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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 93RD SESSION OF THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD

INTRODUCTION

1. This report should be viewed in conjunction with, and supplementary to, the shadow report dated 1 November 2021 that Cooper Legal prepared in advance of New Zealand's review at the 74th session of the United Nations Committee on the Rights of the Child. We have **attached** our shadow report as an appendix.

2. We also refer the Committee to the previous submissions our firm has made in relation to New Zealand's Fifth Periodic Review by this Committee, which covered similar matters as those that are contained in this Report.

3. Cooper Legal is a small, Wellington-based litigation firm, which currently represents approximately 1,640 people who suffered abuse while they were children under the care of the New Zealand State. Most of our clients were under the age of 18 when they suffered abuse.

4. The majority of our clients allege 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.

5. The claims cover the period from the 1950s right up to the present time. We are continuing to receive regular instructions from clients who suffered abuse in 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.

SUMMARY OF MAJOR CONCERNS

6. We cautiously welcome the Government's commitment to taking action in response to the recent report of the Royal Commission of Inquiry into Abuse in State and Faith-Based Care ("The Royal Commission"), *He Purapura Ora, he Māra Tipu - From Redress to Puretumu Torowhānui*, December 2021 ("the interim report")[1]. We invite the Commission to seek an update from the New Zealand Government as to its progress in responding to those recommendations.

7. We urge the Government not to enact the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill 2021 in its current form.

8. We raise concerns that children and young people charged with certain "serious offences" are exempted from the protections afforded to other children and young people, and we support the call for the Government to raise the age of criminal responsibility, from 10 to 12.

9. We remain significantly concerned about the Government's approach to the privacy rights of children and former children. We are also very concerned about the recent increase in numbers of children in care experiencing harm and the continued overruse of secure care facilities.

10. Finally, we remain very concerned with the Government's approach towards survivors of abuse in state care, including those whose rights have been breached by the actions or inaction of state agents, and by the barriers these individuals face to obtain a remedy for their experiences of abuse.

RESPONSE TO THE SIXTH PERIODIC REPORT OF THE NEW ZEALAND GOVERNMENT

LOIPR I – NEW DEVELOPMENTS

Royal Commission of Inquiry into Abuse in Care interim report

11. Notably, in responding to LOIPR 2(a) the Government's Report omits any reference to the recent interim report of the Royal Commission. This thorough interim report, which is highly critical of previous and current State responses to reports of abuse in care, contains a number of detailed wide-ranging recommendations around abuse in care, particularly in relation to children in care, including that the Government:

    a. Create in legislation a right to be free from abuse in care;

[1] https://www.abuseincare.org.nz/our-progress/reports/from-redress-to-puretumu/

b. Create in legislation a non-delegable duty on the Crown, faith-based institutions and any other care providers to ensure so far as is reasonably practicable the protection of this right;

c. Create in legislation exceptions to existing legal barriers for civil litigation relating to abuse in care, including limitation provisions;

d. Take steps to ensure WorkSafe New Zealand (the primary workplace health and safety regulator) includes abuse in care within its focus areas for investigation and prosecution; and

e. Improve access to legal aid services for survivors of abuse in care.

12. The Government has publicly accepted the 95 recommendations made by the Royal Commission and is urgently considering how best to implement them. The Government has now announced a small number of active projects by way of initial response[2], but a full response to the recommendations will not be made until the Royal Commission has ended in mid-2023.

Oversight of Oranga Tamariki System and Children and Young People's Commission Bill 2021

13. A second key omission from the Government's report relates to the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill 2021 ("the Bill"),[3] which has now passed its Second Reading in Parliament and is likely to become law in the near future.

14. On 8 November 2021, the New Zealand Government introduced the Bill, which it says is designed to improve outcomes for children by:

a. Replacing the current Children's Commissioner sole model with a Children and Young People's Commission ("the Commission"), which would have a Board consisting of 3-6 members. This Board would not include a named Children's Commissioner, and would provide systemic advocacy to all children under 18 and young people between 18 and 25 who had been in care or custody under the age of 18;

b. Establishing a new body called the Independent Monitor of the Oranga Tamariki System ("The Monitor") and defining the functions, duties, and powers of the Monitor. Those functions, duties and powers largely include those of the current Children's Commissioner, though the Monitor is to be housed within the Education Review Office ("ERO"), instead of within the Office of the Children's Commissioner;

[2] https://www.abuseinquiryresponse.govt.nz/making-change/
[3] https://www.parliament.nz/en/pb/bills-and-laws/bills-digests/document/53PLLaw26641/oversight-of-oranga-tamariki-system-and-children-and-young

c. Altering how the Ombudsman's complaints function operates in relation to Oranga Tamariki, and in particular calls into question the Ombudsman's powers to investigate non-government organisations that nevertheless fall within the Bill's definition of the "Oranga Tamariki system";[4] and

d. Establishes a framework for the Commission, the Monitor, and the Ombudsman to work together.

15. Cooper Legal, along with a number of other organisations, joined the Children's Rights Alliance in making joint submissions to the Select Committee on the Bill.[5] As at August 2022, the amendments recommended by the joint submissions have not been incorporated into the Bill and the Bill will soon pass through its Third Reading in Parliament. We emphasise Cooper Legal's particular contributions to the joint submissions below, though note that Cooper Legal endorses the entirety of the joint submissions.

The Royal Commission recommendations

16. The approach by the New Zealand Government in relation to the Monitor does not align with the recommendations made in the Royal Commission's interim report. That report emphasises that the monitoring system for children in care to date has not been effective because the monitoring functions have been spread across several government agencies and portfolios, and where recommendations made have been implemented without adequate time, resourcing and communication across the agencies and portfolios. The Royal Commission recommends that the Crown should ensure that any new monitoring body:

    a. nurtures the trust of children, young people and adults at risk;

    b. is consistent with the Crown's te Tiriti o Waitangi obligations;

    c. is organised to reflect the Māori-Crown relationship;

    d. is independent of other oversight mechanisms and the organisation(s) being monitored;

    e. complies with all relevant human rights obligations; and

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[4] The "Oranga Tamariki system" is defined (in clause 9 of the Bill) as

- the system responsible for delivering services and supports under "or in connection with" the Oranga Tamariki Act 1989
- applying to those providing services and supports (agencies, or contracted partners within the system) including health, education, disability and other services.

[5] https://www.parliament.nz/resource/en-NZ/53SCSS_EVI_116701_SS2692/b578bf9c6992cb2ba70febc31b4722dbf2eaaca1

f. operates regularly, or is conducted regularly, using staff with appropriate skills and expertise.[6]

17. The Monitor proposed by the New Zealand Government in this Bill does not achieve these objectives. By spreading decision-making across a Board, there is no one easily identifiable for vulnerable children and young people to reach out to. The provisions relating to te Tiriti o Waitangi lack specificity, and there is no truly independent input from iwi, only that a certain proportion of the board employed must have sufficient tikanga Māori knowledge. As the Monitor is housed within the ERO, which is a government department, there is not true independence. Further, the panel which is to be established to nominate the Monitor and the Board is to be made up of officials from various unstated government agencies. Obviously, the operation of the Monitor and its compliance with human rights obligations cannot be assessed prior to the Monitor's establishment, but Cooper Legal is not confident in compliance, given the issues already present within the Bill.

18. Similarly, we note with concern that, contrary to Concluding Observation 11(b), CRC/C/NZL/CO/5, the creation of the role of Monitor will effectively weaken the independence of the body with oversight of children in care.

Advocacy by the Commission

19. There is also significant likely confusion around the role of the Commission's advocacy. While the advocacy for most children is limited to those under the age of 18, the advocacy for young adults who were in care or custody at some point during their childhood includes when they are between 18 and 25 years old. The Oranga Tamariki Act 1989 defines people between 18 and 25 as "young persons" for limited purposes, and the Children's Convention defines a child as someone under 18.[7] This causes confusion, as the Commission's proposed duties include promoting the rights and interests of children and young people with regard to the Children's Convention. It leaves open the question of what role the Commission has, to advocate for those between 18 and 25 who are or have been in care and custody.

20. There is also no indication that children, young adults, and adults who are, or have been, in care and custody, and particularly in the care and protection system, think about their inclusion in the Commission's advocacy mandate. In Cooper Legal's experience, many of our clients have not appreciated continued intervention in their lives by anyone involved with the State, even on an advocacy basis. Turning 18 often represents a freedom from State intervention, or a significant abandonment and/or lack of support that they were unprepared for.

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[6] https://www.abuseincare.org.nz/our-progress/reports/from-redress-to-puretumu/from-redress-to-puretumu-5/1-1-introduction-24/

[7] Oranga Tamariki Act 1989, s 386AAA.

Oversight of the Oranga Tamariki System

21. This Bill appears to create an overly complicated system focussed on government accountability, as opposed to the rights, interests and wellbeing of children and young people.

22. We believe there will be significant confusion surrounding the separation of the advocacy and complaint roles between the Ombudsman, the Commission, and the Monitor. This will mean children, young people, and their families may not know who to approach. As noted above, the ability of the affected people to make complaints and be advocated for, should be the focus.

23. To achieve this, the interface between the Ombudsman, the Commission and the Monitor needs to be actively managed to ensure the oversight and monitoring of children is effective.[8] Resources will need to be allocated to achieve effective communication channels, which could be better spent elsewhere if monitoring was allocated to the Commission.

24. It is unclear from the Bill how the oversight framework will provide feedback to the Oranga Tamariki system and other systems – such as the education system, welfare system, or labour market – making positive, timely changes to protect and advance children's rights, interests and wellbeing. Specifically:

    a. Cl 13 and 14 provide that the Monitor may make multiple assessments of the Oranga Tamariki system, and cl 21-30 enable the Monitor to make reports. However, these clauses do not empower the Monitor to make binding recommendations on Oranga Tamariki or even refer matters to a body who can, like the Ombudsman;

    b. Cl 16(4) provides that, when developing their tools and monitoring approaches, the Monitor must consult the Chief Executive of Oranga Tamariki, the Police Commissioner and anyone caring for children who is approved under s 396 of the Oranga Tamariki Act 1989. We believe that the Ombudsman or the Commission should also be added to the bodies to consult, to ensure better independence;

    c. Cl 20 provides that the Monitor is to create its own code of ethics for engagement with people in relation to the monitoring function. We recommend that this code is guided by principles similar to those in s 5 of the Oranga Tamariki Act 1989, where they relate to engagement with children. Those principles are likely also to be generally useful; and

    d. Under cl 21 and 22, the Monitor is required to prepare annual reports of compliance and outcomes related to the compliance with national care

[8] Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill, clause 102.

standards and regulations and for pēpē, tamariki and rangatahi Māori. However as indicated above, the proposal to place the Monitor within the Education Review Office has the potential to significantly impact the actual or perceived independence, and therefore the value, of these reports.

25. Under cl 35, the power of an authorized staff member of the Monitor to enter premises is limited where a child may be put at risk of being harmed as a result of their entry or in exceptional circumstances. Exceptional circumstances include the possible spread of disease occurring, or where the entry is likely to "exacerbate tension or emotional harm".

    a. On this wording, there is no requirement that the tension or emotional harm is to be felt by a child or young person on the premises. This creates an absurdity whereby a person in charge of a premises could deny entry because a caregiver or staff member could be distressed by the entry, where that entry is to assess them.

    b. Further, all that is required is that the person in charge provides their reasoning for their refusal to the Monitor in writing. There is no way for the Monitor to override the refusal to allow the Monitor's staff member to enter where the reason is inadequate, beyond reporting non-compliance under cl 52 if they choose to. This section could be improved by, at a minimum, requiring mandatory reporting when improper refusal occurs.

26. Children are unlikely to know about the Ombudsman, let alone understand the functions or the boundaries of that Office's role, whereas they know that the Children's Commissioner is there to champion them and their needs and issues.

27. Additionally, we note that the Ombudsman's Office deals with complaints across nearly all government agencies. They are consistently overburdened and significantly delayed in handling complaints. Significantly greater resourcing is needed for the Ombudsman to deal with Bill-relevant complaints, or a specific independent complaints system established to ease the burden on the Ombudsman's office. This is necessary given the specific vulnerability that children in care, and all children, face, and the need for the swift resolution of any concerns raised by a child while they are still in care.

28. The Ombudsman needs to be accessible to children in the Care and Protection system and operate in child and family-friendly ways, with staff who have the capability and expertise to work in these ways.

29. Cooper Legal believes that there needs to be ongoing evaluation of the changes and a shorter review period to ensure the new structure is working and:

    a. is not burdensome for children, and those who care for/about them;

b. the interface and ways of working between the three agencies are clear and effective (this has potential to be confusing and perversely lead to detrimental impacts for children);

c. recognises that children and young people in the Oranga Tamariki system are first and foremost children - they live their lives beyond the "Oranga Tamariki system" and they should not be defined by being in the care and protection system.

Media

30. Multiple news articles have focused on this Bill, and particularly the concerns raised by child-focussed NGOs and multiple opposition and coalition political parties within Parliament. As at 15 August 2022, an opposition MP has already walked out of Parliament due to the Government's refusal to modify the Bill or slow its progress to legislation, given the consistent concerns raised.

31. In line with this, Cooper Legal has also been notified, anecdotally, by a respected New Zealand journalist that the State agencies involved have already begun advertising roles for this new body, before the Bill has passed into legislation.

Conclusion

32. Like other advocates for children's rights, we are deeply concerned that the Bill does nothing to enhance children's rights; instead, it dilutes those rights and has the potential impact of stifling appropriate investigations into and/or monitoring of placements children in care end up in. Given New Zealand's appalling history of abuse of children in care, this is alarming. Successive governments and State agencies have already suppressed and/or covered up information regarding harm and/or abuse perpetrated on our most vulnerable citizens. Our real concern is that the Bill, if passed into law will legitimise that.

LOIPR IIB - DEFINITION OF THE CHILD

33. We repeat the concerns identified in our shadow report dated 1 November 2021 about the exclusion of children and young people charged with certain "serious offences" from the protections contained within ss 272–280A of the Oranga Tamariki Act 1989.

34. We observe that Amnesty International has recently launched a campaign[9] to raise the age of criminal responsibility, from 10 where it is now, immediately to 12, and then to 14. We support this move as being in line with international obligations as well as with current research.

[9] https://amnesty.org.nz/raise-the-age-of-criminal-responsibility

35. Our treatment of young people who offend is still far too punitive and fails to address the drivers of crime. Neuro-scientific research shows that a child, particularly under the age of 14, does not have the brain development to consider the consequences of what they are doing. Children are very strongly influenced by peer pressure and their sense of empathy has not fully evolved.

36. A consultant in Adolescent Forensic Psychiatry, Dr Enys Delmage is clear that children need protection rather than pursuing a criminal justice route for them. He further says that putting children through the Youth Justice System hard wires identify elements which become harder and harder to undo later in lives. In other words, these children see themselves as criminals and they cement that into their lives[10]. This is something Cooper Legal has seen in its work, every day.

LOIPR IIC - GENERAL PRINCIPLES

Civil rights and freedoms: Right to privacy

Disclosure of client information to Police and perpetrators

37. The Government states[11] that Oranga Tamariki and Police work collaboratively to respond to alleged or actual incidents of serious child abuse or neglect.

38. It is important to comment that one of the strategies employed by the State to defend claims brought by the Cooper Legal claimant group has been to disclose information from the claims to police, particularly, to potentially derail pending civil trials.

39. Although MSD and Oranga Tamariki will refute the interpretation of their conduct as 'tactical', it is a fact that MSD (and more recently Oranga Tamariki and the Ministry of Education) have adversely affected the willingness of our younger clients, particularly, to disclose what has happened to them in care, because of the fear that such information will be disclosed to third parties, including the police and/or the persons who harmed them.

40. This issue was first raised in 2006. In 2005, Cooper Legal had prepared a detailed paper, setting out the allegations of the client group at that time. The paper identified staff perpetrators of abuse and corroborating evidence of abuse in residences, as well as some programmes. The paper was provided to MSD and Crown Law in January 2006.

41. In March 2006, following discussions between Crown Law and Sonja Cooper, the paper was provided to the police. On 30 March 2006, Cooper Legal received a letter from the Detective Sergeant stating he was looking to investigate any

[10] https://www.rnz.co.nz/programmes/the-detail/story/2018853100/criminal-responsibility-how-young-is-too-young

[11] At paragraph 124

previously unreported allegation of sexual offending, or any similar cases of multiple, or very serious assaults. The Detective Sergeant stated that to enable the investigation to take place, the police would need to be able to speak to the clients and obtain their accounts of what took place. Cooper Legal was requested to contact the clients and obtain their authority to disclose any statements they may have made to us and to obtain current contact details for any clients who wanted to make a complaint so that the police could meet with them.

42. In response to the letter Cooper Legal sent out a newsletter to clients about the police request for them to come forward. Clients were advised it was entirely their call as to whether they wished to be involved with the police investigation. No clients were willing to come forward at that time.

43. On 12 May 2008, the Detective Sergeant wrote to Cooper Legal, advising that in the absence of an express indication that a client wished to speak to the police, the police did not expect any complaint to be referred to them. This appeared to be the end of the matter.

44. The issue arose again in January 2008 when Cooper Legal received a letter from Crown Law advising it had received a request under the Privacy Act from police for information held by MSD in relation to a former staff member who was being investigated.

45. The letter advised Cooper Legal that MSD was going to release portions of the court documents filed by four identified clients of Cooper Legal to the police.

46. Our response, sent on 22 January 2008, was to strongly object to those documents being provided in the absence of the clients' consent. Cooper Legal described this as a fundamental and significant breach of client privacy.

47. Over the top of our strong objections, on 21 February 2008 Crown law advised Cooper Legal that the identified portions of the statements would be provided to the New Zealand Police.

48. In mid-2009 Cooper Legal was approached for assistance in the investigation and prosecution of several staff members from DSW and Salvation Army institutions. With the consent of clients, Cooper Legal provided the Police with the names of clients who were willing to be part of the police investigation.

49. In 2010, Sonja Cooper was again contacted by police, this time in relation to the prosecution of one staff member who had worked in a Boys' Home. Defence counsel for the former staff member applied to the District Court for access to information held on Cooper Legal files about the complainants' claims. Cooper Legal was required to make available some information from the files.

50. On 13 April 2011, a jury convicted the staff member on eight of the eleven charges he faced. He was subsequently sent to prison.

51. The issue of police involvement in civil claims came up again in relation to a claim that had been filed in 2006. The claim was tracking towards a trial in court. In February 2016, MSD through its counsel, advised the High Court that it intended to refer the client's allegations to the police. Cooper Legal objected, stating that the client had chosen to bring a civil claim and did not want to make a police complaint.

52. Unbeknown to Cooper Legal, it was around this time that MSD was finalising an information-sharing protocol with police. To this day, neither Cooper Legal nor the client have any idea what, if any information, was provided to the police from the client's court file.

Information-sharing protocol: MSD (Oranga Tamariki) and Police

53. In July 2017, Cooper Legal received a letter from MSD relating to three clients of the firm, including the client referred to above. Cooper Legal was advised that MSD had referred all allegations it considered could constitute criminal acts to the police. Cooper Legal was asked to contact the three clients to seek their views on their allegations being further investigated by the police.

54. None of the three clients concerned had consented to having the details of their claims provided to any entity except MSD. Further, in respect of two of those clients, including the client referred to above, name suppression orders had been granted by the High Court, which should have protected their identify from being disclosed.

55. The protocol, which was eventually provided to Cooper Legal, in its original form allowed MSD to forward significant personal information about a claimant (including their current address, names and details of perpetrators, and details of the abuse that was perpetrated on the claimant) to the police, without reference to the claimant.

56. The claimants instructing this firm could have easily been contacted through Cooper Legal but were not. The Police had, instead, asked MSD to contact the claimants and ask if they wanted the Police to follow up with an investigation.

57. Due to our concern about the widespread disclosure of client information to the Police, Cooper Legal raised this with the High Court which was case managing the claims.

58. Due to our inability to reach a resolution about the issue, we made a formal complaint to the Office of the Privacy Commissioner ("OPC") on 12 September 2017. The complaint was sent on behalf of the three persons whose information we had been told had been sent by MSD to police, and on behalf of the unknown clients of Cooper Legal whose information had been sent to the police.

59. The reply from the OPC was disappointing, to say the least. In a letter dated 22 December 2017, the OPC found that the privacy interests of children presently in care outweighed any privacy interests of Cooper Legal clients.

60. Cooper Legal was then forced to litigate the issue. Cooper Legal applied for orders from the High Court that documents from the court file not be disclosed by MSD and the Ministry of Education ('MOE') to third parties. Cooper Legal also sought an order that no claimant's court file could be searched, except with the leave of the Court after hearing from Cooper Legal.

61. On 20 September 2017, the State consented to the "no search order" but opposed the non-disclosure order.

62. There were several High Court hearings in relation to continuing applications made on behalf of MSD and Oranga Tamariki to disclose claimant information to the police and others. Some hearings were resolved by consent. Other hearings were not.

63. Because of the distance between Cooper Legal and the State, the High Court issued a substantive decision on 7 June 2018.[12]

64. This is possibly the first New Zealand court decision in which the High Court explicitly acknowledged the vulnerability of the Cooper Legal client group. Indeed, the Judge, Justice Ellis, stated in her decision that "both individually and as a group, the plaintiffs in these proceedings are undoubtedly some of the most vulnerable people in New Zealand society".[13]

65. While Justice Ellis acknowledged that choosing a litigation path should prepare claimants for the possibility of some form of public airing of their claims, she noted that most claimants hoped for and expected an out of court resolution[14].

66. Again, for probably the first time, the High Court acknowledged that many claimants had had negative interactions with the police, the criminal justice process, and the Corrections system.[15]

67. She accepted that for many, their experience in State care, together with their subsequent interactions with the police, had resulted in them developing a deep distrust of those in authority and a genuine reluctance to engage or cooperate with them.[16]

68. She accepted that many claimants had good reason to be sceptical of any undertakings that may be offered to them to keep them safe or protect their interests.[17]

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[12] *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [2018] NZHC 1331 [7 June 2018].

[13] *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [7].

[14] *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [18] – [19].

[15] *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [22](a).

[16] *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [22](b).

[17] *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [22](c).

69. Finally, Justice Ellis acknowledged that for claimants presently in prison, associated with organised criminal groups of gangs, or who had made allegations against those associated with such groups, safety issues may arise in the context of any perceived cooperation or interactions with authorities, including the police.[18]

70. The High Court concluded that the claimants had "a strong and legitimate expectation that their claims will be kept confidential and private".[19] Ultimately, relying on the inherent jurisdiction of the High Court, Justice Ellis concluded that the Court was able to make an order restricting release of court documents to third parties, if it was necessary to do so in order to act fairly and efficiently within its own jurisdiction.[20]

71. The High Court repeated that there were important and relevant policy reasons favouring protecting the claimants' confidentiality and privacy interests.[21] In light of that, Justice Ellis concluded that no copies of documents contained on the litigation files for the group were to be provided by a party to a non-party without leave of the court. This did not apply to providing copies to counsel or other persons involved in the conduct of the litigation, or between MSD, Oranga Tamariki, or MOE for the purposes of ensuring the safety of children presently in care.[22]

72. The State applied for leave to appeal this decision. On 19 October 2018, the High Court granted leave to appeal the decision to the Court of Appeal.

73. The appeal was heard in the Court of Appeal on 3 April 2019. The State submitted that the courts had no jurisdiction to interfere with what was essentially a statutory power held by Oranga Tamariki to refer information obtained from claimants on to third parties. The State also argued that its right to pass such information to police was "throwing a light" on abuse, which was potentially beneficial to children currently in care, but also more generally.

74. In reply, Cooper Legal argued that the effect of the State's actions, to date, and the fear that the appeal might succeed, had led to some claimants refusing to disclose the particulars of their allegations of abuse in their claims and in offer letters made by Cooper Legal to MSD. Cooper Legal submitted, therefore, that the impact of the State's conduct had had the effect of inhibiting claimants from disclosing what had happened to them in care, for fear that their allegations may be disclosed to the police and their perpetrators. Cooper Legal observed, further, that this benefited MSD in the settlement process, as MSD could simply refuse to take such allegations into account, on the grounds that the individual claimant had provided insufficient detail. In that context, we observe that MSD and Oranga Tamariki had competing interests.

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[18] *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [22](d).
[19] *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [24].
[20] *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [67].
[21] *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [68].
[22] *J (and other plaintiffs back in the DSW Litigation Group) v Attorney-General* [69].

75. We also observed that the updated police protocol required that a claimant consent to being engaged in a police prosecution before any referral would be made.

76. The Court of Appeal decision was issued on 16 October 2019. The decision was reissued on 25 October 2019 as a "public" and "confidential" version, following concerns on the part of the MSD that the decision in its original form might identify the three claimants referred to, and possibly identify a staff member employed by Oranga Tamariki.

77. Yet again, the State was unsuccessful. In its decision,[23] the Court of Appeal observed that some claimants fear for their safety if their identity and accusations are communicated to alleged abusers. Some are prison inmates and fear repercussions if it becomes known in prison that they are "narks". Some are deeply distrustful of the State and its motives, especially of the police, and do not wish to cooperate for any collateral purposed under any circumstances. Some are too ashamed to disclose what happened to them outside proceedings.[24]

78. The Court of Appeal accepted the submission made by Cooper Legal that the Oranga Tamariki Act creates "opportunities" for information sharing between agencies, but no duty to that effect.[25] The Court of Appeal stated that, in the context of historic abuse cases, the power of the State to share information for child safety and law and order purposes "overlaps with the High Court's power to prevent disclosure where necessary for the safety or wellbeing of claimants in proceedings before it. If it is possible to read these powers together, then that construction is to be preferred. In our view such a construction is available and there is no necessary implication of ouster".[26]

79. The Court of Appeal found that the Privacy Act does not impose a duty on MSD or MOE to share information to third parties relating to allegations of abuse.[27] The Court of Appeal acknowledged that privacy is the most valuable where the loss of it exposes its owner to harm.

80. While the Court accepted that the claims involved serious allegations of criminal conduct, which raised the public interest that such offences should be investigated by independent prosecutors, tried, and if proved, then punished, the Court also accepted that some claimants genuinely fear for their safety, others wish to protect their privacy for the sake of their mental wellbeing, and still others feel ashamed to be the victims and do not want their secrets to be published more than is necessary to obtain a remedy.[28]

81. The Court of Appeal went on to say that the potential impact of an inadvertent disclosure may well be very significant in terms of the safety and wellbeing of particular claimants. As with the High Court, the Court of Appeal expressed the

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[23] *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)* [2019] NZCA 499 [16 October 2019].
[24] *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)* [3].
[25] *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)* [69].
[26] *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)* [76].
[27] *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)* [77].
[28] *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)* [84].

view that it would have been better if the parties had agreed a protocol to resolve these kinds of issues, noted that had not occurred, resulting in the need for judicial intervention.[29]

82. For some time after that decision was issued, Cooper Legal claimants had some respite from continuing requests for clients to consent to the disclosure of their information and ensuing court applications. Unfortunately, that has not continued.

83. Cooper Legal has very recently been advised that MOE intends to apply to the High Court for an order disclosing information from a claimant's court file to the police in relation to a teacher who the claimant says abused him. Of note, neither the claimant nor Cooper Legal are to be advised of the identity of the teacher, at least at the outset. In addition, contrary to the practice of MOE in previous cases, MOE is not agreeing to provide the details of the claim to police on an anonymous basis. This is in the face of Cooper Legal not having been able to contact the claimant to obtain his instructions.

84. In the face of the Royal Commission findings about the damage suffered by claimants in State care and taking into account the very strong statements made by the High Court and the Court of Appeal about the vulnerability of the claimant group, this is a very disappointing and disturbing development.

85. What this shows is that while the State pays lip service to the rights of claimants in terms of progressing their claims, it is merely that.

Access to records

86. The majority of children who suffered abuse in care who seek redress for that abuse require access to their personal care records to do so. These are currently provided by the Stage agencies under whom they were in care - the Ministry of Social Development, or Oranga Tamariki for those in care since 2017.

87. The Ministry of Social Development is currently taking close to 18 months, on average, to provide these records to legal representatives for (former) children in care. Even then, it only provides records that are kept on these children's personal files and not copies of personal information from institutional records, such as might be found in institution-wide daily diaries, on the basis that the latter would be too time-consuming to provide.

88. As previously found to be the case by the Privacy Commissioner, these systemic delays are a breach of the privacy rights of the 1700 or so clients of Cooper Legal who currently have claims against the Ministry of Social Development, among others, and are the result of chronic under-resourcing within that Ministry. We have been raising concerns about these same delays for 15 years.

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[29] *Attorney-General v J (and other plaintiffs in the DSW Litigation Group)* [87].

89. The Government has in August 2022 committed to considering how to improve easier records access for survivors, but it is fair to say that we remain sceptical as to whether adequate improvements will eventuate.

LOIPR IID - VIOLENCE AGAINST CHILDREN

Freedom of the child from all forms of violence

90. As Cooper Legal indicated in our report for the Fifth Periodic Review, and notwithstanding this Committee's previous recommendations (CRC/C/NZL/CO/3-4, para. 35 and CRC/C/NZL/CO/5, para. 23), it is our 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)). This has continued during the period covered by the current Review.

91. 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.

92. We note the Government's response reports data on violence and abuse against children between 2017 and 2020 (Table 13). This is not disaggregated to cases occurring in State care or otherwise, nor does it contain other elements sought in the LOIPR such as information on prosecutions and sentences. It is also limited to only those cases reported to the police, but there is currently no statutory requirement for individuals or organisations to report suspected or actual child abuse in New Zealand. It is, of course, sadly well-established that sexual violence is more often than not, never reported to anyone, let alone the Police, until many years after the fact, if at all.

93. Since our shadow report, we note there are now additional reports available on the Oranga Tamariki Safety in Care team website.[30] Concerningly, the most recent report (covering January-June 2021) observes: "There has been an increase in both the number of children experiencing harm and the number of findings in the most recent period."

94. Cooper Legal represents approximately 775 clients who suffered physical, sexual and/or psychological abuse while they were in State care as children since 6 April 1993. We observe that this is a significant increase from the number we reported as being clients as part of the Fifth Periodic Review, six years ago, which was approximately 200.

[30] https://www.orangatamariki.govt.nz/about-us/performance-and-monitoring/safety-of-children-in-care/

95. Our youngest clients, still in their late teens, have disclosed being subject to assaults by other residents, poor supervision (which has exposed them to psychological and sexually exploitive behaviour by others) and the ability to access drugs while in State residences.

96. The common response to staff is still to use Secure Units to detain children who have been either the perpetrator or victims of assaults. We comment we have commented on the risk to children of the over-use of Secure detention below.

97. 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 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 (some amounting to 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;
- The failure of social workers to obtain expert services for clients when mental health or medical issues are raised;
- 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;
- 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.

98. 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

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

100. While not mentioned in the Government's Sixth 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.

101. 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, now the Oranga Tamariki Act, 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.

102. 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 possible, as required by Article 37(b) of UNCROC.

103. 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.

104. Not only are these examples inconsistent with the provisions of UNCROC, but 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

105. In our report for the Fifth Periodic Review, we noted that the New Zealand Government was refusing to acknowledge where it has breached the New Zealand Bill of Rights Act 1990 ("NZBORA"), in settling claims in respect of its torture or cruel, degrading, or disproportionately severe treatment or punishment of our clients, including during the time after UNCROC was ratified by in New Zealand.

106. Since July 2022, possibly timed to align with this Review, the Ministry of Social Development has marked such breaches with a paltry additional payment of either $4,000 or $8,000[31]. To date, the State has refused to engage in discussion regarding these inadequate further awards, which are significantly out of step with judicial awards for similar breaches occurring in relation to adults.

107. 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.

108. 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).

109. 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).

110. In Cooper Legal's experience, the New Zealand Government continually acts to undermine NZBORA, and a claimant's rights to compensation for the breach of NZBORA – and therefore, UNCROC.

CONCLUSION

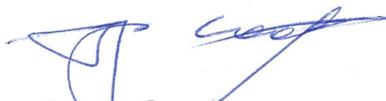
[31] Although the policy allows for the possibility of "bespoke" additional NZBORA payments in circumstances that are not transparent, we have not seen this apparent discretion exercised to date.

111. As outlined in this Report and our Shadow 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.

112. We have seen little improvement in the care and safety of children in care since New Zealand was last examined by the Committee. We are deeply concerned about the failure of the Government to wait for the recommendations of the Royal Commission into Abuse in Care before pushing on with legislation that, in our view, will significantly undermine the rights and protections of New Zealand children and which has been widely criticised. Given New Zealand's terrible and ongoing history of abuse of children in care, we see this as a cynical move to hide future abuse of children and further protect state officials responsible for their care. We can see there being a strong call for a further Royal Commission in the next 10 to 20 years.

113. 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



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APPENDIX – COOPER LEGAL 1 NOVEMBER 2021 SHADOW REPORT

S M Cooper / A L Hill /

K Whiting / C Rabel

1 November 2021

United Nations Committee on the Rights of the Child

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

SHADOW REPORT IN ADVANCE OF NEW ZEALAND'S REVIEW AT THE 74th SESSION OF THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD

INTRODUCTION

1. Cooper Legal is a small, Wellington-based litigation firm, which currently represents approximately 1,600 people who suffered abuse while they were children in the care of the New Zealand State. All these clients were under the age of 18 when they suffered abuse. In addition, Cooper Legal represents survivors in the Royal Commission of Inquiry into Abuse in Care.[32] We are aware that a similar number of people — around 1,600 have approached the State directly about their abusive experiences in care.

2. 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 of, persons acting in an official capacity.

3. 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. As time progresses, the proportion of our clients who were in state care after 1993 increases.

4. Alongside our non-recent abuse work, Cooper Legal's Principal, Sonja Cooper, has spent over 30 years working as a Youth Advocate. In this role,

[32] https://www.abuseincare.org.nz/

Ms Cooper is tasked with representing young people between 14 and 17 years of age, who come before the Youth Court for offending.

5. These two areas of work have provided our firm with a unique insight into the issues that affect 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.

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

7. We note that this Report repeats much of what was said in our previous report to the Committee, as, disappointingly, many of the issues remain unchanged.

SUMMARY OF MAJOR CONCERNS

8. A fundamental shift in attitude towards the legal, social, and economic interests and rights of children and young persons is still required, along with the provision of the necessary services — many of which are currently not available or accessible.

9. Our treatment of young people who offend is still far too punitive and fails to address the drivers of crime. For charges of murder and manslaughter, young offenders will initially appear in the Youth Court before the case is transferred to the High Court. The Youth Court may also transfer cases to the District Court where the offending is particularly serious. This sets young people on a path to prison.

10. The State is abdicating its responsibility for the wellbeing of New Zealand children, by contracting third parties to undertake services for this vulnerable group. In proceedings filed in the High Court, the State has continued to deny legal liability for any harm and abuse suffered by children and young persons in the care of these organisations.[33] This is in the face of a detailed statutory and regulatory scheme requiring approval and ongoing monitoring of these organisations.

11. 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.

12. Māori and Pasifika young people are over-represented in care and protection and youth justice statistics. This reflects the deep-seated racism in state

[33] Although, in evidence for the Ministry of Social Development at the Royal Commission of Inquiry into Abuse in Care, this position appears to have become more nuanced.

institutions, from the police to care agencies, to youth correctional facilities. It also reflects the impact of colonialism, particularly on rangatahi Māori.

13. We often represent several generations of a family who have been impacted by abuse in state care. We are deeply saddened that the cycles of abuse evident several decades ago have not been broken, reflected in the continuing reports of mistreatment, abuse and neglect suffered by children and young persons in state care since 1993.

14. We have identified particular issues around the use of Secure Care, restraints and strip-searching in Oranga Tamariki residences. We have also identified concerns about how complaints made by children and young persons are inadequately dealt with, which has a subsequent chilling effect on their willingness to make complaints.

15. Finally, we address the State response to civil claims for redress for abuse suffered in state care. While this is fully addressed in our evidence to the Redress hearing of the Royal Commission,[34] it is notable that the State will seek to avoid or minimise the nature and impact of abuse on young people. It has forced claimants into a redress process which is not independent, transparent, or accountable. This means that very young claimants are often entering into settlement agreements with the State that in no way address the harm they have suffered. Related to this is the impact of the ACC scheme on the ability of a person to seek redress.

RESPONSE TO THE SIXTH PERIODIC REPORT OF THE NEW ZEALAND GOVERNMENT

I: GENERAL MEASURES OF IMPLEMENTATION

Oranga Tamariki Ministry for Children ("Oranga Tamariki")

16. In 2017, the New Zealand Government formally established Oranga Tamariki Ministry for Children, following a wide-ranging inquiry into the previous Child, Youth and Family Service.

17. In our previous report, we identified our concern that the renaming of the former Child, Youth and Family Services would not create the substantive structural change that is greatly needed. Four years on, we are clear that little has changed.

18. The draft Sixth Periodic Report, at paragraph 184, notes that part of the changes made by Oranga Tamariki included annual reporting under s 7AA of the Oranga Tamariki Act 1989. In its most recent report, Oranga Tamariki

[34] Cooper Legal's evidence on this topic can be found here: https://www.abuseincare.org.nz/library/v/149/statement-of-cooper-legal-for-state-redress-hearing

emphasised that it was committed to improving the outcomes for Māori children who come into state care and had shifted its focus towards early intervention services and more support delivered "for Māori by Māori".[35]

19. However, since the establishment of Oranga Tamariki, there have been several independent and government-led inquiries and reviews into the operation of Oranga Tamariki — the majority of them concerned with the treatment of Māori children.

20. These have included an internal review by Oranga Tamariki into the attempted uplift of a Māori infant (pēpi) from their parents; an independent review by Whānau Ora of historical and current cases of state removal of Māori children from their families; a two-part review of Oranga Tamariki Ministry for Children by the Office of the Children's Commissioner; an urgent Inquiry by the Ombudsman into Oranga Tamariki; and an urgent Inquiry by the Waitangi Tribunal into Oranga Tamariki practices as they related to Māori children. Each review and report is summarised and published on Oranga Tamariki's website, along with Oranga Tamariki's response where relevant.[36]

21. The recommendations of each report and review range from minor changes to practice around involving families in decision-making, to an entire overhaul of government child protection and support services by transferring power and resources to iwi to enable "by Māori, for Māori" approaches that allow Māori children to remain with their families.

22. Cooper Legal supports the recommendations made by various governmental and non-governmental entities to shift the focus for Māori children coming into contact with Oranga Tamariki to remaining with family, where it is safe for them to do so.

23. The report of the Ministerial Advisory Group issued in September 2021 was the 19th report or inquiry into Oranga Tamariki. Even after such a sustained period of scrutiny, the Minister for Oranga Tamariki described it as "broken".[37]

24. However, although we acknowledge that Māori children make up a concerning majority of the children coming into care, Cooper Legal also supports a total overhaul of government child protection and support services for all children in care. In particular, as has been mentioned in previous reports, 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.

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[35] Questions on children deprived of a family environment - Children's Convention from the United Nations - Ministry of Social Development (msd.govt.nz)

[36] https://www.orangatamariki.govt.nz/about-us/performance-and-monitoring/reviews-and-inquiries/

[37] https://www.orangatamariki.govt.nz/about-us/performance-and-monitoring/reviews-and-inquiries/ministerial-advisory-board-report/
https://www.orangatamariki.govt.nz/about-us/performance-and-monitoring/reviews-and-inquiries/ministerial-advisory-board-report/

Recommendation: that the Committee urges the New Zealand Government to commit to meaningful and long-term substantive change to the practice of Oranga Tamariki in light of the multiple reports and reviews referred to above for Māori children specifically, and for all children in care.

Residences in New Zealand

25. In the New Zealand Government's draft Sixth Report, at paragraph 190, it is stated that work is being undertaken to develop suitable community-based placements for children in care who are currently placed in residences. However, the report also acknowledges that there is no set timeframe for this work to be completed.[38]

26. We draw the Committee's attention to the recent whistle-blower report by a staff member at the Te Oranga Care and Protection Residence, who made public some video footage of a child being tackled, having his arms twisted behind his back, and being put in a headlock by staff, before staff threw him to the ground.[39] We note that many of our clients report similar — and in some cases, more severe — abuse occurring in residences.

27. Initially, Te Oranga was temporarily closed, to enable Oranga Tamariki and the police to investigate the footage. However, Oranga Tamariki recently announced that the residence would not be closed, on the basis that the investigations showed that children and young people placed in the residence were not unsafe, nor was there a widespread culture of abuse.[40]

28. Cooper Legal does not agree with that assessment. Based on reports by our clients, an increasing number of whom have been in residential care in New Zealand in the past 20 years, there are cultures and patterns of violence. This is particularly seen in "Kingpin" hierarchies amongst young people, which are exploited by staff. There is also a culture prohibiting the disclosure of abuse — "snitches get stitches". We also continue to hear about violation of children's rights in residences by the overuse of Secure Care, damaging restraints, strip-searches and detention in Time Out rooms.

29. Notably, the use of Time Out rooms has recently been deemed unlawful and the use of rooms for detaining children have been phased out.[41] We applaud this move, but we remain concerned about the overuse of Secure Care.

30. We share the view of the Children's Commissioner that residences must be closed, as they remain places of abuse. The Commissioner recently released their inspection report into Epuni Care and Protection Residence, finding that

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[38] Questions on children deprived of a family environment - Children's Convention from the United Nations - Ministry of Social Development (msd.govt.nz)
[39] https://www.newsroom.co.nz/oranga-tamariki-closing-care-and-protection-residence
[40] Reprieve for Oranga Tamariki Centre Where Abuse Occurred | Newsroom
[41] https://www.education.govt.nz/school/managing-and-supporting-students/student-behaviour-help-and-guidance/seclusion/

children did not feel safe there, and that the facilities were run down and not fit for purpose.[42]

31. The overuse of seclusion in Oranga Tamariki residences was highlighted in an April 2017 report by highly respected expert Dr Sharon Shalev, called *Thinking outside the Box? A review of seclusion and restraint practices in New Zealand*.[43] In a follow-up report titled *Time for a Paradigm Shift,* Dr Shalev identified that insufficient progress had been made by 2020 to address these concerns.

32. Dr Shalev noted, in the follow-up report, that Oranga Tamariki's assertion that the use of force and seclusion of young people had reduced was not borne out by the data. Touching on New Zealand's obligations under the UNCROC, Dr Shalev wrote:[44]

> A submission from one civil society organization noted the key importance of updating the Regulatory Framework for Residential Care in order to make it consistent with the UN Convention on the Rights of the Child. Whilst welcoming the options for change to the Regulatory Framework developed by Oranga Tamariki and opportunity to comment on these, it noted that no update had been provided since last year. The submission emphasised the need for a greater consistency of approach across residences, underpinned by universally applicable guidelines, and for more sharing of good practice.

33. Dr Shalev noted that record-keeping by Oranga Tamariki staff in residences was poor, and data about the use of Secure Care was not centrally held. Focusing on one residence, Dr Shalev recorded:[45]

> In the six months between June and December 2019, a total of 76 children and young people aged 14 to 18 years old were placed in the Secure Unit of their facility on 298 occasions, spending anywhere between a few hours and 20 days in the Secure Unit. In total, these children spent 815 days in Secure Care in the Youth Justice facility (compared to 54 children and young people spending a total of 307 days in Secure during 6 months in 2016). Over half (54.7%) of these children identified as New Zealand Mäori.

34. From the available data, Dr Shalev concluded that the use of Secure Care had actually increased in the Youth Justice residence studied, particularly for long stays. There were several instances of stays in Secure longer than two weeks, which was the limit set out in the Mandela Rules (noting that the Mandela Rules actually prohibit the use of seclusion for children under the age of 18).

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[42] https://www.occ.org.nz/assets/Uploads/Oranga-Tamariki-Residence-Visit-2020.pdf
[43] https://www.hrc.co.nz/files/4616/3244/3194/Thinking_Outside_The_Box_ONLINE-compressed.pdf
[44] https://www.hrc.co.nz/files/9216/0749/3332/Time_for_a_Paradigm_Shift_Print.pdf at page 27.
[45] https://www.hrc.co.nz/files/9216/0749/3332/Time_for_a_Paradigm_Shift_Print.pdf at page 28

35. Dr Shalev also repeated her finding from the 2016 report that Secure Care rooms remained drab and "prison-like", further harming the young people placed in them.

36. The Shalev reports provide a detailed, independent review of the use of seclusion and force in Oranga Tamariki residences and we endorse the recommendations of Dr Shalev.[46]

37. Seclusion has no place in our care of vulnerable young people. Together with Dr Shalev, we call for an end to the use of this harmful tool for young people under the age of 18.

Recommendation: that the Committee urges the New Zealand Government to formulate a plan for phasing out the use of residences in New Zealand for children in care as soon as possible and within an agreed timescale, in light of the concerns for the safety of children and young people in those residences. Further, the New Zealand Government take immediate steps to prohibit the use of Secure Care and other forms of seclusion in residences and care settings for young people.

Vulnerable Children's Act 2014

38. In Cooper Legal's previous report, we noted that the Vulnerable Children's Act 2014 had been enacted. That Act introduced 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 that will be taken by the Chief Executives to achieve the Government's priorities for improving the wellbeing of vulnerable children.

39. Sections 12 and 20 of the Vulnerable Children's Act provide that the strategy and child protection policies established by the Act do not create legally enforceable rights or remedies. The legislation has little real weight and will be subject to the political whims of successive governments.

40. 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 welcomed this initiative but, as detailed below, is concerned that children are still suffering abuse in care. This occurs because, even with vetting, state authorities have decided to place children with unfit caregivers or have elected to overlook the use by third-party agencies of unvetted, or unsuitable, staff.

II: DEFINITION OF THE CHILD

[46] *Time for a Paradigm Shift,* page 38.

41. In our last report, Cooper Legal noted that the New Zealand Government was in the process of passing the Children, Young Persons, and Their Families (Advocacy, Workforce, and Age Settings) Amendment Bill, to raise the age of support and protection for children and young persons under state care to 18 years old. We are happy that this has been achieved and the statutory care and protection system has now been extended to include young people aged 17 years, and guardianship orders can be made for young people aged up to 20 years in some circumstances. The Youth Justice system has also been redesigned to increase the alignment of New Zealand's justice system to the Convention. This includes an extension for most 17-year-olds to be in the Youth Justice system rather than the adult system.

42. However, ss 272–280A of the Oranga Tamariki Act 1989 provides that young offenders charged with certain "serious offences", some of which are specified in schedule 1A of the Act, will have their cases transferred out of the Youth Court into other courts and will then be dealt with as part of the adult criminal justice system, particularly if they are 17 or over when the charges are laid.

43. This means that certain young offenders who commit a specified class of offending 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 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.

44. The exclusion of these children and young people who commit certain specified crimes from the legal protections above remains a significant and ongoing concern to those who represent young offenders in New Zealand.

Recommendation: that the Committee urges the New Zealand Government to allow all offending by children and young people to be dealt with in the Youth Court.

III: GENERAL PRINCIPLES

Best interests
Private providers

45. Article 3 of UNCROC states that the best interests 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.

46. Since New Zealand ratified the UNCROC in 1993, Oranga Tamariki and its predecessor agencies have approved a number of programmes, institutions and residences that are governed and 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 Oranga Tamariki 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.

47. 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.

48. 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.

49. The programmes referred to above were the subject of multiple complaints about sexual and/or 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.

50. These complaints were often reported to the Ministry of Social Development's predecessor agencies which failed to revoke the approval of the programmes, sometimes allowing them to run for years.

51. As a result, our firm has acted in civil proceedings against the New Zealand Government, alleging that the Ministry[47] is vicariously and directly liable for the abuse these young claimants suffered on these programmes.

52. In response, the Ministry has raised a defence, relying on the contract for services with the providers, 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.

53. 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

54. 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.

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[47] The Ministry of Social Development is the defendant for all civil claims arising prior to the establishment of Oranga Tamariki. As we have flagged elsewhere in this report, the State's position was modified in evidence to the Royal Commission of Inquiry into Abuse in Care, but it is not clear that this would carry over into proceedings before the courts.

55. We have 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.

56. This concern is confirmed in the Government's draft Sixth Periodic Report at paragraph 185, which acknowledges that there is little data collection undertaken that allows children in and out of care to give their views on their education, health, and wellbeing, as they are generally targeted to people aged 15 and over. At paragraph 186, the Government acknowledges this is something that Oranga Tamariki is working on with other government entities, but no further information has been provided on this.

57. Regarding Oranga Tamariki's data collection regarding children in care specifically, our firm has reviewed multiple records where the concerns raised by children of being mistreated and/or being moved frequently have been ignored or inadequately investigated (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. Additionally, records often show that concerns around educational needs, such as attendance or even provision of education, can persist for long periods without action being taken for the child concerned.

58. 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.

IV: CIVIL RIGHTS AND FREEDOMS

The abuse of children and young people in New Zealand state care

59. 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)).

60. 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.

61. This issue was not addressed in any depth in the Government's Sixth Periodic Report. The Government has provided statistics on the number of children and young persons with substantiated findings of abuse and neglect but provided no statistics or other information regarding the abuse of children and young persons by institutional staff members or other caregivers. This is even though the Committee explicitly asked for this information at Part III, paragraph D, sub-paragraph 38 of the List of Issues.

62. Table 13 provides data on the number of reported cases of violence against children, including sexual abuse, and the recorded outcomes, but no data on the identities of the abusers.

63. However, this information is available, in reports from the Oranga Tamariki Safety in Care team.[48] In its initial report, it was found that more than 220 already damaged children were further harmed in a six-month period in 2018.

64. Of the reported abuse, 36 children were sexually harmed, 182 physically harmed, 35 neglected and 83 emotionally harmed by caregivers, family members, other children and Oranga Tamariki staff. Since the first report was issued, Oranga Tamariki has shifted to annual, rather than quarterly reporting.

65. 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 and/or other disabilities and/or a low level of education; and a history of drug or alcohol abuse.

66. The Government, in its draft Sixth Report, notes at paragraph 134 that Oranga Tamariki and Police have a statutory obligation to investigate incidents of violence and abuse of children and young people, including those in state care. At paragraph 141, it is also noted that children and young people are "welcome to" contact Oranga Tamariki themselves to discuss any concerns or complaints they may have.

67. The vetting that is now undertaken of children's workers is also noted at paragraph 132, including confirmation of identity; police checks; bankruptcy checks; case management database checks; and third-party checks with any applicable licensing authorities and/or professional registration bodies.

68. While the measures set out at paragraphs 66-67 above are welcome, Cooper Legal is concerned that there is still no mandatory reporting duty in care settings, where abuse by a caregiver is suspected, which would serve to

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[48] https://www.orangatamariki.govt.nz/about-us/performance-and-monitoring/safety-of-children-in-care/

protect the children / tamariki concerned, and the staff members reporting concerns / whistle-blowers.

Secure Care

69. The use of seclusion, referred to as Secure Care, has been addressed in relation to Oranga Tamariki residences elsewhere in this report. Cooper Legal has also encountered numerous instances of children and young people being detained unlawfully and arbitrarily (Article 37(b)) in Secure Care — that is, in the absence of the strict statutory scheme setting out the requirements before it can be used, and the reporting and documentation of the use of Secure Care, and the strict time limits on Secure Care. This aggravates an already harmful situation.

70. 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. This is borne out by the Shalev reports, referred to above.

71. 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.

72. Children in residences are also routinely strip-searched.[49] Earlier in 2021, media obtained statistics which showed that in the six months from July 2020 to January 2021, Oranga Tamariki conducted 41 strip-searches: 12 in Auckland, none in Rotorua, one in Palmerston North. Three-quarters of them (28) took place at one facility in Christchurch. While strip-searching has been conducted in residences for years, it is often done in contravention of the regulations and guidelines prescribing how they are carried out. Third-party organisations contracted to Oranga Tamariki and its predecessors have also used strip-searching, in the absence of lawful authority to do so.

73. The Minister for Oranga Tamariki has indicated that strip-searching of children and young people will be 'phased out' but we call for an immediate end to the practice.

74. Not only are these examples inconsistent with the provisions of UNCROC, but they also breach the Oranga Tamariki Act 1989 and the New Zealand Bill of Rights Act 1990.

75. The Government, in its draft Sixth Periodic Report, states at paragraph 133 that children's workers responsible for managing safety in state care are now provided with two compulsory training programmes on the use of restraints and de-escalation techniques. In light of the observations above regarding the frequency and severity of restraints that our clients are continuing to report, Cooper Legal is concerned that this training does not go far enough and is not

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[49] https://www.newshub.co.nz/home/politics/2021/05/oranga-tamariki-strip-searching-children-in-youth-justice.html

an adequate safeguard. We have already noted the temporary closure of Te Oranga after the violent restraint of a child was captured on camera.

76. Cooper Legal also notes there is no data (disaggregated or otherwise) in the Government's draft report on the use of restraint in care settings, and whether — and if so, to what extent — this has been impacted by the introduction of compulsory training. There is also insufficient, centrally held data on strip-searching.

V: FAMILY ENVIRONMENT AND ALTERNATIVE CARE

Review of detention for mental/physical health reasons

77. In paragraph 141 of the Sixth Periodic Report, the Government highlights 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.

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

79. At the present time, residents must 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.

80. 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.

81. 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.

82. Cooper Legal notes that, in its August 2015 *State of Care* report,[50] 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

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

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).

83. Little had changed by the next *State of Care* report in 2017.[51] The Children's Commissioner recorded:

> I cannot ignore repeated reports from young people, particularly in youth justice residences, of regular bullying amongst young people. Neither can I ignore their stated determination not to use the well organised complaints system to report instances of serious abuse and violence. 'Snitches get stitches' was the all-too-often refrain from the young people we interviewed.

84. We note that the *Final Report of the Expert Panel on Modernising Child, Youth and Family* 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.[52] Cooper Legal endorses that initiative.

Abuse and neglect

85. As outlined above, we continue 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).

86. Many of these clients also did not receive appropriate post-abuse responses and/or care. Some of the reoccurring issues, which our client group experienced while they were in state care, have included the following.

    - 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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[51] https://www.occ.org.nz/assets/State-of-Care.pdf

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

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

- Young people often do not receive any psychological counselling or other support, after disclosing that they have been abused.

- Young people 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.

87. The effects that our clients have suffered, because 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.

REDRESS FOR ABUSE IN STATE CARE

88. As we have detailed to the Royal Commission of Inquiry, the processes for people seeking redress from any part of the State are fundamentally broken. None of the processes implemented by the State are transparent, accountable, independent, or fair. Immense delays mean that claimants are dying before redress is achieved. The processes also take no account of Te Tiriti o Waitangi — failing to address the underlying racism in our care system which caused the loss of language and culture which still haunts many Māori people today.

Royal Commission of Inquiry into Abuse in Care — narrowing of terms of reference

89. The Government, in its draft Sixth Periodic Report, makes reference to the Royal Commission of Inquiry into Abuse in State Care at paragraph 137. While Cooper Legal has welcomed the work of the Royal Commission, and has been actively engaged in this, we were very disappointed by the Government's decision, in April 2021, to narrow the scope of the Inquiry so that it could only make findings and recommendations relating to abuse in care prior to 2000. This has prevented the Inquiry from looking at modern-day care policy settings.

90. Cooper Legal represents survivors who have suffered abuse from the 1950s through to the current time. The decision to narrow the scope of the Inquiry to pre-2000 is inconsistent with the wishes of survivors, silences survivors in care after 1999, and places children currently in care at risk.

91. Survivors of abuse and key stakeholders were consulted on the draft terms of reference for the Royal Commission and most, if not all, agreed to participate to help prevent the abuse they experienced happening to children and tamariki

in care today. By changing the scope, Cooper Legal is very concerned that the Government has failed to focus on a key purpose of the Commission — changing our care system to prevent abuse happening in the future. As a survivor said at the Royal Commission recently, *if you are not focused on prevention, you are not survivor-focused.*

92. Cooper Legal is also concerned that the narrowed scope is giving rise to a complacency that the abuse described by survivors is entirely non-recent — which is incorrect. It limits the Inquiry to hearing from people who were in care prior to 2000 — two decades before the investigations into Oranga Tamariki referenced above. These investigations were problem-solving focused, whereas the Royal Commission is looking to propose solutions to break the cycle of abuse in state institutions.

93. In addition, Cooper Legal is concerned that the narrowing of the scope is inconsistent with the Government's stated desire to address the drivers of crime, child poverty and mental health issues, and is incompatible with New Zealand's clear obligations under the UNCROC.

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

94. 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.

95. The Historic Claims Team ("HCT") of the Ministry of Social Development has 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).

96. Cooper Legal has concerns about the HCT's ongoing approach towards settling these claims. These include the following.

- 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 (in light of the fact that the Ministry of Social Development is responsible for Child, Youth and Family Services).

- The HCT states that it will accept most allegations, except where there is documented evidence which says the alleged abuse might not have happened. In practice, this often means HCT requires some type of proof before claims of abuse are accepted. 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, the perpetrator has admitted to it, or there are multiple allegations made against the perpetrator about the specific type of abuse by multiple

claimants. Additionally, claimants must either identify the person by name, or give a sufficiently detailed description for the circumstances before HCT will accept that they are making allegations against the perpetrator concerned. This is inconsistent with research which shows that children and young people rarely report abuse when it occurs, research on how traumatic memory works, and does not take into account the often-inadequate reporting by social workers, which characterises many of our clients' files.

- However, Cooper Legal notes that the HCT applies a higher level of investigation for serious sexual abuse allegations, and allegations against current MSD staff members.

- The HCT process is beset with significant delays which are caused by a lack of appropriate government resources or commitment towards resolving these abuse claims. As an indication, Cooper Legal currently has approximately 468 clients (some of whom come under UNCROC) who are still waiting for a response from the HCT. Some 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 Office of the Privacy Commissioner has held that these delays were a breach of the Privacy Act 1993 (which was the legislation then in force) by the Ministry.

- Currently it still takes many months for the Ministry to release records to Cooper Legal and the delays are increasing. This can detrimentally affect some of our younger clients' claims, as it prejudices our ability to file their claims in court. Claims of younger clients are filed to avoid the Ministry relying on limitation as a defence. When this happens and the clients' claims are time-barred, they have no option but to follow the settlement processes set by the Ministry.

- The Ministry regularly redacts ("blacks out") names and other significant information from a client's personal Child, Youth and Family files, in order to protect the privacy of third parties. This is consistent with our privacy legislation. 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. Receiving

records that are heavily redacted can also be very disempowering for survivors, particularly when the reasons for this redaction are not always clearly explained.

- In addition, the Ministry of Social Development completely redacts all court documents from the copy of a claimant's file, as it takes the position that those documents are "owned" by the Court, even though they go to the core of the claimant's legal relationship with the State. We are working with the Ministry and the courts to change this, but it is another obstacle to redress faces by claimants.
- In Cooper Legal's previous report to the Committee, we noted that the offers made by the HCT to our clients, where allegations of abuse were accepted, were low and the average settlement offer made was $20,000. At the time, considering the seriousness of the abuse alleged, Cooper Legal assessed that the amounts offered were often completely unacceptable. Recently, offers of settlement seem to have dropped even further.
- 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.
- All 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.

97. Cooper Legal notes that all 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.

98. There is a smaller cohort of claimants who were in Special Residential Schools, which are governed by individual Boards of Trustees, where the trustees are often appointed by the Ministry. This allows the Ministry of Education to abdicate its responsibility for these schools, even though each child is only admitted with the approval of, and the funding provided by, the Ministry of Education.

99. For claimants who are eligible for the Ministry of Education process, the outlook is bleak. The Ministry has appointed two psychologists as assessors who make recommendations for redress. The outcomes are poor and reflect a poor assessment process. The process itself has an enormous backlog, meaning claimants will wait a long time for a response.

100. It appears that at least one Board of Trustees which is a defendant to claims has taken the stance that it is not liable for the harm done to the claimant, and that the claims are barred by the provisions of the Limitation Acts and the Accident Compensation Scheme. The response by the Board reflects the likelihood of significant litigation ahead.

Recommendation: that the Committee urges the State to implement an independent, transparent claims process to facilitate redress and healing for people harmed in State care. The Committee's attention is also drawn here to the ongoing work of the Royal Commission of Inquiry into Abuse in Care, including the interim report, Tāwharautia: Pūrongo o te Wā.[53]

Recognition of fundamental rights in settlement processes

101. All children and young people who were in state care after September 1990 receive the protection of our fundamental rights legislation, the New Zealand Bill of Rights Act 1990. More often than not, the same people will also be/have been in care from the time UNCROC was enacted.

102. The NZBORA embeds key provisions of the ICCPR and UNCAT into our domestic law. It provides for protection against torture, inhuman treatment, arbitrary detention, unreasonable search and seizure, discrimination and so on.

103. There are many examples of the rights of children and young people under the NZBORA being breached by the State after 1993. However, the redress processes in place to address these fundamental wrongs do not adequately recognise the breach or attempt to redress it.

104. The redress process for the Ministry of Social Development provides for staff to increase the compensation payable to a claimant for abuse in care by a discretionary amount. There is no information given to the claimant about how much that compensation is, or what it is for.

105. However, this is still better that the Ministry of Education process, which does not acknowledge the place of the NZBORA and does not provide any redress for breaches at all.

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

[53] https://www.abuseincare.org.nz/reports/

106. Our firm is 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.

107. In Cooper Legal's view, there are still significant problems with the way in which the New Zealand Government is 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;
- 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.

Recommendation: that the Committee encourages the New Zealand Government to behave as a Model Litigant in all 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.

IX: SPECIAL PROTECTION MEASURES

Children in conflict with the law

108. The principal of Cooper Legal, Sonja Cooper, continues to work as a Youth Advocate for young offenders (between 14-17 years of age inclusive) in the New Zealand Youth Court.

109. Ms Cooper has been involved in ongoing cases where the rights of young persons who were arrested and detained were significantly breached, in clear contravention of Article 40 of UNCROC.

110. In one case, (involving a 16-year-old Māori/Pasifika boy charged with a number of driving offences), the boy was: arrested by police for alleged breaches of bail, most of which had already been dealt with in the Youth Court as being circumstances in which bail had not been breached; held in the police cells overnight; and then was released by police prior to appearing before the court, when Ms Cooper pointed out that the arrest was in breach of s 214A of the Oranga Tamariki Act, because there had not been the required three breaches of bail. Ms Cooper complained about the detention of the young person in custody for some 16 hours and was eventually able to negotiate compensation for the boy after the police acknowledged that the Act had not been complied with. Ms Cooper has challenged subsequent arrests of the same boy, now 17, for the same reason and/or because arrest was not the least restrictive outcome of an interaction with police.

111. In another case Ms Cooper acted for a 13-year-old Māori/Pasifika girl, who was deliberately charged with a very high-level assault so that she could be dealt with in the Youth Court. The investigation by police took some time to complete. The girl was arrested at school, where she was handcuffed and taken to the police station. Submissions made to the Youth Court to transfer the case to the Family Court, given the child's age, were unsuccessful. The Youth Court also upheld the challenge to the legality of the arrest, refusing to accept Ms Cooper's argument that this was not the least restrictive approach, given that the arrest was made sometime after the offence had occurred. As the police would not amend the charge (to keep the child in the Youth Court), the matter proceeded to a defended hearing where the serious charge was found proven by the Principal Youth Court Judge. Ms Cooper appealed the decision to the High Court which accepted Ms Cooper's argument that the child had not exhibited the necessary intention required to prove the charge, given her age and her inability to fully understand the nature of her actions.[54]

112. Children under the age of 14 should not be facing charges in a criminal court, except in exceptional circumstances. That is one of four recommendations made by the former Children's Commissioner, Andrew Becroft and other experts, all of which recommendations we agree with and endorse.[55]

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[54] *DH v R* [2017] NZHC 3223 (Simon France J)

[55] https://www.wgtn.ac.nz/__data/assets/pdf_file/0008/1976084/Four-Urgent-Law-Changes-for-the-Youth-Justice-System.pdf

113. Cooper Legal has an ongoing concern that, particularly in cases involving more serious alleged offending, the New Zealand Police will overlook their statutory obligations in arresting and interviewing young persons, in order to lay charges.

114. Cooper Legal also has ongoing concerns that when young people appear before non-specialist judges particularly (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 particularly so if the young person is Māori or Pasifika. This is a breach of UNCROC. We agree with Andrew Becroft et al that the power to detain young people in police cells should be immediately repealed.

115. Cooper Legal also repeats our significant concerns about the lack of 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).

116. There are still few programme providers and no Youth Justice residences which provide specialist programmes and/or facilities for young offenders presenting with significant neuro-cognitive impairments.

117. 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 disability 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.

118. Cooper Legal again complains 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 per cent of prison inmates under the age of 20 have had prior contact with Child, Youth and Family.[56] 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.

119. Cooper Legal shares the concerns of others that there are too many young Māori and Pasifika 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.

120. While the specialist courts, namely the Rangatahi Courts and the Pasifika Court, have achieved very good outcomes in those parts of New Zealand where they have been set up, there are still large parts of New Zealand that

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

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 Māori and Pasifika young persons, on the one hand, and Pākehā (European) young persons, on the other hand.

CONCLUSION

121. 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 extending the Youth Court's jurisdiction to include 17-year-olds, although this should be for all offences, not just the less serious ones.

122. 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.

123. One 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. Cooper Legal is hopeful that the ongoing work of the Royal Commission will assist with this.

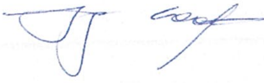
124. The post-1993 clients that our firm represents are a growing group. Almost every week, Cooper Legal receives new instructions from people who were in New Zealand State care after 1993, and who suffered unacceptable and (often, prolonged) abuse and/or mistreatment by those who were supposed to be 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.

125. Cooper Legal believes that it is unacceptable, first, that this abuse and mistreatment was able to occur. Second, 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).

126. 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 our children and young people.

127. 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



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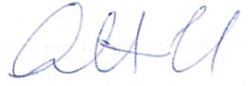

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