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S M Cooper
4 February 2015

Secretariat of the Committee against Torture
By email

Dear Secretariat

Response to the List of Issues prepared by the Committee against Torture (CAT/C/NZL/Q/6) and Sixth Periodic Report of New Zealand (CAT/C/NZL/6)

Please find attached submissions prepared by Cooper Legal, in advance of New Zealand's review at the 54th session, scheduled for 20 April to 15 May 2015.

We will also send hard copies of our submissions by post, so that these can be distributed amongst members of the Committee before the 54th session.

Cooper Legal is a small, Wellington-based litigation firm. We currently represent hundreds of clients who suffered abuse while they were children under the care of the New Zealand State. For the majority of our clients, the abuse they allege includes serious, often systematic, torture and/or cruel, inhuman, or degrading treatment or punishment. As discussed in New Zealand's Sixth Periodic Report, we are currently attempting to secure Government compensation for our clients, by a variety of legal and alternative dispute resolution means.

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

Thank you for taking the time to consider our submissions.

Yours sincerely

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Comments of Cooper Legal on New Zealand's Implementation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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

Introduction

Cooper Legal is a small, Wellington-based litigation firm, which is currently representing hundreds of clients who suffered abuse while they were children under the care of the State. For the majority of our clients, the abuse they allege includes serious, often systematic, torture and/or cruel, inhuman, or degrading treatment or punishment, inflicted by, at the instigation of, or with the acquiescence or consent of, persons acting in an official capacity.

The claims cover the period from the 1950s, right up to the present time, although the majority of allegations are of abuse that occurred in the 1970s and 1980s. The firm's youngest clients are in their teens. In a number of cases, the abuse is substantiated by contemporaneous records, including convictions of the perpetrators. In the majority of cases, there is significant corroborative evidence available.

Response to "Key Developments"

1. New Zealand's draft 6th periodic report to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "the Government Report") provides a number of "key developments" since the last report in 2009. At (9) of these developments, the Government reports that the Ministry of Social Development ("MSD" or "the Ministry") has committed to the responsible Minister that all historic abuse claims with respect to MSD will be closed by the end of 2020. This summary is taken from paragraph 269 of the Government Report.

2. Cooper Legal currently has 643 clients awaiting resolution of their historic claims against MSD – as at 25 January 2015, 307 of these claims were filed in the High Court, with the remainder unfiled. MSD itself acknowledged that, as at August 2013, it had a backlog of 470 direct claims and 300 filed claims[1]. At the current rate, the Ministry is settling no more than 50 of Cooper Legal's claims per year. There is no sign of that rate significantly increasing. Optimistically, Cooper Legal's 643 *current* claims will accordingly take 10 years to resolve – that is, to the end of 2023, at least.

[1] Webber, David (14 August 2013) *Historic Claims of Abuse of Children in State Care Pre-1993*, p18

3. Further, Cooper Legal continues to receive new instructions to act on historic abuse claims every year. In 2014, this firm processed 106 new grants of Legal Aid (legal aid is funding provided by the State for legal representation) in relation to MSD claims. There is no sign of the rate of new instructions significantly decreasing, either. Indeed, at paragraph 269 of the Government Report, it is noted that there has been an: "upsurge over the past two years in the number of people utilising the historic claims resolution process." Accordingly, by the end of 2023, we estimate that Cooper Legal will still represent 500 clients with claims against the Ministry – 500 claims which will take another ten years to resolve. We are also acting for increasing numbers of younger clients, some of whom have only just exited care. This shows that children are still being abused in State care.

4. As the law firm representing all historic abuse claims that are filed in the High Court, as well as most unfiled historic abuse claims, this target will not be met without a radically new approach to these claims. Whatever the case, MSD should be concerned with fulfilling its responsibility to achieve "fair and adequate compensation" for all historic abuse claims in accordance with Article 14, however long it takes, rather than rushing to meet a deadline that does not appear achievable.

5. A better approach would be for MSD to commit to a deadline for resolving all *outstanding* claims, while ensuring that the rights of future claimants to compensation are not jeopardised.

Article 2

Issue 1: *Please provide updated information on the enactment of comprehensive legislation to incorporate into domestic law all the provisions of the Convention. Also, please update on the establishment of a mechanism to ensure consistently the compatibility of domestic law with the Convention.*

6. Cooper Legal is concerned that a number of recent legislative measures enacted by the Government are in direct conflict with the rule of law and rights embedded in domestic and international rights instruments.

7. Cooper Legal endorses the report of the New Zealand Law Society Human Rights and Privacy Committee to the Human Rights Council in 2013 regarding these legislative changes.[2] Of note in respect to the UNCAT, is the passing of the Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act 2013, which continues the application of the Prisoners' and Victims' Claims Act 2005 (which would have otherwise expired under a sunset clause). This

[2] Submission to the 18th Session of the Human Rights Council; Shadow Report to New Zealand's 2nd Universal Periodc Review, 17 June 2013

legislation restricts awards of compensation to prisoners for rights breaches committed while they are inmates in prison.

8. Cooper Legal acts for a small number of prison inmates who have experienced treatment that constitutes torture, while they were in prison. The legislation restricts their access to fair and adequate compensation as provided for in the UNCAT. We comment on this further, below.

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

Issue 2: *Please provide information on the steps taken by the State Party to guarantee the rights of persons in police custody from the very outset of detention, including prompt access to a lawyer, being informed of the charges against them in a language that they understand and having their detention duly registered, the right to have access to an independent doctor, if possible of their own choice, as well as the right to notify family members or persons of their choice about their detention. Please indicate how this is implemented in practice and any restrictions that may be imposed on these rights.*

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

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

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

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

statements were inadmissible. This was a traumatic and prolonged experience for the 2 boys.

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

15. It is observed that this boy was extremely vulnerable and has an extensive care and protection history. Accordingly, this breach was significant. Thankfully, due to the co-operation of Youth Aid (specialist police working with young offenders), Child Youth and Family and Ms Cooper, a satisfactory outcome was reached for both the young boy and his alleged victims, which did not involve the formal youth justice processes.

16. Cooper Legal has a concern that, particularly in cases involving more serious alleged offending, Police will overlook their statutory obligations in arresting and interviewing young persons, in order to lay charges.

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

Article 11

Issue 19: *In light of the previous recommendations of the Committee (para 8) and taking note that the State party did not accept that it is necessary to increase the age of criminal responsibility, please indicate whether all persons under 18 in conflict with the law are accorded special protection in compliance with international standards. Also, please inform on the application by the State party of the Beijing Rules and the current availability of sufficient youth facilities, and whether all juveniles in conflict with the law are held separately from adults in pretrial detention and after conviction?*

18. Persons who are 17 are treated as adults in the criminal justice system. They are afforded none of the special protections afforded to young persons (as defined by legislation) in terms of: arrest; interviews by Police; admissibility of evidence; representation by Youth Advocates; being dealt with in the Youth Court (as opposed to the adult courts); and having the advantages of sentencing through the Youth Court.

19. This is a significant, ongoing concern to those who represent young offenders. Cooper Legal endorses the UN stance that New Zealand's treatment of 17 year olds is in breach of its international obligations.

Article 14

Issue 24: *Please provide information on redress and compensation measures, including the means of rehabilitation, ordered by the courts and actually provided to victims of torture, or their families, since the examination of the last periodic report in 2009. This information should include the number of requests made, the number granted, the amounts of compensation ordered and those actually provided in each case.*

"Victims of Torture" Defined

20. The Government's response to this issue is that there have been no prosecutions under the Crimes of Torture Act 1989, and therefore no compensation has been awarded.

21. Cooper Legal says that the definition of "victims of torture" is broader than those people who are the subject of a prosecution under the Crimes of Torture Act 1989. Issue 24 does not appear to be limited to prosecutions under that legislation – of which there have been none. This is not for lack of victims. In one case, one arm of the Government made findings of fact that State actions could amount to torture under the Convention, but another arm of the Government chose not to prosecute under the Crimes of Torture Act 1989.[3]

22. Cooper Legal takes the view that being a victim of torture does not depend on the Government's success in prosecuting the person or persons who have perpetrated the torture.

23. The Government has not mentioned, in respect of this issue, the large number of civil proceedings filed in the High Court in respect of historic abuse in State-run or State-approved institutions and programmes.

24. The claimants in these cases say that they have been the victims of torture, often carried out in a context of systemic and institutionalised abuse. The experiences they describe fit within the definition of Acts of Torture set out in section 3 of the Crimes of Torture Act 1989. However, the Government has

[3] Report of Ombudsman Dame Beverley Wakem, *Management of Arthur Taylor at Auckland Prison between 15 June 2011 and 30 April 2012,* where she stated that the treatment of Mr Taylor, who was held in solitary confinement for a period of some eight months, was a significant breach of his rights. In the Annual Report on Activities under OPCAT 1 July 2012 – 30 June 2013, the Ombudsman described segregation conditions at Auckland Prison: *Accommodation for those prisoners currently undergoing a period of segregation is well below standard and could be considered cruel and inhuman for the purposes of the Convention against Torture."*

elected not to prosecute named offenders under this legislation. In any case, a prosecution can only be taken with the consent of the Attorney-General, and compensation only awarded at the discretion of the Attorney-General. Sufficient evidence that acts of torture have taken place is available, but the Government has elected not to prosecute offenders.

Claims Filed with the Court Against the Ministry of Social Development ("MSD")

25. Cooper Legal says that the Government's approach to resolving claims through the courts has resulted in unacceptable delays and resulted in no compensation or rehabilitation being awarded to this claimant group.

26. 307 claims (collectively referred to as the "DSW Litigation Group") are currently filed in the High Court at Wellington, but few have been progressed since the last reporting period in 2009. The DSW Litigation Group is managed under a protocol that largely deals with procedural matters such as obtaining discovery (release) of relevant documents. The judiciary are unable or unwilling to progress the bulk of the historic matters to resolution through Court processes, allowing the claims to stagnate.

The Whakapakari Trial

27. A number of clients of Cooper Legal were placed on a State-approved and funded programme known as "Whakapakari" between 1994 and 2004 – all being aged between 13 and 16 at the time of placement. Many of the clients who were placed there suffered extensive physical, sexual and psychological abuse, deprivation and false imprisonment (where they were placed on a small island with little food, no shelter and no supervision for periods of time as punishment). The MSD and its predecessors regularly recorded and investigated complaints of physical and sexual assaults at Whakapakari, and found several proven. Issues of poor hygiene, systemic failure and poor compliance were recorded and investigated over a decade, but the MSD continued to place children on the programme.

28. Two claimants who were on this programme are having their claims progressed to a trial, which is now scheduled to begin in June 2015, as a third claimant has settled his claim. However, the MSD's approach to the litigation seems likely to result in the trial being delayed.

29. Points to note about the MSD's approach are:

a) The New Zealand Government has clearly stated as a matter of policy that no claims alleging breach of section 9 of the Bill of Rights Act 1990 (the right not to be subjected to torture or cruel treatment) will be resolved or settled in any way, in the absence of a full trial. The Government will never concede that a breach of section 9 has occurred. This forces the claimants to have to give evidence about, and be subjected to cross-examination about, their sexual and physical abuse which is very traumatising for them in a court context;

b) The disclosure of relevant documents necessary to prepare for the trial has been done on a piecemeal basis, over a couple of years. This has created difficulties for Cooper Legal in preparing its case. Even now, Cooper Legal is not confident that all relevant documents have been disclosed.

c) While this client group does not face the same Limitation Act issues as their older counterparts in that many of the claims were filed in the High Court before the claimants turned 26 (meaning only a maximum four-year delay needs to be addressed before the statutory bar does not apply), limitation issues are being raised in an attempt to deny the claimants access to a remedy. In contrast to previous and current concessions in respect of limitation, in November 2013 the MSD indicated it would seek to have the limitation issue heard as a preliminary issue for the two claimants, though their proceedings have been filed since 2006 (when the first claimant was 23) and 2007 (when the second claimant was 25);

d) The MSD has also proposed a criminal investigation of the sexual abuse complaints at this point, presumably as a tactical means of delaying the trial. The suggestion of criminal investigation was only raised in January 2015, and only in relation to the two claimants going to trial;

e) The MSD has also contested the need for name suppression for the witnesses, all of whom are victims of physical and/or sexual abuse and many of them are prison inmates. It is customary in New Zealand for victims of sexual abuse, particularly, to receive name suppression when giving evidence of abuse. Further, such a stance is contrary to the rights of witnesses in torture cases under the Istanbul Protocol;

f) The MSD made a revised settlement offer to one of the claimants, stating that if the claimant did not accept the offer by a short timeframe, then the offer would lapse and, if the claimant lost in court, he would be offered no compensation and no help with his legal costs. The same approach has been adopted in relation to another claimant who has a separate Bill of

Rights Act claim. Further, in that case the MSD has disputed that the Bill of Rights Act applies at all. This is clearly coercive.

30. Such actions bring the Government into conflict with its own Model Litigant policy, and in particular, the principle not to expend public funds unnecessarily and not to rely on technical defences.

Judicial Settlement Conferences (JSC)

31. One means of resolving filed claims is by JSC, a without prejudice conference facilitated by a Judge of the High Court. Cooper Legal has mixed views about the value of JSCs as a means for resolving our claimants' claims. While we have had some successful outcomes, JSCs can also be a process which acts to wear down claimants to accept what we consider to be unacceptable offers. The High Court is also restricting access to JSCs, in any event, so they will only be directed in special cases.

Independent Fact Finding Process ("Intractables" Process)

32. As a means to progressing matters, this firm attempted to have narrow issues of fact (such as whether alleged sexual assaults occurred, on the balance of probabilities) resolved through the High Court by way of hearings under Rule 10.15 of the High Court Rules. This was intended to address so-called "Intractable" claims, where the parties could not agree on key areas of fact (which affected the level of redress offered). The basis of this approach would be that, with significant facts being established, the parties could then resolve compensation and rehabilitation issues.

33. The proposal to conduct Rule 10.15 hearings for specific claims was opposed by the MSD and resisted by the High Court. The High Court took the view that MSD would be entitled to pursue all of its defences, if the Court was to become involved and stated these issues would best be dealt with out of court. Accordingly, the parties have agreed in principle to trial an Independent Fact-Finding Process, whereby hearings on specific issues of fact are heard by an agreed "Authority" – a retired Judge or someone with similar credentials. The process is run by a third party company, which regularly contracts to run dispute resolutions with Government. The MSD 'vetoed' any person with any significant experience with human rights issues or retired Judges who had previously given judgment for a plaintiff in abuse cases. For example, the proposal that Robert Hesketh, a former Director of Proceedings for the Human Rights Commission, was rejected by the MSD.

34. The parties have agreed on one person who has accepted the position in principle. The scope of the hearings and whether other issues (such as indications as to quantum of compensation) will be addressed, remain

undecided. It is as yet unclear whether this process will be beneficial to the victims of torture we represent.

Claims for Breaches of Prison Inmate's Rights

35. Cooper Legal acts for an increasing number of clients who allege breaches of their rights by the Department of Corrections while they are incarcerated in prison. The factual circumstances vary from arbitrary placement in solitary confinement, blanket removal of privileges and security restrictions and physical assaults by prison guards on inmates.

36. In responding to these claims, the Government does not deal with the matter on the facts, but relies on the Prisoners' and Victims' Claims Act, which is referred to above. The Government does not engage in any out-of-court settlement process, meaning that victims in these circumstances are forced to litigate and then have any compensation they may receive at the end of that process, denied them through operation of the Act.

37. Cooper Legal views this as a direct abrogation of the rights of victims of torture by the Government of New Zealand.

Issue 26: *In light of the previous recommendations of the Committee (para 11), please provide statistical data on the number of "historic cases" of cruel, inhuman or degrading treatment which have been processed since the consideration of the last periodic report, disaggregated by civil claims in courts; criminal complaints to the New Zealand Police; the Office of the Ombudsman; and through the Independent Police Conduct Authority, as well as any other competent body, including through the optional alternative process with the assistance of the Care Claims and Resolution Team (CCRT). Also, please provide information on the number of cases dealt with by bodies which can provide compensation, apologies and other remedies such as the Confidential Listening and Assistance Service (CLAS) and the Alternative Resolution Process, as well as on the number of prosecutions and convictions of perpetrators and redress, including compensation and rehabilitation, provided to the victims. Please indicate how compensation is dealt with in cases where limitation restrictions bar claims.*

The definition of "historic" claims

38. The Government Report defines "historic" claims as those claims falling in the period 1972 to 1992. These parameters have their basis in litigation relating to psychiatric claims. In terms of claims relating to Social Welfare care, however, the parameters are arbitrary and operate to prejudice the legal rights of a subset of claimants. This is dealt with in more detail under the "Limitation" section of this submission.

The HCT / CCRT Process

39. As acknowledged in the Government Report, responsibility for processing historic Social Welfare claims now lies with the Historic Claims Team ("HCT") of the MSD, which was previously known as the Care, Claims and Resolution Team ("CCRT").

Number of settlements

40. As at 30 June 2013, the MSD has made payments to 167 people who have brought claims directly against the MSD (Government Report, paragraph 228(a)). We note that the New Zealand Government has not provided information on whether these 167 people were represented by lawyers, or unrepresented.

41. Cooper Legal has settled over 140 claims through the HCT out-of-court settlement process.

42. In 2014, there was a decrease in the number of offers Cooper Legal was receiving from the MSD, particularly for unfiled clients. Cooper Legal made an Official Information Act request to the MSD for information relating to the numbers of offers the Ministry had made to unrepresented claimants and Cooper Legal claimants. The MSD's 12 August 2014 response stated that, during the period of 1 January to 1 July 2014, the MSD had made 32 settlement offers to non-represented claimants and 0 to unfiled Cooper Legal claimants. In Cooper Legal's opinion, this stark discrepancy indicates why it continues to be necessary to file clients' claims in court in order to achieve any progress. However, as discussed above, filing claims adds to additional delays and costs, and, as discussed above, the court system is ill-equipped (and indeed, actively resisting) to deal with historic claims such as these.

Settlement amounts

43. The settlement payments made by the MSD to date have ranged from $1,150 to $80,000 for clients of Cooper Legal (the Government Report says the top payment is $70,000, paragraph 228(a)). This does not include the payment of legal costs, for Cooper Legal clients at least.

44. Cooper Legal emphasises that very few of our clients have received settlement payments in the top end of this range. On average, the settlement offers that are made to our clients are $20,000. There is a considerable range above and below that average. A number of our clients have been offered inadequate amounts given the seriousness of the abuse they allege, due to the high standard of proof typically required by the HCT (discussed below under 'burden of proof').

45. The vast majority of Cooper Legal's clients are legally aided (explained at paragraph 3 above). The MSD and Legal Aid Services have an agreement whereby the MSD will pay the claimant's Legal Aid bill whenever a MSD settlement offer is accepted. The MSD contributes two-thirds of the cost and Legal Aid Services writes off the remaining one-third, irrespective of the settlement amount offered to the client. While this is no doubt a positive aspect of the current HCT process, Cooper Legal has recently received some settlement offers from the MSD, often relating to filed clients, where the MSD has stated that it will refuse to pay the claimant's legal costs if they choose not to accept the offer. This is an extremely concerning development and, if actioned, would be a significant impediment to the settlement of historic claims. It may also lead to problems with Legal Aid Services continuing to fund the claims.

46. As discussed below under 'unrepresented clients', Cooper Legal is also concerned about the settlement amounts being offered to individuals who approach the HCT directly. In particular, the anecdotal evidence received by this firm suggests that the offers being made to unrepresented people are well below what Cooper Legal would consider their claim to be worth, and do not comply with Article 14's requirement of "fair and adequate compensation".

Nature of the investigation

47. Cooper Legal has a number of concerns regarding the transparency and thoroughness of the investigations undertaken by the HCT.

48. When undertaking its investigation, the HCT reviews the individual's personal Social Welfare file. However, in this firm's experience, these files often do not contain much of value to support allegations of abuse. It is the institutional and/or staff records, such as those released to us through the court discovery process, which often establish a pattern of systemic physical and/or sexual abuse to support a client's claim. Given that a number of the alleged perpetrators are now deceased and unable to be interviewed, this information is extremely important. This is especially the case as, as discussed below under 'burden of proof', some evidential proof is often required before the HCT will accept a client's allegation of abuse.

49. This apparently cursory investigation by the HCT is inadequate to ensure that "fair and adequate" compensation is offered to claimants in accordance with Article 14. The internal nature of the process, where the HCT is tasked with the responsibility of assessing its own department's liability, is also insufficient to meet the requirement of a "prompt and impartial investigation" under Article 12.

Burden of proof

50. The HCT often requires evidential proof before claims of abuse are accepted. In particular, the HCT often refuses to accept that abuse occurred unless there is some record of it in the individual's personal Social Welfare file, or the perpetrator admits to it.

51. This approach is inherently unjust towards claimants for two reasons. Firstly, during the time periods involved (1950s-1980s), there was poor social work reporting and many institutional records that may have supported an individual's claims have since been lost or destroyed. Secondly, incidents of abuse were rarely recorded. Employees who were caught abusing children were quietly dismissed with little record of the reasoning and, usually, no investigation as to the scale of the offending.

52. As an example, Cooper Legal has approximately 11 separate clients who have alleged abuse by a particular staff member while they were resident at Epuni Boys' Home during the 1960s and 1970s. However, the HCT has refused to accept many of these allegations, due to the staff member being deceased and therefore not able to respond.

53. The HCT has consistently failed to recognise systematic failures within the institutions where historic abuse has been alleged. However, Cooper Legal maintains a database of the institutions and perpetrators named by our clients which indicates that such systematic failures *did* occur. The failure of the HCT to acknowledge the presence of widespread and systematic abuse is another barrier preventing claims of abuse from being accepted, and then achieving "fair and adequate compensation" in accordance with Article 14.

54. In our view, all of this points to an approach by the HCT which puts a high burden of proof on claimants, inconsistent with both the evidence available for historic claims, and the Government's responsibilities under the UNCAT. It highlights the "conflict of interest" position the HCT is in, being an agency investigating the actions of its own staff or agents.

Delays

55. The Government Report has noted that there is now at least a two year delay from the initial meeting with a complainant to commencing a detailed investigation of the client's case. The MSD has itself acknowledged that this delay is unacceptable (Government Report, paragraph 233).

56. In Cooper Legal's experience, there is indeed an average wait of *at least* two years between the time a settlement offer is made to the HCT on behalf of a

client, and when the HCT responds. In increasing numbers of cases, this wait has been more than two years. Cooper Legal currently has well over 200 clients for which a settlement offer was sent to HCT *over 3 years ago*, who are still waiting for a response. Many of these clients instructed Cooper Legal as far back as 2003/2004.

57. The New Zealand Government has also failed to acknowledge in its report the *additional* delays which exist within the HCT process, in *addition* to this standard 2 year delay.

58. It is currently taking the MSD over a year to process Cooper Legal's requests for copies of a claimant's personal Social Welfare files. Cooper Legal has complained to the Office of the Privacy Commissioner regarding these delays, and the Privacy Commissioner subsequently held that these delays were a privacy breach by the MSD. Despite assurances from the MSD that its systems have improved, we have not seen a commensurate decrease in delays.

59. The delays are exacerbated for clients who have filed claims, many of whom instructed Cooper Legal between 2004-2007. Cooper Legal is currently now receiving those clients' records under discovery, which means we receive not only the clients' personal files, but also their family and institutional records. These documents are essential in formulating a letter of offer. The delays in receiving these records affect, exponentially, the time by which clients can expect a resolution of their claims.

60. If Cooper Legal does not accept the HCT's initial response to a settlement offer (which is common given that, as discussed under 'burden of proof', the HCT often refuses to accept many claimant's allegations due to lack of evidence), then Cooper Legal will often wait many more months to receive a counter-offer. Even after the delay, many of the counter-offers merely restate the HCT's original position.

61. As discussed under the section dealing with court remedies, there are further delays involved with filing claims and arranging JSCs.

62. This situation is obviously extremely frustrating for Cooper Legal's clients. This is particularly so considering that those clients who meet directly with the HCT are often given the impression that their claim will be resolved in a short time, i.e. within two years. Clients are also often given the impression that the facts of their claims (such as sexual assaults) are accepted, which later does not turn out to be the case (see the above discussion under 'burden of proof').

63. Cooper Legal has seen these substantial delays, which occur at every stage of the HCT process, have the effect of "wearing down" the resolve of claimants.

Just in the last few months we have had a long-term client (who first instructed us in 2004) elect to have us no longer represent him, as he was under the impression that his claim would be settled faster if he were unrepresented. As discussed below under 'unrepresented clients', this raises a number of issues regarding the fairness and adequacy of the compensation that that client will eventually be offered.

64. In the most extreme (but not uncommon) cases, Cooper Legal clients have committed suicide or died before their claims could be resolved.

65. Other clients are so worn out from the years of waiting that they accept settlement offers well below what we consider their claims to be worth. Many of our clients are financially struggling and simply make the decision to take whatever they are offered in order to move on. In our view, it is contrary to Article 14's principle of "fair and adequate compensation" that individuals should leave the HCT process feeling disillusioned and short-changed.

Records issues

66. In accordance with the New Zealand Privacy Act 1993, some names are redacted from a claimant's personal Social Welfare files, in order to protect the privacy of third parties.

67. 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 MSD. There have also been inconsistencies between what has been redacted within the same and different files, with the names of third parties being redacted for some documents and not others.

68. The inconsistent and apparently arbitrary nature of these Privacy Act redactions raises concerns about whether information is being withheld on justified grounds, especially where it is relevant to a client's claim. Receiving all the relevant information touching on a client's claim is especially important considering that, as discussed above under 'burden of proof', the HCT places such a high importance on evidential proof.

69. We are encountering similar issues with documents provided under court-ordered discovery. This is in the face of a recent consent memorandum in which both parties agreed to limit information that would not be disclosed to Cooper Legal.

Unrepresented claimants

70. Many of the concerns raised in this submission have an even greater impact on those individuals who approach the HCT directly, without legal representation.

71. In particular, these individuals face a greater challenge to 'prove' their allegations of abuse, given that they do not have the access to the institutional and social work practice knowledge that Cooper Legal does. As such, unrepresented clients are wholly reliant on the outcomes of the HCT's own investigation, which, as discussed above under 'nature of the investigation', appears to be cursory and conducted under a conflict of interest.

72. Unrepresented claimants are also at a greater risk of accepting settlement offers well below what their claims are worth, due to a lack of knowledge, or sheer desperation and frustration with the delays. Cooper Legal has been approached by unrepresented clients who have been offered, and have sometimes accepted, inadequate offers by the MSD. Unfortunately, once an offer is accepted, Cooper Legal is largely unable to assist them. The HCT's approach in this regard does not uphold Article 14's emphasis on "fair and adequate compensation".

Confidential Listening and Assistance Service (CLAS)

73. The establishment of the CLAS was a positive step in the context of historic abuse cases.

74. However, as implied by the Government Report, the CLAS is only able to arrange counselling or other support for claimants, or to refer them onto the appropriate government department. The CLAS is not designed, nor is it able to achieve, "fair and adequate" compensation for claimants in line with the Government's obligation under Article 14.

75. Many of Cooper Legal's clients have appreciated the opportunity to have their accounts listened to by the CLAS and utilise the services offered by the CLAS, as an adjunct to making a claim.

76. Cooper Legal is concerned about the Government's decision to cease funding for the CLAS from June 2015. As mentioned above, we believe the CLAS represented a positive step by the Government towards recognising and claiming responsibility for the systematic abuse which did occur. The decision to cease funding, without introducing any replacement mechanisms or initiatives, suggests that the Government is not fully committed towards full rehabilitation for claimants, as it is required to be under Article 14.

77. Cooper Legal is also concerned about the individuals who wished to engage with the CLAS, but had to be turned away to meet the June 2015 closing deadline.

78. As noted in the Government Report, 1,346 people have registered to share their story of abuse with a CLAS panel. All of these meetings are recorded. Cooper Legal's concern is that the transcript of these meetings will be lost or destroyed when the CLAS is wound up in June 2015. These are historical accounts, and evidence of widespread systematic abuse which should be preserved and utilised.

79. In Cooper Legal's view, the funding that was allocated for the CLAS should be used to set up an independent tribunal, such as that established in Ireland and Canada, to investigate the systematic abuse which occurred throughout New Zealand state institutions. The sheer numbers of individuals who have approached the CLAS (1,346 pursuant to paragraph 229(a) of the Government Report) and our firm demonstrates that a widespread Government response is necessary. An independent tribunal could adopt a reconciliatory approach towards resolving historic cases of abuse, rather than the conflicted model of the current HCT settlement process.

Criminal Complaints to the New Zealand Police

80. Cooper Legal has supported a number of clients to make complaints to the New Zealand Police. In particular, two former staff members of a Boys' Home were convicted on historic sexual assault charges against boys at the Home.

81. Overall, this firm's relationship with the Police is positive. However, the Police are reluctant to press charges against alleged abusers unless multiple complainants are willing to give evidence. Given the historic nature of complaints, the onus of proof in criminal proceedings is often too high to obtain a conviction. Many abusers have died or suffer age-related illnesses, meaning they never stand trial.

82. The recent Supreme Court case of *CT v The Queen* [2014] NZSC 155, which quashed CT's convictions for historic sexual assaults, is also likely to act as a deterrent to the prosecution of historic complaints in New Zealand.

The Office of the Ombudsman

83. The Ombudsman does not facilitate the resolution of complaints of torture, or provide mechanisms to access compensation or rehabilitation. The Ombudsman has a minor role in this context in obtaining information from the State Party and challenging the legitimacy of policies introduced by the State Party. The Ombudsman role includes the inspection of prisons. While it has produced at least one adverse report, no further action was taken by Government to remedy the issues raised in the report (refer to paragraph 21 above).

The IPCA

84. The IPCA does not investigate claims where the complainant is aware of the issue for 12 months or more. It will also refuse to investigate claims where no records are available to support a claim. It is not a viable option to resolve historic complaints of torture.

Cases where the Limitation Bar applies

85. The Government's response to this issue was as follows: *In May 2011, counsel for the plaintiffs and MSD agreed that all outstanding proceedings would be managed through an out-of-court process, if possible. This agreement includes MSD suspending the effects of Limitation Act legislation, which ensures that no person is disadvantaged by using the out-of-court process. The courts have formally approved this change in approach, and good progress is being made to resolve cases this way.*

86. Cooper Legal does not hold such a positive view of progress. The agreement in May 2011 was very useful in terms of preserving the legal position of claimants while out-of-court settlement was progressed. However, since that agreement, several factors have undermined its applicability to the claimant group, although this firm continues to rely on the agreement and a subsequent Addendum (now signed by both parties):

a) The May 2011 agreement refers to the "Limitation Act". The legislation applying to most claimants at the time of the agreement was the Limitation Act 1950;

b) The Limitation Act 2010 came into force on 1 January 2011 and repealed the 1950 Act. However, claims based on acts or omissions before that date continue to be covered by the Limitation Act 1950 – so the 1950 Act applies to most of our clients;

c) New provisions 23A-D were inserted into the 1950 Act by the 2010 Act. This is the insertion of a 'long-stop' period, which will affect every client to whom the 1950 Act applies;

d) The May 2011 agreement defines the affected claimants as simply being "clients of Cooper Legal". The MSD has since attempted to impose a time parameter on this client group, where the agreement would only apply to claims arising prior to 2008 (initially the MSD argued this should be prior to 1 January 1993). This is not accepted by Cooper Legal, where we say that as soon as the Limitation Act applies, the claim is "historic". If the MSD's subsequent narrowing of the May 2011 agreement was accepted, those clients with causes of action arising after 2008 (of which there are a

growing number) would be subject to the limitation bar and would be disadvantaged;

e) However, the Ministry has recently agreed that the long-stop provision inserted by section 23B will not apply to the claimant group. The MSD has not agreed to the application of the Limitation Act 2010 to the historic claims, which Act has specific provisions extending limitation periods for abuse victims.

87. In light of the Ministry's uncertain position in respect of the definition of "historic" claims, along with the other issues of delay and records matters referred to above, the firm is taking the step of filing the claims of all the clients whose claims are currently not filed in the High Court, to preserve each claimant's legal position.

The "Accelerated Process"

88. Cooper Legal disagrees with the Government statement above that "good progress" is being made to resolve claims in an out-of-court setting. The Ministry has proposed an "Accelerated Process" that would operate alongside the CCRT/HCT process to resolve claims. The MSD proposes:

a) The Ministry carries out a cursory examination of the claimant's account and records and establishes basic facts;

b) The claimant is 'categorised' according to the seriousness of the allegations, where six categories range from serious sexual and physical abuse "with distinguishing features" down to "minor physical assaults". The categorisation is to be done by Cooper Legal where the claimant is represented by the firm and by the MSD for unrepresented clients, however MSD would be able to alter Cooper Legal's category;

c) Settlement payments would be determined by the claimant's category, rather than individual considerations;

d) The payments would be made out of a limited financial envelope.

89. The primary concerns of Cooper Legal in respect of the Accelerated Process are:

a) The process does not make any special provision for claimants with claims under the New Zealand Bill of Rights Act 1990. These claims, sometimes for the most serious breaches of an individual's rights, should warrant a separate resolution process, which reflects breaches of the

claimant's rights. The MSD is resisting that, except (perhaps) with claimants who were at Whakapakari (paragraphs 17-20 above).

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

c) The process is significantly under-funded. The MSD has indicated that Cooper Legal will have to artificially 'deflate' claims to fit within the allocated budget. This presents significant ethical and professional problems for Cooper Legal. It will also result in unfair outcomes for our clients by way of insufficient compensation and rehabilitation;

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

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

"High End Offenders"

90. Victims of torture come from a range of backgrounds. Unsurprisingly, many people who have been in State care experienced dysfunction and abuse as children (either at home or in State care, or both) and have offended against others as a result.

91. Correspondence between this firm and the MSD has referred to a "High End Offender's Policy". At the time of writing, Cooper Legal's request to obtain a copy of this policy has been declined and is the subject of an investigation by the Office of the Ombudsman. The policy appears to block settlement payments being made directly to victims of childhood abuse who have, as adults, been convicted of murder or serious sexual offences, or who have otherwise received significant negative media focus. If this is correct, it goes

against the articles of the Convention relating to fair and adequate compensation. Victims should be compensated for what they experienced. It is for the penal system to deal with their adult offending. The MSD's approach constitutes a form of double jeopardy.

Claims Against the Ministry of Education

92. A small number of claims brought by Cooper Legal clients relate to allegations of torture in State-run education institutions. These were often "special schools" where children with learning difficulties or intellectual disabilities were placed and subsequently abused. The Ministry of Education is the defendant in relation to these schools.

93. The Ministry of Education has rejected any arrangement or concession in regard to the Limitation Act similar to the arrangement with MSD. As a result, Cooper Legal has been forced to file (or will shortly file) all of these claims in the High Court to protect the legal position of its clients.

94. The Ministry of Education does have a form of ADR process which we are engaging with. However, as with the HCT, the process is: slow; records take too long to be produced; and the level of compensation offered is inconsistent (that is lower) with offers by the HCT.

Claims Against the Ministry of Health

95. As noted by the Government Report, most historic claims relating to abuse in psychiatric care have been either settled or discontinued. Cooper Legal has approximately 8 clients for whom we are negotiating settlements under the Historic Abuse Resolution Service (HARS) model. Where sexual abuse is alleged, Cooper Legal obtains a psychiatric report and has managed to settle several claims for $18,000, which is more commensurate with the previous settlement processes.

96. As with the Ministry of Education claimants, we comment that the level of compensation offered by the Ministry of Health is inconsistent with and significantly lower than that offered by the MSD.

Issue 32: *Please provide detailed information on the relevant new developments on the legal and institutional framework within which human rights are promoted and protected at the national level, that have occurred since the consideration of the previous report, including any relevant judicial judgments relating to State liability in historic abuse cases*

97. Since the last report in 2009, a number of judicial decisions have made it increasingly difficult for plaintiffs to overcome the limitation defence often raised by the State in historic cases. In particular, the limitation exception for disability has become increasingly difficult to establish. Particular decisions of note include:

a) *AB v Attorney-General*:[4] where the High Court found that the plaintiff's "sense of shame" did not mean AB should not reasonably have connected his abuse with his damage.[5] The High Court also held that "some sense of shame" must be recognised as entirely normal in the context of a sexual assault, and cannot in itself constitute unsoundness of mind for the purposes of proving disability;[6] This was in the context of AB being diagnosed with complex PTSD by his expert.

b) *White v Attorney-General*:[7] although the Court of Appeal repeated the High Court's findings that physical violence, encouragement of bullying, abusive language, and detention in Secure Units were breaches of duty by residential staff members, for which the State would be vicariously liable,[8] the Court of Appeal upheld the finding that both plaintiffs' claims were out of time under the Limitation Act 1950. The plaintiffs were held not to be under a relevant disability as they were able to give evidence in court, pursue the current claim, and one participated in (unrelated) Family Court proceedings.[9] Contrary to Australia and the United Kingdom, the "reasonable discoverability" requirement (that the plaintiff makes, or ought to make, a connection between their harm and the abuse before the limitation period commences) was held only to apply to sexual abuse cases;[10]

c) *Hurring v Attorney-General*[11] and *Ashton v Attorney-General*:[12] where the Courts refused to grant leave for the plaintiffs, even though expert evidence had been provided stating that each had a *prima facie* case in regards to establishing disability, and the Courts in each case had acknowledged that a decision on disability should typically be left to trial.[13]

98. In our earlier report to UNCAT, we recorded that the Legal Services Agency (as it was called then) decided to withdraw funding for the remaining 800 or so

[4] HC Wellington CIV 2006-485-2304 [22 February 2011].
[5] Ibid at [445].
[6] *ibid* at [462].
[7] [2010] NZCA 139.
[8] *ibid* at [383]-[386].
[9] *ibid* at [58]-[60].
[10] *ibid* at [82].
[11] [2008] NZHC 1565.
[12] HC Wellington CIV 2007-485-2711 [8 October 2008].
[13] *Hurring* at [7]; *Ashton* at [8].

legally aided plaintiffs with historic child abuse claims. This resulted in litigation, culminating in the Court of Appeal decision of *JMM and Ors v Legal Services Agency*.[14]

99. During the course of this Legal Aid litigation, the New Zealand courts imposed further 'glosses' on the limitation tests. The courts increasingly took into account assessments of plaintiffs taken during incarceration, which did not identify the need for psychiatric intervention and/or medication. They also took into account factors such as: entering into relationships; periods of employment; the ability to instruct criminal lawyers; surviving in the community without offending or taking drugs; and holding a driver's license. The courts also rejected the previous decision of *S v Attorney-General*, a Court of Appeal decision; that a person under a disability could still function in other areas of their life.[15] This has been somewhat overturned by the recent Court of Appeal decision of *Jay v Jay*.[16]

100. *Jay v Jay* reviewed the case law regarding disability, particularly. The Court of Appeal upheld the High Court finding that the plaintiff was under disability until her lawyers issued proceedings in November 2009, although she had first instructed her lawyer in July 2008. The Court of Appeal accepted that the plaintiff had a specific litigation disability, rather than generalised disability which meant she had been unable to bring her claim earlier than she did.[17]

101. The net effect of New Zealand judicial decisions since 2009 has been that only a rare plaintiff will be able to surmount the limitation hurdles which apply to historic cases. While *Jay v Jay* may indicate a shift towards historic claimants, it is worth noting that the perpetrator in that case was an individual, rather than a State party. For this reason, it is unclear whether the *Jay* decision will have a long-term favourable impact on historic claims against the State.

Judicial decisions relating to the damages available for historic claimants

102. A number of recent judicial decisions have also limited the remedies and recourse available to historic claimants in New Zealand, contrary to the purpose of Article 14 of the Convention.

103. In New Zealand, compensation for personal injury is barred by the provisions of the Accident Compensation Scheme. Although exemplary damages are still available (Accident Compensation Act 2001, section 319), a recent Supreme Court decision has strictly limited the situations in which they will apply,

[14] [2012] NZCA 573.

[15] *ibid* at [26].
[16] [2014] NZCA 445.
[17] Ibid, [88] – [92], - [100].

especially in cases of vicarious liability.[18] Attempts to obtain damages under the heads of public law compensation and vindicatory damages have also failed.[19]

Conclusion

Cooper Legal's overwhelming impression is that the MSD process is stagnating. Little improvement has been achieved since the last UNCAT report. Meanwhile, clients continue to despair (and die) while they wait for a response. As we have stated above, the response is often inadequate. We believe a major overhaul of the State's approach to historic abuse claims (and the other issues we have referred to in this Report) needs to occur, for the State to fulfil its obligations under UNCAT.

We are happy to provide further input and information, if required.

Sonja Cooper, Amanda Hill, Katharine Ross, Courtney Scott and Rebecca Hay.

[18] *Couch v Attorney-General* [2010] NZSC 27.
[19] *Marsh v Attorney-General* [2009] NZHC 2463; *P v Attorney-General* [2010] NZHC 959.