



S M Cooper  
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Secretary of Human Rights Committee  
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## **International Covenant on Civil and Political Rights: New Zealand's sixth periodic report (CCPR/C/NZL/6)**

Please find attached submissions on behalf of Cooper Legal, in advance of New Zealand's review at the 116<sup>th</sup> session of the Human Rights Committee, scheduled for 7 to 31 March 2016.

We will also be sending hard-copies of our submissions by post, so that these can be distributed among the Committee in advance of the 116<sup>th</sup> session. We apologise that these hard-copies have not been provided yet. We will endeavour to provide them as soon as possible.

Cooper Legal is a small, Wellington-based litigation firm. We represent hundreds of clients who suffered abuse while they were in the care of the New Zealand State and other institutions. These institutions include Social Welfare childrens' homes, foster homes, religious organisations, and prisons. For the majority of our clients, the abuse they allege includes serious, often systematic, torture and/or cruel, inhuman or degrading treatment or punishment. We are currently attempting to secure compensation for our clients, from either the Government or private bodies, by a variety of legal and alternative dispute resolution means.

We note that we have also made submissions, addressing concerns similar to those that will be addressed in this report, to the United Nations Committee against Torture, on 4 February 2015. We are happy for the Human Rights Committee to also review those submissions, if they think that they will be helpful.

We are happy for the Committee to contact us for further information about the issues we have raised in our submissions. We are also willing to address the Committee by teleconference, if this is desired.

Thank you for taking the time to consider our submissions.

Yours sincerely

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## **Introduction**

1. Cooper Legal is a human rights law firm. We largely act for people who have suffered abuse while they were in State care – whether that is in Social Welfare / Child Youth and Family care, in prisons, mental health facilities or hospitals. While most of these complaints are historic, we have many young clients – some as young as 18 or 19 years old.
2. New Zealand’s compliance with the ICCPR has deteriorated in recent years. Prisoners are not safe in prison and they are prevented by the State from achieving an adequate remedy for breaches of their rights by legislation. Young people in the justice system are unfairly treated and children in State care suffer an unacceptably high rate of abuse. Those who qualify for legal aid – those who earn the least in society – are required to pay a user charge before they can access courts and tribunals, meaning many are not able to access justice for legitimate claims.
3. Recently, the High Court found the State in breach of its obligations under the New Zealand Bill of Rights Act (by legislation preventing prisoners from voting) and made a declaration accordingly. The State has taken no steps to address the breach. This demonstrates the increasing contempt the State holds for rights under the ICCPR.

## **Executive summary of major concerns**

4. These submissions focus less on the substantive facts of those claims, and more on issues relating to:
  - a. our growing number of claimants who allege physical and sexual abuse in prisons and the limits placed on their ability to receive an adequate remedy for those abuses;
  - b. the treatment of young people in State institutions;
  - c. the approach by the State in providing an adequate remedy to historic abuse claimants, including the State’s obstructive conduct in litigation and its refusal to compensate specifically for breaches of the New Zealand Bill of Rights Act for people who were in Child, Youth and Family care after 1990; and
  - d. the legislative block on access to courts and tribunals created by a ‘user charge’ for people in receipt of legal aid.
5. When we refer to ‘historic abuse claimants’ we are referring to the 650 or so claimants with current claims for historic abuse in Social Welfare care. The State has recently introduced a “Fast Track Process” for the backlog of claims. Our significant concerns about this process are set out in our submissions to UNCAT. For the purposes of the ICCPR, our primary concern lies in the State’s unwillingness to provide an effective remedy. In particular, the State refuses to provide specific compensation for people who have had their rights breached under the New Zealand Bill of Rights Act 1990.

## Rights of prisoners

**Article 7:** *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

6. Cooper Legal currently acts for around 30 clients, in regards to claims against the New Zealand Department of Corrections.
7. The majority of these clients allege abuse (whether physical, sexual or psychological) while they were incarcerated in prison, perpetuated by either prison staff or other inmates.
8. On their behalf, our firm addresses these claims to the New Zealand Department of Corrections (which has oversight over New Zealand State and privately-run prisons), seeking a remedy for the breach of their rights.
9. In terms of prisoners who were beaten by staff members, two examples are:
  - a. A man who was repeatedly punched by a Corrections Officer, breaking his jaw in two places. This man has since been compensated by the Department of Corrections for the assault on him. The Officer was permitted to resign and did not face charges;
  - b. A severely mentally ill woman, who was badly beaten and restrained by several officers, breaking her arm and wrist. This claim is currently being considered by the Department of Corrections.
10. It appears that the Department of Corrections will only provide a remedy for such beatings when they are caught on CCTV, as the first assault was. To date, it has not accepted other allegations of assaults on prisoners by Corrections Officers.
11. We act for a number of prisoners who were assaulted by other prisoners in situations of inadequate staffing or monitoring. Only one of those prisoners, to date, has received compensation, largely because the extensive beating he received from other inmates was captured on CCTV, which also clearly showed Corrections Officers failing to intervene to protect him. We deal separately with situations arising out of 'double-bunking' below.
12. The Department of Corrections does not accept that the ICCPR – implemented by the New Zealand Bill of Rights Act 1990 – imposes a positive duty on it to keep inmates safe from other inmates, primarily through appropriate placement, adequate staffing and adequate monitoring. We say that this refusal of a positive duty is causing the State to breach Article 7.

### 'Double-bunking'

13. In the last decade, the Department of Corrections has relied on 'double-bunking' prisoners to deal with an increasing prison population in New Zealand. In our view, this practice, which involves requiring two inmates to share a small cell, has put a number of inmates at serious risk of abuse.

14. In an April 2012 report, entitled "*Prisoner double-bunking: Perception and Impacts*" the Department of Corrections acknowledged that maintaining safety and humane containment under double-bunking conditions required that risks were monitored and managed. In particular, placement decisions should be made that avoid prisoners being placed with another prisoner who has the potential to cause them emotional or physical harm.
15. At that time, the Department of Corrections maintained that double-bunking did not increase the rate of assaults on prisoners by other prisoners. We strongly disagree and say that assaults in these situations are prevalent and that some prisons are dangerously overcrowded. Prisons that have double-bunks fitted do not have increased facilities (washing machines, phones and so on) to cope with the increase in prisoners.
16. The Department, and its contractor Serco, are also inadequately screening prisoners for double-bunking. Three cases that have come to our attention are:
  - a. A transgender (male to female) prisoner held in voluntary segregation was placed with a man who allegedly had a history of sexual offending. The prisoner says she was raped by her cellmate. The investigation is ongoing;
  - b. A second prisoner, also transgender, was placed in a cell with a man who allegedly had previously sexually assaulted his flatmate. This prisoner was also raped. The investigation is ongoing;
  - c. A male prisoner was sexually assaulted by another prisoner, who inserted the handle of a table tennis bat in his rectum. This was captured on CCTV. There were no Corrections Officers present. The Department of Corrections says that the lack of staffing was not a breach of duty and will not provide a remedy to this man.
17. Double-bunking escalates the risk to prisoners of physical or sexual assault. There are no additional measures in place to monitor double-bunked inmates and the screening of inmates is inadequate. The practice of double-bunking is a breach of Article 7. Double-bunking is one reason the rate of prisoner-on-prisoner assaults is increasing in New Zealand prisons.
18. The failure of the Department of Corrections to adequately manage prisons is exacerbated by the contracting of prison management to Serco, an international company. Serco currently manages Auckland South Correctional Facility, and until recently managed Mt Eden Correctional Facility – a remand facility in Auckland. There was significant publicity showing that "fight clubs" ran freely in Mt Eden, with inmates assaulting each other with the encouragement of staff members. These assaults were recorded on cellphone cameras. There followed numerous incidents of prisoner injuries at Mt Eden, which were the subject of an Inquiry.
19. On 9 December 2015 the Department of Corrections determined not to renew Serco's contract to run Mt Eden Prison. However, Serco continues to run the prison at Auckland South Correctional Facility.

## Removal of Effective Remedy for Prisoners – Breach of Article 2(3)(a)

### Prisoners' and Victims' Claims Act 2005 ("PVCA")

20. This legislation limits the rights of a prisoner to an effective remedy for breaches of their rights while they are in prison. It therefore breaches Article 2 of the ICCPR.
21. The PVCA does not just affect prisoners, although by far they are the group we deal with. It also applies to people 'under the control' of the State – in police custody, on remand, on home detention, parole, community based sentences and extended supervision orders at the time their rights were breached by the State.
22. The PVCA limits remedies for breaches of the New Zealand Bill of Rights Act, the Human Rights Act 1993 and the Privacy Act 1993. It does this by providing that prisoners must use 'internal complaints mechanisms' first, and providing that compensation is only appropriate if an effective remedy cannot be achieved any other way.
23. Internal mechanisms include internal complaints processes, the Ombudsman and the Prison Inspector. None of those mechanisms have the power to compensate a prisoner for breach of their rights. The Ombudsman is under-resourced and overburdened, meaning complaints can take years to be addressed.
24. Where a plaintiff has not utilised internal complaint mechanisms (the Ombudsman and/or the Prison Inspector) the Courts will use that as a basis to decline compensation under s13 & 14 of the PVCA: *Edgecumbe v Attorney-General* [2005] DCR 780.
25. To obtain compensation, a prisoner must show that the internal mechanisms did not provide them with an "effective remedy". In *Vogel v Attorney-General* [2014] NZSC 5, the Supreme Court upheld the Court of Appeal's decision that a small amount of compensation that would have been payable to V was barred by s13 of the PVCA, because "there was no evidence that V had attempted to use internal complaint mechanisms".
26. The Courts have effectively interpreted s13 of the PVCA as a bar to all proceedings, even though a Court declaration is a remedy in itself. This is leading, in our experience, to Legal Aid Services declining to grant legal aid to deserving cases because it has the erroneous view that the PVCA is a complete barrier to any kind of remedy.
27. Even if a prisoner gets compensation, they then have a second process whereby their victims (if any) can lay claim to the money.
28. Any compensation must be paid by the State directly to the Secretary for Justice. The Secretary then must pay:
  - a. Any charge in favour of Legal Aid; and

- b. Any order of reparation made under specified provisions of the Sentencing Act.
29. The Secretary must then notify victims of their ability to make a claim, and hold the remaining money in an interest-bearing account for six months. The money is protected from creditors of the offender, including the IRD and people with secured debts.
  30. The Secretary may write to any person they believe is a victim, but only if they have their contact details. The Secretary is also able to search court files. The notification will also appear in a local daily newspaper.
  31. Through these mechanisms, any compensation received by a prisoner who has had their rights breached, is diminished and indeed may be rendered completely nugatory.

### Voting rights

32. Cooper Legal remains concerned that the New Zealand Government is continuing to deny prisoners the right to vote in general elections, in violation of both Article 25 of the Convention and Section 12 of the New Zealand Bill of Rights Act 1990.
33. In New Zealand, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 disenfranchises *all* persons imprisoned in New Zealand at the time of a general election. As such, it affects a significant number of Cooper Legal clients.
34. This prisoner voting legislation has recently been challenged in the decision of *Taylor & Ors v Attorney-General* [2015] NZHC 1706. In that case, a group of five prisoners sought a declaration that the bar on prisoner voting was inconsistent with the New Zealand Bill of Rights Act. The High Court affirmed that the bar on voting was inconsistent with the Bill of Rights Act and, secondly, that the matter was of such constitutional importance that it justified the Court exercising its discretion to make a formal declaration of inconsistency. Cooper Legal notes with concern that the New Zealand Government has since decided to appeal the decision in *Taylor*.
35. Cooper Legal is concerned that this law unduly punishes prisoners and bars one of their few opportunities to remain engaged in civil society.

### **Rights of young people in the Youth Justice system**

36. The principal of Cooper Legal, Sonja Cooper, works as a Youth Advocate for young offenders (between 14-16 years of age inclusive).
37. As part of her work in this area, Ms Cooper has become concerned that the Article 9 rights of youth offenders, who have been arrested and detained, are not being upheld by the New Zealand Police.

38. Ms Cooper has been involved in two cases, both involving serious alleged offending, where the rights of young persons who were arrested and detained were significantly breached.
39. 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.
40. 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 inadmissible. This was a traumatic and prolonged experience for the two boys.
41. In the second (and more recent 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.
42. 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.
43. Ms Cooper has seen further examples of Police ignoring the rights of young persons not to make a statement and/or to receive proper advice during 2015.
44. Cooper Legal has a concern that, particularly in cases involving more serious alleged offending, Police will overlook their statutory obligations in arresting and interviewing young persons, in order to lay charges.
45. Cooper Legal also has concerns that when young persons 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 the Convention and also the UNCROC.
46. Cooper Legal is also concerned that 17 year olds are not given the protections of minor status, as required by Article 24 of the Convention.
47. This is because persons who are 17 are treated as adults in the New Zealand criminal justice system. They are afforded none of the special protections

afforded to young persons (as referred to in defined by legislation) 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.

48. This is a significant, ongoing concern to those who represent young offenders. Cooper Legal endorses the UN stance that New Zealand's treatment of 17 year olds is in breach of its international obligations.
49. Cooper Legal also raises concerns that there are no and/or inadequate facilities and experts available to deal with young offenders who exhibit neurodisability. This leads to young persons being inappropriately detained in Youth Justice facilities and/or denied appropriate resources for diagnosis and treatment.

### **Rights of children in Child, Youth and Family (CYF) care**

50. Cooper Legal acts for over 600 clients who allege abuse while they were in the care of Child, Youth and Family or its predecessors. Much of the abuse that these clients allege would qualify as torture or cruel, inhuman or degrading treatment, or punishment in violation of Article 7 of the Convention. We also note that almost all of these clients were children when they were subjected to that abuse.
51. Although most of these clients' allegations of abuse are historic (with the majority occurring in the 1960s to 1980s), Cooper Legal remains concerned that young people are continuing to instruct our firm.
52. Cooper Legal now represents a small number of 18 to 25 year old clients, who allege abuse while they were in recent CYF care. Cooper Legal also notes that the New Zealand Office of the Children's Commissioner has also recently released a recent "*State of Care*" report on CYF, which confirms that torture and abuse is still being inflicted on children in New Zealand State care (<http://www.occ.org.nz/our-work/state-of-care/>).

### **Effective remedies for victims of torture**

53. Article 2(3)(a) of the Convention states that State Parties must ensure that any person whose rights under the Convention are violated shall have "an effective remedy". Article 2(3)(b) also states that the person claiming such a remedy shall have his right determined by competent judicial, administrative or legislative authorities.
54. As already discussed, Cooper Legal says that many of our approximately 600 clients have had their Convention rights violated. In particular, a vast majority of our clients allege treatment that would constitute torture, inhuman or degrading treatment or punishment, which violates Article 7 of the Convention.
55. However, despite its obligations under the Convention, the New Zealand Government has continued to put into place various barriers which have prevented Cooper Legal clients from obtaining an effective remedy.



New Zealand State conduct in context of legal claims

56. Cooper Legal has a number of concerns about how the New Zealand State is addressing the claims that our firm has brought to it.
57. In particular, our firm has observed a strong reliance on a 'defend at all costs' mentality from the State. This observation was confirmed when Cooper Legal was granted access to the State's 'Historic Claims Litigation Strategy', which explicitly states that any proceedings that proceed to a court hearing will be defended by State lawyers. This approach has the effect of re-victimising and traumatising victims of abuse, albeit the State and its lawyers are obliged to act as 'Model Litigants'.
58. Cooper Legal acts for approximately 300 clients, who have filed their claims against the State in the High Court in Wellington. Cooper Legal says that the State's approach to resolving these claims through the courts has resulted in unacceptable delays and resulted in no compensation or rehabilitation being awarded to this claimant group.
59. In particular, Cooper Legal has faced the following challenges, when seeking to progress these claims against the State:
  - a. the bringing of technical interlocutory applications by State counsel, that have the effect of delaying proceedings;
  - b. applications by State counsel, opposing the granting of name suppression for alleged victims of abuse;
  - c. challenging a victim's claim against the State by bringing evidence to suggest that sexual assault convictions secured by the State for the victim, were wrongly obtained; and
  - d. discovery of relevant documents on a 'piece-meal' basis over a couple of years, which has hindered Cooper Legal's ability to adequately prepare its case.
60. Cooper Legal has also been concerned about the State's approach to settling claims *outside* of the court context. Attempts to settle claims through alternative dispute resolution methods (including Judicial Settlement Conferences and Intractable Processes) have been largely unsuccessful, due in some part to the State's refusal to compensate claimants for breaches of their New Zealand Bill of Rights Act rights.
61. Cooper Legal is also frustrated by the long delays it has experienced in trying to access relevant clients records from State agencies. These records are often highly relevant to a client's claim of abuse in State institutions and are vital for progressing the client's case. Despite this, it takes some State agencies 12 months or longer to deliver these records to our firm. Cooper Legal notes that it has recently made a Privacy Act complaint, on behalf of 68 clients, in relation to these delays, which is now before the Human Rights Review Tribunal. The State is defending that claim vigorously.

62. Lastly, Cooper Legal is also concerned that the New Zealand courts are not being adequately resourced, leading to a lack of available hearing dates and significant delays for our already-damaged clients.

### **Breach of Article 14 – Equality before courts and tribunals**

#### 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 provides legal assistance for people who cannot afford it. In the purposive section of the Act, it 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 State 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 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.

#### Complaint to the Regulations Review Committee

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.

### The Exemption to the User Charge

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.

Cooper Legal says that the user charge is a debt owed to the Legal Services Commissioner and can therefore be subject to a write-off application. Legal Aid Services disagrees. The dispute is currently before the Legal Aid Tribunal and may be heard before the High Court.

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.

### **Application of the New Zealand Bill of Rights Act 1990**

We refer again to the Government's conduct in regards to legal claims, as outlined above.

Approach to BORA claims - Strenuous defence in litigation, refusal to award compensation for BORA in an ADR context, denying liability for independent contractors

The New Zealand Law Society report also outlines concerns about the number of times the Attorney-General has reported to Parliament that proposed legislation does not comply with the Bill of Rights Act 1990, but the legislation has been passed despite the inconsistency. Cooper Legal highlights and endorses this concern. All laws in New Zealand should be consistent with domestic and international human rights instruments.