New Zealand's 6th periodic review under the Convention Against Torture

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Submission of the New Zealand Human Rights Commission

The New Zealand Human Rights Commission is an independent Crown entity that derives its statutory mandate from the Human Rights Act 1993. The long title to the Human Rights Act states it is intended to provide better protection of human rights in New Zealand in general accordance with United Nations human rights Covenants and Conventions.

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March 2015

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1 Introduction

1. The New Zealand Human Rights Commission ("Commission") is an independent Crown Entity pursuant to the Crown Entities Act 2004 that derives its statutory mandate from the Human Rights Act 1993 ("HRA"). The long title to the HRA states it is intended to provide better protection of human rights in New Zealand in accordance with United Nations ("UN") human rights Covenants and Conventions.

2. The Commission welcomes the opportunity to make a submission to the Committee Against Torture ("Committee") in relation to New Zealand's sixth periodic review.

OPCAT

3. The Crimes of Torture Act 1989 ("COTA") is the primary piece of anti-torture legislation in New Zealand. An amendment to the COTA in 2006 added a new Part 2 to the Act, with the stated purpose of meeting New Zealand's obligations under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("OPCAT") and with provisions which closely reflect its text. The OPCAT itself is attached in full as a schedule to the Act.

4. New Zealand ratified OPCAT in 2007 and established a multi-body National Preventive Mechanism ("NPM") comprising four independent monitoring bodies each responsible for specific places of detention, and a central coordinating NPM. The NPMs are the Office of the Ombudsman ("Ombudsman"), the Independent Police Conduct Authority ("IPCA"**)**, the Office of the Children's Commissioner ("OCC") and the Inspector of Service Penal Establishments ("ISPE"). The Commission is the central NPM with responsibilities for coordination, reports, systemic issues and liaison with the UN.

5. The NPM has made a separate submission to the Committee which the Commission endorses in full.

Visits by International monitoring bodies

6. The United Nations Subcommittee on Prevention of Torture ("SPT") visited New Zealand for the first time in April 2013. Its report to the New Zealand Government

confirmed a number of issues that the Commission and the NPM have also identified. In summary, the recommendations relate to:

a) resourcing and effectiveness of the NPM monitoring bodies and the OPCAT system in New Zealand;
b) alignment of domestic legislation with human rights standards;
c) a need to review the institutional framework, including regime conditions, access to parole and pre-trial detention;
d) fundamental safeguards, such as access to information and complaint mechanisms;
e) Māori over-representation in the criminal justice system and availability of programmes aimed at reducing Māori recidivism;
f) juvenile justice, including the currently low legal age of criminal responsibility and access to organised activities;
g) health and mental health care in detention, particularly the high rates of often chronic and acute mental disorders within the prison population, and access to timely and adequate health and mental health care services; and
h) conditions of detention, including adequacy of facilities, access to exercise and outdoor activities, nutrition, the right to privacy and the use of segregation and restraint.

7. **The Commission recommends that the Committee urge the Government to commit to implementing the SPT recommendations over the next reporting period (subject to one clarification set out at section 2 of the NPM submission).**

8. In addition the United Nations Working Group on Arbitrary Detention ("WGAD") conducted a country visit to New Zealand from 24 March to 7 April 2014. The WGAD acknowledged that, overall, legislation and policy concerning deprivation of liberty in New Zealand is well-developed and generally consistent with international human rights law and standards. However, they drew special attention to the over-representation of Māori in the prison population, the detention of refugees and asylum-seekers, and loopholes in law and practices regarding judicial proceedings involving persons with intellectual disabilities.

9. This submission outlines the Commission's views on New Zealand's compliance with the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment

or Punishment ("CAT").[1] In preparing the submission, the Commission has consulted with civil society groups and organisations.

10. The submission has been presented according to thematic issues identified in the Committee's *List of issues prior to the submission of the sixth periodic report of New Zealand* ("LOIPR").[2] For each thematic area, the Commission has identified the relevant articles of the Convention and paragraphs of the LOIPR, as well as providing a brief summary of the key issues and proposed recommended actions.

11. A full list of recommended actions is compiled in **Appendix 1** of the submission.

[1] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 12 October 1984, 1465 UNTS 85 (entered into force on 16 June 1987).
[2] UN Doc: CAT/C/NZL/Q/6.

1. Domestic Implementation of Human Rights Obligations

A. Legislation

LOIPR: para 2 – in light of the previous recommendations of the Committee, please provide updated information on the enactment of comprehensive legislation to incorporate into domestic law all the provisions of the Convention.

Para 28 – please provide an update regarding any further steps taken by the State party with regard to withdrawing its reservation to article 14 of the Convention.

Relevant provision of the CAT: Article 2

SPT Recommendation:

The SPT recommends that the State party

(a) Consider withdrawing its reservations to UNCAT, article 14 and CRC Article 37(c);

(b) Put in place guidelines that restrict the wide discretion of the Attorney General with regard to prosecutorial decisions for crimes against torture in order to ensure that decisions whether or not to prosecute an offence of torture are based solely on the facts of the case;

(c) Reconsider the Bail Amendment Bill in the light of the SPT's concerns set out in para 21, above;

(d) Reconsider the Immigration Amendment Bill in the light of the SPT's concerns

WGAD:

Overall, legislation and policy concerning deprivation of liberty is well developed and to a high degree consistent with international human rights law and standards.

[However], the Working Group has particular concerns over the wider availability of preventive detention since the enactment of the Sentencing Act 2002, extended supervision

orders under the Parole Act 2002, options for intellectually disabled offenders in the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, and the Public Safety (Public Protection Orders) Bill currently before Parliament.

Key issues:

- Protection measures under the Children, Young Persons and Their Families Act 1989 do not extend to 17 year olds.
- Corrections legislation continues to extend restrictions on those deprived of their liberty.
- Extended use of preventive detention.
- Denial of right to effective remedy and maintenance of reservation to article 14.
- Continued use of reverse onus of proof.

Recommended actions:

The Commission recommends that the Committee strongly urge the Government to:

- commit to reviewing all legislation relating to detainees within the next reporting period to ensure that it fully complies with New Zealand's international obligations;
- reconsider the legislative limits which continue to deny any victims of torture and other cruel, inhuman or degrading treatment with an effective remedy;
- commit to taking the required steps to withdraw its reservation to article 14 over the next reporting period; and
- commit to reviewing the use of reverse onus of proof to ensure that the right to be presumed innocent is fully protected.

12. Overall legislation and policy concerning detention is well developed and generally consistent with international standards. A notable gap remains in relation to the

legislative protections available to young people aged 17 years. The Children, Young Persons and Their Families Act 1989 ("CYPF Act"), is the key piece of legislation relating to detention of children and young people up to the age of 17. Despite recommendations by the UN Committee on the Rights of the Child[3] and the Committee to extend the protection measures under the CYPF Act to include 17-year-olds, this has not occurred.

13. There has been a raft of recent corrections legislation which has extended restrictions upon the rights of people who are deprived of liberty. For example:

- The Electoral (Disqualification of Sentenced Prisoners) Amendment Act, passed in 2010, effectively disenfranchises all sentenced prisoners. Until this law change, all New Zealand prisoners serving a sentence of more than three years had been unable to vote while incarcerated.

- The Corrections Amendment Act 2013 makes a number of changes to corrections legislation. Among other things, that Act lessens the oversight processes relating to the use of mechanical restraints and extends the situations in which intrusive strip search powers may be used.

- The Prisoners' and Victims' Claims Act 2005 deals with the awarding of compensation to prisoners for breaches of their rights under the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 and the Privacy Act 1993. The Act restricts the awarding of compensation to exceptional cases and only to the extent that it is necessary to provide effective redress. Restrictions on compensation include that the plaintiff has first made reasonable use of available internal and external complaints mechanisms and that other remedies are used if they could provide effective redress. Compensation funds are subject to a claims process by victims, before becoming available to a prisoner.

14. The SPT voiced particular concern about the Bail Amendment Act which removes the presumption of bail for 17 – 20 years old who have previously served a sentence

[3] Committee on the Rights of the Child's, *Concluding Observations in relation to New Zealand's 4th and 5th periodic reports*, CRC/C/NZL/CO/3-4, 201, http://www.converge.org.nz/pma/CRC-C-NZL-CO-3-4.pdf

of imprisonment. "The SPT [was] concerned that these amendments will have a negative impact on the number of youth held on remand and the length of time spent on remand, which is already a matter of grave concern. Furthermore, the SPT [was] deeply concerned that the Bail Amendment Bill could exacerbate the disproportionately high number of Māori in prison, given the high rate of Māori recidivism, and the number of Māori currently on remand."[4]

15. The SPT also noted that the "2012 Immigration Amendment Bill may have the effect of depriving persons in need of protection of their liberty, based solely on the manner of their arrival in the State party."[5]

16. Furthermore the WGAD had particular concerns over the wider availability of preventive detention since the enactment of the Sentencing Act 2002 extended supervision orders under the Parole Act 2002, options for intellectually disabled offenders in the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, and the Public Safety (Public Protection Orders).

17. In December 2014 the Parole (Extended Supervision Bill) was passed. The Bill extends the Extended Supervision Order ("ESO")[6] regime to offenders who have committed serious sexual offences and some serious violent offences. The range of qualifying offences is also expanded to include conspiracies and attempts (as well as any equivalent offences committed overseas). An ESO under the proposed regime can be renewed consecutively for 10 year periods.

18. Section 107C of the Parole Act 2002 provides that an offender may be subject to an ESO where the relevant offending pre-dated the commencement of the ESO scheme in 2004. This could be viewed as a retroactive penalty in conflict with New Zealand's international human rights obligations. The Bill further extended this regime by allowing an ESO to be renewed, which may result in an indeterminate punishment.

19. Taken cumulatively these changes impinge on the rights of detainees and arguably breach New Zealand's international obligations. **It is recommended that the**

[4] SPT, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand,* at 21.
[5] Ibid at 22.
[6] The purpose of an extended supervision order is to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing sexual offences against children or young persons. (Section 107I of the Parole Act 2002).

Government commit to reviewing all legislation relating to detainees within the next reporting period to ensure that it fully complies with New Zealand's international obligations.

Reservation to article 14

20. On ratifying the CAT New Zealand entered a reservation to article 14:[7]

The Government of New Zealand reserves the right to award compensation to torture victims referred to in article 14 of the Convention against Torture only at the discretion of the Attorney-General of New Zealand.

21. When New Zealand entered that reservation in 1989, the Bill of Rights Act 1990 ("BORA") did not exist. Section 9 of BORA provides that:[8]

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

22. Despite there being no remedies clause in BORA the courts have found that a person can seek compensation in respect of a violation of rights guaranteed by BORA.[9] The Law Commission has stated that there should be no legislative interference with the availability and development of BORA compensation jurisprudence.[10]

23. However, as noted above, the Prisoners' and Victims' Claims Act 2005 significantly restricts the circumstances in which courts are able to make compensation awards to prisoners for violation of their rights as set out in BORA. In 2013 the Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act was passed, continuing the application of the 2005 Act – which would otherwise have expired.

[7] Ministry of Foreign Affairs and Trade, *New Zealand Handbook on International Human Rights*, Wellington (2008) at 179.
[8] New Zealand Bill of Rights Act 1990, s9.
http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html
[9] See for example: *Simpson v Attorney-General* [1994] 3 NZLR 667; *Dunlea v Attorney-General* [2000] 3 NZLR 136; *Upton v Green & Anor (No 2)* (1996) 3 HRNZ 179.
[10] New Zealand Law Commission, *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick*, NZLC R37.

24. The COTA expressly prohibits any act of torture against another person in or outside of New Zealand. Compensation can be awarded in appropriate cases. However, it is important to note that prosecution under COTA can only be taken with the consent of the Attorney-General, and compensation only awarded at the Attorney-General's discretion.

25. In its follow-up responses to the concluding observations of the Committee dated 19 May 2010[11] the Government indicated that it was reviewing the further steps, if any, necessary to withdraw this reservation in light of various developments, including redress available under BORA.

26. **The Commission recommends that the Committee urge the Government to:**

- **reconsider the legislative limits which continue to deny victims of torture and other cruel, inhuman or degrading treatment an effective remedy; and**

- **in light of BORA commit to taking the required steps to withdraw its reservation to article 14 over the next reporting period.**

Presumption of Innocence

27. Under section 25(c) of the BORA, everyone charged with an offence has "the right to be presumed innocent until proved guilty according to law". While the right can be limited in some situations the Supreme Court in *R v Hansen*[12] (*"Hansen"*) held that such situations will not be a common occurrence[13]. In *Hansen* the majority held that although the control of illegal drugs was a significant objective, the fact that the reverse onus was triggered by possession of an arbitrary amount, it was not rationally connected with the objective and could not be justified in a free and democratic society.

[11] CAT/C/NZL/CO/5/Add1 at [61]-[62
[12] [2007] 3 NZLR 1.
[13] The Chief Justice considered whether justification of the presumption of innocence could ever be limited as it denies the right entirely.

28. In the wake of *Hansen*, the Attorney-General has twice found that the reverse onus of proof in proposed legislation could not be justified under section 5 of BORA[14] but the legislation has been passed despite the inconsistency. These laws remain on the statute book.

29. More recently amendments to the Bail Act were passed in 2012 that include a reverse onus of proof which requires defendants charged with murder and serious Class A drug offences to show why they should be released on bail rather than the prosecution showing they should not be released (as is the case at present).

30. **The Commission recommends that the Government commit to reviewing the use of reverse onus of proof to ensure that the right to be presumed innocent is fully protected.**

B. Pre –Legislative Scrutiny

LOIPR: para 2 – Also please update on the establishment of a mechanism to ensure consistently the compatibility of domestic law with the Convention

Relevant provision of the CAT: Article 2

UPR Recommendation:

Further enhance the legislation and legal system, with more considerations to the harmonization of domestic developments and the international stipulations on human rights... (Viet Nam).

Government Response:

New Zealand accepted this recommendation in full.

[14] Misuse of Drugs (Classification of BZP) Amendment Act 2008 and the Misuse of Drugs Amendment Bill 2010.

Key issues

- The scope and reach of BORA vetting.
- Compliance with Cabinet Manual requirements to assess international human rights obligations in the development of legislation.
- Need for human rights mainstreaming across all parliamentary and legislative processes.
- Lack of knowledge and expertise in human rights principles and analysis amongst Parliamentarians and Senior Civil Servants.

Recommended actions:

The Commission recommends that the Committee urge the Government to commit to:

- amending its pre legislative scrutiny processes to better protect human rights in legislative development by:
    - ensuring that section 7 reports are prepared, tabled in Parliament and referred to select committee where a Bill appears to be inconsistent with BORA. In other words where there is a *prima facie* inconsistency;
    - requiring section 7 reports to be prepared and tabled on all substantive Supplementary Order Papers;
    - establishing a mechanism for Parliament to periodically review the continued validity of any justified limitation of a BORA right.
- extending the requirement in section 7.60 of the Cabinet Manual to apply to all policy and legislation and ensure that it is strictly adhered to.
- continue to mainstream human rights by *inter alia* developing and implementing capacity-building programmes for parliamentarians and senior civil servants.

The New Zealand Bill of Rights Act 1990

31. The principal means by which New Zealand implements international human rights standards is through BORA. Section 7 of BORA requires the Attorney-General to

inform Parliament about any provision in a Bill that appears to be inconsistent with any of the rights and freedoms affirmed therein. The Ministry of Justice and the Crown Law Office examine all draft legislation and advise the Attorney-General on any BORA implications.

32. The effectiveness of the section 7 process hinges on the extent to which Parliament is systematically informed and involved in the scrutiny process.

33. In 2014 Parliament's Standing Orders were amended to require all section 7 reports to be referred to select committee[15] for consideration.[16] The Commission welcomes this amendment and believes that it will result in more systematic review and debate of the BORA implications of legislation.

34. Parliament may form a different view about whether a particular right or freedom is limited or whether the limitation is justified. However, that decision is informed by the opinion of the Attorney-General.

35. This means that despite the intent of the reporting mechanism to ensure that legislation complies with BORA a number of significant Bills pass which limit fundamental rights and freedoms. For example, Professor Janet McLean has noted that "in respect of all 27 negative reports that had been tabled as at May 2011, the government proceeded with the Bill, which "it openly acknowledged as limiting protected rights unreasonably in a way that could not be justified."[17]

36. In 2010 the Sentencing and Parole Reform Act ("SPR Act") was passed despite being subject to an adverse section 7 report. The SPR Act provides for full sentences, including life sentences, to be served without parole for repeat violent offenders convicted of a second or third specified serious violent offence. The Attorney-General found that the provision for a life sentence to be imposed for a third listed offence

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[15] Select committees are regarded as an important check and balance on the Executive, particularly in a Parliament that lacks an upper house or revising chamber, as is the case in New Zealand. Examination of bills for consideration after the first reading – except for those to which urgency is accorded – is a primary function of select committees.

[16] SO 265(5). The recommended amendments to Standing Orders were debated and adopted by the House on 30 Jul, and came into effect on 15 August 2014: http://www.parliament.nz/resource/en-nz/00HOHPBReferenceStOrders4/eb7c8b9e4a6c7aa88a47d14dc4100513b2557e60

[17] Professor Janet McLean "Bills of Rights and Constitutional Conventions" (lecture, Victoria University of Wellington, 30 August 2011).

appeared to be inconsistent with the right not to be subjected to disproportionately severe treatment. Neither the courts nor the Parole Board have the ability to consider individual circumstances in any given case.

37. The New Zealand Law Society has suggested that legislation enacted despite a negative section 7 report should be subject to a "sunset clause" to enable it to be periodically reconsidered. The Commission supports this recommendation.

38. A further complication is that a section 7 report is not tabled where a provision appears to be inconsistent with BORA. Rather it is tabled where it is considered that it is in fact inconsistent. This entails consideration not only of prima facie inconsistency but also justification under section 5 of BORA. Section 5 of BORA provides:[18]

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

39. What is justifiable in a free and democratic society is a question for Parliament and will potentially change over time depending on the political, social and economic environment.

40. The Commission believes that the current approach is inconsistent with the purpose and wording of section 7, which states:[19]

Where any Bill is introduced into the House of Representatives, the Attorney-General shall…..

Bring to the attention of the House of Representatives any provision in the Bill that ***appears*** *to be inconsistent with any of the rights and freedoms contained in the Bill of Rights.*

(emphasis added)

[18] New Zealand Bill of Rights Act 1990, section 5. http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html
[19] Ibid, s7.

41. **The Commission recommends that the Government commit to amending its process to better protect human rights in legislative development by:**

- **ensuring that section 7 reports are prepared, tabled in Parliament and referred to select committee where a Bill appears to be inconsistent with BORA. In other words where there is a *prima facie* inconsistency;**
- **establishing a mechanism for Parliament to periodically review the continued validity of any justified limitation.**

42. Supplementary Order Papers ("SOPs") propose amendments to bills after their introduction into Parliament. SOPs are not routinely subject to BORA reporting. The Commission considers that this is a gap in New Zealand's pre legislative scrutiny processes.

43. In 2012, for example, an SOP proposing greater mandatory use of invasive strip-searching of prisoners was not considered for consistency with the Bill of Rights despite raising questions of compliance with both domestic and international human rights standards. Where proposed amendments engage domestic and international human rights obligations, the usual reporting mechanism ought to apply.

44. The Standing Orders Committee of the House of Representatives has recommended that Bill of Rights reporting be required on substantive SOPs.[20] The Commission agrees with the Standing Orders Committee and **recommends that the Government commit to amending its BORA reporting process to require section 7 reports - in the modified form referred to above at paragraph 41 – on substantive SOPs.**

Wider human rights scrutiny measures

45. The New Zealand Cabinet Manual expressly requires Ministers to advise the Cabinet of any "international obligations" affected by proposed legislation.[21] However, this requirement is consistently overlooked and there is seldom any transparent assessment of New Zealand's international human rights obligations in the development of legislation.

[20] *Review of Standing Orders* (Report of the Standing Orders Committee, September 2011) at 37. http://www.parliament.nz/en-nz/pb/sc/documents/reports/50DBSCH_SCR56780_1/review-of-standing-orders-2014-i18a

[21] Section 7.60 of the *Cabinet Manual*, Cabinet Office, 2008.

46. **The Commission recommends that:**

a) the requirement set out in section 7.60 of the Cabinet Manual be more explicit in requiring identification of implications in relation to international human rights commitments and extended to apply to all policy and legislation (both primary and secondary); and

b) Ministers and officials be directed to strictly adhere to current and extended Cabinet Manual requirements.

Human Rights Select Committee

47. Many NGOs and civil society organisations have stated that they want to see a dedicated Human Rights Select Committee established that would scrutinise legislation and section 7 vets, and conduct thematic inquiries and issues reports. This has been raised by some submitters in relation to this review.

48. In 2014 the Standing Orders Committee considered whether it was appropriate in the New Zealand situation to establish a Human Rights Select Committee. It concluded that it was not, stating:[22]

It could be difficult to maintain the membership of such a committee, and in principle, this proposal could potentially marginalize important matters that already seem to be too confined to legal and academic circles.

…However, there is another part to the equation: as well as drawing the attention of members to Bill of Rights matters, there should be an increased emphasis on expressing these issues in ways that are comprehensible, not only for member, but for the public in general. The answer is not to shut NZBORA matters away in a specialist committee, as that could in fact be counter-productive.

New Zealand has a well-regarded system of subject select committees that have multiple functions and exercise general oversight of policy, legislative, and

[22] Standing Orders Committee, *Review of Standing Orders* (July 2014) at 15.

administrative matters within their subject areas. Bill of Rights scrutiny should be part of a mainstream discussion about legislative quality that takes place in all subject select committees and is applied in all policy contexts…

49. As a result of this work the Commission is considering its own position. It has to date advocated for a Human Rights Select Committee. It has however, already participated in human rights training of the Select Committee Clerk and seen firsthand the seriousness with which the Parliamentary Officers are taking the issue. If human rights can be mainstreamed in all Select Committees that is likely to be a better result than a separate Human Rights Select Committee. The challenge is to make mainstreaming a reality.

50. **The Commission urges the Committee to encourage New Zealand to continue to mainstream human rights by *inter alia* developing and implementing capacity-building programmes for parliamentarians and senior civil servants.**

C. National Action Plan for Human Rights

LOIPR – par 33 –Please provide detailed relevant information on the new political, administrative and other measures taken to promote and protect human rights at the national level since the consideration of the fifth periodic report, including on any national human rights plans or programmes, and the resources allocated thereto, their means, objectives and results.

Relevant provision of the CAT: Article 2

UPR Recommendation:

Develop a new human rights action plan under the auspices of the New Zealand Human Rights Commission (Burkino Faso).

Continue implementing the second national human rights action plan (Cote d'Ivoire).

Government Response:

Accepted noting:

The Human Rights Commission is developing a second national human rights action plan.

51. The Commission has statutory responsibility for the development of a National Plan of Action for human rights ("NPA"). In 2005 the Commission developed the first 5 year action plan.

52. In 2014 New Zealand underwent its second Universal Periodic Review before the United Nations Human Rights Council. One hundred and fifty five recommendations were made to New Zealand. The Government accepted 121 recommendations.[23]

53. By accepting these recommendations, the Government has committed to take action to improve the realisation of rights across a number of areas. Of particular relevance to the CAT are commitments to:[24]

- reduce the overrepresentation of Māori and Pacific people in the justice system;
- end violence against women;
- end neglect and abuse of children;
- only detain asylum seekers in exceptional cases;

54. The actions to be taken by Government as a result of these commitments will be set out in New Zealand's second NPA.[25] The NPA is currently being developed and will be completed by June 2015.

[23] Response to Report of the Working Group: http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/universal-periodic-review/upr-documents-relating-to-new-zealand-1/second-report-2014/new-zealand-government-response-to-2014-upr-recommendations
[24] Ibid.

D. The National Preventive Mechanism

LOIPR: para 8 – Please provide information on the functioning of the National Protective Mechanism and whether it has been provided with the necessary human, material and in particular financial resources to enable it to fully comply with its mandate.

Relevant provision of the CAT: Article 2

SPT Recommendation:

The SPT reminds the State party that the provision of adequate financial and human resources constitutes an ongoing legal obligation of the State party under article 18.3 of the OPCAT. It recommends that the State party:

(a) Ensure that the NPMs enjoy complete financial and operational autonomy when carrying out their functions and that they are able to freely determine how to use the resources available to them;

(b) As a matter of priority, increase the funding available in order to allow the NPMs to effectively implement their OPCAT mandate throughout the country;

(c) Ensure that the NPM is staffed with a sufficient number of personnel so as to ensure that its capacity reflects the number of places of detention within its mandate, as well as being sufficient to fulfil its other essential functions under the Optional Protocol;

(d) Provide the NPMs with the means to ensure that they have access to the full range of relevant professional expertise, as required by OPCAT.

WGAD

The Working Group also recommends that the National Preventive Mechanisms are appropriately resourced to monitor all places of deprivation of liberty, including rest homes

[25] S5(2)(m) of the Human Rights Act 1993 requires the Commission "to develop, in consultation with interested parties" an NPA.

and secure facilities.

Key Issues:

- Lack of resources to undertake OPCAT work for some NPMs;
- Lack of specific expertise in some areas; and
- A number of places where people are deprived of their liberty are not currently monitored by the OPCAT mechanism.

Recommended actions:

The Commission recommends that:

- funding levels should be increased without delay to cover the actual costs of OPCAT work of NPMs, where the appropriation for OPCAT work is less than the actual costs of that work, and to enable NPMs to carry out more site visits and to establish a coordinated mechanism to engage the services of experts to assist with those visits; and
- the Government commit to reviewing the scope of the OPCAT mandate in New Zealand with a view to identifying ways to address the gaps in monitoring all places where people are deprived of their liberty. Any increase in scope would need to be properly funded.

55. An overarching challenge that some NPMs have struggled with, is the resources available for OPCAT monitoring. Since ratification of the OPCAT, NPMs have received very limited additional resourcing to carry out their OPCAT functions. To manage within the funding available, NPMs have smaller visit teams and undertake visits with less frequency than they would like (or believe is envisioned by the OPCAT.

56. The Children's Commissioner, for example, has received no funding for taking on its NPM role, which it has funded from other work streams. The funds allocated to the IPCA cover 34 percent of their respective OPCAT costs, and in the past they have also covered the difference, but more recently have reduced their NPM activities to

align with the actual funding provided by government. For these NPMs resource pressures are significant, and inhibit the full performance of their OPCAT function.

57. Some NPMs are adopting innovative approaches to address these issues. For example, the IPCA is moving away from its traditional random inspection method. Instead, the authority is working on producing a national standard against which to audit the Police. They hope that this will help the Police to plan systematically and target their resources where they are most needed. The authority still plans to inspect cells randomly from time to time and it will continue to monitor cell conditions in response to complaints.

58. The OCC have been developing the way they monitor Child Youth and Family residences and are focusing on the systemic issues that can impact on how staff and the institution treat children and young people in their care. This new approach aligns with the preventative element of the NPM function.

59. The Ombudsman is in a slightly different but equally difficult position. Although all of its OPCAT work is funded it is limited in its ability, within its existing budget, to monitor prisons and mental health facilities with the frequency, comprehensiveness and depth that is expected under OPCAT. Moreover, in addition to the 104 places of detention which the Ombudsman's Office currently monitors, there are a further 138 locked aged care facilities and dementia units that may fall within the Ombudsman's mandate in respect of health and disability places of detention. In order to adequately monitor the facilities that it currently inspects, together with these additional facilities, the Ombudsman would need additional funding.[26]

60. The SPT expressed concern that the significant resource constraints facing the NPMs severely impedes the full implementation of New Zealand's international obligations: At paragraph 12 of its report to the New Zealand Government the SPT stated: [27]

Most of the components of the NPM have not received extra resources since their designation to carry out their OPCAT mandate which, together with general staff shortages, have severely impeded their ability to do so.

[26] Note that Parliament is involved in funding of the Ombudsman. Both government and Parliament need to commit to provision of funding to enable the Ombudsman to monitor additional facilities.
[27] Supra note 4 at 12.

61. The SPT was equally concerned about the current number of staff and the lack of specific expertise in some areas:[28]

Whilst the SPT was impressed by the commitment and professionalism of NPM experts, it was concerned that the number of staff were inadequate, given the large numbers of places of detention within their mandates. It was also concerned at the lack of NPM expertise in medical and mental health issues.

62. **The Commission recommends that funding levels should be increased without delay to cover the actual costs of OPCAT work of NPMs, where the appropriation for OPCAT work is less than the actual costs of that work, and to enable NPMs to carry out more site visits and to establish a coordinated mechanism to engage the services of experts to assist with those visits.**

NPM mandate

63. A substantial number of areas where people are deprived of their liberty are not currently monitored by NPMs. This includes facilities where people reside subject to a legal substitute decision-making process, such as locked aged care facilities, dementia units, compulsory care facilities, community-based homes and residences for disabled persons, and other situations where children and young people are placed under temporary state care or supervision. People detained in these facilities potentially are vulnerable to ill-treatment that can remain largely invisible.

64. Currently, an estimated 138 aged care providers with locked facilities potentially fall within the scope of OPCAT. Care agencies note that with a rapidly aging population the health system is already under pressure as the sector is reaching capacity. These and other factors potentially impact on the quality of care provided to the elderly and increase the risk of ill-treatment, including over-medication and pharmaceutical restraint.[29] The WGAD noted "that despite the increasing phenomenon of older persons staying in residential care, there is very little protection available to ensure that they are not arbitrarily deprived of their liberty against their will."[30] It called on the government "to develop a comprehensive, human rights-based legal framework

[28] Ibid at 13.
[29] See *Elder abuse and neglect*, Families Commission (2008), p.16.
[30] United Nations Working Group on Arbitrary Detention, *statement at the conclusion of its visit to New Zealand (24 March -7 April 2014).*

governing the provision of services to older persons suffering from dementia or other disabilities in residential care."[31]

65. The Committee on the Rights of Persons with Disabilities in April 2014 identified that the detention of persons with disabilities, whose legal capacity has been denied, in institutions against their will (either without their consent or with the consent of a substitute decision-maker), results in risks of ill-treatment, including the exercise of seclusion and restraint and un-consented medical treatment.[32]

66. A 2013 study highlighted the hidden nature of ill-treatment directed against disabled persons within the community.[33] People in home-care/live-in support situations may have limited ability to communicate their needs, or any concerns about their treatment, or may be reliant on the abuser for day-to-day support and assistance.

67. These facilities are all subject to New Zealand's international obligations in the ICCPR[34] and CAT[35] and may be subject to various types of general monitoring under the auspices of different government agencies. However, the lack of rigorous preventative oversight from an OPCAT specific perspective is concerning.

68. **The Commission would welcome guidance from the Committee on these issues and urges the Government to prioritise reviewing the scope of the OPCAT mandate in New Zealand with a view to identifying ways to address the gaps in monitoring all places where people are deprived of their liberty. Any increase in scope would need to be properly funded.**

[31] Ibid.
[32] See CRPD General Comments No.1 (2014), p.10. New Zealand ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2008.
[33] *The Hidden Abuse of Disabled People Residing in the Community: An Exploratory Study,* Roguski, M (18 June 2013). http://www.communityresearch.org.nz/wp-content/uploads/formidable/Final-Tairawhiti-Voice-report-18-June-2013.pdf.
[34] ICCPR Article 7.
[35] CAT Article 16.

3. Violence

A. Violence against women

LOIPR: para 4 – In light of previous recommendations of the Committee (para.17), please provide statistical data on the number of incidents of violence against women, including domestic violence, since the consideration of the last periodic report in 2009...

Please indicate if the State party has taken additional protective measures for women during the period under review

Relevant provision of the CAT: Article 2

Key issues:

- Violence against women is pervasive. In 2013, there were 6749 recorded male assaults female offences. There were 1,848 reported sexual offences against an adult over 16 years.
- Only 1 in 10 sexual assaults are actually reported to Police and only 3 of them are prosecuted.
- Lack of an agreed common understanding and definition of family and sexual violence.
- Lack of appropriate data.
- Lack of joined up programmes and services that are monitored and evaluated.
- Apparent lack of emphasis on prevention in some Police practice and policy.
- Confusion about the application of sections 128 and 134 of the Crimes Act 1961 in investigations of sexual assault.

Recommended actions:

The Commission recommends that the Government:

- commit through the Social Sector CEO Group – or another appropriate forum – to:
    - develop in consultation with civil society an agreed definition of sexual and family violence and appropriate minimum data set of indicators; and
    - co-ordinate and monitor all interventions to reduce violence and ensure that they are adjusted and extended as required on the basis of robust empirical evidence.
- review Police practice and policy to ensure that appropriate emphasis is placed on prevention; and
- ensure that adequate instruction and guidance about the application of section 128 and 134 of the Crimes Act 1961 is provided to the Police Child Protection Team.

69. Violence against women in New Zealand is pervasive and as Kofi Annan has noted, perhaps the most shameful human rights violation.[36] Studies quoted by the Ministry of Women's Affairs (now Ministry of Women) show the gender of victims of sexual violence as being between 92 and 95 percent female.[37] The groups most at risk of sexual violence are young women, Māori women, women who have been victimised before and people with disabilities.[38] Young women between the ages of 16 and 30 comprise 66-70 percent of victims of sexual violence. Just under half of all victims are New Zealand European, just under one third is Māori, and just over one tenth is Pacific. Urgent and ongoing attention is required to address violence in the home and the wider community.

[36] Kofi Annan (1999\0, quoted in "Violence Against Women in Aotearoa New Zealand 2009", Herbert, Hill, A and DicksonS. Published online at http://.roundtablevaw.org.nz/Integrated.pdf
[37]Restoring Soul (2009), Ministry of Women's Affairs. (Wellington New Zealand) p84
[38]V Kingi and J Jordan 2009 and S Triggs et al 2009 quoted in Restoring Soul (2009) Ministry of Women's Affairs (Wellington New Zealand) p12
http://www.mwa.govt.nz/news-and-pubs/publications/restoring-soul-pdf

70. In 2013, there were 6749 recorded male assaults female offences and 5025 recorded offences for breaching a protection order. There were 1,848 reported sexual offences against an adult over 16 years. While these statistics are compelling, they do not reflect the full picture – only 1 in 10 sexual assaults are actually reported to Police and only 3 of them are prosecuted.

71. Twenty nine percent of New Zealand women reported having experienced sexual assault in their lifetime. 73% of these assaults were perpetrated by a partner, ex-partner or other family member.[39] One in three (35.4%) ever-partnered New Zealand women report having experienced physical and/or sexual Intimate Partner Violence ("IPV") in their lifetime. When psychological/emotional abuse is included, 55% report having experienced IPV in their lifetime.

72. In 2013, Women's Refuges received 81,720 crisis calls. 7,642 women accessed advocacy services in the community and 2,940 women and children stayed in safe houses.[40]

73. The latest statistics collated for the New Zealand Families Commission is reproduced in tables 1 -6 below.

[39] Mayhew, P., Reilly, J.L. (2009). 'The New Zealand Crime and Safety Survey.' In *Family Violence Statistics Report*. Wellington: Families Commission. August. Retrieved June 2013 from http://www.familiescommission.org.nz/sites/default/files/downloads/family-violence-statistics-report.pdf

[40] National Collective of Independent Women's Refuges. (2013). Annual Report : July 2012 - June 2013. Wellington: NCIWR. Retrieved from https://womensrefuge.org.nz/users/Image/Downloads/PDFs/Annual%20Report%202012-2013.pdf

Table 1: Male assaults Female and Breaches of Protection Order Offences and Apprehensions

	2005	2006	2007	2008	2009	2010	2011	2012	2013
TOTAL RECORDED MALE ASSAULTS FEMALE OFFENCES	**8049**	**8326**	**9593**	**9630**	**9583**	**8925**	**7896**	**7651**	**6749**
Number of resolved Male Assaults Female	7295	7655	8862	8962	8865	8185	7242	6749	5754
% of recorded offences	*91%*	*92%*	*92%*	*93%*	*93%*	*92%*	*92%*	*88%*	*85%*
TOTAL RECORDED OFFENCES FOR BREACHING A PROTECTION ORDER	**4297**	**4290**	**4874**	**4914**	**5278**	**5327**	**5217**	**4816**	**5025**
Number of resolved breaches of Protection Order offences	3847	3858	4380	4413	4759	4689	4744	4185	4278
% of recorded offences	*90%*	*90%*	*90%*	*90%*	*90%*	*88%*	*91%*	*87%*	*85%*

Source: New Zealand Police

Table 2: Sexual Assault - Apprehensions for sexual offences against adult women (>16 years)

	2005	2006	2007	2008	2009	2010	2011	2012	2013
TOTAL APPREHENSIONS	570	703	689	754	770	674	728	698	651
Apprehensions that were prosecuted	405	562	537	594	623	528	591	543	536
% of total apprehensions	*71%*	*80%*	*78%*	*79%*	*81%*	*78%*	*81%*	*78%*	*82%*
Apprehensions that were warned/cautioned	66	64	72	55	41	57	50	54	70
% of total apprehensions	*12%*	*9%*	*10%*	*7%*	*5%*	*8%*	*7%*	*8%*	*11%*
Apprehensions resulting in other outcome	99	77	80	105	106	89	87	101	45
% of total apprehensions	*17%*	*11%*	*12%*	*14%*	*14%*	*13%*	*12%*	*14%*	*7%*

Source: New Zealand Police

Table 3: Prosecutions and convictions for sexual violence against adult women (>16 years)

	2005	2006	2007	2008	2009	2010	2011	2012	2013
NUMBER OF CHARGES PROSECUTED	**1049**	**1084**	**1057**	**1080**	**1265**	**1152**	**1086**	**1214**	**1282**
Number of convictions	403	386	360	347	447	434	400	401	522
% of charges prosecuted	*38%*	*36%*	*34%*	*32%*	*35%*	*38%*	*37%*	*33%*	*41%*
Number of Youth Court proved	5	3	5	2	4	3	3	6	6
% of charges prosecuted	*<1%*	*<1%*	*<1%*	*<1%*	*<1%*	*<1%*	*<1%*	*<1%*	*<1%*
Number discharged without conviction	6	3	6	7	8	6	9	4	11
% of charges prosecuted	*<1%*	*<1%*	*<1%*	*<1%*	*<1%*	*<1%*	*1%*	*<1%*	*<1%*
Number of other outcomes	635	692	686	724	806	709	674	803	743
% of charges prosecuted	*61%*	*64%*	*65%*	*67%*	*64%*	*62%*	*62%*	*66%*	*58%*

Source: New Zealand Police

Table 4: Number of hospitalisations for assault on women aged between 15 and 50 years

	2005	2006	2007	2008	2009	2010	2011	2012
TOTAL HOSPITALISATIONS FOR ASSAULTS ON WOMEN AGED 15-50	**344**	**416**	**417**	**411**	**455**	**489**	**461**	**451**
Assault hospitalisation – perpetrator family member	173	229	226	227	232	287	255	251
% total assault hospitalisations	*50%*	*55%*	*54%*	*55%*	*51%*	*59%*	*55%*	*56%*
Assault hospitalisation – perpetrator non-family member	50	64	63	64	87	99	91	83
% total assault hospitalisations	*15%*	*15%*	*15%*	*16%*	*19%*	*20%*	*20%*	*18%*
Assault hospitalisation – relationship with perpetrator unknown	121	123	128	120	136	103	115	117
% total assault hospitalisations	*35%*	*30%*	*31%*	*29%*	*30%*	*21%*	*25%*	*26%*

Source: Ministry of Health

Table 5: Service Use -National Collective of Independent Women's Refuges

Description		05/06	06/07	07/08	08/09	09/10	10/11	11/12	12/13
Number of women accessing safe house services		2281	1920	1832	1930	3885 women and children	1635	2273	2940 women and children
Average length of stay in the safe house		37 nights	N/A	19 nights	26 days (women)	22 days (women)	23 days (women)	20 days (women)	24 days (women)
Numbers accessing advocacy services in the community	Women	9611	8808	9365	11,305	12,513 Women and children	8930	8410	7642
	Children	3565	4637	4815	7161		7005	N/A	N/A
Number of crisis calls received		41,734	47,918	49,509	52,739	58,485	60,565	85,794	81,720

Source: National Collective of Independent Women's Refuges

Table 6: Women using services: National Collective of Independent Women's Refuges

Description		05/06	06/07	07/08	08/09	09/10	10/11	11/12	12/13
Ethnicity of women using refuge services	Pākehā	33%	37%	38%	33%	32%	43%	31%	40%
	Māori	48%	43%	47%	45%	45%	47%	50%	42%
	Pasifika	4%	6%	5%	6%	6%	6%	6%	7%
	European	4%	5%	6%	7%	7%	N/A	9%	N/A
	Asian	1%	2%	2%	2%	2%	3%	2%	3%
	Other/ Unknown	5%	7%	6%	7%	7%	1%	2%	8%
Ages of women using refuge services	<17	N/A	N/A	2%	N/A	N/A	1%	2%	1%
	17-25	27%		25%	27%	27%	26%	27%	24%
	26-35	34%		30%	30%	29%	30%	30%	30%
	36-45	26%		25%	24%	24%	25%	24%	24%
	46+	13%		13%	13%	13%	14%	13%	16%
	Unknown			5%	6%	6%	4%	4%	5%

Source: National Collective of Independent Women's Refuges

74. Despite the efforts of successive governments the continuing high level of violence against women and girls remains one of New Zealand's greatest contemporary challenges. The continued absence of an agreed common understanding and definition of family and sexual violence and a lack of appropriate data and indicators invariably

limit the ability to monitor and evaluate the effectiveness of various programmes and services.[41]

75. The Commission met with key civil society groups in the development of the NPA. The lack of adequate and sustainable funding for some programmes, and the absence of joined up programmes and services that are monitored and evaluated were highlighted as key concerns.

76. There are a number of promising new initiatives underway including a proposed population survey to ascertain the full extent of family and sexual violence in New Zealand, a more efficient and 'mobile' way that Police are collecting family violence data, an innovative new model of how victims of sexual violence are managed, and the pilot of healthy relationship training in nine secondary colleges.

77. While the Commission welcomes the Government's ongoing commitment to address violence against women and girls, it remains concerned that progress has been slow. **The Commission recommends that the Government commit through the Social Sector CEO Group – or another appropriate forum – to:**

- **develop in consultation with civil society an agreed definition of sexual and family violence and appropriate minimum data set of indicators; and**
- **co-ordinate and monitor all interventions to reduce violence and ensure that they are adjusted and extended as required on the basis of robust empirical evidence.**

Roastbusters

78. In early November 2013 stories about the sexual activities of a group of young men in Auckland who referred to themselves as *Roastbusters* gained worldwide media attention. The young men allegedly intoxicated young women (under the age of 16) and engaged in sexual conduct with them.

79. The New Zealand Police had received reports of concern about four separate incidents involving the *Roastbusters* between 2011 and early 2013. None of these resulted in criminal charges being laid.

[41] Reported sexual assaults only account for 1% of actual assaults.

80. The alleged behavior and the lack of Police action garnered public outrage. On 16 November 2013 numerous protests were held across New Zealand's major cities to speak out against rape culture, the police mishandling of the case, victim blaming and inadequate funding for rape crisis centres and educational programmes set up focusing on consent, and rape prevention and awareness.

81. The IPCA was asked by the Minister of Police to conduct an inquiry into Police actions in this case. In March 2015 the IPCA released its report.[42] The IPCA found that "while existing Police child protection policy and investigation is sound," the Police failed in several significant areas to meet the requirements of a good criminal investigation.[43]

82. In particular the IPCA concluded that there was a lack of emphasis on prevention in the investigations. The IPCA stated in its report that:[44]

> *…all of the Police officers involved in these matters treated the young women and their families with courtesy and compassion, and ensured that they were afforded both dignity and privacy. Officers were clearly victim-focused and motivated to act in accordance with the victims' wishes, and in their best interests. The Authority does not question the appropriateness and importance of this focus, and recognizes the substantial improvements in policing practice that have effected in the last decade. However, it is concerned that in several of these cases, because officers concluded that there was insufficient evidence to proceed without the cooperation of the young women, they decided that no further action was required. They therefore overlooked the importance of holding the young men accountable for their behavior and* ***preventing*** *its recurrence.*
>
> (Emphasis added)
>
> The Police, themselves, have acknowledged that this is an area requiring further policy development to guide Police practice.[45]

[42] IPCA, *Report on Police's Handling of the alleged offending by 'Roastbusters',* Wellington (March 2015).
[43] Ibid at 33.
[44] Ibid at 14.
[45] Ibid.

83. The young men were alleged to have committed such offences as sexual violation by rape and unlawful sexual connection, attempted rape, and assault with intent to commit sexual violation. These offences are set out in the Crimes Act 1961 ("Crimes Act").

84. Section 128 of the Crimes Act states that the offence of sexual violation is committed if it can be proven that the alleged victim does not consent to the connection, and that the alleged perpetrator does not have a reasonably held belief that he or she is consenting.

85. There is no statutory definition of consent. The courts have held that it must be full, voluntary, fee and informed[46] and that a person must understand their situation and be capable of making up their mind when they agreed to the sexual acts.[47] In addition section 128 A states:[48]

> *(1) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.*
>
> *(3) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.*
>
> *(4) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.*

86. Under section 134 of the Crimes Act, everyone who has a sexual connection with, or does an indecent act on, a young person (under the age of 16 years) has committed an offence and is liable to a term of imprisonment. There is no consent requirement under section 134.

87. While acknowledging that it is uncommon for Police to prosecute a young person under section 134 as it is not considered to be in the public interest to do so, the IPCA found that there were a number of aggravating factors in these cases that should have prompted prosecution. In particular, the young women were between two and three

[46] *R v Isherwood* CA182/04, 14 March 2005.
[47] *R v Adams* CA70/05, 5 September 2005
[48] Crimes Act 1962, s128A.

years younger than the men; they were vulnerable; the extent to which they were willing parties was at best equivocal; and they were subject to sexual acts by more than one man. Furthermore the behavior of the young men was considered serious and required a response.

88. The IPCA concluded that the Police Child Protection Team did not properly evaluate all available offences due to a misunderstanding of the interplay between sections 128 and 134 of the Crimes Act.

89. **Drawing on the IPCA report the Commission recommends that the Government commit to:**

- **reviewing Police practice and policy to ensure that appropriate emphasis is placed on prevention; and**
- **ensuring that adequate instruction and guidance about the application of section 128 and 134 of the Crimes Act 1961 is provided to the Police Child Protection Team.**

B. Violence, abuse and neglect of children

LOIPR – par 5 –Please provide information on legislative and other steps taken by the State Party to prevent and eradicate violence, sexual abuse, neglect, maltreatment or exploitation of children within the family, in schools and in institutional or other care

Relevant provision of the CAT: Article 2

Key issues:

- New Zealand has the 5th worst child abuse record of 31 OECD countries.
- The number of children suffering abuse and neglect has, however, gone down for the first time in 10 years.
- Violence and bullying is endemic in New Zealand schools.

- Disabled children and young people, and same-sex attracted, both sex-attracted, trans and intersex children and young people are disproportionately affected by violence in schools.

Recommendations:

- The Commission recommends that the Government continue to actively monitor the impact of its policies and programmes on reducing the number of children experiencing physical and sexual abuse.

- The Commission recommends that the Committee urge the Government to extend its *Positive Behaviour for Learning* initiative to all New Zealand schools and fully implement the "Bullying Prevention and Response Strategy and Implementation Plan" agreed by the Bullying Prevention Advisory Group.

90. While there has been some good progress, the level of family violence in New Zealand is unacceptably high. New Zealand has the fifth worst child abuse record of 31 OECD countries.

91. The government has set a target for the public service to halt the ten year rise in children experiencing physical abuse and reduce the total number to 3,000 by 2017.

92. In 2014, 3178 children were physically abused, 1294 were sexually abused and 9,499 suffered emotional abuse and neglect.[49] This is a decrease of 12 percent from 2013 where 3,181 children were physically abused, 1,423 were sexually abused and 11,386 suffered emotional abuse and neglect.[50]

[49] http://www.scoop.co.nz/stories/PA1501/S00097/child-abuse-down-by-12-percent-but-still-way-too-high.htm

[50] Ibid.

93. The Commission is pleased to see that the number of children suffering abuse and neglect in New Zealand has gone down for the first time in 10 years. However more needs to be done to ensure the physical and emotional safety and wellbeing of all children in New Zealand. **The Commission recommends that the Government continue to actively monitor the impact of its policies and programmes on reducing the number of children experiencing physical and sexual abuse**.

Bullying

94. Violence and bullying is endemic in New Zealand schools. Effects on victims can include living with anxiety and fear, lowered self-esteem, engagement in risk-taking behaviours such as substance abuse, self-harming, truanting and dropping-out from school, with associated long term adverse impacts. Victims may also suffer mental health issues including suicidal ideation, relationship difficulties and impeded emotional, behavioural and cognitive development.[51] Disabled children and young people, and same-sex attracted, both sex-attracted, trans and intersex children and young people are disproportionately affected by violence in schools.

95. In 2013 the government convened a cross-sector Bullying Prevention Advisory Group ("BPAG"). BPAG has produced a guide for schools to help prevent bullying and to provide practical advice on what to do when bullying occurs. The Commission is part of BPAG along with other accountability mechanisms such the Children's Commissioner, Ombudsman and Education Review Office. The BPAG has developed an overall plan to prevent bullying. The plan is known as the "Bullying Prevention and Response Strategy and Implementation Plan". Suggestions that the plan focus only on disabled students and GLBTI students were rejected, at the Commission's request because in the Commission's view changing the attitudes of non-disabled and non-GLBTI students was critical to improving inclusion of disabled and GLBTI students. It was agreed that there will be a focus on disabled and GLBTI students but the whole school culture needed to be addressed at the same time.

96. The Ministry of Education's *Positive Behaviour for Learning*[52] initiative represents a major step towards ensuring that New Zealand schools are safe, positive and

[51] Office of the Children's Commissioner (2009) *School Safety: An Inquiry into the safety of students at school*
[52] http://www.minedu.govt.nz/NZEducation/EducationPolicies/SpecialEducation/OurWorkProgramme/PositiveBehaviourForLearning/About.aspx

inclusive. It moves away from seeing individual students as a "problem" and towards proactively changing the environment around them to support positive behaviour. However, less than half the schools in New Zealand are engaged in the initiative.

97. **The Commission recommends that the Committee urge the Government to extend its *Positive Behaviour for Learning* initiative to all New Zealand schools and fully implement the "Bullying Prevention and Response Strategy and Implementation Plan" agreed by the Bullying Prevention Advisory Group.**

C. Disabled People

Relevant provision of the CAT: Article 2

Key issues:

- Disabled people in community care situations are not adequately protected by existing legal frameworks from violence and abuse.

- The consent of an intellectually disabled girl under the age of 18 is not required before sterilisation can be performed.

Recommendations:

The Commission recommends that the Government commit to reviewing:

- the application of the Domestic Violence Act 1995 to disabled people in community care situations; and
- the current framework for sterilisation in light of its international human rights obligations.

98. A recent study[53] focusing on violence against disabled people highlighted the hidden nature of much abuse directed against disabled people within the community. In addition to the physical, emotional and sexual abuse experienced by non-disabled people, "locked in" and "silencing" violence is often specifically directed at disabled people.

99. The report noted that it was reasonable to interpret the Domestic Violence Act 1995 as generally excluding people in employer/employee relationships, such as care workers, from the definition of a domestic relationship. The author continued:[54]

As such, it is not clear whether the Act adequately protects disabled people experiencing abuse in home-care/live-in support situations. There appears to be an uncertainty about the legal protection available to disabled people experiencing such abuse, and particularly emotional and psychological abuse.

100. **The Commission recommends that the Government commit to reviewing the application of the Domestic Violence Act 1995 to disabled people in community care situations.**

Sterilisation

101. The consent of an intellectually disabled girl under the age of 18 is not required before sterilisation can be performed. The Care of Children Act 2004[55] provides that a minor's guardians together with the appropriate medical professionals have the authority to decide which medical treatments they will receive and the High Court has observed that court authorisation in a case of sterilisation is not required.[56]

102. This is in stark contrast to similar jurisdictions, such as Australia, where a court order is required. The Commission is unaware of any government work programme to review or amend the current framework.

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[53] *The Hidden Abuse of Disabled People Residing in the Community: An Exploratory Study*, Roguski, M (18 June 2013) http://www.communityresearch.org.nz/wp-content/uploads/formidable/Final-Tairawhiti-Voice-report-18-June-2013.pdf.

[54] Ibid.

[55] Care of Children Act 2004 s36(1)

[56] *Re X* [1991] 2 NZLR 365 (HC)

103. **The Commission recommends that the Government commit to reviewing the current framework for sterilisation in light of its international human rights obligations.**

4. Detention of Asylum Seekers

LOIPR: para 10 – Please provide information on the detention of asylum seekers and undocumented migrants in correctional facilities and indicate whether they are detained together with convicted prisoners

Relevant provision of the CAT: Article 1, 3, 4, 10, 11 and 16

SPT Recommendation:

The SPT recommends that the State party should expedite the rebuilding of the Mangere refugee and asylum centre with a view to ensuring that living conditions respect the dignity of refugees and asylum seekers.

The State party should also, as a matter of urgency, improve record keeping at the Mangere refugee and asylum centre, ensuring that information concerning refugees and asylum seekers is easily accessible and accurate.

WGAD Recommendation:

It is of concern to the Working Group that New Zealand is using the prison system to detain irregular migrants and asylum seekers....

The Working Group is also concerned over cases reported to it in which asylum seekers and irregular migrants were not provided with legal representation and interpretation, and detained in police stations or remand prisons.

Key issues:

- The appropriateness of using police stations for immigration purposes.
- The criminalisation of asylum seekers.
- Lack of knowledge and training in relation to identification of symptoms of trauma and standards of detention for asylum seekers.

- Inability to appropriately monitor the standards of detention in relation to asylum seekers in line with international obligations.

- Absence of adequate individual review mechanism in relation to the Immigration Amendment Act 2013.

Recommended action:

The Commission recommends that the Committee urge the Government to ensure:

- asylum seekers detained in correctional facilities are separated from other prisoners;

- asylum seekers are not subject to criminal standards of detention; and

- prison staff are appropriately trained in relation to standards of detention for asylum seekers, the identification of the symptoms of trauma and human rights.

The Commission further recommends that the Government commit to reviewing the Immigration Amendment Act 2013 to ensure that:

- where detention is deemed to be a necessity, a maximum 30 day time limit should be adhered to, so that all asylum seekers are moved into the community once health, character and identity checks are complete; and

- adequate review mechanisms are available to those detained as part of a 'mass group' which consider individual circumstances to avoid delay, discrimination and unnecessary detention.

104. Detention of asylum seekers in New Zealand can occur under two circumstances. Those arriving at the border are initially held in police custody pending a risk assessment and court hearing. After the hearing, claimants are either detained at a prison if identity or security concerns are raised, conditionally released to an approved address in their community, or held at the Mangere Accommodation Centre.

105. For the year to date 16 claims for asylum had been made at the border, 3 were granted visas and released into the community, 7 were detained at the Mangere Accomodation Centre and 6 were detained in penal institutions. Statistics from the Ministry of Business, Innovation and Employment for the last the last 3 financial years are reproduced below:

2012/2013 Financial Year				
Month	**Visa**	**Penal**	**MRRC**	**Totals**
Jul	0	0	0	0
Aug	0	2	0	2
Sep	8	0	1	9
Oct	12	0	1	13
Nov	0	0	3	3
Dec	0	1	0	1
Jan	0	1	1	2
Feb	0	0	1	1
Mar	5	0	0	5
Apr	6	0	0	6
May	0	0	0	0
Jun	0	1	0	1
Total	**31**	**5**	**7**	**43**

2013/2014 Financial Year				
Month	**Visa**	**Penal**	**MRRC**	**Totals**
Jul	5	0	0	5
Aug	1	0	0	1
Sep	0	0	0	0
Oct	2	0	0	2
Nov	0	0	1	1
Dec	0	0	1	1
Jan	1	0	1	2
Feb	0	0	1	1
Mar	5	3	3	11
Apr	1	1	1	3
May	1	0	0	1
Jun	1	0	1	2
Total	**17**	**4**	**9**	**30**

2014/2015 Financial Year				
Month	**Visa**	**Penal**	**MRRC**	**Totals**
Jul	1	1	1	3
Aug	0	1	1	2
Sep	1	1	0	2
Oct	0	1	1	2
Nov	1	1	1	3
Dec	0	1	2	3
Jan	0	0	0	0
Feb	0	0	1	1
Mar				0
Apr				0
May				0
Jun				0
Total	**3**	**6**	**7**	**16**

106. Foreign nationals already detained in a prison under section 310 of the Immigration Act 2009 ("Immigration Act") can claim asylum, but must do so within two days of being taken into custody. In these cases, refugee and protection officers have access to the prison to interview them and are encouraged to make a decision as quickly as possible, ideally within 20 weeks. Claimants remain detained in prison until a decision is made, at which point they are released if granted refugee status.

107. Asylum seekers can appeal to the Immigration and Protection Tribunal if their claims are rejected. For those detained in a prison, the appeal must be made within five working days of the decision, while in all other instances the deadline is 10 working days. Legal aid is also available to those wanting to challenge their detention, a significant change provided for through the 2009 amendments to the Immigration Act.

Police cells

108. Under the 2009 Act any police station in New Zealand can be used to detain a person without a warrant of commitment for up to 96 hours including both undocumented migrants and asylum seekers whose identity is uncertain. Under the previous

immigration act detention could only last up to 72 hours. Individuals reportedly are generally detained at police stations for no longer than 24-48 hours.

109. The appropriateness of using police stations for immigration purposes has been criticised by human rights groups. For instance, the Papakura police station in Auckland has been criticised for not providing separate facilities for migrants and asylum seekers, as well as overcrowding and poor hygiene. Detainees also claimed being denied access to their belongings and being forced to sleep in cells without a mattress.

The Mangere Accomodation Centre

110. Located in a former army barracks, the Mangere Accommodation Centre (also known as the Mangere Refugee Resettlement Centre) is the sole facility in New Zealand dedicated entirely to housing refugees and asylum seekers. The centre's population is predominantly made up of incoming UN Quota Refugees being resettled in the country (of which New Zealand accepts 750 annually), as well as asylum seekers whose identity is uncertain and who do not pose either a risk of absconding or to national security. Both are housed together, which has reportedly caused resentment and tension between the two groups, and has led to criticism of differences in treatment, including a lack of parity in accessing housing and employment support services. On average, asylum seekers spend six weeks at the centre, which can hold up to 28 at any given time. While at the centre, the Immigration Act officially classifies these asylum seekers as 'detainees'

111. New Zealand authorities characterise the facility as "open detention". There are, however, limitations on asylum seekers' movements, and the centre's management has the right to refuse permission to leave during the day.

112. As part of Budget 2013, the New Zealand Government committed $5.5 million of operating expenditure over the next four years towards the cost of the rebuild of the Mangere Centre. The rebuild process is now underway.

Correctional Institutions

113. Asylum seekers and irregular migrants who are considered to potentially pose risk of absconding and/or a risk to national security are detained in correctional institutions. At the time of the WGAD visit to New Zealand they are generally held in Waikeria Prison, Arohata Prison for Women and Mt Eden Corrections Facility. These prisons are not providing separate facilities for immigrants in an irregular situation and asylum seekers.

114. Asylum seekers detained in these prisons are criminalised and are subject to general prison standards such as wearing prisoner uniforms and lockdowns. The UNHCR has made it clear that the imposition of such standards on asylum seekers is inappropriate.[57]

115. There are well known negative, and at times serious, physical and psychological, consequences for asylum seekers in prison detention. However, prison staff are often not trained in relation to asylum, the identification of the symptoms of trauma and standards related to detention of asylum seekers.

116. Furthermore corrections staff are often unaware which detainees are asylum seekers. The absence of this basic knowledge can prove problematic in monitoring the standards and conditions being applied to asylum seekers.

117. **The Commission recommends that the Government commits to ensuring that:**

- **asylum seekers detained in correctional facilities are separated from other prisoners;**
- **asylum seekers are not subject to criminal standards of detention; and**
- **prison staff are appropriately trained in relation to standards of detention for asylum seekers, the identification of the symptoms of trauma and human rights.**

[57] UNHCR, *Detention guidelines*, p 31 available at http://www.unhcr.org/505b10ee9.html .

Alternatives to Detention

118. Historically, New Zealand has been viewed as both a regional and global leader with regard to Alternative to Detention ("ATD") development and implementation. Section 315 of New Zealand's Immigration Act 2009 introduced a tiered detention and monitoring system that includes a greater ability to use reporting and residence requirements instead of secure detention. Section 315 reads:

> *[A]n immigration officer and the person liable for arrest and detention may agree that the person will do all or any of the following things:*
>
> *(a) reside at a specified place;*
>
> *(b) report to a specified place at specific periods or times in a specified manner;*
>
> *(c) provide a guarantor who is responsible for:*
>
> *(i) ensuring the person complies with any requirements agreed under this section; and*
>
> *(ii) reporting any failure by the person to comply with those requirements;*
>
> *(d) if the person is a claimant, attend any required interview with a refugee and protection officer or hearing with the Tribunal;*
>
> *(e) undertake any other action for the purpose of facilitating the person's deportation or departure from New Zealand.*
>
> *The person is subject to arrest and detention if they fail to comply with the conditions of their release or in order to execute a deportation order. The application of these conditions is at the discretion of the immigration officer.*

Immigration Amendment Act 2013

119. International law clearly sets out the permissible purposes and conditions of immigration detention. It is a fundamental human right that no one shall be subject to arbitrary or unlawful detention. This means that detention must not only be lawful but must be necessary, reasonable and proportionate. It can only be justified when other less invasive and restrictive measures have been considered and found insufficient to

safeguard the lawful objective. Criminalising illegal entry or irregular stay would exceed the legitimate interest of States.[58]

120. In relation to asylum seekers the UN guidelines on detention of asylum seekers state that detention of asylum seekers is only a legitimate purpose where it relates to verification of identity or the protection of national security or public order. Even then it must only be used as a matter of last resort and on exceptional grounds - after all possible alternatives to detention have been exhausted and for the shortest time possible.

121. However, in 2013 the Immigration Amendment Act[59] was passed. The Act introduces new provisions which enable detention of asylum-seekers who arrive in New Zealand by boat as part of a 'mass group' containing 30 or more persons. An Immigration officer can now apply to the District Court for a group warrant of commitment authorising the detention for a period of not more than 6 months. The Act also removes the right of an individual to apply to the District Court to vary a warrant of commitment or to be released on conditions.

122. While it is highly unlikely that the detention provisions of this Act will ever be used, the Commission remains concerned that in the absence of accessible and robust review mechanisms its application may result in arbitrary and unlawful detention. **The Commission recommends that the Government review the Immigration Amendment Act to ensure that:**

- **where detention is deemed to be a necessity, a maximum 30 day time limit should be adhered to, so that all asylum seekers are moved into the community once health, character and identity checks are complete; and**

- **adequate review mechanisms are available to those detained as part of a 'mass group' which consider individual circumstances to avoid delay, discrimination and unnecessary detention.**

[58] Working Group on Arbitrary Detention, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4, 10 January, 2008, para. 53.
[59] http://www.legislation.govt.nz/act/public/2013/0039/latest/whole.html

5. Over-representation of Māori in the criminal justice system

LOIPR: para 18 – In light of the previous recommendations of the Committee, please provide an update on … any legal, administrative and judicial measures taken to reduce the over-representation of Māori and Pacific Islands people in prison.

Relevant provision of the CAT: Article 11

SPT Recommendation:

The SPT recommends that the State party replicate and further develop existing programmes, including Māori literacy programmes, aimed at reducing Māori recidivism. The State party should focus on programmes which support reformation and reintegration, produce tangible outcomes and focus on preventing reoffending.

WGAD:

We recommend that a review is undertaken of the degree of inconsistencies and systemic bias against Māori at all the different levels of the criminal justice system, including the possible impact of recent legislative reforms. Incarceration that is the outcome of such bias constitutes arbitrary detention in violation of international law.

The Working Group has studied the police review and the 'Turning the Tides' initiative, and the review it recommends would take further the work of the police, extending it to other areas of the criminal justice system. The Working Group also considers that the search needs to continue for creative and integrated solutions to the root causes which lead to disproportionate incarceration rates of the Māori population.

Key Issues:

- Only 5% of Māori come into contact with the justice system
- However, those who do are disproportionately represented at every stage.
- Māori experience more factors which contribute to offending and victimization.

Recommended action:

It is recommended that the Government commit to addressing the overrepresentation on Māori in the criminal justice system by both:

- drawing on the approach of the Police and iwi in *Turning the Tides* to develop partnerships with iwi across other areas of the criminal justice system; and
- stepping up its efforts to address the root causes which lead to disproportionate incarceration rates of Māori.

123. Fourteen percent of the population is Māori. The vast majority – approximately 95% - do not come into contact with the justice system. However, those who do come into contact with the justice system are disproportionately represented at every stage of the process.

124. A recent report from the New Zealand Police, *A review of Police and Iwi/Māori relationships: working together to reduce offending and victimisation among Māori* ("Review"), confirmed that "Māori comprise 45% of arrests, 38% of convictions and over 50% of prison inmates."[60] Māori are significantly more likely than non-Māori to be reconvicted and re-imprisoned.

125. Twenty three percent of the 14 – 16 year old population is Māori.[61] The number of young Māori aged 14-16 who appear in the Youth Court is 5% of the total population of 14-16 year old Māori.[62] However, Māori make up 52% of apprehensions of 14 – 16 year olds,[63] and 55% of Youth Court appearances. [64]Māori youth offenders are given

[60] http://www.police.govt.nz/sites/default/files/publications/review-of-police-and-iwi-maori-relationships.pdf at i.
[61] Calculated using statistics for 14-16 year olds in the mean year ended 31 December 2012 from Statistics New Zealand (www.stats.govt.nz) "Māori Population Estimates: Mean Year Ended 31 Dec 1991-2012 and "Infoshare" "National Population Estimates" "Population" "Population Estimates DPE" "Estimated Resident Population by Age and Sex (1991+) (Annual-Dec)."
[62] Calculated using statistics for 14-16 year olds in the mean year ended 31 December 2012 from Statistics New Zealand (www.stats.govt.nz) "Māori Population Estimates: Mean Year Ended 31 Dec 1991-2012 and Statistics New Zealand "Child and Youth Prosecution Tables" "Multiple-Offence Type Prosecution".
[63] Calculated using statistics for the mean year ended 31 December 2012 from Statistics New Zealand (www.stats.govt.nz) "New Zealand Police Recorded Crime and Apprehensions Tables" "Annual Apprehensions for the Latest Calendar Years".
[64] Calculated using statistics for the mean year ended 31 December 2012 Statistics New Zealand (www.stats.govt.nz) "Child and Youth Prosecution Tables" "Multiple-Offence Type Youth Court Order".

65% of Supervision with Residence orders (the highest Youth Court order before conviction and transfer to the District Court).[65] [66]

126. The Review identified Māori women as disproportionately represented in the criminal justice system, noting that "the age-adjusted imprisonment rate for Māori men is about seven times that of New Zealand European men, and for Māori women, nine times the rate"[67]

127. The Review further acknowledged that "on average, Māori experience more factors which contribute to offending and victimisation: low education, low skills, unemployment, drug and alcohol abuse, and living in deprived neighbourhoods. These are often linked and mutually reinforcing so that they can create a vicious cycle in people's lives."[68] The factors which increase the likelihood of exposure to the criminal justice system ("CJS") can then be compounded by bias within the CJS. This can take the form of direct discrimination and/or indirect discrimination.[69]

128. As the WGAD acknowledged, therefore, it is not only important to reduce bias within the system but also to address those underlying risk factors which increase the likelihood of exposure to the criminal justice system. The WGAD stated:[70]

the search needs to continue for creative and integrated solutions to the root causes which lead to disproportionate incarceration rates of the Māori population.

129. Over the last three years, as a result of the *Drivers of Crime* initiative – a whole of government approach to reduce offending and victimisation – the number of young Māori appearing in court has reduced by 30%.[71] Building on the *Drivers of Crime* initiative, the Government launched the Youth Crime Action plan in October 2014. This plan aims to reduce youth crime and recidivism.

[65] Calculated using statistics for the mean year ended 31 December 2012 Statistics New Zealand (www.stats.govt.nz) "Child and Youth Prosecution Tables" "Multiple-Offence Type Youth Court Order".
[66] See also: Judge Andrew Becroft, *"From Little Things, Big Things Grow" Emerging Youth Justice Themes in the South Pacific,* Australasian Youth Justice Conference: Changing Trajectories of Offending and Reoffending (2013); http://www.aic.gov.au/media_library/conferences/2013-youthjustice/presentations/becroft-paper.pdf
[67] Ibid. at 25.
[68] Ibid at i.
[69] Ibid.
[70] Supra note 23.
[71] Minister of Justice, *Opening remarks to the UN Human Rights Council*, January 2014.

130. In addition, a recent crime and crash prevention strategy, *The Turning of the Tide*,[72] sets targets for reduced Māori offending, repeat offending and apprehensions. It commits police and Māori to working together to achieve common goals by 2018. These goals are:

- 10 percent decrease in the proportion of first-time youth and adult offenders who are Māori;
- 20 percent decrease in the proportion of repeat youth and adult victims and offenders who are Māori;
- 25 percent decrease in Police apprehensions (non-traffic) of Māori that are resolved by prosecution; and
- 20 percent reduction in Māori crash fatalities (without increasing the proportion of Māori injured in serious crashes).

131. Although these initiatives are achieving some very positive results, the over-representation of Māori in all levels of the criminal justice system in New Zealand remains an enduring issue.

132. **It is recommended that the Government commit to addressing the overrepresentation on Māori in the criminal justice system by both:**

- **drawing on the approach of the Police and iwi in *Turning the Tides* to develop partnerships with iwi across other areas of the criminal justice system; and**
- **stepping up its efforts to address the root causes which lead to disproportionate incarceration rates of Māori.**

[72] http://www.police.govt.nz/sites/default/files/resources/the-turning-of-the-tide-strategy.pdf

6. Children and young people

LOIPR – par 19 – ...please indicate whether all persons under 18 in conflict with the law are accorded special protection in compliance with international standards. Also, please inform on the application by the State party of the Beijiing Rules and the current availability of sufficient youth facilities and whether all juveniles in conflict with the law are held separately from adults in pretrial detention and after conviction.

Relevant provision of the CAT: Article 11

Key issues

- The protections in the CYPF Act do not extend to 17 year olds. Seventeen year olds are considered adults for penal responsibility, tried as adults, and if convicted, are sent to adult prisons.
- The number of young people detained in police custody is on the rise
- There is a lack of consideration of children and vulnerable people when executing search warrants.

Recommendations

It is recommended that the Government:

- review the application of the CYPF Act to 17 year olds;
- continue to progress the recommendations from the IPCA's Joint Thematic Review of Young Persons in Police Detention;
- amend their policy on planning for children and vulnerable people present during the execution of a search warrant; and
- ensure that the development of a new operating model for Child, Youth and Family is

founded on New Zealand's international human rights obligations including under CAT and OPCAT.

133. As noted above,[73] a notable gap remains in relation to the legislative protections available to young people aged 17 years. The CYPF Act is the key piece of legislation relating to detention of children and young people up to the age of 17. Despite recommendations by the UN Committee on the Rights of the Child[74] and the Committee to extend the protection measures under the CYPF Act to include 17-year-olds, this has not occurred.

134. Seventeen year olds are considered as adults for penal responsibility, tried as adults and, if convicted, are sent to adult prisons. The Department of Corrections has dedicated Youth Units for male prisoners under the age of 18 years. Male prisoners 18 and 19 years may also be housed in these units if a test shows that this in their best interests. Currently, there is no separate unit for female prisoners under the age of 18 because there are consistently fewer than five at any time. The Government states that they can be easily separated from the mainstream population where appropriate.

135. However, the SPT has noted that the prisoner classification system, combined with limited space and limited staff numbers, undermines the full implementation of juvenile justice standards and in some instances leads to further penalisation of young persons – by for example, being subject to increased lock down periods.

136. **It is recommended that the Government review the application of the CYPF Act to 17 year olds.**

Police Detention

137. When young people need to be arrested for their own safety or the safety of others, it's an opportunity for them to turn their life around. This kind of intervention is an opportunity to point that life in a different direction. If that doesn't happen, or worse, if the young person is mistreated or doesn't know their rights, there are other consequences that follow and they are more likely to reoffend.

[73] Paragraph 17.
[74] Committee on the Rights of the Child's, *Concluding Observations in relation to New Zealand's 4th and 5th periodic reports*, CRC/C/NZL/CO/3-4, 201, http://www.converge.org.nz/pma/CRC-C-NZL-CO-3-4.pdf

138. Police cells are intended for the short-term detention of adults awaiting bail or transfer to a remand facility. They are not suitable for long-term detention of any prisoner, and are particularly unsuitable for the detention of young people. However, data indicates that the numbers of children and young people detained in police custody are on the rise.[75]

139. The Joint Thematic Review of Young Persons in Police Detention,[76] published by the IPCA in 2012 issued 24 recommendations aimed at improving police training and treatment of children of young people in police custody. **The Commission urges the Government to continue to progress the implementation of these recommendations.**

Police procedures

140. The IPCA's recent report on police conduct during the Operation 8 raids noted a lack of police policy regarding planning for and response to children and vulnerable occupants affected by the raids was undesirable.[77] The IPCA recommended that the Police review and amend their policy on planning for children and vulnerable people, in order to set out steps to be taken whenever children or vulnerable people are present during the execution of a search warrant.

Child, Youth and Family

141. On 1 April 2015 Social Development Minister Anne Tolley announced that "an independent panel has been established to lead a complete overhaul of Child, Youth and Family, to ensure that the agency delivers the best possible results for vulnerable children and their families in the decades ahead."[78] The Panel is due to lodge its first report on 30 July 2015.

142. The terms of reference[79] are broad and include reviews of the child protections and youth justice residences and of the adequacy of current independent oversight,

[75] http://www.ipca.govt.nz/Site/media/2012/2012-October-23-Joint-Thematic-Review.aspx
[76] Ibid.
[77] Independent Police Conduct Authority, Operation 8: The report of the Independent Police Conduct Authority, p 60, 82.
[78] http://www.beehive.govt.nz/release/independent-expert-panel-lead-major-cyf-overhaul
[79] http://www.msd.govt.nz/documents/about-msd-and-our-work/newsroom/media-releases/2015/cyf-modernisation-tor.pdf

complaints and advocacy. This will invariably necessitate a review OCC's functions, including its NPM functions.

143. **The Commission recommends that the Government ensure that the development of a new operating model for Child, Youth and Family is founded on New Zealand's international human rights obligations including under CAT and OPCAT.**

7. Historic Cases of abuse

LOIPR – par 26 – In light of the previous recommendations of the Committee (para.11), please provide statistical data on the number of "historic cases" of cruel, inhuman or degrading treatment which have been processed since the consideration of the last periodic report....

Relevant provisions of the CAT: Article 12, 13, 14, 16

Key issues

- Some claimants and their lawyers question the impartiality and independence of the MSD Historic Claims process.

- The MSD process deals with claims of abuse and mistreatment in social welfare homes and residences. There is no analogous process to deal with claims about abuse in care settings administered by other agencies.

- The Confidential Listening and Assistance Service has been integral to the resolution of historic claims and ensuring that the dignity of claimants is upheld. Unfortunately the Service will be closing in 2015.

- To date there has only been limited acknowledgement of historic abuse and mistreatment of disabled people in care.

Recommendations

- The Commission would welcome guidance from the Committee on the benefit of judicial verses non-judicial processes as to the amounts of compensation actually received by victims net of legal and other costs.

- The Commission would welcome guidance from the Committee as to what circumstances, if any, may necessitate structural independence to comply with the impartiality requirement of Article 12.

- The Commission urges the Government to ensure that any proposed new process extends to all claims of historic abuse in state care and is founded on New Zealand's international human rights obligations. Any such process must also be appropriately adapted to be accessible to people with intellectual disabilities.

- The Commission encourages the government to acknowledge all historic abuse and the ongoing detrimental impact it has had on the lives of disabled people who were under state care. It is important that an apology accompany this acknowledgement.

144. Allegations of abuse in state care are dealt with through a variety of mechanisms. These include:

    a. the existing social security regime;

    b. the Accident Compensation framework;

    c. the Ministry of Social Development's Historic Claims process;

    d. Confidential Listening and Assistance Service (and before that the confidential forum); and

    e. the Courts (to a very limited degree).

145. The current framework has progressively developed over the past few years and some hard lessons have been learnt. It is now generally accepted by all parties that the courts are not the appropriate forum for resolving such complaints.

146. That same conclusion was the basis of the establishment of the Accident Compensation ("ACC") framework in 1974 under which the ability for anyone to sue in tort for damages for personal injury was abolished. As a result people who have suffered personal injury do not have the right to sue an at-fault party, except for

exemplary damages. As in OPCAT the importance of prevention, rehabilitation and compensation are the foundations in the ACC framework.

147. In the summary of the report that led to the establishment of the ACC framework the authors made the following statements: [80]

The toll of personal injury is one of the disastrous incidents of social progress, and the statistically inevitable victims are entitled to receive a co-ordinated response from the nation as a whole. They receive this only from the health service. For financial relief they must turn to three entirely different remedies, and frequently they are aided by none.

The negligence action is a form of lottery. In the case of industrial accidents it provides inconsistent solutions for less than one victim in every hundred. The Workers' Compensation Act provides meagre compensation for workers, but only if their injury occurred at their work. The Social Security Act will assist with the pressing needs of those who remain, provided they can meet the means test. All others are left to fend for themselves.

Such a fragmented and capricious response to a social problem which cries out for co-ordinated and comprehensive treatment cannot be good enough. No economic reason justifies it. It is a situation which needs to be changed.

Prevention, Rehabilitation, and Compensation—Injury arising from accident demands an attack on three fronts. The most important is obviously prevention. Next in importance is the obligation to rehabilitate the injured. Thirdly, there is the duty to compensate them for their losses. The second and third of these matters can be handled together, but the priorities between them need to be stressed because there has been a tendency to have them reversed. No compensation procedure can ever be allowed to take charge of the efforts being made to restore a man to health and gainful employment.

[80] Royal Commission to Inquire into and Report upon Workers Compensation. Compensation for personal injury in New Zealand. Report of the Royal Commission of Inquiry.Wellington : Govt. Print., 1967 ("Woodhouse Report") p 19 http://www.library.auckland.ac.nz/data/woodhouse/woodhouse1.pdf

148. The ACC framework does not apply to most historic abuse occurring before 1974 and therefore for victims the "the negligence action is a form of lottery" and a lottery that has seen no such legal challenge succeed.

149. In 2006 the government established a team within the Ministry of Social Development ("MSD") to investigate and resolve claims of historic abuse and mistreatment out of Court. MSD will respond to a direct approach from any affected person and will consider making an apology and providing some compensation.

150. Between January 2004 and December 2014, MSD received 1682 historic claims of abuse, or which 569 have been dealt with. NZ$8 million, or an average of NZ$14,059, has been paid out to claimants so far. In addition the State has funded millions of dollars in its own legal costs and the costs of legally aided lawyers representing victims. The Commission is not aware what victims themselves have paid for legal representation but the NZ$8 million is the gross damages paid under the MSD process not the compensation received by victims net of costs, including legal costs.

151. **The Commission would welcome guidance from the Committee on the benefit of judicial verses non-judicial processes as to the amounts of compensation actually received by victims net of legal and other costs.**

152. The Confidential Listening and Assistance Service"(CLAS") was established in 2008 to hear from people alleging abuse or neglect while in state care before 1992. More than 1100 people have registered with the service.

153. Taken together CLAS and the MSD Care Claims and Resolution process establishes an integrated mechanism to provide remedies and rehabilitation to claimants in relation to social welfare homes and residences.

Impartiality

154. One criticism of the MSD Historic Claims process from some claimants and their lawyers is that there is a lack of independence – whether perceived or actual. These lawyers advise that the fact that the department against whom a claim has been made is investigating that claim has caused some victims to lose confidence in the process.

155. Article 12 of CAT requires "each State Party shall ensure that its competent authorities proceed to a prompt and **impartial** investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." As the Committee is aware that same obligation applies to cases of cruel, inhuman or degrading treatment.

156. The Commission notes that "Article 12 [of CAT] does not require an investigation by an independent body, much less by a judicial body. But the investigation must be prompt and impartial, i.e. serious, effective and not biased."[81]

157. Although independence is not required by Article 12, this does not mean that it is not a desirable feature of an investigation.[82] **The Commission would welcome guidance from the Committee as to what circumstances, if any, may necessitate structural independence to comply with the impartiality requirement of Article 12.**

Scope of Claims resolution process

158. The MSD process deals with claims of abuse and mistreatment in social welfare homes and residences. Related processes are established on an ad hoc basis in relation to other State Departments and Ministries when claims are made – such as the Ministry of Education and the Ministry of Health. However, procedures and outcomes are inconsistent.

159. It is at the discretion of the particular Ministries as to whether to investigate and establish a process for redress in any given case. In 2013, for example, the Ministry of Health determined that it would not investigate a former home for the intellectually disabled in South Auckland where disabled children were abused – including a young boy being left in a paddock to eat grass.[83]

CLAS

160. The CLAS process reflects international best practice in a number of respects. It

- is independent and chaired by a Judge
- treats people with dignity and respect

[81] Nowak & McArthur, *The United Nations Convention against Torture: A commentary* (OUP, 2008) 435f.
[82] Nowak & McArthur acknowledge that in some circumstances independence will be necessary; *R v Lippe* [1991] 2 SCR 114.
[83] http://www.stuff.co.nz/auckland/8652516/No-further-Parklands-investigations

- is entirely victim-focused; and
- tailors assistance to a person's individual needs.

161. CLAS has a record of contributing to rehabilitation through the quality of its own processes and by brokering assistance from a range of government and community agencies. Generally it tries to tailor an assistance package for each participant (if assistance is requested) that reflects specific needs. Some of this assistance is provided by existing services and accessed with the help of a facilitator, and some is directly provided by the Service.[84]

162. CLAS is set to close in 2015 and is receiving no further registrations. This leaves a significant gap in the framework to resolve historic claims of abuse in New Zealand.

163. In response to criticism about this closure the Minister for Social Development has suggested that a new process will be announced soon.[85] **The Commission welcomes this announcement and urges the Government to ensure that the new process extends to all claims of historic abuse in state care and is founded on New Zealand's international human rights obligations. Any such process must also be appropriately adapted to be accessible to people with intellectual disabilities.[86]**

Disabled People

164. The taking of a child from their family and institutionalising them solely because they were disabled is a form of abuse and has a profound lifelong impact. To date, there has only been limited acknowledgement of this having occurred. Nor has the ongoing abuse and violence against disabled people in social welfare homes and institutions for people with learning disability or mental illness been properly acknowledged.

165. Part of ensuring the safety and wellbeing of disabled people today and tomorrow is to ensure that these mistakes are made visible and that lessons are learned.[87] **The**

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[84] For example, listening, drafting correspondence to Ombudsman etc, connecting people with families, arranging cultural support and contacts, advocacy with Work and Income New Zealand and other agencies and services.

[85] http://www.radionz.co.nz/national/programmes/ninetonoon/audio/20167843/social-development-minister-on-settling-historical-abuse-claims

[86] To date processes have not been accessible to people with intellectual disabilities and very few have engaged.

[87] Ibid, p 49.

Commission encourages the government to acknowledge all historic abuse and the ongoing detrimental impact it has had on the lives of disabled people who were under state care. It is important that an apology accompany this acknowledgement.

8. Mental Health in places of detention

LOIPR: para 31 - In light of the previous recommendations of the Committee (para 9), please indicate whether the mental health screening and the establishment of the mental health status of prisoners upon arrival in prisons is carried out by qualified personnel in addition to the registered primary health nurses. Please provide updated information on the number of waitlisted acutely mentally unwell prisoners who cannot be accommodated in the District Health Board (DHB) forensic inpatient beds and on the measures taken by the State party to remedy the situation and place them in appropriate health-care facilities.

Relevant provision of the CAT: Article 16

SPT Recommendation:

The SPT recommends that a comprehensive national policy and strategy be developed to ensure appropriate access to health care and mental health care services across the criminal justice system. A significant increase in provision of mental health services is required to cope with the high number of detainees with mental health problems.

Key issues:

- Sixty to seventy percent of people in prison have either a learning disability or mental illness.
- People with mental illness and/or intellectual disabilities are being re-institutionalised in the criminal justice system
- Detainees experiencing mental illness should be professionally treated in a therapeutic environment, rather than managed in a custodial setting.
- Some district health boards are continuing to use seclusion at much higher rates than the rest of the country.
- Māori are significantly more likely than non-Māori to experience seclusion.

Recommended actions:

It is recommended that the Government:

- take steps to develop a national strategy and agree a set of actions to ensure the provision of mental health care in places of detention, which includes mechanisms to ensure the timely sharing of individuals' health information across Government agencies.
- develop a cross-agency plan, drawing on the approach taken by the Canterbury DHB, to improve capability for the appropriate management of individuals with high and complex needs.

166. The high prevalence of mental health issues amongst people in detention, and their access to care and treatment in detention are longstanding issues. Sixty to seventy percent of people in prison have either a learning disability or mental illness.

167. In 2012 the Ombudsman completed an investigation into prison healthcare,[88] identifying deficiencies in the management of mentally unwell prisoners, and finding that aspects of the management of prisoners at risk of self-harm could be detrimental to their long term mental health. In general, it was found that services were insufficiently responsive to the diverse needs of prisoners requiring mental health care.

168. Also in 2012, the IPCA carried out a review of deaths in police custody,[89] highlighting the effect of alcohol, drugs and mental health issues on people in Police custody as areas requiring attention. The 20 recommendations made by the IPCA included "to work towards establishing detoxification centres to provide appropriate care for heavily intoxicated people, and expansion of the watch-house nurse programme to help identify and manage detainees with mental health, alcohol or other drug issues."[90]

[88] http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/456/original/own_motion_prisoner_health.pdf?1349735789
[89] http://ipca.govt.nz/Site/media/2012/2012-June-30-Deaths-in-Custody.aspx
[90] Ibid.

169. Despite some very positive developments, such as increased adolescent mental health services, improved screening for mental health issues in prisons, efforts to reduce seclusion, and a successful pilot initiative placing mental health nurses in Police watch houses, overall, mental health issues in detention remain a concern. An ongoing concern is that detainees experiencing mental illness should be professionally treated in a therapeutic environment, rather than managed in a custodial setting.

170. According to the New Zealand Police Mental Health Team, Police dealt with around 5,000 mental health related jobs in 1995/96. By contrast in 2103/14 Police responded to over 25,500 mental health related calls for assistance.[91]

171. In March 2015 the IPCA released a review of Police custodial management[92] that identified systemic and organizational deficits that contributed to recurring problems in Police detention. Specifically, the IPCA noted that discussions with Police and Area Mental Health Services staff have clearly shown that the problems with the way Police respond to vulnerable and mentally impaired persons are commonplace.

172. The report highlighted the absence of appropriate alternatives to Police detention for dealing with vulnerable people, including those who have not committed an offence, and the lack of a timely response by Mental Health Services to mentally impaired persons in Police custody. The IPCA considers that, unless they are violent or pose an obvious and immediate threat to the safety of others, all practicable steps should be taken to avoid having mentally impaired people detained in Police cells solely for the purpose of receiving a mental health assessment.[93]

173. Police have developed new training packages for both recruit and frontline officers based on feedback from Mental Health Service User ("MHSU") groups, and acknowledged the importance of having MHSU involved in future thinking around mental health crisis response. Police watch houses with on-site mental health nurses have also resulted in better monitoring and continuity of care during police custody. The SPT recommended this practice be applied nationally.

[91] New Zealand Police, *Mental Health Team Newsletter*, November 2014, p2.
[92] IPCA, *Review of Police Custodial Management*, Wellington (March 2015).
[93] Ibid.

174. **It is recommended that the Government take steps to develop a national strategy and agree a set of actions to ensure the provision of mental health care in places of detention which includes mechanisms to ensure the timely sharing of individuals' health information across Government agencies.**

Seclusion

175. The Commission recognises that within a detention context it may be necessary to temporarily separate a person from other detainees for their own or others' safety. Human rights standards require that the use of segregation, seclusion or other conditions amounting to isolation must be limited and accompanied by safeguards, such as monitoring, review and appeal processes. Because of the potentially harmful effects on a person's physical and mental health, human rights minimum standards are premised on the notion that conditions amounting to 'isolation' should be a measure of last resort and used for as short a time as possible.

176. Although there has been an improvement in the philosophy of care in many mental health facilities the Ombudsman has identified some facilities where controlling practices are still in place. Specifically two forensic units were identified in 2012/2013 where a blanket policy was applied of locking patients in their bedrooms overnight.

177. The Office of the Director of Mental Health's annual report provides the following data in relation to seclusion in 2013[94]

Between 1 January and 31 December 201, 7146 people spent time in New Zealand adult mental health units (excluding forensic and other regional rehabilitation services). Of this total, 768 (10.7 percent) were secluded at some time during the reporting period.

178. Annual seclusion rates have been progressively dropping since a reduction policy was introduced in 2009. The Office of the Director of Mental Health annual report shows that the total number of seclusion hours has decreased nationally by 50 percent between 2009 and 2013.[95] However some district health boards ("DHB") are

[94] Ministry of Health (2013) 2012 *Annual Report, Office of the Director of Mental Health*
[95] Ibid.

continuing to use seclusion at much higher rates than the rest of the country. Māori are significantly more likely than non-Māori to experience seclusion. In 2013 of the 768 people (aged 20 to 64) secluded in adult services, 32 percent were Māori.[96]

179. There have been improvements in reporting and transparency around the use of seclusion, including closer monitoring and regular publication of data. The Ministry of Health has published guidance on the use of seclusion and night safety procedures in mental health inpatient services. The Ministry also advises that further guidelines on the use of restraint and seclusion practices are planned for 2015, which will have an increased emphasis on a human rights approach to the provision of treatment and the continued reduction of restrictive practices such as seclusion and restraint. However, there are still indications that a small number of patients are secluded for lengthy periods.

180. The Canterbury DHB ("CDHB") has acknowledged that seclusion is not therapeutic and can have a traumatizing effect. It has made a concerted effort of the past five years to eliminate the use of seclusion in their facilities.

181. CDHB has adopted an approach based on the *Six Core Strategies©*[97] to work towards seclusion elimination. This process includes:

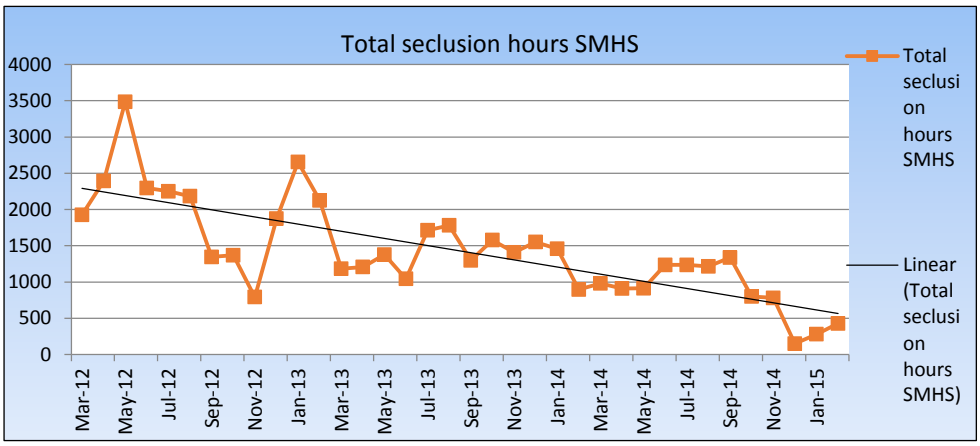
- **Leadership**; clinical leaders are actively involved with staff in the implementation of new models of care including supporting alternatives to seclusion. Environmental changes have taken place which has allowed the development of small *high care areas* where staff are able to provide support and treatment for highly distressed consumers.
- **Use of data**: Before implementing seclusion reduction strategies a number of staff raised concerns that less seclusion use would increase risk to consumers and staff. Data has shown, however, that as seclusion use has reduced so have injuries to consumers and staff. This data is a powerful motivator for all staff.
- **Workforce Development**; Training and supporting clinicians in the use of all therapeutic activities which support consumers with managing their distress is part of the CDHB training programme. Sensory modulation is one of the

[96] Ibid.
[97] United States of America by the National Association of State Mental Health Program Directors Medical Directors Council (NASMHPD)

interventions staff are now utilising on a daily basis. This useful suite of practical interventions has given staff more confidence when working with people who are expressing very strong emotions. This has resulted in stronger therapeutic relationships and earlier recognition of escalation of distress, with more timely interventions.

- **Prevention tools**; Personal safety plans, where a consumer works with a member of staff and/or their family to identify what does and doesn't help when they are feeling highly agitated and distressed, is a tool which many have found very useful. This is something that is not fully implemented across CDHB services yet but will be progressively rolled out.
- **Consumer, Family and Cultural perspectives**; collaboration has resulted in effective changes to models of care, training programmes and many processes within the consumer's journey. For example consumers are jointly delivering training with clinical staff on communication, de-escalation and interpersonal skills. During this training consumers talk about the traumatic effects of seclusion on them as individuals. This sharing of experiences has reinforced staff belief that seclusion should only ever be a very last resort and commitment to continue to look for ways to eliminate its use.
- **Evaluation** – every time seclusion is used a review is completed to gain greater understanding of why seclusion was required and what could be done differently in future to reduce the likelihood of it happening again.

182. As a result of this process the use of seclusion at CDHB has reduced significantly during the last five years across all our services. One service has managed to eliminate it completely and decommission both its seclusion rooms.



183. **It is recommended that the Government develops a cross-agency plan, drawing on the approach taken by the Canterbury DHB, to improve capability for the appropriate management of individuals with high and complex needs.**

9. Other Issues of Concern

184. The Commission wishes to draw the Committee's attention to three other issues of concern:

- arrangements for dealing with people who are severely intoxicated, drug-affected or otherwise mentally impaired;
- treatment of people with intellectual or learning disabilities who find themselves required to interact with the criminal justice system; and
- the detention of persons with mental disabilities under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

Arrangements for dealing with people who are severely intoxicated, drug-affected or otherwise mentally impaired.

185. At around 5.16am on Sunday 23 February 2014, Police found Sentry Taitoko unresponsive and struggling to breathe in a cell at the Counties Manukau District Custody Unit (DCU). Police had taken Mr Taitoko into custody about four hours earlier for breach of the peace and detoxification. Paramedics were called to the cell and attempted to resuscitate Mr Taitoko but he was pronounced dead at 6.10am.

186. The IPCA conducted an independent investigation into Mr Taitoko's death. The IPCA's report was released on 27 March 2015.[98]

187. The IPCA found that the Police "breached their legal duty of care to Mr Taitoko because they did not seek urgent medical care when they first encountered him, and subsequently failed to carry out appropriate checks on his condition."[99] The case highlighted a concern that has long been raised by NPMs jointly and individually – that the current arrangements for dealing with people who are severely intoxicated, drug-affected or otherwise mentally impaired are inappropriate.

[98] IPCA, *Death in Police custody of Sentry Taitoko*, Wellington (March 2015).
[99] Ibid at 47.

188. Drawing on its conclusions from the 2015 Review of Police Custodial Management[100] the IPCA recommended that the New Zealand Police:[101]

- introduce more systematic and nationally consistent training for both sworn staff and authorised officers working in custodial facilities, particularly in relation to:

    a) the risk assessment and treatment of intoxicated and mentally impaired persons; and

    b) how to recognise the signs that a prisoner requires urgent medical attention (such as the symptoms of drug overdose/head injury).

- Ensure that the National Standards governing Police custodial facilities (which are currently being developed):

    a) require custody staff to record detailed information in the electronic custody module (ECM) describing how they carried out a check of a prisoner and the prisoner's condition at the time of the check;

    b) provide additional specific guidance to custody staff on the nature of the checks that must be undertaken in order to ascertain the well-being of a prisoner who is under frequent or constant monitoring; and

    c) include a requirement for regular cleaning of CCTV camera lenses;

- work with the Ministry of Health and other agencies to identify options for:

    - minimising the number of mentally impaired people who are detained in Police cells to await a mental health assessment; and

    - Improving current methods of dealing with extremely intoxicated (and sometimes violent) prisoners.

[100] Supra note 88.
[101] Supra note 93 at 49.

- ensure that Police Medical Officers (PMOs) are aware of:

    a) the requirement for a full and written assessment for any prisoner deemed to be 'in need of care'; and

    b) the requirement for Police to call an ambulance for dangerously intoxicated prisoners, or transport them to hospital.

189. **The Commission urges the Government to commit to a timeframe for implementing these recommendations.**

Treatment of people with intellectual or learning disabilities

190. The WGAD heard testimonies that people with intellectual or learning disabilities are at a particular disadvantage in the criminal justice system. Police officers, lawyers and officials are inadequately trained in relation to intellectual and learning disabilities. This has meant that in some cases, an individual may be questioned by the police without the presence of a lawyer, and is subsequently convicted and sentenced without or with inadequate legal representation.

191. **The Commission urges the Committee to remind the Government of its obligation under Article 13 of the Convention on the Rights of Persons with Disabilities to afford access to justice on an equal basis and to develop a set of actions designed to ensure there is equal access to justice for persons with Disabilities is New Zealand.**

Detention under the Mental Health (Compulsory Assessment and Treatment) Act 1992

192. The number of people subject to both community and inpatient compulsory treatment is growing both absolutely and as a proportion of the population. Of particular concern is that New Zealand's use of community treatment orders is amongst the highest in the world.[102] In 2013 Māori were 2.9 times more likely to be under a community treatment order than non-Māori.[103]

[102] O'Brien AJ. *Community treatment orders in New Zealand: regional variability and international comparisons*, Australas Psychiatry (2014).
[103] Supra note 90.

193. The WGAD noted with concern that the legislative framework governing the detention of persons with mental disabilities under the Mental Health (Compulsory Assessment and Treatment) Act 1992 ("MHCAT Act") is not effectively implemented to ensure that arbitrary deprivation of liberty does not occur. In practice, compulsory treatment orders are largely clinical decisions, and it is difficult to effectively challenge such orders as the right to legal advice of patients undergoing compulsory treatment may be limited.[104]

194. Concerns also remain over the issue of capacity and the tension between compulsory treatment and the right to refuse mental health treatment, to make an informed choice and to give informed consent. The MHCAT Act arguably does not differentiate between people who have capacity and those who do not.[105] As such, people with a mental disorder may be treated against their will despite retaining decision-making capacity.[106]

195. A gap in OPCAT monitoring that has been identified by the NPMs concerns facilities where people reside subject to a legal substitute decision-making process, such as locked aged care facilities, dementia units, compulsory care facilities, community-based homes and residences for disabled persons. People detained in these facilities are potentially vulnerable to ill-treatment and this can remain largely invisible because of the nature of the residences.

196. NPMs strongly argue that persons in such facilities or situations can effectively be in a state of detention, which means these places should be subject to preventive monitoring under OPCAT.[107] **The Commission would welcome the Committee's guidance on these issues.**

[104]United Nations Working Group on Arbitrary Detention, *Statement at the conclusion of its visit to New Zealand (24 March -7 April 2014)*, p.5.
[105] Mental Health (Compulsory Assessment and Treatment) Act 1992.
[106] The right to refuse consent, s(57), and not accept treatment, s(59), is limited as the Act effectively deprives a person of any power to refuse treatment within the first month of compulsory treatment, at the discretion of the responsible clinician, s(59)(4).
[107] See also CRPD General comment No.1, p.10.

APPENDIX 1:

Recommendations

A. Visits by International Monitoring Bodies

1. The Commission recommends that the Committee urge the Government to commit to implementing the SPT recommendations over the next reporting period (subject to one clarification set out at section 2 of the NPM submission).

B. Domestic Implementation of Human Rights Obligations

2. It is recommended that the Government commit to reviewing all legislation relating to detainees within the next reporting period to ensure that it fully complies with New Zealand's international obligations.

3. The Commission recommends that the Committee urge the Government to:

    - reconsider the legislative limits which continue to deny victims of torture and other cruel, inhuman or degrading treatment an effective remedy; and

    - in light of BORA commit to taking the required steps to withdraw its reservation to article 14 over the next reporting period.

4. The Commission recommends that the Government commit to reviewing the use of reverse onus of proof to ensure that the right to be presumed innocent is fully protected.

5. The Commission recommends that the Government commit to amending its process to better protect human rights in legislative development by:

    - ensuring that section 7 reports are prepared, tabled in Parliament and referred to select committee where a Bill appears to be inconsistent with BORA. In other words where there is a *prima facie* inconsistency; and

    - establishing a mechanism for Parliament to periodically review the continued validity of any justified limitation.

6. The Commission recommends that the Government commit to amending its BORA reporting process to require section 7 reports - in the modified form referred to above at paragraph 41 – on substantive SOPs.

7. The Commission recommends that:

- the requirement set out in section 7.60 of the Cabinet Manual be more explicit in requiring identification of implications in relation to international human rights commitments and extended to apply to all policy and legislation (both primary and secondary); and

- Ministers and officials be directed to strictly adhere to current and extended Cabinet Manual requirements.

8. The Commission urges the Committee to encourage New Zealand to continue to mainstream human rights by *inter alia* developing and implementing capacity-building programmes for parliamentarians and senior civil servants.

9. The Commission recommends that funding levels should be increased without delay to cover the actual costs of OPCAT work of NPMs, where the appropriation for OPCAT work is less than the actual costs of that work, and to enable NPMs to carry out more site visits and to establish a coordinated mechanism to engage the services of experts to assist with those visits.

10. The Commission urges the Government to prioritise reviewing the scope of the OPCAT mandate in New Zealand with a view to identifying ways to address the gaps in monitoring all places where people are deprived of their liberty. Any increase in scope would need to be properly funded.

Violence

11. The Commission recommends that the Government commit through the Social Sector CEO Group – or another appropriate forum – to:

- develop in consultation with civil society an agreed definition of sexual and family violence and appropriate minimum data set of indicators; and

- co-ordinate and monitor all interventions to reduce violence and ensure that they are adjusted and extended as required on the basis of robust empirical evidence.

12. Drawing on the IPCA report into the Police's handling of the alleged offending by *Roastbusters*, the Commission recommends that the Government commit to:

- reviewing Police practice and policy to ensure that appropriate emphasis is placed on prevention; and

- ensuring that adequate instruction and guidance about the application of section 128 and 134 of the Crimes Act 1961 is provided to the Police Child Protection Team

13. The Commission recommends that the Government continue to actively monitor the impact of its policies and programmes on reducing the number of children experiencing physical and sexual abuse.

14. The Commission recommends that the Committee urge the Government to extend its *Positive Behaviour for Learning* initiative to all New Zealand schools and fully implement the "Bullying Prevention and Response Strategy and Implementation Plan" agreed by the Bullying Prevention Advisory Group.

15. The Commission recommends that the Government commit to reviewing the application of the Domestic Violence Act 1995 to disabled people in community care situations.

16. The Commission recommends that the Government commit to reviewing the current framework for sterilisation in light of its international human rights obligations.

Detention of Asylum seekers

17. The Commission recommends that the Government commits to ensuring that:

- asylum seekers detained in correctional facilities are separated from other prisoners;
- asylum seekers are not subject to criminal standards of detention; and
- prison staff are appropriately trained in relation to standards of detention for asylum seekers, the identification of the symptoms of trauma and human rights.

18. The Commission recommends that the Government review the Immigration Amendment Act 2013 to ensure that:

- where detention is deemed to be a necessity, a maximum 30 day time limit should be adhered to, so that all asylum seekers are moved into the community once health, character and identity checks are complete; and
- adequate review mechanisms are available to those detained as part of a 'mass group' which consider individual circumstances to avoid delay, discrimination and unnecessary detention.

Over-representation of Maori in the criminal justice system

19. It is recommended that the Government commit to addressing the overrepresentation on Māori in the criminal justice system by both:

- drawing on the approach of the Police and iwi in *Turning the Tides* to develop partnerships with iwi across other areas of the criminal justice system; and
- stepping up its efforts to address the root causes which lead to disproportionate incarceration rates of Māori.

Children and Young People

20. It is recommended that the Government review the application of the CYPF Act to 17 year olds.

21. The Commission urges the Government to continue to progress the implementation of the recommendations from the Joint Thematic Review of Young Persons in Police Detention 2012.

22. The Commission recommends that the Government ensure that the development of a new operating model for Child, Youth and Family is founded on New Zealand's international human rights obligations including under CAT and OPCAT.

Historic Claims of Abuse

23. The Commission would also welcome guidance from the Committee on the benefit of judicial verses non-judicial processes as to the amounts of compensation actually received by victims net of legal and other costs.

24. The Commission would welcome guidance from the Committee as to what circumstances, if any, may necessitate structural independence to comply with the impartiality requirement of Article 12.

25. The Commission urges the Government to ensure that any new resolution process extends to all claims of historic abuse in state care and is founded on New Zealand's international human rights obligations. Any such process must also be appropriately adapted to be accessible to people with intellectual disabilities.

26. The Commission encourages the government to acknowledge all historic abuse and the ongoing detrimental impact it has had on the lives of disabled people who were under state care. It is important that an apology accompany this acknowledgement.

Mental Health in places of detention

27. It is recommended that the Government take steps to develop a national strategy and agree a set of actions to ensure the provision of mental health care in places of detention which includes mechanisms to ensure the timely sharing of individuals' health information across Government agencies.

28. It is recommended that the Government develops a cross-agency plan, drawing on the approach taken by the Canterbury DHB, to improve capability for the appropriate management of individuals with high and complex needs.

Other Issues of Concern

29. The Commission urges the Government to commit to a timeframe for implementing the recommendations from the IPCA's 2015 Review of Police Custodial Management.

30. The Commission urges the Committee to remind the Government of its obligation under Article 13 of the Convention on the Rights of Persons with Disabilities to afford access to justice on an equal basis and to develop a set of actions designed to ensure there is equal access to justice for persons with Disabilities is New Zealand.