

Information for the consideration of the Fifth Periodic Report of the Government of New Zealand

Allegations of torture and/or cruel, inhuman or degrading treatment or punishment

By way of introduction, I am the principal of a small, Wellington-based litigation firm, which is currently representing hundreds of clients who suffered abuse while they were children under the care of the State in New Zealand and/or while they were psychiatric hospital patients. For the majority of my 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, although the majority of allegations are of abuse that occurred in the 1970s and 1980s. The firm's youngest clients are in their teens. In a number of cases, the abuse is substantiated by contemporaneous records, including convictions of the perpetrators. In the majority of cases, there is significant corroborative evidence available.

Social Welfare group

My firm acts for about 500 clients who are bringing claims against the Ministry of Social Development, in respect of the former Department of Child, Youth and Family, the Department of Social Welfare and the Division of Child Welfare. The claims are for abuse inflicted on them by staff, carers and other residents in institutions and/or Homes run by the State. In the main, the abuse includes physical, sexual and psychological abuse, solitary confinement, threats of, and the witnessing of, physical and sexual abuse and neglect of education. In many cases, the abuse was prolonged and repetitive.

A number of staff members were caught sexually abusing children under their care, but were allowed to leave the institution, sometimes without the Police being alerted. The abuse was, on occasions, covered up by management and/or Head Office. In most cases where a child reported that they had been sexually assaulted by a staff member, the child was not given any help or counselling in order to deal with the abuse. Often, the child would be punished and was locked up, or transferred to another institution.

Paragraph 301 of the Fifth Periodic Report of the Government of New Zealand ("the Report") states: "MSD has had a "no smacking" policy for over 20 years for the caregivers with whom it places the children and young persons who are in its care. Corporal punishment of any sort or infliction of physical pain on a child or young person by a caregiver is not acceptable." In spite of this policy, the extensive abuse, including torture, referred to above occurred. The Government has a duty to provide redress for this abuse.

In the middle of 2008, the Government announced that a Confidential Listening and Assistance Service ("the Service") would be established, although this has yet to occur. This is intended to

provide assistance to those who allege abuse or neglect or have concerns about their time in State care in health residential facilities, child welfare or residential special education sector prior to 1992. However, there are real concerns about this Service, particularly when compared with the Confidential Forum, described below. The Service is unable to: determine liability or the truth of the participants' experiences or stories; acknowledge liability or make an apology for past actions of any official; report to the Government (or anybody else) on the stories it has heard from participants. Further, the Service is not permitted to allow participants to have legal representation when telling their stories, nor does it have a duty to ensure participants could access legal representation. This is of particular concern given the likely effect that participating in the Service would have on participants' legal time limits for bringing a claim.

Psychiatric patients

In addition, my firm and another Wellington law firm represent about 350 former psychiatric hospital patients. Their claims are for abuse inflicted by staff and fellow patients, including physical and sexual assaults, seclusion and punishments such as unmodified ECT and painful injections. In many cases, our clients were children when they were placed in psychiatric hospitals, not because they were ill, but because they exhibited behavioural problems.

In 2005, the Government established the Confidential Forum for Former Inpatients of Psychiatric Hospitals. This provided psychiatric hospital patients, their families and former staff members of psychiatric hospitals the opportunity to talk about their experiences in psychiatric institutions. The Forum regularly reported back to the Government and repeatedly referred in its reports to allegations of physical and sexual assaults, punitive treatment and the general neglect of patients. The Forum noted that many participants hoped for a public acknowledgement or apology as a result. While the Government indicated that it may look at remedies for those abused in care, it did nothing.

Attempts to obtain redress

Most of my clients have not made a Police complaint about their allegations. The primary reasons for this are, first, that the Police are reluctant to investigate historic abuse allegations. Secondly, as a result of the damage caused by the abuse, most of my clients are not emotionally robust enough to deal with the trauma of giving evidence about the abuse they suffered in a criminal investigation. Finally, my clients seek to be able to move on and rehabilitate themselves. Accordingly, they seek a civil remedy.

For at least five years, this firm has advocated, and continues to advocate, for a fair, non-adversarial out-of-court process to resolve the claims. New Zealand is lagging behind other Commonwealth countries in investigating and addressing the abuse of children in State care and of former psychiatric patients. In recent years, there have been formal Government Inquiries in Australia, Canada, Ireland and England into the treatment of children in residential institutions. These Inquiries have found patterns of widespread and systemic abuse extending over many years. Mechanisms have been created outside of the Court system for recognising

the harm done and providing redress to victims. New Zealand also has its own precedents for undertaking such investigations and resolving claims out of court.

The refusal of the Government to consider an out-of-court process in these cases, has left the claimants with the only option available, namely litigation. As a result, about 500 claims have been filed in the High Court to date, some dating back to 2004, with more being filed regularly. With reference to paragraph [274] of the report, given the historic nature of most of the allegations, in general my clients are not able to rely on more recent enactments, such as the New Zealand Bill of Rights Act 1990, for redress.

To date, the Government has: contested almost all claims vigorously; relied heavily on technical defences such as Limitation Act time limits; denied the existence of any systemic problem or culture of abuse; refused to conduct an official inquiry into the abuse of children in State care or patients in psychiatric hospital care; and refused to implement an out-of-court settlement process for the client group. There has been no prompt and impartial examination of our clients' cases, which is in breach of Article 13.

The approach by the Government has dragged this litigation out for over 6 years so far, causing considerable distress to our clients, who ask how a moral and just State, which has obligations to protect them, can allow this to happen without providing any redress.

At the present rate, it would take approximately 150 years for the currently filed claims to progress through the Courts. What little progress has been made in relation to legal issues, is being extensively appealed by both sides. Of the two trials of this firm's clients to date, all resulted in factual findings that were favourable to our clients, but failed on technical legal defences. One of these trials is currently being appealed.

Settlement offers to date

As noted in the Report, New Zealand has entered the following reservation to Article 14, in relation to the State's obligation to fairly and adequately compensate victims of torture: "The Government of New Zealand reserves the right to award compensation to torture victims referred to in article 14 of the Convention only at the discretion of the Attorney-General of New Zealand."

This reservation runs against international good practice regarding the provision of reparations to victims of serious human rights violations, for example the United States' Alien Tort Claims Act and the Van Boven Principles.

From the perspective of the legal representative for hundreds of torture victims, it is clear that the Attorney-General is taking full advantage of this reservation. In the very small number of cases where compensation has been offered as settlement, the amount offered has certainly not been "fair and adequate", nor has it provided for "as full rehabilitation as possible". The reason for the often insulting amounts of compensation offered is that the Attorney-General is relying on the technical defences, such as Limitation Act time limits and ACC legislation, which

is discussed in paragraphs [232]-[236] of the Report. This is in the face of the comments at [233] and [236] of that report.

Funding

Almost all my clients' claims are entirely funded by the Legal Services Agency, as this client group does not have resources from which to fund litigation themselves. Over the last 10 months, the Legal Services Agency has initiated a widespread process of withdrawal of legal aid for all historic abuse cases in New Zealand, purportedly subject to an analysis of "prospects of success". While this approach is being appealed, there has been no decision as yet and the Agency is largely not funding other work in the meantime. It is concerning that the Legal Services Agency, which is a Government Agency, is raising blocks to funding cases taken against the Government. This raises serious questions about access to justice and also Bill of Rights issues.

Conclusion

The New Zealand Government has an obligation to promptly and impartially investigate my clients' allegations of torture. Instead, they have raised numerous barriers to investigating and compensating these claims. They are forcing my clients to go through a lengthy, traumatic, adversarial process. This is in breach of my clients' rights and of the State's obligations under the Convention Against Torture.

Yours Sincerely

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