation.
  - (v) My conclusion.

#### About IHC

- 13 IHC is now the largest disability advocacy and service provider organisation in New Zealand and a leader in the disability sector. IHC advocates for the rights, inclusion and welfare of over 50,000 people in New Zealand with an intellectual disability.

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<sup>3</sup> This was filed during the interlocutory process by way of a Notice of Opposition dated 5 December 2014 to an application of IHC for joinder of two additional parties (Teachers Council and Chief Review Officer). See Minute dated 23 December 2014 in Common Bundle at page 1. IHC filed its original claim on 27 September 2012 and its current Second Amended Statement of Claim on 18 August 2014.

- 14 The organisation was established 70 years ago by parents of children with intellectual disabilities. It has over 2500 family and individual members and provides support and advocacy for people with an intellectual disability and their families.
- 15 IHC's vision for people with an intellectual disability is to live satisfying lives in the community. This means participating in and contributing to their communities and realising their full rights and responsibilities as New Zealanders. IHC has a strong philosophical and practical commitment to upholding the rights of all people with intellectual disability to live, work and learn in inclusive, non-segregated settings.
- 16 IHC has a long history of advocacy for education. It was an integral part of the lobby to create a legal right to education for children which was implemented as section 8 of the Education Act 1989. Its advocacy work is targeted at every level: the individual, the community and government systems and policies. It responds to a large number of communications from families who require support and assistance, advice and information about inclusive education and how to resolve the difficulties they experience securing their disabled child's right to access education at their local school.

#### Part 1A Human Rights Act 1993

- 17 Part 1A was a novel provision when it came into effect in 2001 and offered the opportunity for IHC to ask the Human Rights bodies to consider whether the policies and practices of the government in relation to its provision of the right to an education to children with disabilities needing accommodations to learn constituted unlawful discrimination against those children as a class.<sup>4</sup> If

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<sup>4</sup> See s 20 L where an act or omission, including an enactment, is in breach of Part 1A if it is inconsistent with s 19 of the NZBORA. Hence the government is answerable to NZBORA in relation to its policies, practices and enactments. Note that Part 1A was the culmination of a Report 'Re-evaluation of the Human Rights Protections in New Zealand' by McLean, Cooper, Mansfield and Hunt, October 2000, Ministry of Justice. A key point of the new law was to ensure there was early consideration of human rights issues and obligation in policy making and thus create a human rights compliant culture within the public service.

so then the Tribunal had wide powers to frame a remedy that would address the causes of the unequal treatment.<sup>5</sup>

Part 1A enabled serious structural and systemic problems with government policies and practices to be challenged as unlawfully discriminatory and for novel remedies enabling systemic change via a staged approach over a period of years to be undertaken with the end result being government policies and practices that were human rights compliant.

#### Background to IHC taking the claim to Human Rights Commission and Human Rights Review Tribunal

- 18 Special Education 2000 was a new policy developed by the Ministry of Education in the late 1990s to deliver the right to an education to children with disabilities needing accommodations to learn in New Zealand state primary and secondary schools. A very small percentage of children with disabilities were individually funded with full teacher aide support (1-3%). The funding for this group is called ORRS funding. The remaining children were to be funded out of a grant given to every school based upon its roll size. The premise was that disabilities are spread evenly through the population.
- 19 By 2006 major faults and gaps were evident in the operation of Special Education 2000. IHC was inundated with concerns and complaints from parents. Unlike all other children, there were no systems to review the

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<sup>5</sup> See s 92I where discretionary remedies include: (d) an order that the defendant perform any acts specified in the order with a view to redressing any loss of damage suffered by the complainant, or as the case may be, the aggrieved person as a result of the breach. ; (f) an order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme, in order to assist or enable the defendant to comply with the provisions of the Act.; (h) any other such relief the Tribunal thinks fit. See also 92 (O). The Tribunal may defer or modify remedies for breach of Part 1A or Part 2. 92(O)(2) instead of or as well as awarding damages the Tribunal may (i) specify a period during which the defendant must remedy the breach; and (ii) adjourn the proceedings to a specified date to enable further consideration of the remedies or further remedies (if any) to be granted; (d) to provide that any granted has effect only prospectively or only from a date specified by the Tribunal. (e) to provide that the retrospective effect of any remedy is limited in a way specified by the Tribunal.

attendance, progress and achievement of children with disabilities requiring accommodations to learn. Teachers usually had no training in how to teach inclusively. Scores if not hundreds of children were being directly and indirectly denied enrolment by local school principals. Many children were being told they could only attend for part of the school day (that part where they had teacher aide hours). Most extracurricular activities were denied these children (such as camps, concerts, sports). Children needing specialist support services were waiting months and even years to access them (such as speech therapy). Children who are denied access to extracurricular activities, or who wait months for services they need, experience loneliness, isolation and a feeling that they are not important or valued.

- 20 Parents who could afford to, were having to pay for teacher aide hours for their children to ensure their children could stay at school the whole school day, as non-disabled children have a duty and right to. Other parents were having to leave work and suffer the harsh economic consequences, so as to home school their children as they were ejected from the school for behavioural problems. Often children were being disciplined and punished because they were not given the supports needed to mediate their behaviours caused by their disabilities. Parents were moving to 'disability friendly' schools which put huge pressure on them as they were not funded based upon how many children with disabilities they had but based upon general population figures.
- 21 There was no doubt but that children were being subjected to serious direct and systemic discrimination in their efforts to gain an education. The discrimination ranges from a denial of their right to enrol at school, which is enshrined in section 8 of the Education Act, but also discrimination from their need to have accommodations to learn. These accommodations were ones that children without disabilities did not need. Hence the claim of

discrimination.<sup>6</sup> The problems were so widespread and serious that IHC could not address them individually with each Board of Trustee, which was the solution proposed by the Ministry whenever the problems were raised.

- 22 When its usual education and government lobbying efforts on behalf of its constituent group bore no fruit with government, IHC decided, in 2008, to take action under Part 1A of the Human Rights Act 1993. This new provision, holding government to account for the first time for discriminatory policies, practices and legislation, had come into effect in 2002.

### The Claim

- 23 The current claim is the second Amended Statement of Claim which was filed in the Human Rights Review Tribunal on 18 August 2014.<sup>7</sup> The claim alleges that despite the statutory right of every child to an education and the statutory and international human rights obligations upon the Crown to provide the same, children with disabilities needing accommodations to learn, have multiple severe barriers preventing them as a class of their right to an education.

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<sup>6</sup> See Article 2 Convention on the Rights of Persons with Disabilities (CPRD): Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation. "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. See Article 24 (CPRD): where governments are required to make sure there is an education system that includes everyone and that there are three aims of education: (a) To make sure that every person can develop fully as a human being and feels respected and valued, and to make respect for human rights stronger (b) to make sure every disabled person develops fully as a human being; (c) to make sure disabled people are included in all parts of society. There are 5 steps a government must take to protect these education rights. (1) make sure that disabled people are not kept out of the education system because of their disability (2) Make sure disabled persons can have a quality primary and secondary education that is free and includes everyone; (3) make sure that steps are taken to meet the needs of individuals; (4) make sure disabled people get the support they need within mainstream education so that can access a good education; (5) make sure that support to individuals is offered within educational environments that help people reach their maximum academic and social development, in line with the aim of full inclusion.

<sup>7</sup> This is a refinement and refocus of an earlier amended SOC filed on 30 April 2014 date and the original Statement of Claim filed on 26 September 2012 page 4 in Common Bundle.



24 The practices and barriers that prevent their learning are set out in paragraph 32 to 44 of the claim and include that:

- significant numbers of such children are discouraged or denied attendance at their local school (33)
- significant numbers are excluded from participation in school curricular and extracurricular activities (34)
- significant numbers are excluded from school for part of the day (35)
- significant numbers learn in school environments which have no or limited inclusive practices and no leadership to create such environments (36)
- significant numbers are taught by teachers who have had no or extremely limited training in 'inclusive teaching practices' relating to disability (37)
- significant numbers have no adequate internal or external performance assessments, performance and progress recording or monitoring and neither the teachers nor schools are held accountable for their effective learning. (37A)
- significant numbers are unable to access the specialist education support services they need to participate and access the curriculum (39)
- students in the discriminated against group are significantly disproportionately represented in the numbers of students stood down, suspended or excluded from school. (40)
- there is insufficient resourcing to cover the accommodations needed by approximately half of students with disabilities needing accommodations to learn. (41)

25 The remedies (redress and outcomes) sought by IHC on behalf of children who need accommodations to learn are set out at para 2 of the claim. They are, in summary:

- an order that Boards of Trustees be directed to collect data on the presence, participation, progress and achievement of such students
- an order that the data be analysed and reviewed by the school and reported to the Defendant for the purposes of:

- monitoring school performance individually and nationally;
- reviewing and developing materials and strategies to assist teachers to effectively teach
- adjusting from time to time the special education framework and resourcing
- an order directing the Chief Review Officer of ERO to review the inclusiveness of school practices, culture and environment to ensure such children can be present, participate, progress and achieve
- an order directing the Defendant produce effective guidelines to ensure effective adoption and implementation of inclusive school wide practices
- an order directing the Defendant to require of the Teachers Council specific competencies in teaching inclusively.
- Order that the Defendant produce stand alone guidelines for the assistance of Boards and parents dealing with disciplinary issues affecting such students.

Lead up to filing of claim in HRRT and developments after filing the claim.

*Advice to Ministry of intention to lodge complaint of breach of Part 1A HRA*

- 26 In March 2008 I advised the then Deputy Secretary of Special Education that IHC intended to lodge a complaint under Part 1A of the Human Rights Act 1993 alleging discrimination by the government against children with disabilities being educated in mainstream state primary and secondary schools. The then Deputy Secretary of Special Education, responded by proposing a series of regular discussions between the parties. We had two meetings in March 2008.
- 27 In April 2008 I followed up on the meetings by providing the Ministry with a briefing paper on IHC's concerns. On page two it set out the issues and on page three it advised that IHC was currently preparing a complaint to the

Human Rights Commission about these issues<sup>8</sup>. The briefing paper said in part:

Para 11. Parents regularly report instances where their children are unable to access an inclusive education. Practices are many and varied but include for example requiring the student to go home when the teacher aides are not available, being required to make financial contributions to teacher aide hours, exclusion from activities such as school trips through to refusing enrolment altogether.

28 On 14 April 2008 the Deputy Secretary responded,<sup>9</sup> He made the point that school boards of trustees have complete discretion to govern schools and IHC's complaint against the government showed a misunderstanding in respect of school governance. He was also discouraging of IHC taking a complaint to the Human Rights Commission.

29 On 29 July 2008 I wrote reassuring him that the complaint was not intended to be divisive.<sup>10</sup> The letter said in part:

I am of the view that the complaint action will not polarise the sector rather it will assist the sector to identify, focus and respond to the structural and systemic barriers which impact on schools' ability to respond to legislative and human rights of disabled children and young people. The complaint action will serve to highlight the context (legislative, government policy and resourcing etc), in which schools are expected to operate...We reiterate that a collaborative approach to seeking a solution is ideally the best way of tackling what has become a most pressing issue.

*Filing formal complaint with Human Rights Commission*

30 On 31 July 2008 IHC filed a complaint at the Human Rights Commission. I met with Commission personnel when I handed it over.<sup>11</sup> Attached to the complaint was the IHC briefing paper<sup>12</sup>. I refer particularly to paragraphs 5 – 12 and specifically paragraph 8. I quote from para 8

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<sup>8</sup> Ref to page 37 in common bundle.

<sup>9</sup> Common Bundle page 40.

<sup>10</sup> Common Bundle page 42.

<sup>11</sup> Common Bundle page 44. Note that in the months prior to the Commission notification to the defendant, there had been communication between Commission personnel, myself and our then lawyer.

<sup>12</sup> Common Bundle page 37 (note this is the doc at footnote 8).

A central theme within the Education Act 1989 (“the EA 1089”) is that everyone is given the opportunity to enjoy meaningful access to free education, and that all students learning takes place alongside their peers. Despite the legislation, disabled students continue to experience:

- Limited attendance due to a lack of teacher aide funding;
- While attending, exclusion from classroom activities because of an absence of support;
- Exclusion from activities such as sport, music and school trips because of the lack of the support necessary to allow participation;
- Suspension and /or exclusion for behaviour attributable to impairment and the absence of support to assist with such behaviour;
- A failure to provide students who are hearing impaired access to the curriculum by way of NZ Sign, despite NZ Sign being an official language of New Zealand;
- Parents being required to contribute financially towards support necessary to allow full participation in the curriculum, the alternative being non-participation;
- Refusal to accept enrolment because of the student’s disability.

31 The following months I and others from IHC met the Secretary of Education Karen Sewell and the Deputy Secretary, Nicholas Pole to discuss IHC’s complaint action. I recall reiterating our wish to engage in constructive dialogue about solutions to the problems identified within the complaint.

32 In January in 2009 IHC briefed the incoming Minister of Education, the Hon Anne Tolley. In that briefing it advised of the complaint and explained it was made in response to longstanding concerns from families, students and disability and education sector organisations.<sup>13</sup>

*Human Rights Commission notification to the Ministry*

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<sup>13</sup> Common Bundle 57.

- 33 On 8 April 2009 a Human Rights Commission (HRC) senior mediator, notified the Ministry of Education (MOE) and Crown Law Office of the IHC complaint.<sup>14</sup>

Subsequent to making its complaint, IHC wrote as follows<sup>15</sup>:

... IHC has collected significant evidence from families, school principals and others in support of the view that disabled children face discrimination when attempting to access equal learning opportunities at their local school... We are continuing to invite further participation to ensure that as many examples of the difficulties people face are provided, including from school principals and boards of trustees. The involvement of schools and boards of trustees telling their story is essential to support one of the arguments around why responsibility for the discrimination sits squarely with government. There appears to be significant agreement, perhaps even widespread agreement, between parents, schools, the education and disability sectors and academics that the difficulties are clearly attributable to government policy...

The complaint is attached in its entirety...It includes as appendices, "IHC briefing on disabled students' access to education, dated February 2008 and a letter to IHC Advocacy dated 14 April from the Deputy Secretary of Education.

- 34 A response was received from the Crown Law office by email dated 8 July 2009. In it Crown counsel, advised that she would be focusing on the complaint and planned a meeting with the Ministry for the week after next.<sup>16</sup>
- 35 A second response was received on 28 July 2009 following an email prompt from the Commission mediator. Crown counsel suggested a facilitated meeting with the Human Rights Commission mediator to tease out the issues and talk about the way forward.<sup>17</sup> The email said in part:

In terms of the government response, we are not in a position at this stage to give any indication about timeframes or even the nature of the response. For example, if it is possible the claim will proceed to litigation, there may be some reluctance to say very much before there has been an opportunity to review all the documents that potentially may be discoverable. That is likely to take many months.

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<sup>14</sup> Common Bundle page 62.

<sup>15</sup> Common Bundle page 62. This is the same document as above.

<sup>16</sup> Common Bundle page 66.

<sup>17</sup> Common Bundle page 67.

- 36 On 27 August 2009 I received a phone call from the Manager of Complaints at the Human Rights Commission about the complaint. I said I had no objection to meeting but would want to know that it actually involved an engagement on the issues and not just a meeting to 'be heard'. I also asked when we could expect a formal response from Crown law. I made a file note of this phone conversation at the time.<sup>18</sup>
- 37 I note there is also a file note dated 4 September 2009 by the Human Rights Commission Manager recording a phone conversation with Crown Counsel where she records her saying that she wanted to meet to get clarity and for IHC to 'articulate the claim and plead it'.<sup>19</sup> Further the Ministry would prepare some questions to ask IHC.
- 38 Almost four weeks later, on 30 September 2009, I received an email from the Human Rights Commission Manager saying that a letter would be coming from Crown Law in the next 3 weeks. It would be explaining its view that the complaint was not framed from the right legal perspective.<sup>20</sup> The mediator acknowledged our disappointment and frustration at the time lapse.
- 39 Finally, six weeks later, on 28 October 2009, the Human Rights Commission received a letter from the Crown Law Office advising of the Ministry's response to the complaint.<sup>21</sup> Among other matters the Ministry advised that:
- a It had prioritised individual complaints rather than the IHC complaint.
  - b The claim appeared to relate only to the level of funding provided and as such would not succeed.
  - c The ministry was not able to provide a response as there was no specific policy or action challenged by IHC.
  - d It also (wrongly) suggested that IHC had declined to participate in mediation.

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<sup>18</sup> Common Bundle page 68.

<sup>19</sup> Common Bundle page 70.

<sup>20</sup> Common Bundle page 71.

<sup>21</sup> Common Bundle page 72.

- e The recently announced review of special education provided IHC with an opportunity to provide input on future policy direction
- 40 On 29 October 2009 the Human Rights Commission Manager emailed our then lawyer to advise us that paragraph 5 of the Crown Law letter was not an accurate representation of the discussion she had had with them.<sup>22</sup>
- 41 Though very frustrated with this response from Crown Law we decided nevertheless to again try and work cooperatively with the government to identify the specific issues we had and to try to continue to mediate the problems.
- 42 During this time, as suggested by Crown Counsel, IHC made a submission to the Ministerial Review of Special Education. It was dated 19 March 2010.<sup>23</sup> I refer particularly to pages 14, 16, 17, and 20. We supplemented it by an oral submission on 22 March 2010.
- 43 A meeting finally took place with the Ministry on 29 March 2010. Present at the meeting were a Commission mediator, (HRC) myself and Laura O'Donovan from IHC, our then lawyer, Andrew Butler, a person from the Ministry of Education and two lawyers from the Crown Law Office.
- 44 The meeting was not a confidential mediation to resolve the issues but rather an open and facilitated meeting to assist the Ministry and its counsels' understanding of the ambit of the IHC complaint and how we viewed it in relation to the law.
- 45 Laura O'Donovan, IHC wrote a file record of the meeting.<sup>24</sup> It identifies the final issues agreed upon as being:
- a. Ministry of Education do not use the levers they have available to them when things go wrong.
  - b. There is no capacity within the schools, teacher training, professional development, teacher aide training to teach people with a disability.

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<sup>22</sup> Common Bundle page 74.

<sup>23</sup> Common Bundle page 75.

<sup>24</sup> Common Bundle page 96.

- c. There needed to be support for the Board of Trustees, schools, and principals to learn about the rights of people with a disability, inclusive education and capacity building with themselves.
  - d. Funding was not the core issue of the complaint.
  - e. IHC was to return with a clear vision of its issues relating to the ORRS funding process.
- 46 The record is in accordance with my recollection. I recall that at the end of the meeting Crown Counsel personnel said that they now had a clearer understanding of our issues and they were not what they had thought. They were going to get back to us within the month on some of the issues and consider the next steps. I was going to clarify IHC complaints in relation to the ORRS verification process. Andrew made notes similar to Laura's.<sup>25</sup> They were transcribed for an affidavit I made to the Human Rights Review Tribunal dated 19 February 2015). I note that at the beginning his notes record that the meeting is to be "open".
- 47 Six months later – on 21 October 2010 - the results of the Special Education Review were announced by Minister Hide.<sup>26</sup> IHC was very disappointed with the outcome. The results did not go far enough and failed to address the problems in the systems, structures, policies and practices which continued to impact adversely on disabled children.
- 48 There followed discussions between the Commission mediator and the parties as to whether the outcomes and recommendations of the Review could be part of the Commission process. IHC wanted them included in the pending mediation. In the end the Ministry position was that IHC could only discuss the Review insofar as the outcome impacted on the complaint IHC had made. IHC was happy with this as the Review had impacted on all of its claims by not giving redress for them.

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<sup>25</sup> Common Bundle page 97.

<sup>26</sup> Common Bundle page 102. See also fact sheet and weblink page.



- 49 On 19 November 2010 we sent the Ministry and the Crown Law Office supplementary information in an email on our complaints against the ORRS funding system as the Ministry had requested.<sup>27</sup> This information had been developed in consultation with John Hancock, YouthLaw.
- 50 The Human Rights Commission mediator thereafter tried to set possible dates to resume mediation of the IHC complaint. IHC gave its dates in December 2010. However, the Crown Law Office refused to set any dates on the grounds it was premature to do so as they had not yet responded.<sup>28</sup>
- 51 More time passed and nothing was received from the Ministry or the Crown Law Office. This time IHC was becoming extremely frustrated with the ongoing delays and resistance on the part of the Ministry to dealing with our complaint through the Commission process.
- 52 During this time of waiting we approached the Director of Human Rights Proceedings to inquire if the office would take on the case. Heather Lear, a new member of the IHC Advocacy sub-committee of the IHC Board, wrote an email on 8 August 2011 on behalf on behalf of IHC complaining to the Associate Minister of Education Rodney Hide about the unacceptable delay and requesting a formal response from the minister if an immediate response was not received.<sup>29</sup> Responses from the office of Minister Hide were received dated 11 August 2011 and 18 August 2011.<sup>30</sup>
- 53 On 18 August 2011, the Crown Law Office finally forwarded its response to the complaint<sup>31</sup>. The letter denied there was any unlawful discrimination revealed in the claim. It said that the complaint was based on a misunderstanding of the ORRS policy and its interaction with other special services. It maintained that the complaint it raised issues of implementation of the policy rather than pointing to any part of it which was discriminatory. It

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<sup>27</sup> Common Bundle page 110.

<sup>28</sup> Common Bundle page 122.

<sup>29</sup> Common Bundle page 125.

<sup>30</sup> Common Bundle page 126.

<sup>31</sup> Common Bundle 128.

stated that issues of discrimination should be taken up with schools. Further, funding issues were a political issue not amenable to challenge under Part 1A Human Rights Act. It concluded that nevertheless if IHC wished to discuss the revamped ORRS policy with it, the Ministry it would consider a request to do so.

- 54 My colleagues and I were bitterly disappointed with the response. It did not address the wider ambit of our complaint but only the ORRS verification process. The Ministry would not participate in mediation of our complaint. After all this time they rejected it as not raising any issues of legal liability for the Crown. Its statement that we had misunderstood the ORRS policy and its interaction with special services was insulting as IHC has daily interaction with ORRS policy and other special services through its advocacy work.
- 55 On 29 September 2011 I responded on behalf of IHC to the Crown law office letter.<sup>32</sup> Among other points I:
- f. Said it was clear from the nature of the complaint filed and from the meeting we had with the Ministry and Crown Law that the complaint went beyond ORRS issues and raised issues in respect of the adequacy of government policy in ensuring available financial resources were channelled to disabled students.
  - g. Explained that the purpose of our letter was to meet their queries on aspects of the ORRS policy, it was not designed to narrow the focus of the complaint in respect of the other matters which had been aired at the meeting last year.
  - h. Reiterated that local school Board of Trustees were provided with inadequate support to discharge the responsibilities to students with disabilities, that there was not a lot of initial and ongoing education for teachers to develop inclusive education practice methodologies.
  - i. Expressed deep disappointment at the process followed by the Crown in respect of the complaint, pointing out that it was filed on 31 July 2008. Some of the smaller delays were caused by the Human Rights Commission assessing the jurisdictional issues at the beginning but the large majority were caused by the Crown.

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<sup>32</sup> Common Bundle page 134.

- j. Advised that as a result of the response received from the Crown, IHC would consider all options including taking proceedings before the Human Rights Review Tribunal.

56 On 3 November 2011 Crown Counsel acknowledged my letter.<sup>33</sup> It apologised for overlooking the need to respond to the whole complaint instead of focusing on the ORRS issue. It noted the comment that we were considering whether to take proceedings and continued:

We understand from that comment that no further response, including in respect of the overlooked issues, is requested or required. Please let me know of that is not the case.

57 In all we felt disrespected, deliberately misunderstood and fobbed off. Crown Law were not operating in spirit of Part 1A. There was no development of a 'human rights culture' as Part 1A had envisaged would happen. There was a complete resistance to accept and resentment of the suggestion that the government had a responsibility to engage on the issues with us.

58 The neglect had been systemic and its impact severe.<sup>34</sup> Children with disabilities already suffer multiple disadvantages in society. Without an education that enables them to learn, progress and achieve to the maximum of their ability, those disadvantages are cemented in for the entirety of that child's life. If they are denied a right to learn they are denied the right to develop. This cannot be anything but state neglect and discrimination.

The Human Rights Review Tribunal

59 On 26 September 2012 IHC filed a claim in the Tribunal. It had sought representation under the Human Rights Act from the Director of Human Rights Proceedings, Robert Hesketh, and he agreed to provide it. A Tribunal minute dated 22 November 2012 recorded an initial teleconference took place and that a reply had been filed by the Crown.<sup>35</sup>

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<sup>33</sup> Common Bundle page 139.

<sup>34</sup> see paras 3-7.

<sup>35</sup> Common Bundle page 140.

- 60 Regrettably for IHC, Mr Hesketh's term expired thereafter. A new Director, Robert Kee, was appointed and he decided to withdraw his representation for the claim.
- 61 It took some time for IHC to find counsel with the expertise and ability to take over the proceedings. Eventually Frances Joychild QC was instructed, and she filed an Amended Statement of Claim on 30 April 2014. The Crown responded to that seeking further particulars.
- 62 The application for further particulars was responded to by the filing of a Second Amended Statement of Claim dated 18 August 2014.<sup>36</sup> That is recorded in a Minute dated 17 November 2014.<sup>37</sup>
- 63 The Crown then filed an application seeking a hearing into preliminary questions. It questioned whether: the Tribunal had jurisdiction to consider paragraphs 36 to 39 and 41 to 44 of the Claim; whether paragraphs 39, 41 and 43 were justiciable as they were about resource; whether the Tribunal had jurisdiction to join the Chief Review Officer (of ERO) or the New Zealand Teacher's Council as Defendants. The point being made was that they were not part of central government. Essentially this was a strike out application of large tracts of the claim.<sup>38</sup>
- 64 That hearing took place on in February 2015 and resumed on 17 March 2015. About a month after the hearing was completed the Tribunal issued a minute seeking further submissions on the issue of the duty to provide an effective remedy.<sup>39</sup> They were duly provided. The submission included relevant overseas human rights case law where complaints like IHC's had been made and foreign courts had ordered remedial action be taken.<sup>40</sup>

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<sup>36</sup> Common Bundle page 4.

<sup>37</sup> Common Bundle page 142.

<sup>38</sup> Common Bundle page 146.

<sup>39</sup> Common Bundle page 153.

<sup>40</sup> The relevant cases were *Zard Adami v Malta (Final) European Court of Human Rights*; *DH v Czech Republic European Court of Human Rights*; *Opuz v Turkey*; *Auton (Guardian ad litem of) v British Columbia (A.G.)*; *European Action of the Disabled (AEH) v France*.

65 By October 2015, with no word on when a decision might be released and in light of comments made during teleconferences, by the Tribunal Chair, as to delays being caused by a lack of resourcing of the Tribunal, I wrote to the Minister of Justice, Amy Adams, asking for more resources for the Tribunal.<sup>41</sup> She replied on 22 October 2015, dismissing the concerns and pointed out IHC's own delay (when the Director of Proceedings withdrew representation).

<sup>42</sup>

66 Given the delays and grave ongoing concerns about the state of education for children with disabilities needing accommodations to learn in mainstream schools, I contacted the new senior manager within the Special Education Unit. Eventually it was proposed that the parties attempt to mediate the claim. However, despite face to face meetings over three days in 2016, there was no resolution. The parties remained a long way apart.

67 By 2017 and 2018 the dire situation of under-resourcing of the Tribunal was reported in the media. Multiple informal calls to the Registry by IHC received the same response i.e. that no time frame for a decision could be given.

68 On 6 August 2019, I wrote again to the Tribunal asking when IHC may have a decision.<sup>43</sup> By then I had seen a public announcement that 5 new deputy chairpersons had been appointed. A Minute was issued on 21 August 2019, again providing no answer and explaining, in detail, the resourcing issues.<sup>44</sup>

#### Current situation

69 IHC regularly collects evidence from families, teachers and specialists about perceptions and experiences of children with disabilities requiring accommodations to learn. Evidence collected for the complaint in 2014 and recent engagement with families, teachers and Principals confirm the serious

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<sup>41</sup> Common Bundle page **159**.

<sup>42</sup> Common Bundle page **160**.

<sup>43</sup> Common Bundle page **161**.

<sup>44</sup> Common Bundle page **162**.

ongoing difficulties students with disabilities experience in having equitable access to and outcomes from New Zealand's education system.

- 70 Our most recent survey dated from December 2019 had over 400 respondents. The results indicate the systemic problems remain. Respondents advised that in the past five years up to a third of disabled children have been denied enrolment, 39 per cent of parents have had to pay out of pocket for their child to be included in school activities and curriculum. Thousands upon thousands of children are being denied an equal right to an education because of their disabilities. The impacts are grave. It is unacceptable the Human Rights Review Tribunal proceedings have taken so long, and disabled children continue to experience neglect and discrimination.
- 71 While yet another education system reform process by another government is underway and some improvements have been made, there has been no ability to challenge the government in proceedings alleging a breach of children's rights, despite the law providing this avenue. Children are essentially left to the mercy of public servants and government as there has been no ability to hold government to account through the judicial branch of government. My most recent communications with the Minister are included in our bundle.<sup>45</sup>
- 72 In relation to resourcing of the Tribunal, the under resourcing was addressed by the Minister of Justice in the new 2017 coalition government. He has appointed 5 deputy Chairs to clear a major backlog of cases before the Tribunal. Regrettably however, five years this month to the last hearing day of the preliminary matter, the Tribunal is still not in a position to give a date for the release of the preliminary decision.

## Conclusion

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<sup>45</sup> Common Bundle page 164

- 73 Twenty years ago Parliament enacted legislation to subject government to the same human rights obligations as the private sector. It aimed to create a human rights culture within government where human rights compliance was an issue to be taken into account when policies and practices were being developed and/or reviewed. The government's defence would be where it could justify discrimination further to s 5 of NZBORA. The legislation gave the Tribunal broad remedial discretions to make orders that included recognition of the need for systems and structures to be changed over time.
- 74 The legislation has been entirely ineffective in enabling the voice of children with disabilities to be heard and their experiences within the education system to be considered. For 12 years there has been no remedy in this case. Despite having the support of the legislation IHC has had to deal with a public sector and its advisors who acted throughout as though the proceedings were an intrusion on their rights to govern and develop policy as they saw fit. At best these proceedings were resented by the defendants and their legal advisors. At worst they were effectively obstructed.
- 75 A whole generation of children with disabilities requiring accommodations to learn has moved through school since this claim was first made. A whole generation of children have not had experienced equitable access to and outcomes from an inclusive education in this time. They will live with the deleterious consequences of this on all their human rights as citizens. Their families, and society at large, have missed out by not having these adults operating at their full potential.
- 76 It may be that there will be a finding of no discrimination in the substantive hearing or that parts of the claim are struck out. However, it may also be that a finding is made and that orders are made for government to address specific issues over a specific period. Clearly it would be for government to determine the means of address. The order would require that the matter be addressed in specific areas.

77 I acknowledge that not all delays have been caused by the Government. There was a period when the newly appointed Director of Human Rights Proceedings, Robert Kee, withdrew the decision of the previous Director, Robert Hesketh, to represent IHC in the proceedings. This decision required IHC to go back to the drawing board and locate private counsel.

#### IHC Access to Justice submission

78 IHC provided a submission to the Royal Commission in December 2019 detailing our work supporting an individual with intellectual disability in his quest to be compensated the neglect he experienced in state care in the 60s and 70s. This neglect involved the state not keeping him safe and the failure to provide him with education, for which he experienced ramifications that continued his entire life. In that case, we were able to secure a good outcome for one person, but it disappointing to see that the state is still unable, and it appears unwilling, to provide inclusive education to disabled children in New Zealand. The case study for this individual, Mr M, is included below.

#### **Case Study: Mr M**

79 An effective way to demonstrate the problems that intellectually disabled people have when trying to access justice is to explore a case study where IHC supported an individual, Mr M, to bring a civil claim against the government.

80 Before IHC became involved in the development of the civil claim, M had tried unsuccessfully for years to have the government investigate the abuse and neglect he experienced in an institution, the life opportunities he had missed, and provide him compensation. M started his formal claim against the state in 1997 and it was finally settled in 2003.

#### **Mr M's Early Life**



81 In 1928, at two months old, M's family placed him into the care of the Home of Compassion at Island Bay, Wellington, to be adopted. At six years old, M had not been adopted, so was sent to Templeton Hospital, as he was diagnosed as being of low intelligence. The recorded evidence for the diagnosis of low intelligence, was that at six years old he did not know his surname, could not add two plus two and could not spell the word cat.

82 M believed that he was going to attend school, as this is what he desperately wanted to do, but he received no schooling at Templeton. He did undertake physical labour at Templeton and was promised wages for this work, which he decided to bank until his discharge. M stayed at Templeton Farm until he was 19 years old. He was discharged with no money, no literacy skills and not a day of schooling.

83 M then moved to an isolated West Coast farm to work. He left this farm after four months due to ill-treatment. Police picked him up and sent him to Seaview Hospital. Once Seaview staff cared for M for a short time, they assessed him as not having an intellectual disability and he was sent to work as a porter and orderly in a hospital. He spent the next 40 years working at hospitals in New Zealand and abroad.

#### **M's Search for Information**

84 After leaving his job at Hutt Hospital in 1991, due to a workplace injury, M began to grapple with his institutionalisation as a child. Up until this point, M had not made an issue about his treatment and the harm done to him whilst in the care of the state, as he felt unworthy of being treated well due to thinking there was something wrong with him.

85 In 1995 he began to contact health agencies to ask for information about the salary he was promised for the work he completed at Templeton. In 1942 M had taken up a paid position at Templeton as an orderly and was meant to be paid five shillings a week. As there was no money paid to him on his discharge, he began to request access to records about this lost salary.

- 86 In 1996 and 1997, through some personal contacts, M reached out to IHC, and with our assistance, continued his quest for information about his past. He wrote to various places asking for his personal information. His search for lost wages led to the organisation responsible for managing the files advising him that they held nothing from before 1980 and were unable to identify the money owing to him and could not pay him. M asked for an ex-gratia payment of the money that was owed to him, but this was denied.
- 87 M wrote to, and engaged with, various politicians in the 90's when seeking redress. He wrote to the Hon's Paul Swain, Jenny Shipley, Bill English, and Katherine O'Regan. Politicians were unwilling to investigate his treatment or consider his request for the salary that was owed to him, or compensation for the abuse he suffered.
- 88 Responses from organisations that M contacted for his personal information were also confusing and contradictory and many records that he was seeking had been destroyed or were never kept. One health organisation advised M to ask Sunnyside directly for some of his records. Sunnyside then told him that they had no record of a file at their hospital with his name. M was also still looking for information that explained his admittance to Templeton but was unable to find any information relating to his diagnosis of an intellectual disability when he was admitted to Templeton.
- 89 M also sought access to the organisational files that governed the institutions he lived in. The Ministry of Health were unable to find files relating to the management of these institutions.

#### **M's Claim for Redress**

- 90 As politicians appeared not interested in resolving M's claim, M engaged a solicitor around 1997. At this time a psychologist's report was compiled about the abuse that M suffered and the trauma it had caused. After this

report was completed, M's lawyer served a statement of claim on the Ministry of Health and the Home of Compassion in 1999.

- 91 M's claim was that he experienced a loss of opportunity and was deprived of an education. This deprivation led to significant losses. The opportunities denied to M were hard to quantify. M did not receive any schooling, he did not receive money for the work he undertook at Templeton, and he was physically and sexually abused at Templeton and Seaview.
- 92 M was beaten by peers and caregivers. He was sexually abused by peers and a caregiver. The trauma that remained after this abuse meant he was never able to have a long-term romantic relationship and remained alone his entire life. M also never experienced any of the family rituals that most of us take for granted. Until M was 14 years old, he did not know that birthdays were something that people celebrated.
- 93 The Crown received M's statement of claim and indicated that his allegations would need to be corroborated before they would consider settling his claim.
- 94 At this time, M started working directly with the IHC Advocacy team and changed his legal representation. M had already used a significant amount of his legal aid funding to get to this point, and his case was just beginning. He needed a team of people to volunteer their time and skill to support him and continue his case and this was organised and financed by IHC.
- 95 IHC worked hard to identify potential witnesses to substantiate M's accounts of abuse. Two witnesses were discovered and specialist IHC staff with experience in interviewing intellectually disabled people interviewed these witnesses. M's new solicitor gathered these witness statements into a brief of evidence and engaged a barrister to represent M in court. M's barrister made an application for a settlement conference at the end of 2001.
- 96 As M's case was gathering momentum, the Crown continued to obfuscate. In 2002 the Crown asked for a specialist report to be compiled by a psychiatrist

that would explain why it had taken M so long to make a claim. Legal Aid funding was obtained to pay for this costly report (the report cost over two thousand dollars in today's money) and this report was provided to the Crown in October 2002.

- 97 The report theorised that the abuse that M claimed to have suffered seemed very real and had caused him to be significantly psychologically disabled. The psychiatrist said that M found it extremely distressing to describe the trauma he had suffered, in particular, the sexual abuse.
- 98 The report also stated that M had not come forward until he had ceased working, as he invested a large part of his personal esteem in his career and he was worried that if his colleagues knew he had been institutionalised and abused they would lose respect for him, or he would lose his job.
- 99 In June 2003, eight years after he first requested the Crown investigate and resolve his claim, after two lawyers and thousands of legal aid dollars and significant advocacy work by IHC, the Crown made a financial settlement with the 74-year-old M and provided him an apology. M passed away in 2006.

#### **Learnings from M's Case**

##### **Barriers**

- 100 There is a lot to unpack from M's life experience. M had a great deal of courage, and was able to articulate himself very well, but he was stifled at every turn when seeking redress for the abuse he suffered. M's diagnosis as someone with an intellectual disability was later withdrawn. For an individual with an intellectual disability, it is without question that they would experience even greater barriers to seeking redress for abuse suffered in care.

##### **Substantiating the facts**

- 101 One of the most difficult things for M to do was to find people who could corroborate his claim, as he did not know where the witnesses were located.
- 102 The Ministry of Health was often not able to locate people who were in institutions and not be able to pass on personal information about these people to M in case it would breach their privacy. M needed the skills and resources of IHC to locate these people.
- 103 Even with corroborated evidence, testimony from people with intellectual disability is often not believed in adversarial trials (*Developing a more responsive legal system for people with intellectual disability in New Zealand* Mirfin-Veitch, 2014: 21).

#### Specialist resources

- 104 Once witnesses were found, specialist knowledge was needed to work with these people to gain their trust, and to hear and record their stories. All the witnesses that M needed were people with intellectual disabilities. They had different ways of communicating, and their time in institutions meant they were often distrustful of strangers.
- 105 Recording these stories took time and would have cost a significant amount if IHC had not resourced staff time. Some witnesses did not want to provide their stories. There is little incentive to re-live painful and traumatic memories in order to further someone else's legal claim. Some witnesses had been cruel to M in the past and some witnesses felt that M had been cruel to them. The institutions that M lived in did not allow strong friendships to grow and the people in the institution would feel that peers were their enemies.

#### Accessing personal information

- 106 M had great difficulty finding personal information about himself from this time. Finding institutional information or management and policy documents was even more difficult. At one stage, M's solicitor served the statement of

claim on the wrong legal entity, as religious entities are often structured in confusing ways.

#### Capacity

- 107 M only had limited capacity to deal with officialdom and bureaucracy. Over the years, M taught himself to read and write, but he always felt inadequate due to this lack of formal education and his inability to attain any formal qualifications. He was concerned about his lack of education and thought that if he interacted with officials, they would judge him mentally unfit and dismiss him as irrelevant or commit him to a mental institution. He was also wary of officials considering the way he had been treated throughout his time living in institutions.

#### Ageing and disability

- 108 As M was in his 70s before he started to act, he was at risk of passing away before any compensation could be paid and this weighed on him. At some points, M felt as though he was being stalled in his quest so that he could pass away without the State ever needing to provide him redress. As he aged, and his peers aged, the ability for them to correctly recall their experiences diminished. This had the possibility of undermining any testimony given by them.

- 109 During the settlement proceedings, M occasionally missed important meetings. Some of this was due to illness, or due to new medication that he was taking that made him confused at times. The process of making and settling a claim requires a perfect complainant, who is never ill or confused, who can communicate easily and has the confidence to make a claim for their rights.

#### Finances

- 110 M had little savings, due to being in entry-level jobs his whole life, this meant he did not have the funds to pursue costly legal battles. If he did not have IHC

supporting him, it is unlikely that he would have reached a settlement with the Crown on the funding provided by Legal Aid.

**Summary**

- 111 This submission highlights the failure by successive governments in providing access to justice for vulnerable people who have experienced abuse in state care. For M, the government obfuscated his search for justice. The government needs to urgently engage in a constructive relationship with providers and advocacy groups, and work towards safeguarding people with intellectual disability. Safeguarding involves identification and monitoring of issues that led people with intellectual disability to become vulnerable.
- 112 It would be incorrect to think that M's treatment was historical, and that people with intellectual disability no longer experience while in care. IHC has contemporary examples of people with intellectual disability experiencing abuse and neglect in community setting while having no access to justice.

**GRO-C**

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