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S M Cooper/ A L Hill/ R M Hay
11 August 2016

Committee on the Rights of the Child
By email

To whom it may concern

ALTERNATIVE REPORT IN ADVANCE OF NEW ZEALAND'S REVIEW AT THE 73RD SESSION OF THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD

Please find attached submissions prepared by Cooper Legal, in advance of New Zealand's review at the 73rd session, scheduled for 15 and 16 September 2016.

We will also send hard copies of our submissions by post, so that these can be distributed amongst members of the Committee before the 73rd session.

Cooper Legal is a small, Wellington-based litigation firm. We currently represent hundreds of clients who suffered abuse while they were children or young persons under the care of the New Zealand State. This includes abuse that occurred after 1993, when the United Nations Convention on the Rights of the Child was ratified in New Zealand. For the majority of our clients, the abuse they allege includes serious, often systematic, torture and/or cruel, inhuman, or degrading treatment or punishment. The Principal of Cooper Legal, Sonja Cooper, has also spent 30 years working as a Youth Advocate in the New Zealand Youth Court.

As such, our firm has a unique insight into the issues that both have, and are, affecting children and young persons in New Zealand. Given that many of our clients have taken legal claims against the New Zealand Government, Cooper Legal is also well-equipped to comment on whether the Government is adhering to its UNCROC obligations.

We are happy for the Committee to contact us for further information about the issues we have raised in our submissions.

Thank you for taking the time to consider our submissions.

Yours sincerely

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United Nations Committee on the Rights of the Child

By email via: http://www.childrightsconnect.org/upload-session-reports/

ALTERNATIVE REPORT IN ADVANCE OF NEW ZEALAND'S REVIEW AT THE 73RD SESSION OF THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD

INTRODUCTION

Cooper Legal is a small, Wellington-based litigation firm, which currently represents hundreds of clients who suffered abuse while they were children under the care of the New Zealand State. All of our clients were under the age of 18 when they suffered abuse.

For the majority of our clients, the abuse they allege includes serious, often systematic, torture and/or cruel, inhuman, or degrading treatment or punishment, inflicted by, at the instigation of, or with the acquiescence or consent of, persons acting in an official capacity.

The claims cover the period from the 1950s right up to the present time. We are continuing to receive instructions from clients who were in State care following New Zealand's ratification of the United Nations Convention on the Rights of the Child ("UNCROC") in 1993, with our youngest clients still being under 18 years old.
Alongside our historic abuse work, Cooper Legal's Principal, Sonja Cooper, has spent 30 years working as a Youth Advocate. In this role, Ms Cooper is tasked with representing young people between 14 and 16 years of age, who come before the New Zealand Youth Court in regards to their offending.

These two areas of work have provided our firm with a unique insight into the issues that both have, and are, affecting children and young persons in New Zealand. Given that many of our clients have taken legal claims against the New Zealand Government, Cooper Legal is also well-equipped to comment on whether the Government is adhering to its UNCROC obligations.

On that basis, we welcome this opportunity to contribute to New Zealand's Fifth Periodic Review by the Committee on the Rights of the Child.

We also refer the Committee to the previous submissions our firm has made in relation to New Zealand's review under the Convention Against Torture (4 February 2015)[1] and the International Convention on Civil and Political Rights (12 February 2016)[2], which covered similar matters as those that are contained in this Report.

SUMMARY OF MAJOR CONCERNS

Cooper Legal supports any steps taken by the New Zealand Government to improve outcomes for New Zealand children and young persons. That includes extending the eligible age for receiving support and protection from the State to at least 18. Cooper Legal also continues to advocate for the New Zealand Youth Court's jurisdiction to be extended to include young offenders under the age of 18 years, rather than the current 17 years.

While Cooper Legal supports a restructure of the Child, Youth and Family Services (referred to below), this needs to be undertaken in a way that both **prevents** New Zealand children and young persons from suffering deprivation and/or abuse and properly assists those who do need the State's care and support. As is illustrated in this Report, a fundamental shift in attitude towards the legal, social and economic interests and rights of children and young persons will be required, along with the provision of the necessary services – many of which are currently not available or accessible.

Cooper Legal is concerned that the New Zealand Government is abdicating its responsibility for the wellbeing of New Zealand children, by increasingly contracting independent third parties to undertake services for this vulnerable group. A particular concern is that the Government is currently denying legal liability for any harm and abuse consequently suffered by children and young persons in care, on the basis that it is not liable for the conduct of those third parties. This is in the face of statutory and policy principles requiring State monitoring and approval of any programme offered to a child or young person who is in care.

In common with other NGOs, Cooper Legal is concerned that children and young persons in care do not have a real voice once they are under the State's control. As set out below, children's concerns and wishes are often ignored and/or downplayed, which can result in destructive and negative long term consequences for those children and young persons, in the future.

Cooper Legal is concerned about the treatment of Maori and Pacific young persons, particularly in the criminal justice system. Tables 91, 93 and 96 of the Government's Fifth Periodic Report demonstrate that this group, particularly young Maori males, are disproportionately subjected to arrest and formal disposition (including harsher sentences) than other young persons. While the specialist courts are a welcome

[1] http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/NZL/INT_CAT_NHS_NZL_20010_E.pdf
[2] http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NZL/INT_CCPR_CSS_NZL_23061_E.pdf

development, there are issues around access to those courts and the lack of any substantive change to arrest and disposition issues.

Most of the work Cooper Legal undertakes is with victims of abuse. Cooper Legal is concerned at the continuing reports of mistreatment, abuse (of all kinds) and neglect suffered by New Zealand children and young persons under the care of the New Zealand Government and its agents (including since 1993). We have documented the particulars below in the body of this Report. It is a fact that New Zealand children and young persons are being abused by those in whose care they have been placed, after being removed from an unsatisfactory home environment. While those children and young persons should be treated with compassion and respect, instead they are often treated in ways that compound the harm and damage they have already suffered in their home environment.

We have identified particular issues around the use of Secure Care in New Zealand Care and Protection and Youth Justice residences. We have also identified concerns about how complaints made by children and young persons are inadequately dealt with and that there is a view that it is not worth complaining anyway.

Finally, we address (at several points), how the New Zealand Government deals with claims made against it by those who were children and/or young persons in care and who suffered mistreatment, neglect and/or abuse (including after 1993). As we have identified, the Government not only denies liability for the conduct of third parties into whose care children and young persons have been placed by it, but it also aggressively defends any claims made against the State for compensation and generally refuses to pay damages under the New Zealand Bill of Rights Act, even where there are clear breaches. This approach is deeply concerning and is in clear contravention of the New Zealand Government's obligations under UNCROC.

RESPONSE TO THE FIFTH PERIODIC REPORT OF THE NEW ZEALAND GOVERNMENT

II: GENERAL MEASURES OF IMPLEMENTATION

Along with other professionals working with young offenders, Cooper Legal is concerned about 17 year olds, in particular, being mixed with older offenders, even if they are typically under the age of 20.

Based on our firm's long experience working with clients who have been in custody, there are real risks for younger residents being physically and/or sexually assaulted by older residents and also of being intimidated and bullied. There are also heightened risks of assaults and other abuse being perpetrated by staff.

There is a very strong "culture" in justice residences against "narks" – in other words, those who report adverse incidents. This means that younger residents are more likely than not to stay silent about abusive experiences, rather than risk being subject to ongoing abuse through being labelled as a "nark".

Vulnerable Children's Act 2014

In the Fifth Periodic Report, the New Zealand Government has referred to the recent enactment of the Vulnerable Children's Act 2014. As indicated at paragraph 37 of that report, the Vulnerable Children's Act introduces a requirement that the Chief Executives of all "children's agencies" (a group of specific government departments or agencies) must work together to prepare a "vulnerable children's plan", outlining the steps which will be taken by the Chief Executives to achieve the Government's priorities for improving the well-being of vulnerable children.

Cooper Legal welcomes any initiative by the Government, which seeks to improve the outcome of New Zealand children. However, Cooper Legal would like to draw the Committee's attention to Section 11(2) of that Act, which states:

> The vulnerable children's plan—
>
> (a) does not—
>
> (i) create legal rules; or
>
> (ii) create any legal right enforceable in a court of law; or
>
> (iii) affect or limit the way in which a Chief Executive or other person is required to exercise a statutory power of decision; or
>
> (iv) affect the interpretation of any enactment or the operation of a rule of law; and
>
> (b) is neither a legislative instrument nor a disallowable instrument for the purposes of the Legislation Act 2012, and does not have to be presented to the House of Representatives under section 41 of that Act.

Cooper Legal notes that an identical provision, contained in Section 20 of the Act, applies to the child protection policies of other child-centred organisations (such as District Health Boards or school boards).

By expressly stating that its provisions are not legally enforceable in a court, the provisions of the Vulnerable Children's Act are left with little real weight and will be subject to the political whims of successive governments. As New Zealand's history has demonstrated, substantive improvements in child protection are rarely seen in this context. The effect of this is that, in reality, the Vulnerable Children's Act has the effect of offering only limited protection for the children and young persons who it was designed to protect.

Lastly, Cooper Legal notes that Part 3 of the Act requires organisations to carry out specific "safety checks" on any people employed or engaged in work that requires regular or overnight contact with children. These checks include requiring proof of identity, a summary of employment history and contact details for a referee, and a "Police vet" summary of all existing criminal convictions. Cooper Legal welcomes this initiative.

Proposed Ministry for Vulnerable Children

Cooper Legal notes that, in July 2016, the New Zealand Government announced that it intended to disband the current Child, Youth and Family Services and replace it with a Ministry for Vulnerable Children, in April 2017.
Cooper Legal notes that this announcement came as a result of a wide-ranging inquiry into the current Child, Youth and Family Services, the leading government child-protection agency in New Zealand.[3]

Cooper Legal agrees with the opinions of various individuals and non-government organisations working in the child rights area (including the current Children's Commissioner and former Principal Youth Court Judge, Andrew Becroft[4]) who oppose the proposed name for this new Ministry.

In Cooper Legal's view, referring to 'vulnerable children' risks stigmatising and ostracising the children and families who come into contact with the Ministry's services. Focussing on 'vulnerable' also presents a negative and narrow vision of what the new Ministry should be aiming to achieve.

The New Zealand Government has indicated that the proposed name of the Ministry still has to be approved by Cabinet before it is finalised.

Recommendation: that the Committee also makes its opposition to the proposed Ministry for Vulnerable Children name known to the New Zealand Government, in the hope that an alternative will be found.

Cooper Legal is also concerned that the current review of Child, Youth and Family Services will be concerned with peripheral changes, such as the proposed re-naming that is outlined above, rather than the substantive structural change that is greatly needed. As the following sections of this report will demonstrate, it is Cooper Legal's view that a total overhaul of government child protection and support services are needed in New Zealand. In particular, Cooper Legal would submit that a major injection of resources is needed across those services, as well as a shift in focus towards long-term placements for children and young persons in need.

Cooper Legal draws the Committee's attention to the 2015 'State of Care' report by the New Zealand Office of the Children's Commissioner, which highlighted the widespread and deeply-imbedded problems within Child, Youth and Family Services. Cooper Legal fully endorses that report.[5]

Recommendation: that the Committee urge the New Zealand Government to commit to meaningful and long-term substantive change to Child, Youth and Family Services, in light of the 'Modernising Child, Youth and Family' and 'State of Care' reports referred to above.

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[3] https://www.msd.govt.nz/about-msd-and-our-work/work-programmes/cyf-modernisation/
[4] http://www.stuff.co.nz/national/faces-of-innocents/82571122/Faces-of-Innocents-Planned-Ministry-for-Vulnerable-Children-labelled-stigmatising-and-cripplingly-disappointing
[5] http://www.occ.org.nz/assets/Publications/OCC-State-of-Care-2015.pdf

III: DEFINITION OF THE CHILD

Cooper Legal fully supports the New Zealand Government's current Children, Young Persons, and Their Families (Advocacy, Workforce, and Age Settings) Amendment Bill, which would raise the age of support and protection for children and young persons under State care to 18 years old.

Cooper Legal also wholeheartedly supports the New Zealand Cabinet's recent decision to investigate raising the jurisdiction of the New Zealand Youth Court to include young persons aged 17 years old.

Under the current law of New Zealand, young people who are 17 are treated as adults in the criminal justice system. They are afforded none of the special protections afforded to young persons (currently defined by legislation as those under 17) in terms of: arrest; interviews by Police; admissibility of evidence; representation by Youth Advocates; being dealt with in the Youth Court, as opposed to the adult courts; and having the advantages of sentencing through the Youth Court. This is inconsistent with both growing academic research, which supports the Youth Court's approach of using criminal convictions as a last resort for young offenders, and the New Zealand Government's obligations under Article 1 of UNCROC.

The exclusion of 17 year olds from the legal protections above remains a significant and ongoing concern to those who represent young offenders in New Zealand.[6]

Recommendation: that the Committee urges the New Zealand Government to support the current proposal to raise the jurisdiction of the Youth Court to include young persons aged 17 years old.

IV: GENERAL PRINCIPLES

Best interests

Private providers

Article 3 of UNCROC states that the best interest of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Article 3(3) places specific obligations on the State Party to ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Since New Zealand ratified UNCROC in 1993, the Ministry of Social Development has approved a number of programmes, institutions and residences that are governed and

[6] http://www.scoop.co.nz/stories/PO1606/S00180/call-to-raise-the-age-of-youth-justice.htm

managed by private entities or individuals; such as incorporated societies, iwi entities or charitable trusts. The approval process is carried out under section 396 of the Children, Young Persons, and Their Families Act 1989. Section 396 provides:

> 396 Approval of iwi social services, cultural social services, and child and family support services
>
> (1) The chief executive may, from time to time, on application made to the chief executive, approve any incorporated body (being a body established by an iwi) as an iwi social service for the purposes of this Act.
>
> (2) The chief executive may, from time to time, on application made to the chief executive, approve any incorporated body (being a body established by 1 or more cultural groups (not being iwi) within New Zealand) as a cultural social service for the purposes of this Act.
>
> (3) The chief executive may, from time to time, on application made to the chief executive, approve any organisation or body (including a children's home), whether incorporated or unincorporated, as a child and family support service for the purposes of this Act.
>
> (4) The chief executive may grant an approval under this section subject to such conditions as the chief executive thinks fit.

Section 397 of the Act provides:

> 397 Restrictions on granting of approval
>
> The chief executive shall not approve any body or organisation as an iwi social service or a cultural social service or a child and family support service unless the chief executive, after making such enquiries as may be appropriate, is satisfied that the body or organisation is—
>
> a) suitable to act as the custodian or guardian of children and young persons; and
>
> b) capable of exercising or performing the powers, duties, and functions conferred or imposed by or under this Act on an iwi social service or, as the case requires, a cultural social service or a child and family support service.

A number of programmes have been approved in this manner since 1993, including remote bush programmes (Moerangi Treks, Lake Tarawera Trust, Eastland Youth Rescue Trust); survival programmes on a remote island (Whakapakari Youth Programme); and residential institutions (Youthlink, Kokiri). The vast majority of children and young persons who were placed in these programmes and residences were in the custody, care, or control of the State.

The programmes referred to above were the subject of multiple complaints about sexual and physical abuse, neglect, poor infrastructure or supervision and false imprisonment. Several proven events clearly amounted to torture. This is discussed more fully in the 'corporal punishment' section, below.

These complaints were often reported to the Ministry of Social Development's predecessor agencies (the Children and Young Persons Service and Child, Youth and Family Services), which failed to revoke the approval of the programmes, sometimes allowing them to run for years.

As a result, our firm has acted in civil proceedings against the New Zealand Government, alleging that the Ministry is vicariously and directly liable for the abuse these young claimants suffered on these programmes.

In response, the Ministry has raised a defence, relying on the contract for services with the providers, in order to limit the Government's liability. This is despite:

- Almost all children being in the custody, care, or control of the State at the time of the placement;
- The high level of engagement and control by the State over the programmes and residences;
- An obligation for children and young people placed on the programmes to be monitored and visited by a social worker; and
- The ability of the State to remove children, or revoke the programme's ability to operate, at any time.

This will be a matter for the courts to decide, in the end. However, it is reflective of the New Zealand Government's avoidance of its obligations under UNCROC, that it has placed children and young people with private providers, then failed to carry out its statutory obligations of ongoing monitoring and approval, and ultimately taken a position that seeks to limit its liability for the children harmed. This is a significantly different position from that taken by the Government in earlier litigation (in 2007), when the Government accepted that it would be liable for harm caused by third parties with whom children were placed in care.

Respect for the views of the child

As part of the work Cooper Legal has undertaken, our firm has reviewed hundreds of files and many documents recording the experiences of children and young persons in State care.

Cooper Legal has real concerns that children's views are often not sought when important decisions are being made that affect them, particularly relating to: who they wish to live with; in circumstances where issues are raised about the care they are receiving; and what wishes they have for their future.

Our firm has also reviewed multiple records where the concerns raised by children in care of being mistreated and/or being moved frequently, have been ignored or investigated inadequately (including not being reported to the Police for investigation, when they should have been). This has created a context in which ongoing neglect, abuse and mistreatment has been able to occur.

Cooper Legal is also concerned about the adequacy of social work and other resources available to facilitate the wishes of New Zealand children and young persons who wish to return to violent or inadequate family members. Our firm has seen too many cases where children have been returned to a family from which they

have been removed, only to find themselves in the same situation which led to their removal in the first place. Further, the social work and resources provided at this time are often grossly inadequate or non-existent. This creates significant risks for those children, which often leads to very poor long term outcomes (as discussed more fully under the 'physical and psychological recovery' section below) and is inconsistent with the New Zealand Government's obligations under UNCROC.

V: CIVIL RIGHTS AND FREEDOMS

Corporal punishment

The torture and abuse of children and young people in New Zealand State care

It is Cooper Legal's experience that, since 1993, New Zealand children and young persons have continued to be subjected to violence, including torture and other cruel, inhuman and degrading treatment (Article 37(a)).

Most disturbingly, this violence has often been perpetuated by staff members and caregivers of State-run institutions, Family Homes and foster placements, which either cater for children and young persons in need of care and protection, or those under the Youth Justice system.

This issue was not addressed in the Government's Fifth Periodic Report. Cooper Legal also notes that the Government has provided statistics on the number of children and young persons with substantiated findings of abuse and neglect (New Zealand Government Response to the List of Issues, Table 1) and child abuse proceedings in which the offender is a parent or step-parent (Table 2), but has provided no statistics or other information regarding the abuse of children and young persons by institutional staff members or other caregivers. This is despite the fact that the Committee explicitly asked for this information at Part III, paragraph 2 of the List of Issues.

In light of this, Cooper Legal welcomes this opportunity to bring our concerns, regarding the violence, torture and mistreatment of New Zealand children and young persons in State care, to the Committee's attention.

Cooper Legal represents approximately 200 clients who suffered physical, sexual and/or psychological abuse while they were in Child, Youth and Family care after 1993.

From the work our firm has done, we have noticed the following 'themes', present in those clients' experiences of State care:

- A number of placements (some of which were run by private providers, as outlined above), where physical and/or sexual abuse by staff members or caregivers was systemic and occurred over a long period of time;

- Inappropriate and overly-harsh punishments (bordering on torture), being inflicted on clients by staff members or caregivers;

- Violence against clients at the hands of other children or young persons, often under the instruction of staff members or caregivers;
- Unlawful, arbitrary or excessive detainment of clients in Secure Care (which is discussed is more detail, below);
- Inadequate supervision and monitoring by social workers;
- Serious drug and alcohol abuse by clients, throughout their time under Child, Youth and Family supervision;
- The supply of drugs and alcohol to clients by staff members and caregivers;
- Clients being frequently moved between short-term, unstable placements;
- Clients reporting abuse to social workers, staff members or caregivers, but no action being taken; and
- The failure of social workers to obtain expert services for clients when mental health or medical issues are raised.

The treatment that many of our clients have received in State care has neither reflected humane treatment, nor a respect for the client's inherent dignity (Article 37(2)). This is especially so, considering that many of our clients have extremely complex needs, as a consequence of a range of factors including: a violent and dysfunctional home environment; poverty; being a previous victim of physical, sexual and/or psychological abuse by family members and/or State-employed care providers; mental health issues; intellectual disabilities and/or a low level of education; and a history of drug or alcohol abuse.

Secure Care

Cooper Legal has also encountered numerous instances of children and young people being detained unlawfully and arbitrarily (Article 37(b)).

While not mentioned in the Government's Fifth Periodic Report, placing children and young people in Secure Care continues to be a regular practice in New Zealand Care and Protection and Youth Justice residential facilities.

Secure Care commonly consists of a sparse, concrete room within a Child, Youth and Family Care and Protection or Youth Justice residence. Under the New Zealand Children, Young Persons, and Their Families Act 1989, staff members may place children or young persons in Secure Care to either prevent the child or young person absconding, or to prevent the child or young person from behaving in a manner likely to cause physical harm to themselves or another. The child or young person can then be kept in Secure Care for up to 72 hours, or longer with a court order.

In Cooper Legal's experience, despite this legislative scheme, Secure Care in New Zealand is often *not* used as a measure of last resort, or for the shortest period of time possible, as required by Article 37(b) of UNCROC.

Cooper Legal has also heard numerous accounts of other forms of detention or restraint being used by staff members or caregivers against children or young persons in their care. These accounts have included clients being locked in rooms for the purposes of "time-out" or punishment, sometimes for hours at a time, and clients being held down and excessively restrained.

Not only are these examples inconsistent with the provisions of UNCROC, they also breach the Children, Young Persons, and Their Families Act 1989 and constitute breaches of the clients' rights under the New Zealand Bill of Rights Act 1990.

The New Zealand Bill of Rights Act 1990

Despite the torture and treatment outlined above, the New Zealand Government is currently refusing to acknowledge where it has breached the New Zealand Bill of Rights Act 1990 ("NZBORA"), in respect of our clients, including during the time when UNCROC was also in force in New Zealand.

These breaches of NZBORA have included subjecting our clients to: unlawful or arbitrary detention (Section 22); torture or cruel, degrading, or disproportionately severe treatment or punishment (Section 9); unreasonable searches or seizures (Section 21); or inhumane treatment (Section 23(5)). We also note that the New Zealand Government has an additional obligation to respect the rights of children and young people under UNCROC pursuant to Section 28 of NZBORA, which expressly states that other existing rights and freedoms are not restricted by that Act.

Due to the Accident Compensation scheme in New Zealand (which provides no-fault cover for personal injury, and bars awards of compensatory damages for personal injury claims in tort), compensation for abuse claims of this nature is typically restricted to exemplary damages (damages designed to punish the offender, rather than to compensate the victim).

However, the scheme does not bar compensation payable for breaches of NZBORA, meaning those claimants covered by NZBORA (most of whom are also covered by UNCROC), should be entitled to significantly more compensation that those claimants who suffered abuse in State care prior to 1990 (for NZBORA) and 1993 (for UNCROC).

In Cooper Legal's experience, the New Zealand Government is currently acting to undermine NZBORA, and a claimant's rights to compensation for the breach of NZBORA, in a number of ways:

- The Government will never accept that a breach of s9 (torture or cruel, degrading, or disproportionately severe treatment) has occurred without a finding by a Court – even in the face of clear evidence that torture has occurred. This places a heavy financial and psychological burden on victims to prove their case;

- When settling claims against it, the Ministry of Social Development will not accept that sexual violence goes to a breach of a victim's rights under NZBORA (and, by analogy, UNCROC);

- The Ministry has been clear that NZBORA breaches are "rolled in" to the current Fast Track settlement process (which is addressed in more detail under the 'abuse and neglect' section below). No additional compensation is paid for breaches of NZBORA under this process;

- In some cases, the Ministry has sought to partially resolve an eligible claim and have the claimant's NZBORA component assessed at another time. We expect that the Ministry will continue to take this approach as more NZBORA claims arise in the future. Given the current backlog of claims (some 720 claims are currently extant), this is a deeply unfair approach for claimants. A claim must be dealt with once and in its entirety. To address it any other way cheapens the fundamental rights and obligations that are imposed by NZBORA;

- Even in the rare cases where the Ministry has settled claims that allege breach of NZBORA, it has not acknowledged that separate breach or that the compensation provided (which is higher than those claims pre-1990) is to compensate for a breach of NZBORA.

VI: FAMILY ENVIRONMENT AND ALTERNATIVE CARE

Review of detention for mental/physical health reasons

Cooper Legal notes that the New Zealand Government has not explicitly addressed Secure Care in this section of the Fifth Periodic Report. Our concerns regarding the use of Secure in Care and Protection and Youth Justice residences have already been outlined above.

In paragraph 99 of the Fifth Periodic Report, the Government has highlighted the residential grievance process as a way in which children and young persons in State care can assert their rights and hold staff members and others to account for any unfair or illegal treatment they may have received.

However, the experience of our firm's clients demonstrates that the grievance process is often ineffective, underutilised by residents, and sometimes lacking in objectivity.

At the present time, residents have to approach a staff member if they want to lodge a formal grievance. This can allow staff members (with either good or bad intentions) to attempt to 'talk over' the resident's concerns and dissuade them from filing a formal grievance form. In times of overwork, staff members are sometimes too busy or unwilling to locate the relevant form for the resident, which leads to delay and, in many cases, the resident 'giving up' on pursuing a grievance.

In the cases where the resident *does* receive a grievance form, literacy or comprehension issues may present a barrier, as the resident is required to write down what occurred and what they would like to be done about it.

Grievances are then investigated by an allocated staff member or residential social worker, before the outcome of the investigation is related back to the resident. In most cases, this involves a private conversation between the investigator and the resident.

In some cases, the lack of a support person for the resident may allow the investigator to seek to persuade or rationalise why the resident's grievance has not been upheld, in an effort to prevent the resident appealing the decision to the grievance panel.

Cooper Legal notes that, in its August 2015 *State of Care* report[7], the New Zealand Office of the Children's Commissioner found that, despite there being a high degree of awareness of the formal grievance process among young people in Child, Youth and Family residences, almost half of the young people surveyed stated they had wanted to raise a grievance at some point, but did not for various reasons. These reasons included:

- they did not think that they would be taken seriously (48 percent);
- they did not think that anything would be done about it (19 percent);
- they thought that they would lose privileges or be treated differently (14 percent);
- they did not know how to make a complaint (12 percent);
- they thought they might have trouble with staff (12 percent); or
- they thought they might have trouble with another young person (10 percent).

We note that the Final Report of the Expert Panel on Modernising Child, Youth and Family has recently recommended the creation of an independent youth advocacy service to ensure that the voices of children and young persons are heard in the design of systems and services.[8] Cooper Legal endorses that initiative.

Abuse and neglect

As outlined above under the 'corporal punishment' section, Cooper Legal is continuing to receive regular instructions from clients who were in State care post-1993 and who suffered various forms of physical, sexual and/or psychological abuse, violence and neglect (Article 19).

Many of these clients also did not receive appropriate post-abuse care. Some of the reoccurring issues, which our client group experienced while they were in State care, have included:

- Reports of abuse are often disbelieved or not acted upon by staff members or social workers;
- In some cases, staff members or caregivers are aware of systemic abuse, but do nothing to prevent it occurring;

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[7] http://www.occ.org.nz/assets/Publications/OCC-State-of-Care-2015.pdf

[8] https://www.msd.govt.nz/documents/about-msd-and-our-work/work-programmes/investing-in-children/investing-in-children-report.pdf

- Clients are left in the same residence, often in close proximity to their abuser, even after they have reported abuse;

- Clients often do not receive any psychological counselling or other support, after disclosing that they have been abused; and

- Clients are often not informed of their legal rights, including their rights to have the claim investigated by the Police, entitlements under the New Zealand Accident Compensation Scheme, or the right to receive independent legal advice, after they have reported abuse.

Redress for victims of abuse and neglect under the Historic Claims Team process

The primary work of our firm is trying to obtain a *legal* remedy for clients who were abused or mistreated in State care. This process requires the New Zealand Government to investigate our clients' complaints and, in some cases, requires judicial involvement. As such, this process specifically touches on the Government's obligations under Article 19(2) of UNCROC.

The Historic Claims Team ("HCT") of the Ministry of Social Development has the responsibility for processing the claims of our clients who have alleged abuse or mistreatment while they were children or young persons in the care of the State (Child, Youth and Family Services or its predecessors).

Cooper Legal has a number of concerns regarding the HCT's current approach towards settling these claims. These concerns are outlined in detail, in the submissions our firm made to the Committee Against Torture in February 2015, but for the purposes of this report include:

- A number of concerns regarding the transparency and thoroughness of the investigations undertaken by the HCT. This is especially so, considering that the HCT is essentially tasked with the responsibility of assessing its own department's liability (considering that the Ministry of Social Development is responsible for Child, Youth and Family Services);

- The HCT often requires evidential proof before claims of abuse are accepted. In particular, the HCT often refuses to accept that abuse occurred unless there is some record of it in the individual's personal Child, Youth and Family file, or the perpetrator admits to it. This is inconsistent with research which shows that children and young people rarely report abuse when it occurs, and does not take into account the often inadequate reporting by social workers, which characterises many of our clients' files;

- The HCT process is beset with significant delays which, in Cooper Legal's view, are caused by a lack of appropriate government resources or commitment towards resolving these abuse claims. As an indication, Cooper Legal currently has well over 200 clients (some of whom come under UNCROC) for whom a settlement offer was sent to the HCT *over 3 years ago*, who are still waiting for a response. Many of these clients instructed Cooper Legal as far back as 2003/2004;

- Additionally, until recently, it was taking the Ministry over a year to process Cooper Legal's requests for copies of a claimant's personal Child, Youth and Family files. The New Zealand Office of the Privacy Commissioner has held that these delays were a privacy breach by the Ministry;

- In accordance with the New Zealand Privacy Act 1993, the Ministry regularly redacts ("blacks out") names from a client's personal Child, Youth and Family files, in order to protect the privacy of third parties. However, in some cases Cooper Legal has found that the names of staff members have been redacted, contrary to what has been agreed to between this firm and the Ministry. There have also been inconsistencies between what has been redacted within the same and different files, with the names of third parties being redacted in some documents and not others. These redactions sometimes have a prejudicial effect on our clients' claims, considering that the HCT process places such a high importance on evidential proof. The redactions have been the subject of litigation in our courts, for those clients whose claims are filed in court and the Ministry's approach has been overruled;

- The settlement amounts which our clients have been offered by the HCT, in cases where their allegations of abuse *are* accepted, are low, ranging from around $1,150 to $80,000. On average, the settlement offers that are made to our clients are $20,000. There is a considerable range above and below that average. In some cases, an additional amount (ranging between $2,000 and $20,000) may be offered to cover services including for therapy, work training and to remove tattoos. Considering the seriousness of the abuse that they allege (as described above), an unacceptable number of our clients have been offered inadequate amounts;

- The Ministry of Social Development has been opposed to most other avenues for settling disagreements above the settlement amount offered (or other legal or factual disputes), other than a full court hearing. This limits the options available to our clients if they are offered an inadequate settlement, or no settlement at all, and further exacerbates the power imbalance that exists between our clients and the New Zealand Government;

- The vast majority of Cooper Legal's clients are legally aided. The Ministry of Social Development and Legal Aid Services have an agreement whereby the Ministry will pay the claimant's legal aid bill whenever an HCT settlement offer is accepted. The Ministry contributes two-thirds of the cost and Legal Aid Services writes off the remaining one-third, irrespective of the settlement amount offered to the client. While this is no doubt a positive aspect of the current HCT process, Cooper Legal has recently received some settlement offers from the Ministry, where the Ministry has stated that it will refuse to pay the claimant's legal costs if they choose not to accept the offer. This is an extremely concerning development and, if actioned, would be a significant impediment to the settlement of historic claims. It may also lead to problems with Legal Aid Services continuing to fund these claims; and

- All of these factors have had the effect of 'wearing down' our clients. As outlined under the 'physical and psychological recovery' section below, many of our clients still suffer from mental health issues, as a result of the abuse that they experienced while in State care. The inadequacies of the HCT process simply add to the disillusionment and mistrust those clients feel towards the New Zealand Government, and further add to their damage.

Cooper Legal notes that all of these concerns are amplified in the case of non-represented claimants, who have also approached the HCT for an acknowledgment of the abuse they suffered while children or young persons in State care. Cooper Legal has been approached by unrepresented claimants who have been offered, and have sometimes accepted, inadequate offers by the Ministry for this abuse. Unfortunately, once an offer is accepted, Cooper Legal is largely unable to assist them.

Recommendation: that the Committee urge the Ministry of Social Development to agree to the implementation of an independent process, separate from the courts, to resolve claims where the parties are in dispute about the Ministry's settlement offer, or as to findings as to the law and/or the facts.

The "Fast Track Process"

The Ministry of Social Development has recently implemented an alternative process for resolving claims of abuse in State care, known as the "Fast Track Process" (formerly known as the "Accelerated Process").

The Fast Track Process was designed as a method of clearing the large 'backlog' of abuse claims that have been made to the HCT. It involves a process whereby the Ministry carries out a cursory examination of the claimant's allegations and a basic 'fact check' to confirm the claimant was in the care institutions they had identified. The Ministry then 'categorises' each claim in line with a list of pre-determined categories (with a corresponding monetary value). In most cases, the Ministry then offers the claimant a letter of apology acknowledging their experiences and an *ex gratia* payment.

However, one of the significant barriers to the Fast Track Process, for the purposes of children and young persons who were in State care under UNCROC, is that in order to be eligible for the Fast Track Process a claimant had to be in State care *before 1 January 1993*. This means that, in all but a few cases, UNCROC clients are not eligible to have their claims processed under the Fast Track Process and must instead remain within the delayed and flawed 'normal' HCT process, described above.

For UNCROC clients who *are* eligible to receive offers under the Fast Track Process (i.e. those who were in care both before *and* after 1993), there still remain significant concerns about that process. Cooper Legal's main concerns in respect of the Fast Track Process are:

- The process does not make any special provision for claimants with claims under the New Zealand Bill of Rights Act 1990. These claims, sometimes for

the most serious breaches of an individual's rights, should warrant a separate resolution process, which reflects breaches of the claimant's rights;

- The process does not make special provision for claimants with rights under UNCROC;

- The process is presented as an "opt-out" process rather than an "opt-in" process. This is particularly concerning for clients whose claims mainly relate to poor social work practice (which is not part of the Fast Track Process), and for non-represented claimants, whose claims would be pushed down into lower categories where the Ministry has limited money to spend;

- The process is significantly under-funded. The Ministry has indicated that it will have to artificially 'deflate' claims to fit within the allocated budget. This means that the Fast Track Process does not achieve a fair and just outcome for many claimants because they will be offered inadequate compensation and nothing towards rehabilitation;

- In addition, an underfunded process disadvantages those have not yet brought claims, or have only brought claims very recently. When the money runs out, there is no adequate way to deal with these claims; and

- The Ministry's proposal not to carry out a detailed search and review of a claimant's records means that a client's claim will not be properly considered. Records disclose such things as: significant practise failures; the names of known abusers (or rosters to establish when alleged abusers were present in an institution); investigations into claims made at the time the abuse occurred; institutional records that often disclose disciplinary procedures against staff members; foster arrangements; placements in Secure Units without legislative authority or in other situations that give rise to false imprisonment claims (which would push a claim to a higher category); and a range of other matters.

Redress for victims of abuse and neglect in the New Zealand courts

Cooper Legal notes that one of the recommendations made by the Committee in its 11 April 2011 'Concluding Observations' was that the New Zealand Government strengthen support for victims of violence, abuse, neglect and maltreatment in order to ensure that they are not victimized once again during legal proceedings (paragraph 36(c)).

In the Fifth Periodic Report, the New Zealand Government has referred to paragraphs 89 to 96 of New Zealand's Initial Report under the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC). With respect, those paragraphs deal mainly with preventing victims from being victimised during *criminal* proceedings. The Government has not addressed any efforts to prevent the victimisation of victims who choose to bring *civil* proceedings, against their abusers and/or the Government department which placed them in the abuser's care.

Our firm has recently become extremely concerned by how the New Zealand Government is treating victims of abuse in State care, once they have initiated civil proceedings in respect of that abuse.

In Cooper Legal's view, there are significant problems with the way in which the New Zealand Government is currently choosing to address (or, in some cases, not address) the claims of people who were abused or mistreated, while they were children or young persons in State care. These problems include:

- Failing to provide relevant records in a timely manner;
- Taking every technical legal and factual point in litigation, even if to do so contradicts the Ministry's previous position in settlement negotiations;
- Causing unacceptable delays and consequently increased legal costs, through bringing and opposing pre-trial applications;
- Refusing to agree to court processes that would be less intrusive and distressing to a victim than a full trial, where the law and/or the facts are in issue and need an independent decision-maker to resolve them;
- Calling into question criminal convictions of perpetrators of abuse of victims when they were in care (which would otherwise be absolute proof of the offending), in order to challenge those victims' credibility;
- Denying liability for placements managed by third parties (referred to above), even though the victims had "status" at those third party placements;
- Opposing name suppression for victims of torture and/or violence, unless that is of a sexual nature (which is discussed under the 'protection of victims and witnesses of crime' section, below);
- Providing independent legal representation for staff members and other residents accused of abuse and supporting them to oppose providing records relevant to the court process;
- Failing to make timely and reasonable offers to settle claims; and
- Incurring extraordinary legal costs in defending victims' claims, instead of acting as a Model Litigant (which the State is required to be in all litigation in New Zealand).

Recommendation: that the Committee encourage the New Zealand Government to behave as a Model Litigant in all of its dealing with those who take claims against it in relation to abuse and other adverse experiences while they were children or young persons in care. In addition, that the Committee recommend that the New Zealand Government establish an independent tribunal to resolve claims where the claimant and the Ministry of Social Development are unable to reach agreement about settlement offers or critical factual and/or legal issues.

Legal Aid User Charge

The Legal Services Act 2011 ("the Act") and the Legal Services Regulations 2011 ("the Regulations") were both amended by the Legal Services Amendment Act 2013 and the Legal Services Amendment Regulations 2013 respectively. These amendments came into force on 2 September 2013.

This legislation enables legal assistance to be provided for people who cannot afford it. The purposive section of the Act states:

> The purpose of this Act is to promote access to justice by establishing a system that:
>
> (a) Provides legal services to people of insufficient means; and
> (b) Delivers those services in the most effective and efficient manner.

The legislation introduced a "user charge" for people who qualified for legal aid funding for civil claims. We note the threshold income to qualify for legal aid is $22,000 – a very low threshold by New Zealand income standards. The user charge is $50, which must be paid to the legal aid lawyer as a condition of being granted legal aid. The lawyer then has the user charge deducted by the State from the lawyer's first invoice for work carried out – whether or not the aided person has paid it.

When introducing this legislation, the New Zealand Government explicitly stated that it was intended to act as a 'gateway' on civil claims – in other words, to force people to make a further payment (after being assessed as impecunious) in order to receive legal aid.

In practice, the user charge is often not paid and the lawyer acting absorbs the cost. However, where the user charge is strictly enforced by the lawyer, a person will be denied access to legal representation and the courts, because the lawyer can refuse to act for them until the user charge is paid. This is particularly harsh on prisoners with legitimate civil claims, as they have no means to make such a payment.

In response to the imposition of the user charge, Cooper Legal made a complaint to the Regulations Review Committee dated 11 September 2013. The core of the complaint was, broadly, that the Regulations did not exempt historic abuse claimants or prisoners from the user charge. Cooper Legal complained that the user charge was imposed in a blanket manner.

In the Cooper Legal submissions, we stated that:

> ...under the Legal Services Act 2000 ("the former Act"), and its legislative instruments, there was a policy of not requiring prisoners to pay the $50.00 user charge that existed for a time – this could be waived by the Legal Services Agency on grounds of hardship. This option was included on the legal aid forms; an example page is attached (see question 18). Beneficiary clients could apply, and often succeeded in an application for a waiver on the grounds of financial hardship.

Cooper Legal sought an exemption on an individual or class basis to allow the Commissioner the discretion to waive the user charge on the grounds of financial hardship, or because it would be just and equitable in the circumstances. In the alternative, Cooper Legal proposed that specific classes of historic abuse cases and

prison inmates were expressly exempted from the user charge. This is because the user charge denies classes of person from accessing the courts.

Regulation 9B of the Legal Services Regulations 2011 took effect from 1 November 2015. Regulation 9B provides for a limited exemption for some historic abuse claimants, a class of people defined by the Regulations. Regulation 9B provides:

> (1) The following proceedings are exempt from the user charge payable under sec18A of the Act:
> (a) The proceedings described in sub clause (2);
> (b) Any appeals made in connection with those proceedings.
>
> (2) The proceedings referred to in sub clause (1)(a) are proceedings commenced by an aided person against the Crown in respect of an incident, or an alleged incident, that –
> (a) Occurred before 1 July 1993; and
> (b) Involved the abuse (whether physical, sexual or psychological) or ill-treatment of the aided person; and
> (c) Occurred while the aided person –
> (i) Had a disability or was under 18; or
> (ii) Was in the care of the Crown.
> [...]

There are a number of problems with this exemption, the primary problem for many clients being the requirement that the abuse complained of had to occur before 1 July 1993 for the exemption to apply, which is a completely arbitrary date. For other clients it will be the fact that they were subject to practice failures (poor social work causing damage to the person) by the State's employees, as opposed to direct physical, sexual or psychological abuse.

This is a particular problem for people who have had their rights under UNCROC breached, as all of those claims will be subject to the user charge. Younger claimants are therefore at a greater disadvantage to older claimants.

Even with the limited exemption, we say that the user charge discriminates against classes of person and is a fetter on the rights set out in Article 14. The user charge should be abolished.

Recommendation: that the Committee asks the New Zealand Government to ensure that all victims of abuse are exempted from payment of the legal aid user charge.

Physical and psychological recovery

As outlined previously under the 'abuse and neglect' section, Cooper Legal is concerned that children and young persons who are abused, neglected, or mistreated in State care are not being given the appropriate resources and support for their physical and psychological recovery.

The effects that our clients have suffered, as a result of inadequate post-abuse care, are, in many cases, profound and long-lasting. These effects commonly include: drug and alcohol abuse issues; mental health issues; a history of suicide attempts and/or self-harming; paranoia; nightmares and flashbacks; social phobias; an extensive

criminal history; trust issues; relationship and intimacy issues; anger and violence issues; poor literacy and education; transience; financial instability and a reliance on social security; and poor physical health.

VII: DISABILITY, BASIC HEALTH AND WELFARE

Disability

Cooper Legal represents a significant number of clients with intellectual or other disabilities. As part of that work, Cooper Legal has recently commissioned an expert report by the Donald Beasley Institute, which is a not-for-profit organisation based in Dunedin, New Zealand which helps to promote research and education in the field of intellectual disability.[9]

At Cooper Legal's request, the Director of the Institute prepared a report on the subject of whether children or young persons with an intellectual disability are more at risk of physical and/or sexual abuse, particularly in residential care institutions. The report found evidence to suggest that those with intellectual disabilities are indeed likely to be at greater risk of abuse in those settings, and may find it more difficult to successfully report abuse, given their disability.

IX: SPECIAL PROTECTION MEASURES

Sexual exploitation and abuse

Cooper Legal repeats its concerns regarding the continued sexual abuse of children and young people in State care, as outlined above.

Protection against torture

Cooper Legal repeats its concern that New Zealand children and young persons are continuing to be subjected to violence, including torture and other cruel, inhuman and degrading treatment, as outlined under the 'corporal punishment' section above. Cooper Legal also refers the Committee to the submissions our firm made to the United Nations Committee Against Torture in February 2015.[10]

Children in conflict with the law

The principal of Cooper Legal, Sonja Cooper, works as a Youth Advocate for young offenders (between 14-16 years of age inclusive) in the New Zealand Youth Court.

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[9] http://www.donaldbeasley.org.nz/

[10] http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/NZL/INT_CAT_NHS_NZL_20010_E.pdf

Ms Cooper has been involved in 2 cases, involving serious alleged offending, where the rights of young persons who were arrested and detained were significantly breached, in clear contravention of Article 40 of UNCROC.

In one case (involving a 15 year old boy charged with a number of arson charges), the boy was: interviewed by Police over his initial objections to being interviewed because of psychological pressure being brought on him by Police and poor advice from his nominated support person; not provided with access to a lawyer when he requested that; interviewed over a lengthy period of time (he was arrested after midnight) although he was constantly complaining he was tired; not reminded of his rights during the course of the interview, in breach of the applicable legislation; and was interviewed for a second time, without a lawyer, after Police had knowledge that Ms Cooper had been appointed.

Ms Cooper challenged the admissibility of the statements, as did the Youth Advocate for another boy who had been interviewed in relation to the same offences, at the same time. After approximately a week in Court arguing the admissibility of the boy's statements, the Crown conceded that the statements were inadmissible. In the case of the other boy, the Court ruled that his statements were also inadmissible. This was a traumatic and prolonged experience for the 2 boys.

In the second case, a 14-year-old boy was arrested on a charge of suspected aggravated robbery. The boy was spoken to extensively by Police at the time of his arrest and was made to take Police through his movements that day and how the offending had occurred. This led to Police locating a knife which was involved. The actions of Police were in breach of the boy's rights under legislation, which states that no young person will be spoken with about alleged offending, without a nominated adult and/or lawyer present.

It is observed that this boy was extremely vulnerable and has an extensive care and protection history. Accordingly, this breach was significant. Thankfully, due to the co-operation of Youth Aid (specialist police working with young offenders), Child Youth and Family and Ms Cooper, a satisfactory outcome was reached for both the young boy and his alleged victims, which did not involve the formal youth justice processes. Cooper Legal has a concern that, particularly in cases involving more serious alleged offending, New Zealand Police will overlook their statutory obligations in arresting and interviewing young persons, in order to lay charges.

Cooper Legal also has concerns that when young people appear before non-specialist judges (for example if they are arrested), they are much more likely to be detained in custody (often Police cells), instead of being released on bail. This is a breach of UNCROC.

Cooper Legal also has significant concerns about the specialist resources available to the Youth Court when young persons present with neuro-cognitive issues, including Foetal Alcohol Syndrome Disorder ("FASD") and Traumatic Brain Injury. There are very few specialists in New Zealand who are sufficiently qualified to diagnose FASD, particularly, and access to those specialists is limited to those courts where the specialists reside, or where parents can afford to pay for reports directly (which is rare).

There are also few programme providers and no Youth Justice residences which provide specialist programmes and/or facilities for young offenders presenting with significant neuro-cognitive impairments. In the case of one young person Ms Cooper acted for (with an acknowledged and significant Traumatic Brain Injury), the lack of any programme and/or facility meant that the young person spent many months in a locked Youth Justice residence, without access to programmes, or even the ability to leave the residence, because of the lack of specialist resources available to provide for his needs. While all involved in the young person's care agreed that the young man's detention in a Youth Justice residence breached his rights to be treated in the least restrictive environment, the reality was that he continued to be detained because there was nowhere else to put him and there were many impediments, legally, to implementing suitable programmes for him.

Cooper Legal suspects there are many young offenders who fall into this category. As a consequence, many young offenders will spend time being detained, inappropriately, because their psychological needs have not been diagnosed and/or there are inadequate facilities and programmes available to meet their needs. This is a significant concern that has not been recognised, let alone, addressed by the New Zealand Government.

Cooper Legal also has concerns that many young persons are dealt with through the youth justice process, when their real issues are care and protection ones (relating to inadequate home, education and disability issues). It has been documented that approximately 83% of prison inmates under the age of 20 have had prior contact with Child, Youth and Family.[11] This tends to demonstrate that Child, Youth and Family has not addressed the care and protection issues that have brought the young persons to their attention in the first place.

Cooper Legal shares the concerns of other NGOs that there are too many young Maori and Pacific young persons who end up in the formal criminal justice system. An additional concern is that those young persons are also more likely to be detained in custody and receive harsher dispositions.

While the specialist courts, namely the Rangatahi Courts and the Pasifika Court, are achieving very good outcomes in those parts of New Zealand where they have been set up, there are still large parts of New Zealand that have no access to those specialist courts. Further, the specialist courts cannot detract from the appalling statistics around the disparity of arrest, charging and disposition outcomes between Maori and Pacific young persons on the one hand, and Pakeha (European) young persons on the other hand.

At paragraph 209 of the Fifth Periodic Report, the New Zealand Government states that children who come into conflict with the law have the protections of Sections 21 to 27 of the New Zealand Bill of Rights Act 1990, which cover a person's rights on search, arrest and detention. Cooper Legal repeats its concerns, regarding the New Zealand Government's current refusal to acknowledge where it has breached Bill of Rights Act rights, as outlined under the 'corporal punishment' section above.

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[11] http://www.radionz.co.nz/news/national/282623/'staggering-link'-between-cyf-care-and-crime

Protection of witnesses and victims of crime

Cooper Legal repeats the concerns that have previously been outlined, under the 'abuse and neglect' and 'physical and psychological recovery' sections above, in regards to the lack of post-abuse care given to child victims of abuse in State care. Once again, Cooper Legal notes that, while the Fifth Periodic Report mentions some protections that are available to victims in the *criminal* context (and that is also limited, as most of the rights are stated to be unenforceable by the courts), victims are offered little to no protection once they initiate *civil* proceedings.

As referred to above, Cooper Legal has significant concerns about the approach of the New Zealand Government to victims of non-sexual abuse, where those victims have asked for their names and identifying details to be suppressed. Suppression is vital for some of our clients, to ensure that they can feel safe (both physically and psychologically) to give evidence in a court about the abuse they suffered as a child or young person in care.

In recent litigation, lawyers for the Government have actively opposed name suppression being granted to witnesses, other than those giving evidence of sexual abuse. This has been in the face of evidence from those witnesses addressing their fears of being identified, particularly those who have been, or are, in prison and who hold genuine fears of being assaulted because of being "narks" and because of the long term psychological harm they have suffered as a consequence of their childhood abuse experiences. Our firm has filed expert evidence to support the factual evidence – both as to the risks of physical harm to the witnesses, as well as the significant possible psychological harm.

The Wellington High Court has refused to grant those witnesses name suppression, to date. The issue is currently the subject of an appeal to the Court of Appeal. One of the arguments advanced for the witnesses is that they would have been entitled to suppression of their names and identities, if the same evidence had been given at the time of the abuse (because the relevant Children and Young Persons legislation protects their identities). Accordingly, that protection should continue into adulthood. The outcome of the appeal is awaited.

Cooper Legal repeats, however, that the State has an obligation to act as a Model Litigant, in any litigation to which it is a party. Opposing name suppression for vulnerable witnesses is inconsistent, in Cooper Legal's view, with that obligation.

CONCLUSION

Cooper Legal welcomes the steps which the New Zealand Government has taken, in recent times, to improve the situation of New Zealand children and young persons. Most notably, Cooper Legal endorses the Government's decision to raise the eligibility for State support and protection, and to consider extending the New Zealand's Youth Court jurisdiction to include 17 year olds.

However, as outlined in this Report, there are still many areas in which the Government is failing New Zealand children and young persons, and consequently not meeting its obligations under UNCROC.

The most notable area in which improvement is needed, from our firm's perspective, is in the way that the New Zealand Government is choosing to address and acknowledge that failures that have *already* been made, namely the abuse and mistreatment of children and young persons in State care. This includes abuse and mistreatment that has occurred since 1993, when UNCROC was formally ratified in New Zealand.

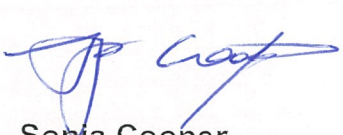
The post-1993 clients that our firm represents are a growing group. Almost every week, Cooper Legal receives new instructions from people who were in New Zealand State care after 1993, and who suffered unacceptable and (often, prolonged) abuse and/or mistreatment by those who were supposed to be protecting them. As indicated in this Report, these individuals were often already vulnerable when they came into State care and the abuse they suffered was often known to Government agents, and occurred due to their omissions.

Cooper Legal believes that it is unacceptable, first, that this abuse and mistreatment was able to occur. Secondly, the New Zealand Government's current approach towards acknowledging and rectifying that abuse and mistreatment is also unacceptable (for the various reasons we have outlined above).

Whether the measure is the United Nations Convention on the Rights of the Child, other international Conventions, the domestic law of New Zealand, or common human decency, New Zealand must do better for the children and young persons of our land.

To that end, Cooper Legal thanks the Committee for this opportunity to present submissions in advance of New Zealand's review and also thanks the Committee for the important work which it is undertaking.

Yours sincerely



Sonja Cooper
Principal

Amanda L Hill
Partner

Rebecca Hay
Staff Solicitor

The Principal of Cooper Legal, Sonja Cooper. Ms Cooper will be present at the Geneva session on 15-16 September 2016.