

BEFORE THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

**Secreteriat of the Committee Against Torture
UNOG - Office of the High Commission for Human Rights
8-14 Avenue de la Paix
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Switzerland**

**IN THE MATTER OF NEW ZEALAND'S 6th PERIODIC REPORT BEFORE THE
COMMITTEE AGAINST TORTURE**

Submission by Grant Mahy, Historic Abuse Claimant, for the United Nations
Committee Against Torture on Article 14, Questions from the Committee and the
Rapporteur: 27. Complaints, claims and compensation

Introduction

1. My name is Grant Mahy. In 2011-12 I was claimant in New Zealand's Historic Abuse claims. Shortly after this experience I began studying a Masters Degree in Human Rights. Additionally, I established the website www.newzealandchildabuse.com to give historic abuse claimants a voice. Through this website I have made contact with other historic abuse claimants and remained in contact with them over issues surrounding their experiences in institutional care and their experiences in the historic claims process. Further, I have been active in lobbying the New Zealand Government to hold a public inquiry into what went on in their institutions and to create an independent and impartial mechanism to resolve cases of institutionalised historic abuse. Other than this, I have accessed Official Information Act (OIA) material in order to have a better understanding of the State's handling of the historic abuse claims.

2. My claim was handled by the Ministry of Education and not the MSD Historic Claims Unit (formerly known as the MSD Care Claims and Resolution process) which handles the majority of claims. However, as Cooper Legal note in their 13/14 UPR Report *"Related processes (to the MSD process) are established on an ad hoc basis in relation to other State Ministries when claims are made."*

3. This submission shadows the State's response to the UN Committee Against Torture surrounding their handling of the Historic Abuse Claims found under heading Article 14, "27. Complaints, claims and compensation."

"Statistical data is sought by the Committee on the number of historic abuse cases disaggregated by civil claims in court, criminal complaints to the New Zealand Police, complaints to the Office of the Ombudsmen, and claims through the IPCA, the Care Claims and Resolution Team (CCRT) or any other alternative body or process. Information is requested on the number of prosecutions and convictions of perpetrators and the redress provided to the victim, as well as how compensation is dealt with in cases where limitation restrictions bar claims.

The Committee has requested information on the number of cases of patients in psychiatric hospitals processed since 2009; the redress including compensation and rehabilitation provided to the victims; how many claims have been discontinued as a result of the Supreme Court decision of September 2009 on the application of a statutory provision in the Mental Health Act 1969 whereby claims relating to events prior to 1972 can no longer be pursued through the courts; and compensation awarded through individual complaints.

The Rapporteur has asked for data on court claims in connection with the historic abuse cases disaggregated by a range of variables and outcomes. New Zealand is asked by the Rapporteur to elaborate on measures that have been taken to eliminate obstacles to redress affecting victims connected with the historic abuse claims, including statutes of limitations on torture or ill-treatment.

The Rapporteur has requested additional information about the CCRT and its independence, and on claims to the CCRT. The Rapporteur has also asked for information of historic abuse cases against the Crown Health Funding Agency (CHFA), cases received by the New Zealand Police following referral to the CCRT, the number submitted by the CHFA, and the number submitted by private individuals.

New Zealand is asked to specify the number of these complaints that were investigated by the New Zealand Police, the number that resulted in criminal prosecutions, and the outcomes of any such prosecutions. The Rapporteur has also asked for advice on whether any historic abuse cases have resulted in disciplinary action against former CHFA staff.

The Rapporteur has requested data on the amount of compensation awarded to the victims of torture and ill-treatment perpetrated between 1972 and 1977; the number of victims that

received compensation; the amount of compensation awarded to each victim; and the maximum and minimum amount awarded to these victims.

Questions are asked by the Rapporteur about Lake Alice awards, investigations, resulting prosecutions, and the sufficiency of the New Zealand Police investigation into the Lake Alice claims. A question is asked as to whether Justice Gallen took into account legal fees when making his determinations.

The Rapporteur asks what measures New Zealand has put in place to ensure that torture and ill-treatment are not perpetrated in state facilities in the future.”

4. The aim of this submission is to take the Committee inside the claims process based on the lived experiences of someone who went through the process and of someone who has an informed understanding of human rights. In the narrow sense, this submission discusses my case and outlines the rights violations that I encountered in the claims process. In the broader sense, my case is by no means unique. Regardless of the Ministry handling the claim, issues such as legal aid difficulties, the quality of remedy and the State's failure to provide an independent and impartial investigation present across the board. For instance, according to Official Information Act (OIA) material, from 1 January 2004 to 31 August 2013, 55.21% of the historic abuse claimants (164 of 297) who have had their cases with the MSD historic claims unit had no legal representation during the course of their claim, while others appear to have had only some legal representation at some point during their claim.¹ This situation becomes even more pronounced when looking at claims handled through 'related' processes, such as the Ministry of Health, where in 104 claims 72% (79 of 104) claimants' have had no legal representation.² Additionally, to date, no historic abuse complainant has received an independent and impartial investigation. I.e. all claims against the State are investigated by that same State.

5. In my case I found the claims process and its outcomes patronising, insulting and retraumatising. Again, this situation appears not to be unique. For instance, as Hon Tariana Turia, the Co-Leader of the New Zealand Maori Party put it when responding to an open letter that I sent to New Zealand Parliamentarians surrounding human rights violations in the Historic Abuse Claims process:

“ It pains me to hear that the issues you so desperately want resolved have not yet been sorted out. I know that there are many people out there like you who feel the same way.”³

6. In New Zealand's last periodic review before the United Nations Committee Against Torture, the Committee recommended that: *“the State party should take appropriate measures to ensure that allegations of cruel, inhuman or degrading treatment in the “historic cases” are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation.”*

To date, this appears not to have been the case. As Cooper Legal points out re the historic abuse claims process in their 13/14 UPR Report:

“(The) process denies many claimants the effective remedies to which they are entitled, due to a number of significant flaws. Broadly, there are concerns about the impartiality and promptness of the process, the excessive delays in obtaining any remedy, and the quality of the remedy that is offered.”

“No police prosecutions nor, to our knowledge, employment-based disciplinary sanctions have resulted from this process.”

¹ Ministry of Social Development OIA 18/11/2013

² OIA, from the Ministry of Health (1/4/14)

³ Correspondence from Hon Tariana Turia, Co-Leader NZ Maori Party 12 Nov 2013

“...the Historic Claims process is not independent. Significantly, the investigation and the findings therefrom are not transparent... When the process results in offers of financial settlement, the quantum is considerably lower than a Court would award (and considerably lower than settlements offered to similar claimants at the Lake Alice Hospital some 10-15 years ago, and quantum awarded in other jurisdictions).”

With regards to the Lake Alice cases to which Cooper Legal refers, a 2012 CCHR/OHCHR Report⁴ notes, a \$132 million liability fund was set aside in the NZ Government to deal with the Lake Alice cases, of which the New Zealand Government settled outside of court for \$6.5 million in 95 cases. Additionally, over another 100 ex Lake Alice patients came forward and lodged claims with total payouts to 200 people being 12 million dollars, with each complainant receiving between \$30,000 and \$100,000. These cases were settled in 2001 - 2002. Factoring in inflation since then, based on the New Zealand Reserve Bank's CPI, the equivalent today would be \$40, 619.42 NZD to \$135, 398 NZD, or averaged (CPI factored in) \$81,100 per claim.⁵

Comparatively, in the historic abuse claims, based on OIA material:

“Between the period from 1 January 2004 to 31 August 2013, the Ministry resolved 455 claims. A total of \$6,073,184 has been paid in respect of those claims.”⁶

This equates to an average of \$13,347.00 per claim, or roughly \$67,000 less on average per claim than was considered adequate redress in the Lake Alice situation.

7. Notably, the State's handling of the Lake Alice situation has also been a point of contention where human rights are concerned – most recently (May 2012) Felice Gaer of the UNCAT writing to the New Zealand Government asking if they intended *“to carry out an impartial investigation into the nearly 200 allegations of torture and ill-treatment against minors at Lake Alice”* and prosecute and punish the perpetrators.⁷

8. What is also notable is there are many similarities between the State's handling of the Lake Alice situation and that of the Historic Abuse Claims. In both situations the State has; 1) denied claimants of an independent and impartial investigation; 2) rigorously invoked statute of limitations defenses in cases that have gone before the courts; 3) denied legal liability in cases where clearly legal liability exists had cases gone before the courts; 4) attempted to deny systemic abuse while also denying claimants of a public inquiry to establish where systemic abuse occurred (albeit the State is now – years on - admitting systemic abuse in the Lake Alice situation); 5) failed to provide adequate redress and; 6) failed to pursue and/or prosecute perpetrators of crimes committed by officials of the State against minors placed in their care.

This said, given the comparative payments (Lake Alice v. the Historic Abuse Claims), it could be reasonably argued that the State has lowered the human rights bar even further where their handling of the Historic Abuse Claims is concerned.

9. What the State highlights in their 6th Periodic Report, regarding the Historic Abuse Claims, is:

“The payments to date have ranged from \$1,150 to \$80,000, exclusive of any contribution made by the Ministry to the individual's legal costs.”

What is perhaps worth adding is, of 297 claims settled between January 2004 and August

⁴BEFORE THE UNITED NATIONS HUMAN RIGHTS COMMITTEE, Secretariat of the Committee Against Torture, In the Matter of New Zealand's 5th Periodic Report . Additional information to the submission by the Citizens Commission on Human Rights (CCHR) New Zealand for the United Nations Committee Against Torture on Recommendation 11, Allegations of ill-treatment (April 2012) available at http://www2.ohchr.org/english/bodies/cat/docs/followup/ngos/CCHR_New_Zealand42SecondReport.pdf

⁵ http://www.rbnz.govt.nz/monetary_policy/inflation_calculator/

⁶ OIA material from the Ministry of Social Development, (9/10/2013)

⁷ New Zealand Herald, UN asks Govt to re-open Lake Alice abuse probe (23/5/12) retrieved 6/2/14 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10807743

2013 only one payment above \$75,000 (\$80,000) has been made and 41 payments over \$30,000 were made.⁸ This means 255 payments of 297 (86%) were \$30,000 or less. Breaking this down further, 15.82% (47 of 297) payments were \$15,000 or less, while 20.2% (60 of 297) were below \$10,000.

My Case

10. I was subjected to physical and sexual abuse while in the care of the New Zealand State. This occurred in 1978 while I was institutionalised at a 'special needs' school for 'maladjusted' children. I was 11-12 years old at the time and the abuse I was subjected to spanned 4 1/2 - 5 months.

11. My case against the New Zealand State was prima facie in that I had irrefutable evidence in the form police records that fully outlined my sexual abuse. Among other things, these records clearly demonstrate that the institution; 1) asked my abuser to resign after he had been reported for kissing a student at the institution; 2) that no complaint, on the part of the institution, had been made to police surrounding this allegation; 3) as a result on the part of the institution to fail to lodge a complaint to police my abuser was given a three month window in which to continue to sexually molest me and other children; 4) that during this three month window my abuser also sexually molested my brother; 5) that had a complaint to police been made by the institution after they had received allegations of abuse this would have almost certainly resulted in my abusers arrest (when a complaint was finally made by the father of a boy who played soccer on a team my abuser coached, police searched his home and according to police records, "*numerous photographs of nude and semi nude children in various poses and positions of sexual intercourse were recovered*" – photographs of myself were among these).

12. A second component of my complaint was that when I did report my sexual abuse to a staff member at the institution I was assaulted and locked in what was essentially a windowless solitary confinement cell below the boy's dormitory. This is covered in my case review where there is an admission that I was "*more likely than not*" "*physically assaulted and punished*" after I reported my sexual abuse. And: "*If there was suspicion or allegations of abuse it was expected that these would be appropriately responded to.*" And, "*The systems at Mt Wellington School were avoided by a staff member or not followed in a consistent manner which may have better protected Mr Mahy from harm.*"

13. A third aspect of my complaint was when my abuse was made apparent to the institution by police in November of 1978 no contact on the part of any State official was ever made with my family, nor myself. That is, while the institution was fully aware that I had been sexually abused, as a direct result of their care, no formal contact was ever made to offer an apology or assistance. There is an admission in the review of my case that states:

"Once he left the school there was no further recorded follow-up of any kind. Mrs Mahy advises that no contact of any kind was made by Mt Wellington School subsequent to the arrest of Gavin Mitchell. Even if one allows for the more limited understandings and awareness of the psychological ramifications of sexual abuse in the late 1970's compared to now that there was not even some informally supportive contact for Mr Mahy and his family seems at the very least to be a lapse in standards by the Mt Wellington School leadership. It could be assumed that the school priority was to distance itself from what had been a shocking event."

Thus, my case was not only about being subjected to sexual and physical abuse but one also of systemic failings, resulting in a gross dereliction of duty of care.

14. As a result of my abuse I have suffered throughout my life with mental health issues (C-PTSD, agoraphobia, chronic anxiety, panic disorder, depression) and I have illicit substance abuse issues dating back to the age of 14. What is noted in my case review is: "*Mr Mahy has had behavioral and psychological issues for which he has sought some*

⁸ OIA material from the Ministry of Social Development, (9/10/2013)

assistance in the past without significant positive outcomes...Many of Mr Mahy's psychological and behavioral issues over the years strongly indicate that he had been traumatised by the experience. His avoidance behaviour and efforts to numb his trauma through self-medication, his anxiety and at times highly emotional arousal along with overt irritability and at times dangerous outbursts of anger are strong and consistent indicators of being traumatised and as such are indicators of post traumatic stress disorder."

15. With this submission I have included a copy of the police records and a copy of my case review (see documents 1 and 2).

My Experiences in the Claims Process

Failing to Provide an Independent and Impartial Investigation

16. Cooper Legal covers this far better than I am capable of in their 13/14 UPR Report, where they note:

"The Historic Claims process is not independent - investigations are carried out by current Social Welfare staff, all former front-line social workers, into the actions/inactions of former (or occasionally current) Social Welfare staff, to whom the Ministry in question owes various duties by virtue of the employment relationship. Significantly, the investigation and the findings there from are not transparent. While legally aided advice is available to assist claimants, they are expressly and repeatedly advised that it is not necessary. There is no right of appeal from decisions made through this process, and judicial intervention to date has been extremely limited."⁹

"No police prosecutions nor, to our knowledge, employment-based disciplinary sanctions have resulted from this process. No Inquiry into nor public statement regarding the findings from this process has ever resulted."¹⁰

"The Confidential Listening and Assistance Service, a semi-independent body established to offer very limited remedies (no compensation is permitted) to victims of state abuse prior to 1992, which is expressly prohibited from making public or Ministerial comment about its inquiries."¹¹

I concur with Cooper Legal's concerns.

17. What I would add to this, from a more personal perspective, is a group of people who intrinsically distrust the State, left without any other choice, are being funneled into a State orchestrated process where the State is seen to be investigating itself. Should justice then not be seen to be done, this is a form of revictimisation/retraumatisation and reaffirms and supports feelings of distrust towards the State.

18. Other than this, while the State might wish to make claims of impartiality in investigating claims, certainly, at least in my case, it seemed apparent that this was not the case. For instance, where I did apply for OIA (Official Information Act) material through the Ministry, in all instances this OIA was denied, either on the basis that the requested information no longer existed or it was refused on the basis of (quote), *"The information requested... has been withheld under section 9(2)(a) of the Act to avoid the unwarranted disclosure of the affairs of another individual."¹²* Further, while the investigator of my case was not, at that time, a Ministry employee, he once was (i.e. he was an ex Ministry employee). Other than this, a second investigator appointed to my case was a current Ministry employee, and all correspondence between myself and the Ministry was handled through the Ministry's Senior Solicitor. Among other things, I was supplied with, at best, misinformed, at worst,

⁹ Cooper Legal 13/14 UPR Report (2013), para 7

¹⁰ Cooper Legal 13/14 UPR Report (2013), para 8

¹¹ Cooper Legal 13/14 UPR Report (2013), para 12

¹² Ministry of Education OIA response (2/12/2011) Signed by Jill Bond, Acting Deputy of Special Education

misleading information and when I responded to, when asked in my face-to-face interview (conducted over Skype) what I expected as an outcome from the claims process that I expected compensation for the harm suffered as a result of the abuse, the investigator responded, *“some people just want an apology”*. This, to me (I think not too unfairly), indicated that the investigator was not looking after my best interests but rather the interests of those who were employing him to conduct the investigation. Other than this, when I had asked the investigator if he had dealt with other cases from the Institution he responded that he had, but for the most part these cases were relatively minor and involved students “perhaps” being detained in “the time out room” (a windowless solitary confinement cell) for longer periods than necessary. This struck me as highly unusual given that, at this point in time, I was aware the institution had been the centre of a widely publicised police investigation which culminated in several arrests and two convictions of one time staff for multiple crimes of sexual and physical abuse committed against onetime students of the institution (See paragraph 64, pp.22 for further information).

19. Notably, all general universal and regional human rights instruments guarantee the right to a fair hearing in civil and criminal proceedings before an independent and impartial court or tribunal. Just some of the Conventions and Treaties that cover this right are the Convention Against Torture (art 13), the International Convention on Social and Political Rights (art 14.1), The Universal Declaration of Human Rights (art 10), and the New Zealand Bill of Rights Act (arts 25,27). Further, the right to an impartial hearing is the cornerstone of any democratic society that is respectful of rule of law and the effective protection of human rights. However, for some yet to be explained reason, the New Zealand State has sought to deny claimants of this fundamental right.

No Legal Aid

“230. Legal aid is available for historic abuse claimants.” (Paragraph 230, page 38, CAT/C/NZL/6)

20. In my case, I was denied legal aid on the basis that I declared I had \$20,000 NZD in savings at the time of the initial legal aid application. However, at the point that I made this declaration I was living in Paris, France and also declared that I was receiving absolutely no income (no job/no benefits) and these savings were all that I had for day-to-day living expenses. Additionally, I had declared I had no assets (no home, car etc). As I had no working visa and couldn't speak French there was also no chance of gaining any form of employment. At that time \$20,000 NZD was 11, 640 euro. Further, at this time an individual was eligible for legal aid if they were earning under \$22, 366 a year. The initial application for legal aid by my then legal representation was submitted on the 10/6/2011. Just day's prior to the denial of legal aid I had submitted bank statements showing that I had \$3,782 NZD left in the bank. This said, the final denial of my legal aid came 6 months after my application on 2/12/2011 on the grounds:

“We remain of the view that Mr Mahy had \$20,000.00 available to him to meet the costs of his own proceedings.”

I questioned this by email, pointing out (excerpt thereof):

“As a rough estimate, to live in Paris costs a minimum of 2,000 euro (\$3,400NZD) a month. This would mean that one could live in Paris on \$20,000 NZD for 5.88 months. Given this and given that the initial application for legal aid by Cooper Legal was submitted on the 10/6/2011 this would mean that on the 2/12/2011 when your department denied me legal aid I would have, based on the information Cooper Legal supplied, been bankrupt with no savings given 6 months had passed since the initial application where \$20,000 NZD savings were declared.”

This appeal was, however, pointless. In order to appeal the denial of legal aid I needed legal representation to lodge an appeal. As I had no money to pay for an appeal this left me without

any hope of legal representation and I was forced to access OIA (Official Information Act) material (police records etc) and present my own case.

21. The denial of legal aid in my case seems to be anything but unique. To date, 55.21% (164 of 297) claimants who have completed claims had no legal representation during the course of their claim, while others appear to have had only some legal representation at some point during their claim.¹³

22. On this note, I am fortunate in that I have a university education gained in Australia at Bachelors level. Additionally, I worked briefly for the Australian Government in the alcohol and drugs sector. These experiences provide me with some understanding of government instruments and institutions and the ability to communicate at a reasonably high level, verbally and in writing. Further, as previously noted, my case was prima facie and fully documented in police records. This gave the State little room to deny the charges leveled against it. This said, Cooper Legal points out in a "Complaint regarding the Legal Services Regulations 2011", that many of the Historic Abuse Claimants have literacy issues, suffer from mental health issues, are homeless or itinerant, and/or have alcohol and/or substance abuse issues,¹⁴ while Rose Northcott (2012) describes the Historic Abuse Complainants as some of "the country's most vulnerable citizens"¹⁵ As such, it is unlikely that many of the Historic Abuse Complainants are able to, among other things, 1) understand their rights; 2) understand government instruments and institutions; 3) write OIA applications ; 4) file complaints with the Ombudsman when OIA is refused and; 5) present their cases at anywhere near the level legal representation could. As such, my belief is that many complainants have been severely disadvantaged in the claims process, and given that 55.21% of complainants have either chosen to enter the process without legal representation or, as in my case, have been denied legal representation, this cannot be seen as insignificant when considering due process.

Position of the State - moral responsibility versus legal liability, and how assurances of legal representation is unnecessary disadvantages claimants

" While legally aided advice is available to assist claimants, they are expressly and repeatedly advised that it is not necessary." (Cooper Legal 13/14 UPR Report)

23. At this point and in line with my previous comment re a lack of legal representation serving to disadvantage claimants I will quote some correspondence that I received from Ms Katrina Kasey of the NZ Ministry of Education after I asked the Ministry through their Senior Solicitor whether they would be prepared to cover my future counseling costs. Without going into too much detail as to the circumstances surrounding what sparked this response, as I will expand on this shortly, under the heading of "Failing to Provide Adequate Redress " Ms Kasey states:

"The basis of this payment was not because the Ministry was legally obliged to offer compensation, but rather on moral grounds acknowledging that you suffered harm as a result of this experience and in order to assist you to move forward.

The Ministry does not hold itself responsible for the unauthorised criminal actions of a former school staff member...

The Ministry can provide no further assistance and therefore will no longer engage in any further discussions in relation to this matter." (Correspondence signed by Katrina Kasey, Deputy Secretary, Regional Operations, November 2012)

¹³ Ministry of Social Development OIA 18/11/2013

¹⁴ NZ House of Representatives, Complaint regarding the Legal Services Regulations 2011 (SR 2011/144) Report of the Regulations Review Committee retrieved 5/12/13 <http://www.parliament.nz/resource/0001709257>

¹⁵ Northcott, R. (2012) 'Doing the Right Thing – Resolving Historical Claims of Child Abuse'

With regards to Ms Kasey's position of no legal liability, such a position is highly offensive when the State has denied claimants judicial remedy through the courts by invoking statute of limitations defences which as New Zealand's ex Chief Human Rights Commissioner Rosslyn Noonan points out, "*The Crown is not obliged to invoke ... It has chosen to do so.*"¹⁶

24. Additionally, such a position appears to be in conflict with human rights norms where the State will be responsible for acts and omissions of its officials and others acting in an official capacity.¹⁷ The State will also be responsible where it failed to take effective legal and practical measures to prevent ill-treatment (including through failing to adequately deter ill-treatment through the operation of the law), failed to exercise due diligence¹⁸ to prevent and protect individuals from ill-treatment, and failed to adequately and effectively investigate where reasonable grounds exist.¹⁹ It will also be responsible where it knew or ought to have known of an immediate risk of ill-treatment anywhere (whether at home, in a State or private institution or elsewhere) and failed to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm.²⁰ Given this, certainly in my case where at least one State representative; 1) failed to report a suspected pedophile to police resulting in my ongoing abuse for several months longer than would have otherwise occurred; 2) this failure also resulting in my brother being sexually abused and where; 3) after my abuse was made apparent to the institution in 1978 no support or apology was offered, had I had access to a mechanism that upheld rule of law, certainly the State could be held legally accountable. Of course, any and all arguments for legal liability become redundant when no viable mechanism that respects/upholds rule of law is available for seeking redress.

25. This said, my point here is not to engage in arguments of legal liability but to instead highlight the position the State has taken in resolving many claims against it; although, a salient point on this matter is that the State is invoking an argument of 'moral responsibility' as a means of shirking its domestic and international legal obligations. This excludes complainants from seeking justice in the legal sense (precedent, liability etc) and instead relies on some immeasurable morality of a State. This same State, however, has also excluded claimants from seeking a measurable legal remedy by invoking a statute of limitations (the Limitation Act 1950) in cases that have gone before the Courts. See following under heading of "Statute of Limitations Defenses Act to Deny Claimants of Legal Findings and an Alternative/Judicial Route for Seeking Redress", paragraphs 37 - 42, for more

¹⁶ Simon Collins, the NZ Herald (21/04/11) Call for abuse claims commission retrieved http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10720704

¹⁷ The UN Committee against Torture has summarized State responsibility under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment thus: "*The Convention imposes obligations on States parties and not on individuals. States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law. Accordingly, each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm. The Convention does not, however, limit the international responsibility that States or individuals can incur for perpetrating torture and ill-treatment under international customary law and other treaties.*" UN Committee against Torture, General Comment No. 2, *Implementation of Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States Parties*, UN Doc. CAT/C/GC/2, Para 15.

¹⁸ In the case of the Irish Commission of Inquiry this included failures of the State to monitor and inspect institutions. In a Scottish case before the ECtHR involving child abuse in the 1970s and 1980s, the UK was rebuked for a "*pattern of lack of investigation, communication and co-operation by the relevant authorities.*" As the Court stated, "*proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk of the damage suffered.*" *E and others v UK*, para. 100, Legal paper, p 47.

¹⁹ As the UN Committee against Torture has clarified, "*where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.*" UN Committee against Torture, General Comment No. 2, *Implementation of Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States Parties*, UN Doc. CAT/C/GC/2, Para 18.

²⁰ The duty to protect exists from the moment at which the State knew or ought to have known. It has been applied in cases under Article 3 (torture and ill-treatment) since the 1990s but has been applied to cases of historic abuse

information on statute of limitations defences.

26. What I have been told via OIA is there are two forms of payment – a ‘settlement’ payment and an ‘ex gratia’ payment:

“A settlement payment refers to a payment that is made where it has been assessed that some litigation risk may arise from the claim either because of the particular facts and circumstances of the claim, and/or because the claimant is legally represented.

“An ex gratia payment is made where it has been assessed that there is no legal obligation to make a payment, but there exists a moral obligation to pay. A moral obligation may arise where the Ministry’s actions or performance have been deficient to a degree that the individual has suffered loss or harm and a financial payment is justified.”²¹

Following is an outline of the monetary compensation that can be offered in the two payment types.

Payment Type	Chief Executive – up to	Minister – in excess of	Cabinet – in excess of
Settlement payment	Up to \$150,000	\$150,000	\$750,000
Ex gratia payment	Up to \$30,000	\$30,000	\$75,000

27. Notably the ‘settlement payment’ ranges are significantly higher than those of the ‘Ex gratia payment’ sums. This said, as Cooper Legal highlight in their 13/14 UPR report, legally aided or not, offers of compensation are made on a take it or leave it basis with no right of appeal. Add to this that no viable alternative mechanism exists for seeking compensation outside of the historic claims process and what seems apparent is the State has funneled abuse victims of that State into a process where the very same State fully controls the outcomes. So, not too surprisingly, while compensation of up to \$750,000 is possible before receiving the stamp of approval from Cabinet, the highest payment to date is \$80,000 (I believe in this case the complainant contracted HIV after being raped while in State care) – or just a fraction over 10% of a possible \$750,000. Keep in mind that, to date, only one payment over \$75,000 has been made. Other than this, the next highest payment figure was a single payment between \$60,001 to \$70,000.²² In both cases (above \$75,000 and \$60,001 to \$70,000) these were settlement payments.

28. Breaking down the numbers of settlement versus ex gratia payments, based on OIA, between the period from 1 January 2004 to 31 August 2013, 124 settlement payments and 173 ex gratia payments were made. Therefore, 58% of payments were made on moral and not legal grounds.

29. Of the 124 settlement payments made during the period from 1 January 2004 to 31 August 2013, 116 (94%) claimants were legally represented at some point during the claims process. Of the 173 ex gratia payments made in the same period, 17 (10%) of the claimants were legally represented at some point during their claim.²³ Keep in mind that “represented at some point during their claim” is just that. That is, some claimants have begun the process legally aided only to have their legal aid retracted at a later date. Total numbers of claimants is 297 with those with legal representation being 133 claimants versus 164 without legal representation – or 55.21% of claimants without legal representation. You’ll note at this point that the numbers of non-legally represented claimants (55.21%) and the numbers of Ex-gratia

²¹ OIA material from the Ministry of Social Development, (9/10/2013)

²² OIA from Ministry of Social Development (11/02/14)

²³ OIA from Ministry of Social Development (18/11/13)

(moral) payments (58%) correlate very closely.

30. The following table shows the sums paid in settlement payments and ex-gratia payments for Historic Abuse Claims between 1 January 2004 and 31 August 2013.

Payment Type	Below \$10,000	\$10,000 to-\$15,000	\$15,000 to \$30,000	Above \$30,000	Total
Settlement Payment	18	23	59	24	124
Ex-gratia Payment	42	24	91	16	173

31. Payments above \$30,000 in all cases (Ex-gratia and Settlement combined) are 40 of a total of 297 claims being 13.46%, with the higher of this group being found at 24 of 124 (19.35%) Settlement payments versus 16 of 173 (9.2%) Ex-gratia payments. Based on this, a claimant is over two times more likely to receive a payment of above \$30,000 if legally represented.

32. What also seems apparent is claimants without legal representation are far more likely to receive offers below \$10,000 with 18 settlement payments of 124 (14.5%) below \$10,000 versus 42 ex gratia payments of 173 (24%) below \$10,000 being made.²⁴

33. As Cooper Legal points out in their 13/14 UPR Report, claimants are repeatedly advised that legal representation is unnecessary. While this may be true (i.e. claims can be settled without legal representation) the statistics/figures demonstrate that legal representation is in the best interests of claimants.

34. Based on this and the fact that 55.21% of the historic abuse claimants have gone through the claims process legally unaided I would request that the Committee ask the State to furnish details on how many historic abuse claimants have, like myself, been denied legal aid or have had legal aid retracted during the course of their claim.

35. On a more personal note, for myself, being denied legal representation and later being told that the State had no legal obligation but instead had acted through what they inferred was an act of benevolence was both insulting and retraumatising. That is, for myself, it was yet another slap in the face by a State who failed me greatly as a child. Of course, from a more analytical perspective, the State would have us believe it is acting morally – or by definition conforming to standards of what is right and just behavior - missing the point completely that the same State has breached its responsibilities according to human rights norms. So another position may be, the State’s approach to solving the historic abuse claims has been morally questionable, where people who had their rights violated by the State as children are now having their rights violated by that same State again.

36. **Footnote:** I have used statistical data from the MSD only in highlighting the legal aid difficulties and other issues claimants have faced. These issues become even more pronounced when analyzing data from other New Zealand State Ministries (related processes). For instance, in the case of the Ministry of Health (MOH) Historic Claims process (in settlements between 1/12/12 - 1/4/2014), 27.84% of claimants’ had/have legal aid – leaving 72% without legal representation. Maximum payments in the case of the MOH are capped at \$18,000 for settlement payments and \$9,000 for ex-gratia payments (in the case of the MOH, “*settlements are still ex-gratia payments but made where there is a likelihood of litigation which takes them over the historical abuse threshold of \$9,000*”²⁵). In all five cases where settlement payments of \$18,000 were made, claimants had legal representation. Based on OIA, received April 1 2014, of the 74 cases resolved so far:

Payments have ranged between \$2,000 to \$18,000

²⁴ OIA from Ministry of Social Development (22/1/14)

²⁵ OIA from Ministry of Health received 1/4/2014

41 payments (55.40%) were \$5000 or less

25 payments (33.78%) were between \$5001 - \$9,000

5 payments (6.75%) of \$18,000 have been made

3 claims failed because no evidence of abuse was established²⁶

Statute of Limitations Defences Act to Deny Claimants of Legal Findings and an Alternative/Judicial Route for Seeking Remedy

“228. Claims from two plaintiffs have proceeded to hearing. The plaintiffs could not overcome either the Limitation Act or the Accident Compensation Commission defences. Nevertheless the court found that there had been breaches of the duty of care in both cases. If the Limitation Act and Accident Compensation Commission defences had not applied the plaintiffs would have struggled in any compensation award because the Court found the breaches did not ultimately cause the damage they manifested as adults. To recognise those breaches, MSD made ex gratia payments and provided formal letters of apology to the plaintiffs;” (26 (a), paragraph 228, page 37, CAT/C/NZL/6)

And:

“241. MSD has agreed to set aside Limitation Act considerations in dealing with claims outside of the court.” (27. Paragraph 241, page 39, CAT/C/NZL/6)

37. Firstly, I would note that the State’s response at 26 (a) paragraph 228, seems misleading and would point out that in the State’s draft of their CAT/C/NZL/6 report, made available for public comment via the Ministry of Justice (MOJ) website, they claimed:

“Claims from two plaintiffs have proceeded to trial; both were unsuccessful. The claims were unsuccessful because the Court could not find a causal link between their experiences in care and their subsequent damage. Nevertheless, the Court did find that the plaintiffs had suffered assaults while in care. The ex gratia payments and the formal letters of apology that were provided to the claimants were to acknowledge that those assaults occurred.”

I myself gave feedback/comment on this claim noting that if the cases (as I suspected) were *W & W v Attorney General* the information was misleading and that both cases failed on statute of limitations defences. I expect others also gave similar feedback to the MOJ – for instance, I dropped Cooper Legal a line, along with alerting the NZHRC that it appeared the State was presenting misleading information in their draft submission to the UNCAT. I also applied for OIA on the cases through both the MOJ and the MSD. In the case of the MOJ I received no response, while in the case of the MSD I was denied OIA on the basis of, *“I do not believe that the public interest outweighs the need to protect the privacy of natural persons in this instance.”*

This said, it appears that my suspicions were correct and that the claim of, *“The claims were unsuccessful because the Court could not find a causal link between their experiences in care and their subsequent damage”* was amended.

However, what the State has produced in its final CAT/C/NZL/6 report still appears misleading on the point of:

²⁶ OIA from Ministry of Health received 1/4/2014

“If the Limitation Act and Accident Compensation Commission defences had not applied the plaintiffs would have struggled in any compensation award because the Court found the breaches did not ultimately cause the damage they manifested as adults.”

This said, it is my understanding that in order to circumnavigate statute of limitations defences, legal representation (Cooper Legal) for the plaintiffs had attempted to demonstrate that the claims were not time-barred because each of the plaintiffs was suffering from a “disability” under section 24 of the Limitation Act which made the plaintiffs incapable of conducting litigation within the limitation time period.

As a Supreme Court document from 2010 notes:

“The applicants have argued that their claims were not time-barred because until recently each was suffering from a “disability” under s 24 of the Limitation Act which made him incapable of conducting litigation. Alternatively, they argue that the doctrine of reasonable discoverability applies to their case, and that time periods ran only from April 2000 for one applicant and April-May 1999 for the other.”

While the key finding was:

“While the applicants have undoubtedly undergone regrettable suffering during their childhood and adolescence, the Limitation Act operates to preclude them seeking legal redress.”²⁷

As such, while the State has now clearly admitted that all Historic Abuse Claims that have gone before the courts have failed on statute of limitations defences it has, in the same breath, attempted to imply that the courts would/may have found in favour of the State either way. This claim is highly misleading; however, I expect that Cooper Legal can address this far more adequately than myself and would refer you to Cooper Legal’s UNCAT shadow report for further information (legal evaluation) on this point.

38. What I would add to this is, firstly, in these cases the plaintiff’s (two brothers) were suing the State for more than one million dollars each. The legal aid bill for their claims came to \$740,000 for both cases, so, in reality, factoring in what it would have cost the State to pay its own defence team, plus court costs etc the total cost to defeat both cases, given the cases spanned eight and six years respectively, would have been in excess of 1.5 million dollars.²⁸ On this point, I don’t think it is too unreasonable to state that this represents a good and, arguably, well calculated investment on the part of the State. I.e. in countries where court awards have been made in historic CSA cases damages/redress of up to a million dollars or more has resulted. Comparatively, where the MSD is concerned, I believe that W & W were finally awarded ex-gratia payments of somewhere between \$40,001 to \$60,000 each.

39. Secondly, as a result of both cases being defeated through Limitations Act defences, it became impossible for any other Historic Abuse Claimants to have legal aid funding approved for court action on the basis that all future cases would fail based on the findings in W&W v. Attorney General. Additionally, even if one could afford to cover their own legal costs, based on W&W v. Attorney General and similar cases such as Banks v. Attorney General²⁹ any efforts to seek remedy through the courts would prove futile. The State has, thus, closed off judicial remedy to historic abuse claimants leaving the MSD and related processes as the only alternative means for seeking redress.

40. The Committee Against Torture in General Comment No.3 (2012) states:

“Judicial remedies must always be available to victims, irrespective of what other remedies

²⁷ W & W v ATTORNEY-GENERAL SC 48/2010 [29 June 2010] retrieved 14/4/14 at <http://www.courtsofnz.govt.nz/cases/w-w-v-attorney-general/?searchterm=civ>

²⁸ Fairfax NZ News (1/1/09) Dismissed claims cost \$928,000 in legal aid retrieved 10/4/14 at <http://www.stuff.co.nz/national/crime/146548/Dismissed-claims-cost-928-000-in-legal-aid>

²⁹ Banks v. Attorney General High Court (11 November 2009) CIV-2006-485-002017 –

may be available, and should enable victim participation.”

And:

“In addition, the failure of a State party to execute judgements providing reparative measures for a victim of torture, handed down by national, international or regional courts, constitutes a significant impediment to the right to redress.”

And:

“On account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them. For many victims, passage of time does not attenuate the harm and in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those who have not received redress. States parties shall ensure that all victims of torture or ill-treatment, regardless of when the violation occurred or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to remedy and to obtain redress.”

41. However, a very clear conflict presents to these ideals in New Zealand’s domestic law where, for instance, in the case of *Banks v. Attorney General* (2009) the court concluded:

“The domestic statute must prevail over international covenants or considerations. If there has been “torture” or breaches of international covenants, remedies may lie elsewhere. But litigants cannot pursue civil claims in the courts of New Zealand, which are not permitted by the statutes of this country. This is precisely that sort of situation. The plaintiff cannot expect the courts to ignore the law of New Zealand so as to afford him the opportunity to present wide-ranging claims and contentions, based upon broad allegations of breach of human rights, when such are not permitted by the law of New Zealand.”³⁰

This leaves Historic Abuse Claimants with no other choice other than to seek redress through the Historic Claims process where the State has waived time limitations defences.

42. What the State now appears to be doing is attempting to frame things in such a way as to imply that even if statute of limitations weren’t invoked, cases would struggle on other grounds. This claim is cynical at best. I.e. The State fully understands that cases are not being fought on establishing legal liability, precedent etc, but are instead being fought solely on arguments that will allow plaintiffs to circumnavigate the Limitations Act, and on this basis alone all Historic Abuse cases that have gone before the courts have failed.

Failing to Provide Adequate Redress

257. New Zealand reserved the right to award compensation to torture victims referred to in Article 14 of the Convention only at the discretion of the Attorney-General of New Zealand. At the time New Zealand entered the reservation, there was no statutory remedy for torture victims. Since the reservation was entered, however, the Bill of Rights Act has been enacted. Courts have held that compensation may be awarded for breaches of the Bill of Rights Act. This means compensation for victims is available through the Bill of Rights Act and other statutory schemes. It is, therefore, arguable whether New Zealand complies with Article 14.” (paragraph 257, page 42, CAT/C/NZL/6)

43. Coming back to my case, a letter of offer, dated 28/06/12, states:

³⁰ *Banks v. Attorney General* High Court (11 November 2009) CIV-2006-485-002017 paragraph 59, page 23

“In acknowledgement of the harm you have experienced, I would like to offer an ex-gratia payment of NZ \$30,000 (inclusive of all costs including transaction costs). The Ministry considers the payment offered to be appropriate and comparable with other similar claims it has assessed.”

Therefore, in my case, what was deemed “fair and adequate” compensation for “as full rehabilitation as possible” was \$30, 000 NZD – or roughly \$850.00 NZD per year since the abuse occurred.

I had no idea of whether the offer, as was expressed, was ‘appropriate’ or ‘comparable’ to similar claims. I had no legal representation to advise me on the matter and I had no idea of what I should expect. Certainly, I know I have spent far more than this amount on medical and other expenses over the past 30 plus years. And certainly I understood that \$30,000 wouldn’t offer as “full a rehabilitation as possible”.

44. For instance, all experts agree that the most important element in healing for historic abuse survivors is counselling. This said, in November of 2012 I arrived back in Australia after several years abroad (I immigrated permanently to Australia in 1989). Just prior to returning to Australia, I had contacted psychologists who specialise in counselling for sexual abuse and trauma related syndromes. What I was told via email was:

“Given your history, it is likely that you would need extensive and ongoing treatment and support beyond the rebate systems available to you... I would suggest that when you arrive in Perth, you arrange to meet with your GP in order to get a referral to myself (if you choose to see me!) on a Mental Health care Plan. This will enable you to claim a rebate from Medicare for each session. The rebate is about half of the fee which is \$160.00 per hr. Unfortunately you will be limited to 10 rebatable sessions per year thereafter the full fee would apply.”

As such, having worked out costs, with rebates, private counseling would cost me \$6400 AUD or roughly \$8000 NZD a year at 45 sessions per year. Additionally, I have been informed that I would likely need “at least” several years of counseling and, thereafter, some ongoing support.

45. As these costs are, for an unemployed person, impossible to meet I contacted the NZ Ministry of Education and asked them if they would cover these costs based on previous assurances of: *“Please be assured that the Ministry is genuine in its willingness to provide whatever assistance it can to you.”*

This is part of the response that I received:

“The basis of this payment was not because the Ministry was legally obliged to offer compensation, but rather on moral grounds acknowledging that you suffered harm as a result of this experience and in order to assist you to move forward.

The Ministry does not hold itself responsible for the unauthorised criminal actions of a former school staff member. The Ministry does not have unlimited funds and has made you a fair and reasonable payment that is consistent with payments made in similar cases.

The Ministry can provide no further assistance and therefore will no longer engage in any further discussions in relation to this matter.” (Correspondence signed by Katrina Kasey, Deputy Secretary, Regional Operations, November 2012)

46. This response, other than being highly insulting, meant that I was on my own and the likelihood of ever living a normal life was unlikely.

47. What the State might argue is that Government funded counseling services are available. This, however, misses the point that, 1) those abused in State care, more often than not, intrinsically distrust State services (this is certainly the case with myself) and this

creates a therapeutic environment that is non-conducive to healing (trust being the most important element in the therapeutic relationship); 2) State services typically only offer limited counseling sessions (eg. the only Government sexual abuse counseling service in Australia offers 16 sessions as standard, with up to 32 maximum sessions where deemed necessary) and; 3) as Professor Russel Meares argues of historic abuse survivors and State services: *“There are, at the moment, only the most inadequate forms of service delivery available to these people.”*³¹

48. With regards to “inadequate forms of service delivery”, I recently sort help through the Sexual Assault Referral Service (SARC) – Australia’s only Government sexual abuse specific counseling service and, as a result of a breach of internal policy, was on-referred to a mental health service - a healthy living program for males - that I didn’t qualify for (leaving me without any counseling/support) after only 3 sessions.

After lodging a formal complaint about my treatment at this service I was offered a written apology that included:

“In conclusion to this investigation, it is evident that it was omitted to consider your transfer to another clinician at SARC... This is usually achieved by an internal referral to another clinician at SARC. I apologise that you were not transferred to another clinician...It is clear that aspects of our communication with you were not of the best standard. Please accept my sincere apologies for this as it clearly distressed you and resulted in you feeling that our services were unable to support you.”

Further, my counselor had, among other things, expressed to me that she wasn’t qualified to counsel for PTSD/C-PTSD – the very condition that many historic abuse survivors suffer from - after I had expressed to her that PTSD/C-PTSD counseling was my aim in counseling. Additionally, she, at the time, had said that PTSD/C-PTSD was *“just a label”*. There is a lot more that could be added to this story, but this perhaps demonstrates the inadequacies of at least some State funded services. Certainly, in my case, I was only diagnosed with a trauma related syndrome after more than 25 years of seeing various State funded counselors and this only occurred when an ex partner’s father paid for me to see a private psychologist. What I would also add is that given the levels of incompetency and misdiagnosis (one psychiatrist diagnosing me with ADHD and prescribing amphetamines, which resulted in a psychotic episode etc) I will never visit another State funded counseling service again.

49. To date my condition (Complex Trauma) goes untreated. Again, my situation is unlikely to be unique. For instance, Garth Young from the MSD Historic Claims Unit is quoted by Rose Northcott (2012) with: *“Resolution can also include being connected with support services such as counseling”*.³² This statement strongly implies that only some of the historic abuse claimants have been afforded with counseling while others have not. Having been denied OIA on the actual figures (claimants who have been provided with counseling versus those who have not) I would, therefore, ask that Committee request further information on this matter.

50. Coming back to the State’s offer of \$30,000, I responded on the 3/07/13 with:

“The problem I do have is that in reality \$30,000 NZD would probably be fair remuneration if this is what other complainants are receiving for similar cases. In my circumstances however it is extremely low as in reality \$30,000 represents less than \$1000 NZD for every year that has passed since these events and having had private counseling before I know that it is extremely expensive...So, what I am saying is what are my options here? What I do know is that I want to get my head together enough to function properly but the future looks pretty bleak right now. “

³¹ Professor Russell Meares, Emeritus Professor, Psychiatry, University of Sydney found in ‘Adults Surviving Child Abuse 2012 Practice Guidelines for Treatment of Complex Trauma and Trauma Informed Care and Service Delivery Adults Surviving Child Abuse: Authors Kezelman C.A. & Stavropoulos P.A.

³² Northcott, R. (2012) ‘Doing the Right Thing – Resolving Historical Claims of Child Abuse’

I received this as a response.

"I can understand your disappointment and your reasons for thinking that the amount offered by the Ministry is inadequate. Please be assured that the Ministry is genuine in its willingness to provide whatever assistance it can to you. However, the Ministry does have to maintain an equitable approach and with that in mind, the amount offered to you is at the highest end of the scale of what has been offered in similar cases." (4/07/13 email from Jyotika Sharma, Senior Solicitor, Ministry of Education)

Thus, I accepted the offer. As far as I could tell I had no other option. Other than this, in truth, I was itinerant, living in a country where I had no access to welfare or means to gaining work, mentally unwell and dead broke – had the offer been far lower I would still have been forced to accept it. The fact is, however, that given what I have lived through as a result of Childhood Sexual Abuse (CSA), to be told that this was valued at \$30,000 with no ongoing support was both retraumatising and insulting. I expect many other Historic Abuse Complainants (certainly those I have spoken to) feel the same way about their settlements.

51. With regards to CSA survivors, let's contextualise this somewhat. Numerous studies demonstrate that around two thirds of both inpatients and outpatients in the mental health system have a history of childhood sexual and/or physical abuse.² Adults who were sexually abused as children have poorer mental health than other adults. The suffering continues throughout their lives. Many adults who were sexually abused as children experience depression, anxiety and in some instances an overwhelming sense of panic. They are more likely to have a history of eating disorders, depression, substance abuse, difficulties in personal relationships, and suicide attempts. Child sexual abuse is also associated with financial problems in adulthood (Silverman, Reinherz et al. 1996). Research also shows that abused and neglected children perform less well on standardised tests and achieve poorer school marks, even when socio-economic status and other background factors are taken into account (Mills, 2004). Adults who were abused as children are greatly overrepresented in the criminal justice system. They are also greatly overrepresented in alcohol and drug rehabs and cemeteries as a result of increased risk of suicide and accidental fatal drug overdose (Mahin Bayatpour et al, 1991; Margaret Dexheimer Pharris et al, 1997; Margaret C Cutajar et al, 2010). Trauma caused by experiences of child abuse and neglect has been shown to have serious physiological effects on the developing brain, increasing the risk of psychological problems (Streeck-Fischer & van der Kolk, 2000). Extensive research has identified a strong relationship between abuse/neglect and post-traumatic stress disorder (Gilbert et al., 2009; Schore, 2002; Streeck-Fischer & van der Kolk, 2000). Recent research suggests that diagnosing children with post-traumatic stress disorder does not capture the full developmental effects of chronic child abuse and neglect and many researchers now prefer the term "complex trauma" or "complex post traumatic stress disorder" (Cook et al., 2005). Exposure to complex and chronic trauma can result in persistent psychological problems. Research has shown that those who endure complex trauma during early childhood are more prone to long-term and severe consequences. Additionally, those who endure trauma for an extended period under the age of twelve are proven to present more devastating results in adulthood than complex trauma afflicted upon someone who is already an adult. This is because morality, social skills, and life skills are all taught in childhood.

What price can be put on this? What is adequate compensation and redress for what was recently described by a CEO of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse as "the devastating impact of child sexual abuse on adult lives"?³³ I've heard many say that no amount of money can give a survivor back what was taken from them. This may be true, but what is just as true is that the right care and financial assistance can undoubtedly go a long way in helping to restore dignity and hope to survivors.

³³Royal Commission CEO, Ms Janette Dines, Found at Royal Commission Marks its One Year Anniversary (Jan 10 2014) retrieved 2/2/2014 <http://www.childabuseroyalcommission.gov.au/royal-commission-marks-its-one-year-anniversary/>

The Committee notes in a General Comment No. 3 under the heading of "Restitution", Para 8;

"Restitution is a form of redress designed to re-establish the victim's situation before the violation of the Convention was committed, taking into consideration the specificities of each case."

Such a proposition becomes extremely complex when considering adult survivors of child abuse. For instance, the State cannot now give me back my childhood, my innocence, and the happiness I once, no doubt, felt. So does this proposition then transcend into my adult years with the question where would the victim be now if the violation of the convention didn't take place? Even this is not strictly quantifiable. Certainly, however, it goes well beyond \$30,000. Take for example, my university degree that I gained in Australia. I owe over \$35,000 for this degree. Had I finished schooling in New Zealand and entered university directly thereafter, my degree at this point in time would have come freely. Add to this, the Masters I am now undertaking, largely as a result of my experiences in the claims process. By the time that I finish this I will owe the Australian Government another \$20,000. That's \$55,000 for just my education. What about the income that I have lost as a result of substance abuse, being mentally unwell and, vis-à-vis, as a result of long-term unemployment? Let's be extremely conservative and say that I have lost \$20,000 a year over 25 years (conservatively factoring in that my working life began at 22). That's \$500,000. What about the teeth I have ground to stumps as a direct result of suffering from a trauma related syndrome? I was recently informed by a dentist that it would cost at least \$40,000 to repair these teeth with caps and other dental surgery. The list could go on and on (past and future medical costs etc). This said, my point here is not to raise arguments of what constitutes adequate redress but to instead demonstrate how inadequate the sums the State is offering really are.

52. Notably, the State has entered a reservation to article 14 which has not been withdrawn despite the Committee's recommendation that the State consider doing so: *"The Government of New Zealand reserves the right to award compensation to torture victims referred to in article 14 of the Convention only at the discretion of the Attorney General of New Zealand."*

53. Having contacted the Attorney General with an earlier (largely completed) submission of this shadow report – a submission that fully outlined my case and the failure of the State to provide adequate redress (as you are reading now re failing to provide adequate redress, less this paragraph) - this is part of the response that I received:

"Dear Mr Mahy

Thank you for your email dated 12 March 2014 and the accompanying draft submission to the United Nations Committee against Torture.

"I have taken a strong interest in the government's approach to the resolution of claims of abuse of those in state care. Over time, I believe that that approach has struck the difficult but necessary balance between the need to support those coming forward over past abuse and the need to ensure that that support is responsible and equitable. In response to your request to discuss these concerns, I acknowledge from your draft submission that you do not believe that the response of an apology and compensation in your own case was inadequate, particularly as you are unable to access state-provided assistance while living outside New Zealand. I also understand from your draft submission, however, that the Ministry of Education has corresponded with you and has concluded that it is not possible to provide further assistance. For that reason, I do not consider it appropriate to comment on the remedies provided in your case."³⁴

³⁴ Correspondence from Office of the Attorney General, Hon Chris Finlayson (14/4/14)

I will leave this one with the Committee to interpret from a human rights perspective. It appears, however, that the Attorney General on a denotative level is stating, a) no comment re your case and, b) that in his view the redress that is being offered to the Historic Abuse claimants is adequate (“equitable”). On a more connotative level the Attorney General seems to be saying I cannot interfere with each ministry’s decisions and therefore cannot/will not comment on your case. It seems an interesting position to take for the Attorney General whose discretion will ultimately determine what is deemed as adequate redress for violations of the Convention.

Compound this with, as Cooper Legal points out, “*erratically different procedures and (particularly) outcomes*” in resolving claims of historic abuse between each ministry and I don’t really know what to make of the situation. For instance, are we to believe that, according to the Attorney General’s discretion, it was more traumatic/devastating to be abused in the care of the MSD than in the care of the MOE or MOH etc?

54. What the State argues in its Report before the Committee is:

“292. New Zealand reserved the right to award compensation to torture victims referred to in Article 14 of the Convention only at the discretion of the Attorney-General of New Zealand. At the time New Zealand entered the reservation, there was no statutory remedy for torture victims. Since the reservation was entered, however, the Bill of Rights Act has been enacted. Courts have held that compensation may be awarded for breaches of the Bill of Rights Act. This means compensation for victims is available through the Bill of Rights Act and other statutory schemes. It is, therefore, arguable whether New Zealand complies with Article 14.”

55. Arguable indeed. This said, the Committee has made very clear general comments surrounding a State’s obligations to article 14. Among these (to quote):

“The Committee considers that the term “redress” in article 14 encompasses the concepts of “effective remedy” and “reparation”. The comprehensive reparative concept therefore entails restitution, compensation, rehabilitation, satisfaction and guarantees of nonrepetition and refers to the full scope of measures required to redress violations under the Convention.”

And:

“The obligations of States parties to provide redress under article 14 are two-fold: procedural and substantive...At the substantive level, States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.”

And:

“As stated in paragraph 2 above, redress includes the following five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Committee recognizes the elements of full redress under international law and practice as outlined in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines). Reparation must be adequate, effective and comprehensive. States parties are reminded that in the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them. The Committee emphasizes that the provision of reparation has an inherent preventive and deterrent effect in relation to future violations.”³⁵

On the point of “compensation and the means for as full rehabilitation as possible”. In my case this was deemed at roughly \$850 a year since the abuse occurred with no ongoing

³⁵ Committee Against Torture General Comment No. 3 (2012)

support for rehabilitation.

On the point of *“each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them.”*

The State has admitted: *“Mr Mahy’s psychological and behavioral issues over the years strongly indicate that he had been traumatised by the experience. His avoidance behaviour and efforts to numb his trauma through self-medication, his anxiety and at times highly emotional arousal along with overt irritability and at times dangerous outbursts of anger are strong and consistent indicators of being traumatised and as such are indicators of post traumatic stress disorder.”* Given that I have suffered from a trauma related syndrome for over thirty years, with all this entails, and given that the State has acknowledged that this is as a direct result of their care; given that as a result of a violation of the convention my life has been profoundly impacted throughout my adolescence and adult years; given that I have incurred many personal and financial losses because of this; given that this was valued at \$30,000 NZD with no ongoing support; and given that the Committee Against Torture has been clear on the scope of a State’s obligations to Article 14, while the State may attempt to argue, it is *“arguable whether New Zealand complies with Article 14”* it is just as arguable that the New Zealand State’s interpretation of Article 14, through their Bill of Rights Act, differs vastly from that of human rights norms.

56. With this submission I have included a copy of the letter of offer (document 3), a copy of the letter rejecting my request for counseling funds (document 4) and a copy of the letter form New Zealand’s Attorney General (document 5).

Retraumatization

57. The Committee Against Torture General Comment No. 3 (2012), paragraph 21, states:

“21. States parties should ensure that their domestic laws provide that a victim who has suffered violence or trauma should benefit from adequate care and protection to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.”

58. I feel this is a very important point to address. Child abuse survivors develop mechanisms for survival. One of these mechanisms is to protect themselves from memories of the abuse. This is no longer possible when one is forced to face these memories in the process of making a claim.

59. In my case, as a result of having to recall long suppressed memories, I spiraled into drinking heavily each day and my world came apart at the seams. I was living in Paris with my then partner. As a result of my drinking the relationship fell apart and my partner purchased me an air ticket to Thailand. Technically, at this point I was homeless and literally every possession I had in the world was in a backpack and computer bag. After three days in Bangkok I was arrested after a fight in a bar in Kao San Rd where I hospitalised a Norwegian and assaulted a British national. I think at this point I was bordering on insanity, if not completely insane. I can’t even remember the fight or the events that led to it. The police showed me photographs of the Norwegian and he had a bad cut above an eye, facial bruising and what was likely a broken nose. I was extremely lucky in this case. The police told me later that there were mitigating circumstances where all parties involved in the fight were as guilty as each other. This said, I was told that should the case go to court I was facing up to a year in a Thai jail. Fortunately, the police dropped the charges and released me after I paid the Norwegian’s hospital bills. This cost me 20,000 Baht (\$650 AUD). It left me with only a few hundred dollars in the bank. I began sleep walking after this. I awoke one morning on a

couch in a common area of the accommodation I was staying in. Somehow, while asleep, I had moved from my bed, down a flight of stairs and ended up on a couch in the common area. As far as I know I have never sleep walked before this. I then went to Bali and stayed in a \$7.00 night hotel. This became my home for several months. I had borrowed money from a friend to hold me over. I spent this almost entirely on alcohol. After I received my ex gratia payment for my claim I returned to Thailand to get an ancestry visa for England. While there I realised that I was in a bad way, so I went to Australia and stayed with a friend. From the time I left Paris to the time I arrived in Australia I had lost over 10Kg and become extremely dependent on 'Xanax' (a highly regulated and addictive Benzodiazepine used to treat anxiety). While I had originally been prescribed Xanax for anxiety over 8 years prior to lodging my claim I had been Xanax free for over a year preceding my claim. Additionally, I had previously been taking no more than 1-2 mg a day. While in Bali and Thailand I was taking up to 5mg a day.

60. My circumstances are perhaps somewhat unique in that I have lived outside of New Zealand for many years. Further, as I was living in countries where I was ineligible to access State funded mechanisms for counseling and/or other assistance this possibly disadvantaged me further. However, as far as I understand the MSD Historic Claims unit and 'related processes' don't, as a part of the course, offer all claimants counseling support while they are involved in the claims process. Certainly at no time during my claim was I offered counseling or other assistance.

61. I have attached with this submission a report (FOI) from the Australian Department of Foreign Affairs and Trade (DFAT) of my arrest in Thailand (see document 6).

Denial of Systemic Abuse While Also Denying Claimants a Public Inquiry to Establish If and Where Systemic Abuse Occurred

"229 a. *Confidential Listening and Assistance Service (CLAS)*, Department of Internal Affairs

CLAS provides a forum for people who allege abuse or neglect, or have concerns about their time in state care in the health, child welfare or special education sector, before 1992, including psychiatric hospitals and wards; health camps; child welfare care; and special education homes." (paragraph 229 a, page 37 -38, CAT/C/NZL/6)

62. As Cooper Legal note in their 13/14 UPR Report, while historic abuse complainants have been afforded with the Confidential Listening and Assistance Service (CLAS), this service is only semi-independent (decisions around funding and the role of the Service are made by Government) and is expressly forbidden from making public or ministerial comment. This is supported by Judge Carolyn Henwood, the woman who heads CLAS, who is quoted in media (2013) with, no government has called for a public inquiry. *"One part of there not being an inquiry is that the public don't know about any of this" as findings are "kept under the radar".*³⁶

This, of course, serves the State's long held position of broadly denying systemic abuse.

63. For instance, in the follow-up responses by New Zealand to the concluding observations of the Committee against Torture, CAT/C/NZL/CO/5 (2010), regarding the Historic Abuse Claims, the State argues at paragraph 27:

"The Government has also considered whether a broader procedure, such as the general compensation scheme provided for former patients of the Lake Alice Hospital in 2001, could be adopted here. However, as the claims generally do not involve claims of broad systemic or

³⁶ Jo Moir, Fairfax NZ News (29/4/2013) Abuse Victims Let Down by System retrieved 21/1/2014 <http://www.stuff.co.nz/national/8606985/Abuse-victims-let-down-by-system>

*institutional failure but are, predominantly, concerned with particular incidents and experiences of individuals, such an approach is not feasible here. The Government has also determined that, for the same reasons, a public inquiry is not an appropriate mechanism.*³⁷

64. This statement appears misleading. For instance, the institution I was abused at (albeit relocated and renamed) was closed in late 2009 with then Education Minister Anne Tolley stating the closure was *"in the interests of the students"*. This said, what Ms Tolley neglected to mention was that the institution was also the centre of a major police investigation – an investigation that would lead to the arrests and convictions of several former staff for sexual abuse and other crimes. It wouldn't be until August 2010 after the lifting of a State orchestrated media gag order, as a result of the conviction of an ex staff member, on 15 of 24 counts, that the Minister would state that she *"was aware of multiple police investigations into staff at the school and did not believe staff had maintained their duty of care to students."*³⁸

Beyond this, media had exposed the "time out room" – described by one ex student with, *"It was a concrete bunker, like something out of World War II. There was a little light in the corner that was covered with wire. I don't think you will ever forget the smell of urine and you were locked in there, there was nothing – no windows, no nothing."* It was reported that the "time out room" was used to punish students, just some of whom had provided harrowing details to police about sexual and physical abuse they had been subjected to in this room. What wasn't reported was the concept of the "time out room" dated back many years. When I attended the institution in 1978 they had converted a darkroom, where my abuser had developed pornographic photos of myself and other children, into what I believe was the first version of what can only be described as a solitary confinement cell. Back then it was a windowless box beneath the boys dormitory. When I had reported my abuse to a housemaster I had been beaten into unconsciousness and awoke in this box. What I am saying here is there is little doubt in my mind and I expect in the minds of many others who spent time in State Institutions prior to and during the seventies and onwards that systemic abuse existed in at least some State run institutions.

65. Additionally, as Cooper Legal has previously argued in a 'Response by Cooper Legal to the New Zealand Government response to the United Nations Committee Against Torture's request for further information on Recommendation 11' (2009):

*"There is no doubt that the paper "Institutional Perpetrators of Abuse", completed by Cooper Legal in 2006 (when the client base was significantly smaller than it is now) reveals systemic abuse. For instance, in the case of one staff member, 16 individual claimants identified him as physically abusive. Another staff member was identified as physically abusive by 14 claimants. Yet another staff member was identified as physically abusive by 30 claimants. Another named staff member was identified as physically abusive by 29 claimants. A further staff member was identified as physically abusive by 27 claimants. There are also significant numbers of claimants making similar allegations about sexual and physical abuse by various individual staff members...It is further observed that, if the assertion by the response that there is no evidence of systemic failure is correct, that would be contrary to the position of every other Commonwealth country and, as stated above, contrary to the research by Cooper Legal.*³⁹

³⁷ follow-up responses by New Zealand to the concluding observations of the Committee against Torture (CAT/C/NZL/CO/5) (19 May 2010) retrieved 21/1/14 <http://www2.ohchr.org/english/bodies/cat/docs/followup/CAT-C-NZL-CO-5-Add1.pdf>

³⁸ Clio Francis, Waimokoia's Abuse (8/8/2010) Sunday Star Times, NZ Fairfax Media retrieved 1/2/2014 <http://www.stuff.co.nz/sunday-star-times/features/3999448/Waimokoias-abuse>

³⁹ Cooper Legal (2009) 'Response by Cooper Legal to the New Zealand Government response to the United Nations Committee Against Torture's request for further information on Recommendation 11 pp 3-4' retrieved 21/1/2014 http://www2.ohchr.org/english/bodies/cat/docs/followup/ngos/CooperLegal_NewZealand42.pdf

Other Information Regarding the CLAS - Drawing comparisons to inquiries held in other commonwealth countries

66. In my case, I was excluded from telling my story to the CLAS due to not living in New Zealand. I.e. when I contacted the CLAS their response was: “ *I note that you live in Singapore (actually this was wrong – I was in Indonesia at the time) and it would prove difficult for you to meet with our panel with out you returning to New Zealand.*” (Email correspondence from Gordon McFadyen, CLAS, 22/12/2011)

67. What is noteworthy here is that New Zealand has a long history with mass migration with Australia as the preferred destination (e.g. In 2003, 43% of permanent and long-term departures were to Australia, 21% were to the United Kingdom, and 4% were to the United States⁴⁰). The number of New Zealanders living overseas is estimated to be in the range of 700,000 to 1 million.⁴¹ This migration has occurred over decades. For instance, between 1976 and 1982, 103,000 New Zealanders settled permanently in Australia.⁴²

68. According to the Australian Bureau of Statistics in 2009, “*The number of NZ-born people living in Australia increased by 89% over the preceding two decades, from 280,200 in 1989 to 529,200 in 2009.*” According to Statistics New Zealand, NZ had a population of 4.32 million in June of 2009, so 529,200 New Zealanders living in Australia represented 12.5% of the total New Zealand population.⁴³

69. The only developed nation that rivals New Zealand for the export of its citizens is Ireland, which has a similar population (4.5 million) and a rising annual outflow of people, now running at some 75,000 a year.

70. As such, perhaps not too surprisingly, approximately half of the Historic Abuse Claimants that I have been in contact with via my website and through referral by others (e.g. Netta Christian, a Historic Abuse Claimant whose case was settled in 2011, who herself lived in Australia for many years before returning to New Zealand in 2002, only then learning of the historic claims, and who has now registered an NGO/community sector organisation for representing care leavers in NZ) live in Australia and elsewhere (e.g. two have contacted me from the UK and one from Japan). Of course, I myself fall into the category of an ex-New Zealander having permanently migrated to Australia in 1989.

71. This said, the New Zealand State, unlike Northern Ireland’s Investigation into Historical Institutional Abuse (NI HIA), has never made concerted/real efforts to speak to ex-patriot New Zealanders about their experiences in State care. For instance, by comparison, the NI HIA sent a specialist team to Australia to interview ex-Northern Irish citizens after 61 alleged victims or witnesses living in Australia made contact. Alternatively, the New Zealand State advised Care Leavers Australia Network (CLAN) of the existence of the CLAS, CLAN advised its members, and then the CLAS excluded those living in Australia from having their stories heard unless they were/are prepared to return to New Zealand and incur at least some costs as a result. These costs would likely prove prohibitive to many (I have been informed by the CLAS that ex-patriots were required to return to New Zealand for face-to-face interviews. “*The Service has contributed to their travel expenses.*”⁴⁴ No clarification around the extent of the expenses covered was provided. Additionally, I had asked; “*Would it also be possible to ask how many people registered from Australia?*” No answer was provided.)

72. What is notable is of the approximately 430 people to come forward to NI HIA alleging abuse in institutions such as borstals and state or church-run children’s homes, 61

⁴⁰ <http://www.teara.govt.nz/en/kiwis-overseas/page-1>

⁴¹ NZ Ministry of Business, Innovation and Employment, Permanent and Long Term Migration: the big picture at <http://www.dol.govt.nz/publications/research/plr-migration-big-picture/03.asp>

⁴² <http://www.teara.govt.nz/en/kiwis-overseas/page-4>

⁴³ Bernard Lagan, The Global Mail, May 24 2012 retrieved 26/03/14 <http://www.theglobalmail.org/feature/the-hollowing-out-of-new-zealand/246/>

⁴⁴ Email from Gordon McFadyen, April 24 2014

were living in Australia – or approximately one in seven of the total number of those who will testify at the NI HIA, which began hearing testimony in January of 2014.

73. At the 2006 Census 21,292 Australian residents declared they were born in Northern Ireland.⁴⁵ Comparatively, in the same year, there were 389,463 New Zealanders living in Australia,⁴⁶ or 18 times the number of New Zealanders to Northern Irish living in Australia. As such, it is likely that using the Northern Ireland figures overlaid with numbers of NZ citizens living in Australia (18 – times more New Zealanders than Northern Irish residing in Australia - x 61 – Northern Irish abuse victims who will speak to the NI HIA = 1080) that, factoring in variables, hundreds of ex-New Zealanders who were abused in State care were potentially excluded from having their stories heard by the CLAS, and, indeed, many of these people (and others residing in countries such as the UK and US) may remain unaware that a mechanism for seeking redress exists.

74. The NI HIA will examine if there were systemic failings by institutions or the state in their duties towards those children in their care between the years of 1922-1995. Where the inquiry believes criminal offences have taken place it will pass the evidence onto the police. The NI HIA inquiry is independent of government and has the power to compel witnesses to give evidence. The institutions under examination are a mixture of children's homes and training schools run by the state, by voluntary organisations and by the Catholic Church. While the inquiry has only just begun, two religious orders of the Catholic Church have publically apologised for the abuse suffered by children in their residential homes and the Health and Social Care Board also said that if the State had failed in any way it was sorry⁴⁷ Most importantly, the NI HIA releases information and findings which is then disseminated and promulgated to the general public through press. As the senior counsel to the inquiry, Christine Smith said, many victims of abuse *"have waited years for this day to come"*. *"This inquiry, both through the work of the acknowledgement forum and these public hearings, is giving a voice to those who feel the system let them down."*⁴⁸

75. The NI HIA largely resulted from an earlier Republic of Ireland Commission (Commission to Inquire into Child Abuse or CICA) which ran for nine years (2000 – 2009). Findings were published in the Ryan Report in May of 2009 and among other things the report stated that the abuse was "systemic, pervasive, chronic, excessive, arbitrary and endemic". The leader of Ireland's four million Catholics, Cardinal Sean Brady, said he was 'sorry and deeply ashamed' a day after the report was published. The public learned about all of this through widespread media coverage. Media coverage that was only possible because of the transparency associated with the inquiry.

76. In totality, in the case of Ireland, the Catholic Church in 2011 was reeling from four reports into clerical child abuse between 2005 - 2011— the Dublin Archdiocese and the Ryan inquiry into industrial schools and homes in 2009, the Ferns Diocese in 2005 and Cloyne in 2011, which related to abuse complaints and investigations as recent as 2008. Further, as a result, the Irish Government in 2011 committed to tough new child protection laws in the wake of the Cloyne, including making it an offence to withhold information about crimes against children and introduce new vetting to allow "soft information" transfers.⁴⁹

77. The CLAS does none of this. Our voices/stories have been muted (hidden from the public eye) by a State that has expressly forbidden information and findings from the CLAS being released publically. Additionally, with regards to human rights norms (*"public apologies, including acknowledgement of the facts and acceptance of responsibility"*)⁵⁰, unlike the case

⁴⁵ Australian Bureau of Statistics

⁴⁶ <http://www.teara.govt.nz/en/kiwis-overseas/page-4>

⁴⁷ BBC News Northern Ireland, NI abuse inquiry: Two Catholic orders apologise (14/01/2014)
<http://www.bbc.com/news/uk-northern-ireland-25730998>

⁴⁸ BBC News Northern Ireland, Inquiry into abuse in NI children's homes and borstals begins (13/01/2014)
<http://www.bbc.com/news/uk-northern-ireland-25697391>

⁴⁹ Irish Echo, Kenny launches strong rebuke of Vatican 21/7/11 retrieved <http://www.irishecho.com.au/tag/dublin-archbishop-diarmuid-martin>

⁵⁰ Committee Against Torture General Comment No. 3 (2012)

in Ireland, there has been no public acknowledgement, nor public apology, on the part of those responsible for the abuse.

78. To put some perspective on just how *under the radar* the CLAS is, at least from the Australian perspective, when Looking at the Australian Government 'Australian Institute of Family Studies' website which lists institutional child sexual abuse studies/inquiries from around the globe (last updated June 2013) Ireland is credited with the Ferns Report, Commission of investigation report into the Catholic Archdiocese of Dublin, Commission to Inquire into Child Abuse, and the Report by Commission of Investigation into Catholic diocese of Cloyne. In New Zealand's case, what is listed is the Green Paper, the White Paper, the Inquiry into improving child health outcomes and preventing abuse with a focus from preconception until three years of age, and the Independently funded Glenn Inquiry, which came about after the New Zealand Government turned down an offer by ex-patriot New Zealander and philanthropist Sir Owen Glenn to fund a Royal Commission into domestic violence and child abuse. There is not a single mention of the CLAS.⁵¹

79. This situation (*under the radar*) also seems apparent in New Zealand. For instance, when Googling 'Confidential Listening and Assistance Service New Zealand Herald' (the NZ Herald newspaper is distributed nationally and has the highest readership in NZ) on the 4/4/14 one 2013 story appears on page 1 of Google surrounding the extension of the service until 2015. Similarly, when Googling 'Confidential Listening and Assistance Service Dominion Post' (the NZ capitals daily and with the second highest readership in NZ) this results in a single story appearing with the headline "Abuse victims let down by system".

80. What is distinctly lacking, unlike the situation in Ireland, is any media coverage whatsoever of the institutions in which the abuse occurred, the levels of abuse, systemic failings that led to the abuse, public acknowledgement and apologies from those responsible, and commitments by legislators to introduce child protection laws/policies as a result of findings from the CLAS. On the latter, with regards child protection laws and policies, this for historic abuse victims, means that guarantees of non-repetition apply to today's children. For instance, many participants of the CLAS have expressed that they came forward to tell their stories "*in the hope that policy and practice around the care of children is made safer for the next generation of children in care.*"⁵² From my perspective, it stands to reason that law and policy changes are better enabled through public knowledge and, therefore, public accountability. As such, transparency becomes pivotal to all of that which is public.

81. This said, at least New Zealand's Historic Abuse Claimants can find some transparency in the Dominion Post story where the head/chair of the CLAS, Judge Caroline Henwood, is on the record with she was "shocked, stunned and staggered" by the high level of sexual abuse, particularly against boys. And; "*One part of there not being an inquiry is that the public don't know about any of this.*" She said the findings are "*kept under the radar*".⁵³ In short, it's worse than I thought. It's shocking. I can't go into detail, but for the record I am prepared to be transparent about the CLAS being non-transparent. Of course, I say the latter somewhat tongue in cheek. My point here is that there is a power in transparency. It facilitates trust. On the other hand, a lack of transparency raises concerns as to just what they are attempting to hide and, as a result, creates feelings of distrust.

82. Having drawn comparison between Ireland and New Zealand, I'll briefly compare the Australian Royal Commission into Institutional Responses to Child Sexual Abuse to the CLAS. I say *briefly*, because much of what needs to be said regarding transparency and, as a result, media exposure, public accountability and outcomes (i.e. public acknowledgement, public apologies and child protection legislation as a result of findings) has already been

⁵¹ Australian Institute of Family Studies, institutional child sexual abuse studies retrieved 29/03/14
<http://www.aifs.gov.au/institute/pubs/carc/4.html>

⁵² Annual Report of the Confidential Listening and Assistance Service 2013, accessed through OIA by John McCarthy, retrieved 22/4/14 at <https://www.fyi.org.nz/request/1570-the-annual-report-of-the-confidential-listening-and-assistance-service-2013-internal-affairs>

⁵³ Jo Moir, Fairfax NZ News (29/4/2013) Abuse Victims Let Down by System retrieved 21/1/2014
<http://www.stuff.co.nz/national/8606985/Abuse-victims-let-down-by-system>

covered when comparing the Irish situation to that of New Zealand. Suffice to say, the Australian RC, inline with the Irish inquiries, is everything the CLAS is not. That is, independent and transparent, based on international best practice standards where human rights are concerned and with the intent of making public knowledge RC inquiries and findings. As with the Irish inquiries, it seeks to give those affected by child abuse a public voice and to “*shine the light*” on those responsible for the abuse.

83. As outlined in the Terms of Reference of the Australian RC, the word “institution” refers to both public and private bodies that have allowed for adults to come in contact with children. Should it emerge through the commission’s investigations that abuse in public, or state-run, institutions was prevalent, distance between the government and the commission will be crucial to ensure its legitimacy.⁵⁴ Notably, on the latter point re “*distance between the government and the commission will be crucial to ensure its legitimacy*” the CLAS is profoundly lacking. In fact, I would argue from a personal perspective, as just one of many who was denied access to a semi-independent inquiry that, in practice, seeks to hide our stories, there is no legitimacy to the CLAS methodology at all. This is particularly relevant when considering it is the State that is under investigation while at the same time it is the State which has cynically censored the facts.

84. As a result of the Australian RC, similar to the Irish inquiries, among other things, to date, inline with human rights norms, the Catholic Church, the Anglican Church and Salvation Army have been compelled to publicly acknowledge the facts and have tendered public apologies to those abused while in their care. Additionally, systemic abuse, systemic failings and official cover-ups have been exposed.

85. Once again, as with comparing the CLAS to the Irish inquiries, we, the New Zealand Historic Abuse claimants, through the CLAS process, have received none of this. No independent and impartial inquiry, no public apology, nor public acknowledgment, no (or extremely limited) media coverage of CLAS inquiries and findings, and no admission of systemic failings and/or systemic abuse (on the latter, quite the opposite, in fact).

This violates Articles 12 and 13 of the Convention where ‘satisfaction and the right to truth’ include:

“Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim.”

And:

*“Public apologies, including acknowledgement of the facts and acceptance of responsibility”*⁵⁵

Inadequate Funding Potentially Sees Many More Victims Silenced

“Funding for CLAS ceases in June 2015. In order to meet with the 290 people waiting to meet the CLAS panel before June 2015 it has been necessary to close registrations now.” (paragraph 229 a, page 38, CAT/C/NZL/6)

86. Having noted that potentially hundreds of ex-patriot New Zealanders have been excluded from telling their stories to the CLAS, recent (6 April 2014) New Zealand media

⁵⁴ Olivia Monaghan, University of Melbourne, Explainer: royal commission into child sexual abuse (11/1/2013) article published by the Conversation, retrieved 4/3/14 at <http://theconversation.com/explainer-royal-commission-into-child-sex-abuse-11561>

⁵⁵ Committee Against Torture General Comment No. 3 (2012)

highlighted that the CLAS had ceased taking registrations in October of 2014 and would close its doors in 2015. What looks apparent, based on this media coverage, is that due to a lack of funding many abuse victims who are still residing in New Zealand (along with those who reside outside of the country) may also be excluded from having their stories heard.

Among other things, the media highlights:

"The Confidential Listening and Assistance Service stopped accepting applications in October from people claiming to have been victims, as it runs out of funding and prepares to close next year.

In a report, released under the Official Information Act, the service warned the October cut-off meant many victims could remain unheard.

"Over 50 people registered with the service in October . . . which would support the contention that there is still a demand," the report says.

There was also a "substantial risk" that victims would be left with no support as they battled the ministry for compensation long after the service had been wound up.

Labour children's spokeswoman Jacinda Ardern said the sheer mass of people had exceeded expectations and the service should stay open.

Social Development Minister Paula Bennett said the service had already been extended once to meet demand and there were "no plans" to extend it again."⁵⁶

87. Just quickly, on the matter of CLAS funding, and drawing comparison between inquiries held in other Commonwealth Countries. On the official NZ Government website, dated 20th May 2012, it is noted:

"The Government has committed \$16 million over the next four years to continue the Ministry's successful Historic Claims Resolution Process for those abused in care... "The funding announced today will allow us to continue to help the 760 people with outstanding claims and those who have not yet come forward. In addition, the Confidential Listening and Assistance Service has provided support services to more than 700 people as a part of the historic claims process. Close to \$1.9 million over two years will enable MSD to help fund the Service."⁵⁷

88. Comparatively, the Australian Government spent a million dollars a week after announcing the Australian Royal Commission into Institutionalised Child Abuse, and announced in April of 2013 that it would provide 44 million AUD over four years for counseling of those who are testifying at the Commission and, as such, have to relive traumatic childhood experiences. Further, they are providing free legal help to all of those testifying at the Commission. This brought the known cost to \$66 million before the Royal Commission had taken any formal evidence.⁵⁸

89. In Ireland, the CICA, which took 10 years to complete its work, is estimated to have cost between €126 million and €136 million.⁵⁹

90. The NI HIA which began hearing testimony in January 2014 and is scheduled to continue until June 2015 will cost up to £19m.⁶⁰

⁵⁶ Ben Heather, the Dominion Post (6/4/14) Abuse victims 'silenced' by service cuts retrieved 6/4/14 <http://www.stuff.co.nz/dominion-post/news/politics/9910103/Abuse-victims-silenced-by-service-cuts>

⁵⁷ Funding continues to resolve historic abuse claims at <http://www.beehive.govt.nz/release/funding-continues-resolve-historic-abuse-claims>

⁵⁸ The Sydney Morning Herald (13/4/13) Royal commission counselling pledge retrieved 4/4/14 at <http://www.smh.com.au/national/royal-commission-counselling-pledge-20130412-2hqzk.html>

⁵⁹ Northern Ireland Assembly Briefing Note 41/10 (April 2010) The Inquiry Into Institutional Child Abuse in Ireland retrieved 3/4/14 at <http://www.niassembly.gov.uk/researchandlibrary/2010/4110.pdf>

91. Therefore, while the State may wish to claim it has adequately funded the CLAS, any assertions to this effect would be starkly contradicted by inquiries held in other Commonwealth Countries.

Enclosed with my submission is a transcript and digital image of the media surrounding the closure of the CLAS (see documents 7a and 7b).

Failing to Provide a Meaningful Apology and/or Acknowledge the Facts

92. Coming back to my case and having covered that there has been no public acknowledgement and/or public apology I would like to touch on the quality of acknowledgement and apology that I was offered privately in writing.

93. The Scottish Human Rights Commission defines what constitutes a meaningful apology to historic abuse survivors with:

“International best practice, suggests a number of elements to a successful apology:

- an acknowledgement of the wrong done;
- accepting responsibility for the offence and the harm done;
- a clear explanation as to why the offence happened;
- expressing sincere regret;
- an assurance that the offence will not be repeated;
- actual and real reparations (or redress).”⁶¹

94. While the Committee, in General Comment 3 (2012) outlines that a State’s responsibility to victims of torture and Other Cruel, Inhuman or Degrading Treatment or Punishment include:

“public apologies, including acknowledgement of the facts and acceptance of responsibility;”⁶²

95. This said, the apology that I received read:

“I understand that you have been able to talk with representatives from the Ministry of Education about your experiences at Mt Wellington Residential School. I have been told something of the experiences you had and accept that these experiences, which led to the conviction of Gavin Mitchell (a staff member at Mt Wellington at the time), should never have happened.

I deeply regret that you were subjected to these experiences and sincerely apologise that you did not receive the care and support required to be provided at the school because this former staff member abused his position of trust and breached the requirements in place.

In acknowledgement of the harm you have experienced, I would like to offer an ex-gratia payment of NZ \$30,000 (inclusive of all costs including transaction costs). The Ministry considers the payment offered to be appropriate and comparable with other similar claims it has assessed.

I sincerely hope that bringing this matter to the attention of the Ministry, this apology and the offer of an ex-gratia payment will assist you to put this part of your life behind you. Please

⁶⁰ The Guardian Newspaper (14/01/14) Northern Ireland child abuse inquiry opens retrieved 2/4/14 at <http://www.theguardian.com/uk-news/2014/jan/13/northern-ireland-child-abuse-inquiry>

⁶¹ Scottish Human Rights Commission (February 2010) A human rights framework for the design and implementation of the proposed “Acknowledgement and Accountability Forum” and other remedies for historic child abuse in Scotland

⁶² Committee Against Torture General Comment No.3 (2012)

note however that this payment and apology is offered on a "without prejudice" basis. It should not be taken to indicate that the Ministry accepts legal liability for this matter."

In other words, we deeply regret with provisos (in real terms, we accept no liability for the actions of our former staff). Other than this, the apology failed to acknowledge key aspects of my case. In fact, I wasn't exactly sure what they were saying. I.e. the apology was somewhat ambiguous. However, seemingly they were acknowledging the actions of a single former staff member alone – that of Gavin Mitchell (i.e. *"did not receive the care and support required to be provided at the school because this former staff member abused his position of trust and breached the requirements in place"*). At no point did they admit that my case involved three of their former staff and, hence, systemic failings. One (Gavin Mitchell), who had acted criminally and sexually abused me, a second who had acted criminally and physically assaulted me after I had reported the sexual abuse, and a third, the then head of the institution, who had failed in his duty of care through, a) not reporting a suspected pedophile to police after criminal allegations had been made and, b) through not making any contact with myself, nor family, after the facts of my case were made clear to him by police. Of course, the Ministry's role itself also needs to be brought into question. That is, the letter from the head of the institution to police was on an official Ministry letterhead. Presumably, a copy of this letter would then need to be filed with the MOE (then the NZ Department of Education) as an official Ministry document. Further, one would expect that such a serious matter would have needed to be directly reported to other Ministry officials. Of course, all of this now is strictly academic, as I am told that all records of these events have long since disappeared (this in itself is highly concerning given the nature of these records and which raises the question, how many other records, that are pivotal to claims against the State, have been destroyed?).

96. Lastly, the letter of apology (with legal disclaimer) had been provided to its signee, Lesley Longstone, then Secretary of Education, by Murray Witheford, the so-called "Independent Investigator" of my case. This is noted in the Investigation Review written and supplied to the Ministry of Education by Mr Witheford which states: *"It is recommended that an ex gratia payment be made. The advice acknowledges the appropriateness of an ex gratia payment to respond to circumstances that give rise to a moral obligation rather than a legal liability... Accordingly I recommend that: the secretary... B) sign the attached letter of apology to Mr Mahy."*

97. Technically, thus, as Murray Withford was supposedly/allegedly not a current Ministry employee, my apology was not even written by a representative of the State. This was highly insulting/retraumatizing. It had taken over thirty years to receive any acknowledgement and apology, and when this finally occurred the acknowledgement failed to acknowledge the facts of my case, while the apology came with a disclaimer (we accept no liability for the actions of our former staff), and wasn't even written by a representative of the State.

98. My case is perhaps somewhat unique in that it was handled by the Ministry of Education and not the MSD Historic Claims Unit. For instance, a representative of the MSD (Garth Young) informs me:

"Each apology letter from the Ministry is written to acknowledge and apologise for the specific issues in each person's case. To my knowledge and in my experience there has never been a disclaimer included in any apology letter."

And:

"The letters do not contain any disclaimers."

99. This said, many claims are handled outside of the MSD, where as Cooper Legal note in their 13/14 UPR Report:

"Related processes are established on an ad hoc basis in relation to other State Ministries when claims are made - such as the Ministry of Education and the Ministry of Health but with

*erratically different procedures and (particularly) outcomes.*⁶³

For instance, the MOH has closed 79 cases of a total of 104 claims between 1 July 2012 to April 2014 (prior to July 2012 claims were handled by the now disestablished Crown Health Financing Agency). Additionally, the CLAS notes in their 2013 Annual Report that 75% of the stories they hear involve the MSD, while 25% involve other ministries. Given these numbers, it is likely that a large number of claimants are receiving extremely substandard apologies.

Other

100. One other significant issue presents in the State's handling of the Historic Abuse claims and that is the excessive delays in investigating/resolving claims through the MSD Historic Claims process.

101. What I would say on this point is that in my case where my claim was handled through the Ministry of Education and not the MSD, a prompt investigation was perhaps the only right that was reasonably respected. That is, after being denied legal aid I contacted Jyotika Sharma, the MOE's senior solicitor, on the 8/11/2011 and received an offer of settlement in July 2012. This said, it had taken an additional 6 months to get to filing a claim with the MOE due to what proved to be a lengthy process of having legal aid denied. Thus, in totality, from the point that I initially contacted solicitors to being made an offer my case took somewhat over one year.

102. However, as Cooper Legal notes of the MSD process, in their 13/14 UPR Report:

*"The ADR process itself is extremely lengthy - some claimants have been waiting ten years after instructing a lawyer without any resolution, and new entrants into the process are advised that they will have to wait over two years before their claim is even allocated for investigation. These delays are regularly increasing as more people sign up to the process, which is inadequately funded by the State."*⁶⁴

103. This is further supported in the CLAS 2013 Annual Report with:

"As I reported last year delays are occurring in the Historic Claims process managed within the Ministry of Social Development. Participants referred to Historic Claims can expect delays of at least over three years before their concerns are investigated and resolved."

And:

*"It is worth repeating that I see a real risk for our participants, who are a vulnerable group, being left for a number of years before their cases are finalised. Their frustrations have the potential to be made more acute without the support of a Facilitator from the Service. We are already receiving angry complaints and calls on an almost daily basis from participants who have been waiting for an outcome from Historic Claims for two or three years already."*⁶⁵

104. Cooper Legal and I expect the NZHRC will present further information regarding undue delays in processing claims in their submissions/shadow reports before the UNCAT.

Closing Remarks and Conclusions

105. While this submission has used my case as an example of the rights violations that present across the claims processes one hopes that the Committee understands that I have attempted to speak on behalf of all the Historic Abuse Claimants who, to date, have remained largely marginalised, silenced and subjected to a top down process where the State can be

⁶³ Cooper Legal 13/14 UPR Report (2013), para 10

⁶⁴ Cooper Legal 13/14 UPR Report (2013), para 8

⁶⁵ Annual Report of the Confidential Listening and Assistance Service 2013 pages 6 – 7, accessed through OIA by John McCarthy, retrieved 22/4/14 at <https://www.fyi.org.nz/request/1570-the-annual-report-of-the-confidential-listening-and-assistance-service-2013-internal-affairs>

seen to be investigating itself.

106. Among other things, the Historic Abuse Claimants have been denied an independent and impartial investigation, denied public acknowledgement and a public apology and, even given standards/precedent already set in New Zealand (in the Lake Alice situation), denied adequate remedy. Additionally, as demonstrated through the State's own figures/statistics, in far too many instances we have been denied or encouraged not to seek legal aid. This, statistically, is shown to have disadvantaged many claimants.

107. In what has proven to be a long, cathartic and, at times, emotionally harrowing process of researching and writing this submission two core issues/dilemmas presented. Firstly, a key philosophical question for myself is can those responsible, as the party who is liable, both politically and financially, for violations against the Convention, be entrusted with investigating those violations and offering remedy to victims? Such a scenario seems fraught with conflicts of interest. Certainly, given what is now being exposed through inquiries such as the Australian RC, history tells us that when institutions investigate their own, aberrations of truth and justice invariably result. Can it be then that the New Zealand State is being guided by a truer moral compass than other institutions or State's such as the Holy See? For myself the answer to this has to be no. That is, I started this process only aware of the facts of my own case and the treatment that I had received. As I delved deeper, what presented were (in the spirit of the Convention) systemic and endemic rights violations by a Government who arguably has sought to mitigate damages both in terms of political blowback and pecuniary losses. This is the exact same thing the Holy See and others have sought to do, even if this does come at the price of justice for victims.

108. Secondly, from a human rights perspective, a key problem presents in that those most in need of human rights protection (right holders) are also, too often, those least able to assert and claim their rights. This is apparent amongst New Zealand's Historic Abuse Claimants where, statistically, of 908 stories heard by the CLAS by 2013, 1 in 3 participants have alcohol and/or illicit substance abuse issues, 241 have been to prison, many have poor physical and/or mental health, and many have literacy issues and require assistance in accessing and disseminating documents relating to their time spent in State care.⁶⁶ As Rose Northcott has noted, the Historic Abuse complainants represent some of the country's most vulnerable citizens.

109. On the other hand, we have a duty bearer (the State) that has formidable resources and, arguably, has used these to full effect to contain/suppress information and deny adequate remedy to victims. On the latter, this applies to the State's reservation to Article 14 and its rigorous invocation of the Limitations Act, in all Historic Claims that have been before the New Zealand Courts, which has forced claimants to seek remedy through the only alternative means; a means that, by design, the State fully controls. This positions claimants between a rock and a hard place to be. As Marks, S.P. (1998) argues, "*human rights conventions are only as effective as the power relations that surround them. If claims exist, methods for holding those who violate claims accountable must exist as well.*"⁶⁷ Given that the State's official position, as expressed through the Attorney General, is their approach to resolving the Historic Abuse Claims has been "responsible" and "equitable" this leaves us with no other choice but to put the situation before the Committee for evaluation.

110. In writing my submission I have endeavored to present as accurate and up-to-date information to the Committee as possible. Part of this process included sending a largely completed draft of the submission (found at <http://newzealandchildabuse.com/my-submission-to-the-un-committee-against-torture-2014/>) to State representatives and inviting comment/feedback. To date, in all cases, this has resulted in either walls of silence (no

⁶⁶ Annual Report of the Confidential Listening and Assistance Service 2013 accessed through OIA by John McCarthy retrieved 22/4/14 at <https://www.fyi.org.nz/request/1570-the-annual-report-of-the-confidential-listening-and-assistance-service-2013-internal-affairs>

⁶⁷ Marks, S.P. (1998) From the "single Confused Page" to the "Decalogue for Six Billion Persons": The Roots of the Universal Declaration of Human Rights in the French Revolution in *Human Rights Quarterly*, Vol 20, No. 3 (Aug, 1998) pp. 459 – 514

response whatsoever), a “*The Ministry doesn’t propose to make any comments at this time.*” from the MSD and comments from others (e.g. the Attorney General and the Minister for Justice) to the effect of I am not in a position to make comment.

111. In short, while I respect that representatives of the State do not wish to go on the record (albeit that a lack of transparency, to a large degree, has been the State’s modus operandi throughout) my attempts to get comment/feedback have resulted in largely evasive responses that have provided nothing new in the way of additional input which may alter/influence aspects of the submission.

112. Other than this, besides the statistics provided by the MSD and MOH, I have attempted to access and provide further statistics from the Ministry of Education pertaining to the numbers of complaints they have dealt with, the quality of remedy that has been offered, the institutions in which the abuse occurred, the numbers of complainants who had legal representation versus those who did not etc. To date, after receiving a commitment that my OIA would be processed and answered by the April 8 2014, I have been stonewalled (no responses to emails requesting an update) and as a result I could not produce this information.

Recommendations:

The State should establish a single, robust, truly independent mechanism for the resolution of claims of abuse against the State. This process should be funded adequately to enable prompt and impartial decisions. The right to legal *advice* and the right to appeal should be included in this process. Past cases handled by the MSD and related processes should be reviewed by this independent mechanism. The independent mechanism should adopt a Rights Based Approach to resolving claims against the State where the ultimate aim is to restore hope and dignity to claimants.

The CLAS should be adequately funded to ensure that victims of abuse are not silenced by time limits or geography. Findings from the CLAS should be made available to the public through press, Ministerial and other channels.

All historic abuse claimants should be offered counseling during the course of, and after making a claim. Numbers of counseling sessions available to claimants should only be limited by their needs. In line with human rights norms (i.e. “*The victim’s participation in the selection of the service provider is essential*”⁶⁸) claimants should be able to choose a counselor/psychologist of their choice.

The State should remove its reservation to Article 14.

Footnote:

Beyond the supporting documentation already submitted with this submission I have compiled comprehensive documented evidence in the form of emails, letters etc to support anything that has been claimed in the submission. If the Committee requires further information or supporting documentation I can be contacted at grant.mahy@gmail.com

Yours sincerely

Grant Mahy

Signed on the 5th May 2014 by Grant Mahy

⁶⁸ Committee Against Torture General Comment No. 3 (2012) pp. 2

