Royal Commission of Inquiry into Abuse in Care: Redress Submission

23 June 2021

Submission of the Human Rights Commission

NZ Human Rights.
Human Rights Commission
Te Kāhui Tika Tangata

Submission of the Human Rights Commission to the Royal Commission of Inquiry into Abuse in Care on Redress

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Introduction

1. The Human Rights Commission (Commission) welcomes the opportunity to make this submission on redress. As set out in the Commission's application for designation as a core

participant in the Inquiry dated 29 March 2021[1] and its submission on the investigation into abuse in state psychiatric care, with respect to Lake Alice dated 28 May 2021[2], the Commission has a particular interest in the issues addressed in this hearing given its primary functions under s 5 of the Human Rights Act 1993 ("HRA") to:

(a) "advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society"[3] and

(b) promote "a better understanding of the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international human rights law".[4]

2. With reference to the Commission's submissions filed on 28 May 2021 on the investigation into state psychiatric care, the Commission relies on and draws upon on paragraphs 1 – 89 of that submission which sets out New Zealand's human rights obligations and those under Te Tiriti o Waitangi.

3. The Commission has read the submission of the Office of the Children's Commissioner (OCC) and endorses the recommendations contained in that submission.

4. This submission addresses the Crown's overarching human rights and Te Tiriti obligations on the right to redress, followed by a focus on its obligations under the Convention on the Rights of Persons with Disabilities (CRPD) and the United Nations Convention against Torture (UNCAT). UNCAT provides comprehensive jurisprudence on the right to redress for survivors of torture and cruel, inhuman or degrading treatment (ill-treatment), while the International Principles and Guidelines on Access to Justice for Persons with Disabilities provide a useful roadmap for ensuring that the State's redress scheme protects and upholds the rights of survivors with disabilities[5].

5. Our recommendations, informed by the application of the human rights and te Tiriti framework, are set out at the conclusion of the submission at paragraph 100.

Survivors' Rights to Redress

The Crown's human rights and Te Tiriti obligations on the right to redress

6. The obligation of a State to provide redress where it has violated international law is a longstanding rule of customary law, given the State's obligation to prevent violations and to

[1] Application of Te Kahui Tika Tangata, Human Rights Commission for Core Participant Status Under s 17 of the Inquiries Act 2013, dated 29 March 2021
[2] Submission of Te Kahui Tika Tangata, Human Rights Commission on investigations into abuse in state psychiatric care, Lake Alice Hearing, dated 28 May 2021.
[3] Section 5(1)(a).
[4] Section 5(2)(d)
[5] *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Geneva, 2020) available at www.ohchr.org/Documents/Issues/Disability/SR_Disability/GoodPractices/Principles_A2_Justice.pdf

respect, protect and promote the human rights of all people within its jurisdiction, as enshrined in international human rights treaties[6] and confirmed by international jurisprudence.[7]

7. The right to redress requires States to:[8]
   a. Take appropriate legislative and administrative and other appropriate measures to prevent violations;
   b. Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
   c. Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
   d. Provide effective remedies to victims, including reparation.

8. The right to redress comprises both a procedural element that ensures legislative and other measures give effect to the rights, as well as a substantive reparative element that ensures the provision of reparative measures such as compensation and rehabilitation.

9. Transitional justice, while originally devised to apply to post-conflict societies transitioning to democracy, also provides a useful framework for redressing historical injustices, with its focus on truth, justice, reparation and guarantees of non-recurrence.[9] The United Nations has defined transitional justice as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[10]

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[6] See: Article 2 ICCPR; Article 2 ICESCR; Article 2 CERD; Article 2 Convention on the Elimination of Discrimination against Women (CEDAW); Article 2 UNCRC; Article 4(1) CRPD.

[7] International Commission of Jurists *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide* (Geneva, October 2018), at 15.

[8] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/Res/60/147 (21 March 2006) (UN Basic Principles on Reparation), at Part II, para 3.

[9] See *Resolution adopted by the Human Rights Council on the creation of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* UN Doc A/HRC/RES/18/7 (13 October 2011) which builds on, inter alia, the UN Basic Principles on Reparation, recognizing that the special rapporteur will "deal with situations in which there have been gross violations of human rights and serious violations of international humanitarian law" and underlining the fact that "the specific context of each situation must be taken into account with a view to preventing the recurrence of crises and future violations of human rights, to ensure social cohesion, nation-building, ownership and inclusiveness at the national and local levels and to promote reconciliation". See also *Report of the Special Rapporteur (Pablo de Grieff) on the promotion of truth, justice, reparation and guarantees of non-recurrence* UN Doc A/69/518 (14 October 2014) which addresses the topic of reparation for victims in the aftermath of gross violations of human rights, focusing on current challenges in implementation including States' political unwillingness to implement existing obligations using questionable economic arguments. See also Courtney Jung "Research Brief on Transitional Justice for Indigenous People in a Non-transitional Society" International Center for Transitional Justice (October 2009) which assesses the approach of the Canadian government in attempting to use such transitional justice measures as reparations, a truth commission, commemoration and an official apology to address the legacy of the Indian Residential Schools, while outlining some of the potential complexities involved in processing indigenous demands for justice through a transitional justice framework, noting at p 2 that "[whereas the government may try to use transitional justice to signal a break with the past, indigenous activists may try to use the past as a way to critique the present".

[10] *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies* UN Doc S/2004/616 (23 August 2004) at [8].

10. States must ensure that domestic law aligns with these obligations to provide redress regardless of "political, social, cultural or economic considerations within the State".[11] Rather, individuals must have "immediate" and "unqualified" access to effective remedies to vindicate their rights. Such remedies should also "be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children".[12]

11. At the domestic level, the right to an effective remedy is guaranteed under the NZBORA, as illustrated in the following passage by Richardson J in the Court of Appeal, cited by the Supreme Court in the recent decision of *Attorney-General v Taylor*:[13]

> A statement of fundamental human rights would be a hollow shell and the enactment of a Bill of Rights an elaborate charade if remedies were not available for breach. On the contrary the premise underlying the Act is that the Courts will affirmatively protect those fundamental rights and freedoms by recourse to appropriate remedies within their jurisdiction.

12. *Taunoa v Attorney-General*[14] establishes that the courts should award compensation for a breach of the NZBORA if remedies other than compensation would not provide an effective remedy for the breach.

13. The Courts and Waitangi Tribunal have affirmed that breaches of Te Tiriti o Waitangi give rise to obligations of redress.[15] The Waitangi Tribunal, in considering a variety of claims, has emphasised that redress should serve to restore the mana and status of Māori, and that recognition of and compensation for grievances may require different forms of redress, acknowledging different forms of loss. The Tribunal has affirmed that an essential aspect of redress is a commitment by the Crown to honour Te Tiriti principles in the future to prevent continuing or new breaches from arising.[16] In several reports the Tribunal has found that rights of redress arise when the Crown fails to honour its obligation to protect or enable exercise of tino rangatiratanga, causing detriment to Māori communities. The Tribunal has also emphasised that a diverse range of remedies is required to achieve reconciliation between the Crown and Māori.[17]

14. Noting that the concept of redress features prominently in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has explored these issues in a 2019 thematic study focussed on

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[11] Human Rights Committee *General Comment No. 31 on the nature of the general legal obligation imposed on States parties* UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at 14.

[12] Above n 11, at [15]. See also CRC Committee, General comment No. 13 on the right of the child to freedom from all forms of violence UN Doc CRC/C/GC/13 (18 Apr 2011) at [46] which provides that under Article 19.2 of UNCRC, the State must provide a range of preventative measures to protect children from violence through "*public health and other measures to positively promote respectful child-rearing, free from violence, for all children, and to target the root causes of violence at the levels of the child, family, perpetrator, community, institution and society*".

[13] *Attorney-General v Taylor* [2018] NZSC 104 at [29] citing *R v Goodwin* [1993] 2 NZLR 153 (CA) at 191 per Richardson J. See also: Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 [the White Paper] at [3.8]–[3.12].

[14] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

[15] Te Puni Kōkiri, *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal*, (Te Puni Kōkiri: Wellington, 2002).

[16] Te Puni Kōkiri (2002), above n 15, at 100-106.

[17] Te Puni Kōkiri (2002), above n 15, at 105.

recognition, reparation and reconciliation.[18] The EMRIP notes that the "concept of redress includes recognition of past wrongs, which leads to both reparation and reconciliation".[19]

15. The EMRIP's recommendations emphasise the need for processes to reflect indigenous perspectives and traditional healing practices,[20] include indigenous participation at all stages,[21] and take a holistic approach recognising that "[t]he concepts of reparation and reconciliation must be understood from an intergenerational and collective perspective."[22] In this regard, the report notes that "[a]lthough a truth and reconciliation commission may address a particular series of violations or an event in time, it is crucial to recognize that, in the case of indigenous peoples these violations and events are inseparable from a long history of colonialism."

16. The EMRIP emphasises that the incorporation of indigenous perspectives at all stages, and the full and effective participation, are crucial factors in the success of reconciliation and reparation initiatives.[23] It further notes that:

    While apologies and other measures of satisfaction are to be commended, **they should translate into tangible changes in terms of respect for and protection of the rights of indigenous peoples** (emphasis added).[24]

The Crown's obligations under CRPD

17. New Zealand signed the CRPD on 30 March 2007 and ratified it on 26 September 2008. The Convention shares some common human rights principles with both Te Tiriti and UNDRIP, including the importance of partnership, autonomy, close consultation and full and effective participation.

18. Redress for survivors with disabilities must take into account a number of considerations, as a distinct cohort of survivors within the Royal Commission's scope, including:

    a. Article 23, which addresses discrimination faced by people with disabilities in relation to home and family life. It states that separation of a child from his or her parents based on the disability of the child or parents or both is discrimination and in violation of Article 23. The placement of children in institutions on the basis of their impairment is also a form of discrimination and prohibited by Article 23(5) CPRD.[25] The Royal Commission's Interim Report outlines residential institutions being the State's preferred option for housing disabled people, particularly those with a learning disability.[26]

    b. Article 24, which affirms the right to education. The Committee on the Rights of Persons with Disabilities note that "the failure of some State parties to provide students with

[18] *Report of the Expert Mechanism on the Rights of Indigenous Peoples on Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, UN Doc A/HRC/EMRIP/2019/3/Rev.1 (2 September 2019) (EMRIP, 2019)
[19] EMRIP, 2019, above n 18, at [39].
[20] EMRIP, 2019, above n 18, at [72].
[21] EMRIP, 2019, above n 18, at [72], [73], [79].
[22] EMRIP, 2019, above n 18, at [80].
[23] EMRIP, 2019, above n 18, at [40], [79].
[24] EMRIP, 2019, above n 18, at [85].
[25] Committee on the Rights of Persons with Disabilities *General Comment No.6 on equality and non-discrimination* CRPD/C/GC/6 (26 April 2018) at 14 – 15.
[26] Royal Commission of Inquiry into Abuse in Care Interim Report, Taawharautia: Puurgono o te Wa Volume 1 p 65.

disabilities – including students with visible and invisible disabilities and those who experience multiple forms of discrimination or intersectional discrimination – with equal access to mainstream school with inclusive and quality education is discriminatory, contrary to the objectives of the Convention".[27] Lack of proper education has been a common theme expressed by survivors who were placed in state and faith based care.[28]

c. Article 13 of UNCAT, which affirms the right to complaint to competent authorities, as discussed in further detail below in the section "the Crown's obligations under UNCAT". Article 13 requires the existence of clearly designated complaints mechanisms that survivors are aware of and can access. The Commission notes the findings of the Royal Commission as outlined in its Interim Report, with respect to the lack of data on abuse of disabled people in care, "in large measure because they often faces extra hurdles to recognising and disclosing abuse. Such as communication difficulties…"[29]

19. Articles 12 (equal recognition before the law), 13 (access to justice) and 16 (freedom from exploitation, violence and abuse) also set out state obligations that are directly relevant to redress for people with disabilities. Pursuant to these obligations, States must:

a. Recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;

b. Take appropriate measures to provide access to persons with disabilities to the support they may require in exercising their legal capacity;

c. Ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse, including by ensuring that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person;

d. Ensure access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages;

e. Take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

20. The United Nations' Guidance on access to justice for people with disabilities ("UN Guidance"), published in 2020, sets out a practical roadmap to assist countries in implementing existing

[27] Committee on the Rights of Persons with Disabilities *General Comment No.6 on equality and non-discrimination* CRPD/C/GC/6 (26 April 2018) at 15.

[28] Royal Commission of Inquiry into Abuse in Care Interim Report, Taawharautia: Puurgono o te Wa Volume 1 p 15.

[29] Royal Commission of Inquiry into Abuse in Care Interim Report, Taawharautia: Puurgono o te Wa Volume 1 p 66.

obligations to ensure effective access to justice for people with disabilities.[30] In particular, Principle 8 affirms the rights of persons with disabilities "to report complaints and initiate legal proceedings concerning human rights violations and crimes, have their complaints investigated and be afforded effective remedies". These guidelines complement the right to redress as set out under UNCAT, by ensuring a disability-rights consistent approach to redress for survivors of torture and ill-treatment.

21. Accessibility is a key principle under the CPRD and the UN Guidance and should be afforded heightened consideration by the Crown in implementing an independent redress scheme. Principle 2 of the UN Guidance states, "facilities and services must be universally accessible to ensure equal access to justice without discrimination of persons with disabilities".[31] Accessibility to physical environments, information and communication, including information and communications technologies and systems, and to other facilities and services open or provided to the public, are preconditions for people with disabilities to have equal opportunities for participation in their respective societies.[32]

22. Article 21 of the CRPD describes in detail how the accessibility of information and communication can be ensured in practice. It requires that State parties "provide information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities".[33] Further, it provides for "facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in office interactions".[34]

23. The UN Guidance outlines further methods for ensuring justice systems and procedures can be accessed by various means, including: video and audio guides, telephone line advice and referral services, accessible websites, induction loop, radio or infrared services, amplification devices and document magnifiers, closed captioning, Easy Read and plain language, and facilitated communication.[35]

The Crown's obligations under UNCAT

24. Articles 12-14 of UNCAT sets out the State's obligations under the right to redress as follows:[36]

[30] *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Geneva, 2020) available at https://www.ohchr.org/Documents/Issues/Disability/SR_Disability/GoodPractices/Principles_A2_Justice.pdf

[31] The Commission notes the comments made by James Packer, who is deaf and has Asperger's syndrome, as to redress, that it should be "more accessible and "it should be made as easy to engage with as possible, given it is already dealing with vulnerable, traumatised people". Royal Commission of Inquiry into Abuse in Care Interim Report, Taawharautia: Puurgono o te Wa Volume 1 p 57.

[32] Committee on the Rights of Persons with Disabilities *General Comment No.2 on Accessibility* CRPD/C/GC/2 (22 May 2014) at [4].

[33] Article 21(a), CRPD.

[34] Article 21(b), CRPD.

[35] Above n 30 at [18].

[36] Article 16 also extends the requirement of State parties to prevent and remedy ill treatment in the same manner as torture.

a. Article 12: "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".

b. Article 13: "ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities".

c. Article 14: ensure that all victims of torture obtain redress and an "enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible". If a victim dies, their dependents shall be entitled to compensation.

Article 12: the right to a prompt and impartial investigation

25. As referred to above, Article 12 establishes minimum standards as regards the investigation of rights violations, by requiring the State to "ensure that its competent authorities[37] 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".

26. For an investigation to be *prompt and effective*, it must be initiated immediately or without delay, and concluded as expeditiously as possible – within hours or a few days of the suspected torture occurring. The Committee has criticised States where responses to serious allegations of torture and ill-treatment "remain at the protracted investigation stage"[38] or when "judicial procedures remain excessively long and drawn out".[39] The European Court on Human Rights (ECtHR) has also criticised authorities when it found undue delays in the taking of statements or examination of forensic evidence.[40]

27. The Committee highlights the importance of proceeding with investigations without delay, since "in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those who have not received redress".[41] Accordingly, "States parties shall ensure that all victims of torture or ill-treatment, regardless of when the violation occurred or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to remedy and to obtain redress".[42]

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[37] "Competent authorities" are defined as those who "have a genuine interest in preventing torture and other forms of ill-treatment" and are "entrusted *with* full investigative powers, such as summoning witnesses, interrogating the accused officials, inspecting official documents, and carrying out forensic examinations". See Moritz Birk "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Part I Substantive Articles, Art.12 Ex Officio Investigations" in Manfred Nowak, Moritz Birk, Giuliana Monina (eds) *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd ed, Oxford University Press, 2019) at 347.

[38] CAT Committee *Concluding Observations on El Salvador*, UN Doc CAT/C/SLV/CO/2 (9 December 2009) at [12].

[39] CAT Committee *Concluding Observations on the third periodic report of Senegal* UN Doc CAT/C/SEN/CO/3 (17 January 2013) at [11].

[40] *Mikheyev v Russia* App no 77617/01 (ECtHR, 26 January 2006) at [109], [133], [114]; *Timurtaş v Turkey* App no 23531/94 (ECtHR, 13 June 2000) at [89]; and *Tekin v Turkey* App no 22496/93 (ECtHR, 9 June 1998) at [67].

[41] CAT Committee *General Comment No. 3 on implementation of article 14 by States parties*, UN Doc CAT/C/GC/3 (13 December 2012) at [40].

[42] UN Doc CAT/C/GC/3, above.

28. Impartiality is a key requirement of the investigation process which is distinct from independence but "closely interlinked, as the lack of independence is commonly seen as an indicator of partiality".[43] An assessment of impartiality requires an assessment of the investigative body "in its entirety' looking at its potential conflicts of interest, hierarchical relationships with potential suspects, and the specific conduct."[44] On this point, the Committee against Torture (CAT Committee) has expressed concern about the involvement of prosecution offices into investigations of torture, noting that "the dual nature and responsibilities of the prosecution authorities for prosecution and oversight of the proper conduct of investigations are a major barrier to the impartial investigation".[45]

29. Accordingly, the United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment (UNSRT) has recommended that "[a]llegations of torture and other ill-treatment should be investigated by an external investigative body… with no institutional or hierarchical connection between the investigators and the alleged perpetrators".[46]

30. In terms of the conduct of the investigation, impartiality also demands that the investigation is "effective"[47] and "thorough"[48] with a view to "determining the nature of the reported events, the circumstances surrounding them and the identity of whoever may have participated in them".[49] The Council of Europe provides a "typical inventory of required investigative measures" including:

> detailed and exhaustive statements of alleged victims obtained with an appropriate degree of sensitivity; appropriate questioning and, where necessary, the use of identification parades and other special investigative measures designed to identify those responsible; confidential and accurate medical (preferably forensic) physical and psychological examinations of alleged victims (carried out by independent and adequately trained personnel); other medical evidence; appropriate witness

[43] International Rehabilitation Council for Torture Victims *Practical Guide to the Istanbul Protocol for lawyers: Action Against Torture* (October 27, 2010) at 28. See: Office of the United Nations High Commissioner for Human Rights *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('Istanbul Protocol') UN Doc HR/P/PT/8/Rev.1 (9 August 1999).
[44] Nowak, Birk, Monina (2019), above n 38, at 348 citing *Mustafa Tunç and Fecire Tunç v Turkey* App no 24014/05 (ECtHR, 14 April 2015) at [222].
[45] Another concern regarding specialized investigation mechanisms arises in respect of the personal independence of the investigators. For example, in the CAT Committee Concluding Observations on the fifth periodic report of New Zealand,UN Doc CAT/C/NZL/CO/56 (4 June 2009),at [12], the Committee was concerned "*that the impartiality of the Independent Police Conduct Authority might be hampered by the inclusion of both current and former police officers*".
[46] *Interim report of the UNSRT Juan E. Méndez* UN Doc A/68/295 (9 August 2013) at [64].
[47] See eg *Alexander Gerasimov v Kazakhstan*, Communication No. 433/2010 UN Doc CAT/C/48/D/433 (10 July 2012) at [5.6] where the CAT Committee notes that "[t]he restarting of the investigation after the lapse of three years did not constitute an effective investigation".
[48] In *Ristic v Yugoslavia*, No 113/1998, UN Doc CAT/C/26/D/113/1998 (11 May 2001) at [9.6], the CAT Committee held that "*the investigation that was conducted by the State party's authorities was neither effective nor thorough*" as "[*a] proper investigation would indeed have entailed an exhumation and a new autopsy, which would in turn have allowed the cause of death to be medically established with a satisfactory degree of certainty*". Eric Svferanidze, *Effective Investigation of Ill-treatment: Guidelines on European Standards* (2nd ed, Council of Europe, 2014) at 6.0.1 provides that effectiveness requires that "[i]nvestigative systems should be provided with adequate financial and technical resources and appropriately trained legal, medical and other specialists".
[49] See *Fatou Sonko v Spain*, Communication No. 368/2008, UN Doc CAT/C/47/D/368/2008 (25 November 2011), at [10.7] *Besim Osmani v Republic of Serbia*, Communication No. 261/2005, UN Doc CAT/C/42/D/261/2005 (8 May 2009) at [10.7]; see also *Blanco Abad v Spain*, Communication No. 59/1996, UN Doc CAT/C/20/D/59/1996 (14 May 1998), at [8.8].

statements, possibly including statements of other detainees, custodial staff , members of the public, law enforcement officers, and other officials;

31. For an investigation to be impartial, it is important that the testimony of victims is not only obtained appropriately but also that it is afforded due weight. In *Oleg Evloev v Kazakhstan*, the Committee found a violation of Article 12 occurred because the investigation relied too heavily on the testimony of the alleged perpetrators, attaching little weight on the complainants or relatives' statements and on the uncontested medical evidence documenting the injuries. In her brief of evidence for the Lake Alice hearing, the Solicitor General also notes the Crown's narrow focus on legal defences over establishing the facts.[50]

32. The obligation of the State to proceed to an investigation based on *reasonable grounds* should be interpreted broadly, that is, in any instance where there is suspicion of torture or ill-treatment having occurred regardless of its origin – such as via a victim's statement or evidence of signs of abuse.[51] The obligation on the State to proceed to an investigation *ex officio* requires the State to investigate when it becomes aware of such relevant information, rather than requiring the complainant to bring the matter to the State's attention. Shifting the burden from the victim to the State is especially important "since torture and other forms of ill-treatment usually take place behind closed doors without any outside witnesses, and the survivors are often too afraid to complain officially about such practices".[52]

33. Article 12 also demands that alleged victims must be involved in the investigative process – through being informed of the various stages of the investigative process and entitled to actively participate through for example requesting that specific steps are taken or challenging actions and omissions of investigating authorities through the provision of legal aid if necessary.[53] States must also make the outcome of any investigation public, such as through a centralised public register, to increase accountability and decrease the risk of reoccurrence through public scrutiny.[54]

Article 13: the right to complain to competent authorities

34. While Article 12 requires States parties to carry out *ex officio* investigations whenever there is a suspicion of torture or other forms of ill-treatment, Article 13 requires States to respond to a complaint by the victim via the prompt and impartial examination of competent authorities.

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[50] At [5.8].

[51] *Blanco Abad v Spain*, Communication No. 59/1996, UN Doc CAT/C/20/D/59/1996 (14 May 1998), at [8.2]. In *Thabti v Tunisia*, Communication No 187/2001, UN Doc CAT/C/31/D/187/2001 (14 November 2003) at [10/4] the Committee confirmed its earlier jurisprudence and noted that Article 12 places an obligation on the authorities to 'proceed automatically' to a prompt and impartial investigation whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed, 'no special importance being attached to the grounds for suspicion'.

[52] Nowak, Birk, Monina (2019), above n 38, at 341.

[53] Eric Svferanidze, above n 49 at 4.5.1.

[54] Nowak, Birk, Monina (2019), above n 38, at 349. See also Lene Wendland, A Handbook on State Obligations under the UN Convention against Torture (Association for the Prevention of Torture, Geneva, 2002) at 52 which states that "States parties are obliged to make the outcome of investigations public". See: <https://www.apt.ch/content/files_res/A%20Handbook%20on%20State%20Obligations%20under%20the%20UN%20CAT.pdf>

35. The right to complain requires the existence of clearly designated complaints mechanisms that survivors are aware of and able to access through a robust, confidential process[55], that is effective and impartial[56], with the provision of adequate legal aid if necessary[57] without fear of reprisals.[58]

36. Not only is a complaint important for triggering an investigation but it is also an important reparation measure. By allowing victims to regain their sense of control and dignity through expressing their disapproval with their treatment.[59] Article 13 helps pave the way towards other forms of meaningful substantive reparation provided under Article 14.[60]

Article 14: the right to redress

37. As noted above, an individual's right to redress under Article 14 covers both the procedural and the substantive elements through requiring State parties to enact legislation that provides victims of torture with the right to obtain adequate and appropriate substantive redress through "the full scope of measures to redress violations" that include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[61] The Committee has highlighted specific procedural obstacles that impede the right to redress and prevent effective implementation of Article 14, which include but are not limited to:[62]

    a. Inadequate national legislation;
    b. Discrimination with regard to accessing complaints and investigation mechanisms and procedures for remedy and redress;
    c. Inadequate measures for securing the custody of alleged perpetrators;
    d. Evidential burdens;
    e. Statutes of limitations;
    f. Failure to prove sufficient legal aid and protection measures for victims and witnesses;
    g. Associated stigma;
    h. Physical, psychological and other related effects of torture and ill-treatment

38. A victim is broadly defined under the Convention as any person or persons "who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or

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[55] UN Doc CAT/C/GC/3, above n 41, at [40]; CAT Committee *Concluding Observations on the combined fifth and sixth periodic reports of Portugal* UN Doc CAT/C/PRT/CO/5-6 (23 December 2013) at [54]; See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', UN Doc A/Res/43/173 (9 December 1988) Principle 33(3) which calls for confidentiality 'if so requested by the complainant'; See also Istanbul Protocol above n 43 at [65] and [89].

[56] The former UNSRT (Méndez) has stated that for complaints to be impartial, they must be "sufficiently detached from the authority alleged to have perpetrated the ill-treatment": See UN Doc A/68/295, above at n 46, at [76].

[57] UN Doc CAT/C/GC/3, above n 41, at [30]: "States parties should provide adequate legal aid to those victims of torture or ill-treatment lacking the necessary resources to bring complaints and to make claims for redress".

[58] See the observations made by former UNSRT (Nowak), *Interim Report of the UNSRT,* UN Doc A/65/273 (10 August 2010), at [55].

[59] Redress, *Taking Complaints of Torture Seriously: Rights of Victims and Responsibilities of Authorities* (London, September 2004) at 7. See: <https://redress.org/wp-content/uploads/2018/01/Sept-TAKING-COMPLAINTS-OF-TORTURE-SERIOUSLY.pdf>.

[60] UN Doc CAT/C/GC/3, above n 41, at [5], [23].

[61] UN Doc CAT/C/GC/3, above n 41, at [2] and as outlined in the UN Basic Principles on Reparation, above n 8.

[62] At [38].

omissions that constitute violations of the Convention", including direct family members and dependents of those directly affected.[63]

39. The definition of victim recognises the wide scope of harm that victims suffer – extending to economic loss – and that the harm can extend beyond the individual to the collective and systemic.[64] The collective impact of the harm is important in recognising the destruction that torture causes to family members, whānau and hapū and is relevant in addressing the intergenerational trauma disproportionately inflicted on Māori and Pacific[65] communities through the breakdown of whanaungatanga and loss of cultural identity. Nevertheless, systemic/collective reparations must not replace an individual's right to redress.[66]

40. The right of victims to obtain redress under Article 14 is closely linked to Articles 12 and 13 a full redress can only be obtained if the obligations under Articles 12 and 13 are met.[67] Therefore, as illustrated through the *Zentveld* decision below, a failure of a State to uphold its obligations under Articles 12 and 13 also violates Article 14. The substantive reparative measures States are required to provide under Article 14 are set out in more detail later in this submission.

41. The United Nations Guiding Principles on Business and Human Rights (UNGP's) set out the "Protect, Respect and Remedy' Framework" which apply to all States and private organisations, including those contracted by the State to perform public functions, such as in the area of health and social services providing care to children[68]. The UNGP's are grounded in recognition of:

    a. States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
    b. The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and
    c. The need for rights and obligations to be matched to appropriate and effective remedies when breached.

42. When human rights are violated by businesses that are contracted to perform functions for the State, Principle 25 sets out that the State party must "ensure through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy". The right to remedy under

[63] The CAT Committee notes that this definition is without prejudice to using the term "survivor" which some people may prefer as a more appropriate term. See UN Doc CAT/C/GC/3, above n 42, at [3].
[64] UN Doc CAT/C/GC/3, above n 41, at [6], the Committee emphasizes that the provision of reparation not only seeks to redress the harm caused to the individual but it also "has an inherent preventive and deterrent effect in relation to future violations".
[65] The Commission refers to the Royal Commission's Interim Report, where it found that recording of ethnicity by state institutions were insufficiently detailed, making it difficult to establish the numbers of Pacific people in care: Royal Commission of Inquiry into Abuse in Care Interim Report, Taawharautia: Puurgono o te Wa Volume 1 p 63,
[66] UN Doc CAT/C/GC/3, above n 41, at [20]: "While collective reparation and administrative reparation programmes may be acceptable as a form of redress, such programmes may not render ineffective the individual right to a remedy and to obtain redress".
[67] UN Doc CAT/C/GC/3, above n 41, at [23].
[68] United Nations Human Rights Office of the High Commissioner *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc HR/PUB/11/04, New York and Geneva, 2011. Principle 5 provides that "States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights".

the UNGP's mirrors the right to redress affirmed under Article 14 – comprising both procedural and substantive aspects as set out at paragraph 36 above.

Gaps in New Zealand's obligations under Articles 12, 13 and 14

Concerns of CAT Committee and Subcommittee on Prevention of Torture (SPT)[69]

43. In 2009 and 2015, the CAT Committee signalled its concerns that the State party had failed to investigate or hold any person accountable for acts of torture and ill treatment in State care institutions[70] and thus recommended that New Zealand:[71]

> "Conduct prompt, impartial and thorough investigations into all allegations of ill-treatment in prisons and health-care institutions, both public and private; prosecute persons suspected of ill-treatment and, if they are found guilty, ensure that they are punished according to the gravity of their acts; and provide effective remedies and redress to the victims"

44. New Zealand has maintained its reservation to Article 14 of the Convention by leaving the right to award compensation to victims of torture at the discretion of the Attorney-General, which the CAT Committee has deemed "incompatible with the letter and spirit of the Convention, as well as with the State party's obligation to ensure the rights of victims of torture to fair and adequate compensation, including the means for as full rehabilitation as possible".[72] It has therefore "urge[d] the State party to consider withdrawing its reservation to that article and ensure the provision of fair and adequate compensation through its civil jurisdiction to all victims of torture".[73]

45. In 2013, the SPT visited New Zealand and raised their "deep concern" on the wide discretion of the Attorney General to decide whether or not to prosecute crime of torture, particularly if he or she considers it is in the public interest not to do so.[74] In the SPT's opinion, it can never be in the public interest *not* to prosecute allegations of torture.

46. The SPT thus recommended that the New Zealand government;[75]

    a. Consider withdrawing its reservations to UNCAT, Article 14; and
    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.

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[69] See Submission of Te Kahui Tika Tangata, Human Rights Commission on investigations into abuse in state psychiatric care, Lake Alice Hearing, dated 28 May 2021 at [15].
[70] In 2015, the CAT Committee referred specifically to the "nearly 200 allegations of torture and ill-treatment against minors at Lake Alice Hospital." See Committee Concluding Observations on the sixth periodic report of New Zealand UN Doc CAT/C/NZL/CO/6 (2 June 2015) at [15].
[71] UN Doc CAT/C/NZL/CO/6, above n 70 at [15].
[72] UN Doc CAT/C/NZL/CO/56, above n 46 at [20] and UN Doc CAT/C/NZL/CO/6, above n 70 at [14].
[73] UN Doc CAT/C/NZL/CO/6, above n 70 at [20].
[74] Subcommittee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment, *Report on the visit of the Subcommittee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment to New Zealand* UN Doc CAT/OP/NZL/1 (28 July 2014), at [20].
[75] UN Doc CAT/OP/NZL/1, above n 73, At [23].

47. In preparation for New Zealand's seventh periodic review under UNCAT, in 2017 the CAT Committee specifically asked the government to provide information on "What concrete measures have been taken to restrict the wide discretion of the Attorney General with regard to prosecutorial decisions for crimes against torture".[76]

Zentveld Decision

48. In 2020, following a complaint in 2017 by Lake Alice survivor, Paul Zentveld to the CAT Committee, the Committee found the Government in breach of its obligations under Articles 12, 13 and 14 due to its failure to consider any avenues of formal investigation into his claims of torture, despite complaints emerging from as early as around 1976 and 1977.[77]

49. In its defence, the Crown stated that Article 12 was not triggered by Mr Zentveld's complaint, as there was insufficient evidence for a prosecution to succeed, no countervailing public interest in proceeding with the prosecution, and the risks to the defendant's right to a fair trial were too high given the length of time that had elapsed and the unavailability of witnesses.

50. However, domestic evidential requirements must not interfere with the State's obligations under UNCAT.[78] In response to the Crown's defence above, the CAT Committee asserted that the obligation to proceed to an investigation *ex officio* triggers the State's responsibility under Article 12 without the need for a complaint or proof by the complainant that they were subjected to torture. Therefore, upon learning that such acts may have occurred the Crown was obliged to proceed to a prompt and impartial investigation to "determine the nature and circumstances of the alleged acts and… establish the identity of any person who may have been involved".[79]

51. In this case however, the CAT Committee found that:

> "despite repeated investigations into the same matter… the State party made no consistent efforts to establish the facts of such a sensitive historical issue involving the abuse of children in State care [and] they also failed to expressly acknowledge and qualify the alleged treatment inflicted on the complainant."[80]

52. Moreover, the Committee observed:

> "the authorities have not tried to find out if anybody else [besides Dr Leeks] could be held responsible for the alleged violations, which raises doubts as to the effectiveness of the police investigation, which should be capable of identifying those responsible".[81]

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[76] CAT Committee, *List of issues prior to submission of the seventh periodic report of New Zealand* Un Doc CAT/C/NZL/QPR/7 (9 June 2017), at [26]. This request was in repsonse to the SPT reccomendation in their 2014 report mentioned above.
[77] *Zentveld v New Zealand* Communication No. 852/2017 UN Doc CAT/C/68/D/852/2017 (23 January 2020).
[78] The CAT Committee has noted previously that "evidential burdens and procedural requirements... interfere with the determination of the right to redress" UN Doc CAT/C/GC/3, above n 41 at [38].
[79] *Zentveld,* above n 76, at [4.19] citing the standard the Committee has required in order for an investigation to be considered effective, see *Kirsanov v. Russian Federation* (CAT/C/52/D/478/2011), para. 11.3.
[80] *Zentveld*, above n 76, at [9.4]. Given the gravity of the alleged offending, "[i]n the absence of convincing explanations by the State party, the Committee also fail[ed] to see why there [was] no countervailing public interest in proceeding with a prosecution". More details on the public interest analysis are set out in the Brief of Evidence of Malcolm James Burgess for New Zealand Police, dated 6 April 2021 at 6.27.
[81] *Zentveld*, above n 76 at [9.6].

53. The Committee also expressed concern that when confronted with several complaints the Police selected only a "representative complaint for analysis" which "trigger[ed] the risk of ignoring the systemic character of the issue at stake and all the surrounding circumstances".

54. By failing to conduct a full investigation into the circumstances of the torture and those responsible as required by Article 12, failing to respond to Mr Zentveld's complaint as required by Article 13 and failing to provide adequate redress as required by Article 14, the Committee found that the Crown had failed in upholding its duty of care not only to Paul Zentveld but all the young people at Lake Alice and their affected family members:[82]

> It was not enough to conduct superficial investigations and pretend these were isolated incidents and the children not credible witnesses. Nor was it enough just to make ex gratia payments to victims, while claiming no liability, when many of them wanted those responsible to be held accountable. The State party could take further steps to ensure this complaint is fully investigated and those responsible for what occurred at Lake Alice are held accountable for their actions.

55. The Committee notes further that by "endors[ing]" the Medical Council's refusal to take action against Dr Leeks based on his resignation as a medical practitioner this led to "impunity, despite [the State's] obligation "to protect those in a vulnerable position against abuse and with no other legal possibility of taking further their allegations to the competent authorities".[83]

56. The Committee has stressed that statutes of limitation do not apply under any circumstance to the crime of torture, and thus notes the inappropriate dismissal of complaints based on a six-month time limit under the Mental Health Act 1969[84] especially when dealing with children's complaints.[85]

57. While accepting the importance of the Royal Commission in "informing policy going forward" the Committee notes – and the Crown acknowledges – that the establishment of the Royal Commission is distinct from the criminal process as it "has no power to determine the civil, criminal, or disciplinary liability of any person".[86]

58. In light of the above concerns, the Committee found that the Crown had "fail[ed] to conduct an investigation into the circumstances surrounding the acts of torture and ill-treatment suffered by the complainant while he was at [Lake Alice]" which "is incompatible with the State party's obligations under articles 12, 13 and 14 of the Convention". Accordingly, the Committee urged the Crown to:

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[82] *Zentveld,* above n 76, at [5.13]. See UN Doc CAT/C/GC/3, above n 41 at [3] which states that "the term 'victim' also includes affected immediate family or dependants of the victim.

[83] *Zentveld,* above n 76, at [9.5]. The Committee notes however at [8.5] that "although the complainant has not disputed the possibility of contesting the decision of the Medical Council before the courts, the Committee considers that the procedure before the Medical Council, which the State party itself admits is an independent regulatory body, cannot replace a criminal investigation into the facts alleged by the complainant".

[84] Six-month time limit for bringing a charge of "neglect or ill-treatment of a mentally disordered person" under section 112 of the Mental Health Act 1969. See [6.2].

[85] See UN Doc CAT/C/GC/3, above n 41 at [40] which provides that "On account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them".

[86] *Zentveld,* above n 76, at [4.13]. It is acknowledged in this submission however that the establishment of the Royal Commission can assist in providing substantive redress under Article 14 as set out in more detail below, through providing satisfaction in the right to truth and guarantees of non-repetition.

a. Conduct a prompt, impartial and independent investigation into all allegations of torture and ill-treatment made by the complainant including, where appropriate, the filing of specific torture and/or ill-treatment charges against the perpetrators and the application of the corresponding penalties under domestic law;

b. Provide the complainant with access to appropriate redress, including fair compensation and access to the truth, in line with the outcome of the investigation; and

c. Make public the present decision and disseminate its content widely, with a view to preventing similar violations of the Convention in the future.

Crown's response to the Zentveld decision and other allegations of torture

59. To date, despite multiple investigations, no person has been charged for acts of torture and ill-treatment inflicted against the Lake Alice victims or other survivors of abuse in care. While Lake Alice victims have received some forms of redress, for example via ex-gratia payments and apologies from the Crown, these measures have been inadequate in addressing the full extent of the harm they have suffered, as evidenced in the briefs of survivors and by the *Zentveld* decision itself. This point will be elaborated on further below in the section of this submission on the right to redress.

60. The Commission understands that the Police have commenced an investigation into Lake Alice. As referred to above, the CAT Committee has recommended an investigation into "all allegations of torture and ill-treatment". This indicates an extensive investigation is required in order to identify all perpetrators and address all instances of torture and ill-treatment allegedly perpetrated.

61. It also appears the Crown has not made public the *Zentveld* decision or disseminated its content widely, with a view to preventing similar violations in the future, in accordance with the CAT Committee's final recommendation and the Crown's obligation to prevent further acts of torture under Article 2 of UNCAT.[87]

62. The next section sets out the Crown's obligations to provide substantive redress to victims of torture in accordance with Article 14, followed by an assessment of the reparative measures that have been available to survivors of abuse in care to date.

Article 14: Crown's substantive obligations to provide redress

63. Under Article 14, a victim of an act of torture must have access to "redress and an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible". The right to reparation not only helps to relieve the suffering of and afford justice to victims through removing or redressing to the extent possible the consequences of the wrongful

[87] The Human Rights Commission has summarised the *Zentveld* proceeding before the CAT Committee and published the summary and a link to the CAT Committee decision on its website. Public disclosure of the facts is also important to uphold the right to satisfaction and the right to truth, as well as the guarantee of non-repetition, as substantive reparative measures under Article 14, as set out in more detail in paragraphs 150-152 below.

acts, but it also "has an inherent preventive and deterrent aspect" through ensuring State accountability and removing impunity.[88]

64. The former UNSRT stated that "adequate, effective and prompt reparation" must be "proportional to the gravity of the violation and harm suffered [and] should include the following forms: restitution, compensation, rehabilitation, satisfaction and the right to truth, and guarantee of non-repetition".[89] These various forms of reparation are set out in more detail below.

Restitution

65. Restitution seeks "to re-establish the victim's situation before the violation of the Convention was committed, taking into consideration the specificities of each case". Restitution can include such measures as 'restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property'.[90] The Committee emphasizes that "[f]or restitution to be effective, efforts should be made to address any structural causes of the violation, including any kind of discrimination"[91] relating to race or ethnicity, which is also closely tied to the measure of guaranteeing non-repetition.

66. However, the Committee acknowledges that '[i]n certain cases, the victim may consider that restitution is not possible due to the nature of the violation" in which case other measures must be provided.[92]

Compensation

67. The CAT Committee has affirmed that the right to prompt, fair and adequate compensation is "multi-layered", and should thus "be sufficient to compensate for any economically assessable damage resulting from torture or ill treatment, whether pecuniary or non-pecuniary".[93] Examples include:[94]

> medical expenses paid and provision of funds to cover future medical or rehabilitative services needed by the victim to ensure as full rehabilitation as possible; pecuniary and non-pecuniary damage resulting from the physical and mental harm caused; loss of earnings and earning potential due to disabilities caused by the torture or ill-treatment; and lost opportunities such as employment and education.

68. The Committee provides further that adequate compensation should also "provide for legal or specialist assistance, and other costs associated with bringing a claim for redress".[95] This ties in

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[88] *Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment Sir Nigel Rodley* UN Doc A/55/290 (11 August 2000) at [28] – [29].
[89] A/55/290, 11 August 2000
[90] UN Basic Principles on Reparation, above n 8 at [19].
[91] CAT Committee *General Comment No. 3 on implementation of article 14 by States parties*, above n 41 at [8].
[92] For example, the cases of *Cantoral Benavides v Peru* and *Loayza Tamayo v Peru* addressed the concept of restitution in terms of restoring the victims' "life plans" through such means as an education scholarship to enable victims to achieve the goals they had set for themselves. Given the young age of the survivors and the length of time that has surpassed, it is unlikely that individual restitutive measures will be sufficient or appropriate to redress the harm caused to them.
[93] CAT Committee *General Comment No. 3 on implementation of article 14 by States parties* above n 41 at [10].
[94] Above.
[95] Above.

with the obligation of States to "provide adequate legal aid to those victims of torture or ill-treatment lacking the necessary resources to bring complaints and to make claims for redress".[96]

69. However, the Committee has affirmed that the provision of monetary compensation is only one form of reparation relating to the economically assessable aspects of the harm, which alone is inadequate for the State party to uphold its obligations under Article 14[97]. Accordingly, it should be provided as part of a suite of reparations, taking into account the other applicable reparative measures.

Rehabilitation

70. The right to "as full rehabilitation as possible" is an essential element of Article 14 and is viewed in the "holistic" sense in that it "include[s] medical and psychological care as well as legal and social services" which aim to "restore, as far as possible, [survivors'] independence, physical, mental, social and vocational ability; and full inclusion and participation in society" through "enabl[ing] the maximum possible self-sufficiency and function for the individual concerned".

71. The Committee affirms that access to rehabilitation should not be postponed or depend on the victim pursuing remedies but should occur without delay "following an assessment by qualified independent medical professionals".[98]

72. The Committee's qualification that rehabilitation be provided "as full as possible" does not refer to the availability of the State's resources, but rather acknowledges that "a victim whose life situation, including dignity, health and self-sufficiency may never be fully recovered as a result of the pervasive effect of torture".[99]

73. A holistic approach requires that State parties establish long-term, effective rehabilitation services and programmes that ensure specialist services for victims are "available, appropriate and readily accessible" to all victims in accordance with the Istanbul Protocol which "may include a wide range of inter-disciplinary measures" including medical, physical and psychological rehabilitation as well as community-based re-integrative and social services through community and family-oriented assistance and services, vocational training and education.[100]

74. The Committee stresses it is of "utmost importance" that rehabilitation takes account of the individuals' needs and background without discrimination[101]. This includes providing services that are available in the victim's language as well as being gender- and culture sensitive, noting the high risk of re-traumatisation to survivors, particularly those who experienced aggravated

[96] At [30]. The Committee notes that denying access to legal aid could also constitute a breach of the State's procedural obligations, as no civil proceedings or otherwise should impose a financial burden upon victims that would prevent or discourage them from seeking redress. See [29].
[97] At [9]–[10]. In the State reporting procedure, the Committee has frequently criticized States parties' legal framework for failing to incorporate other means of redress besides monetary compensation for victims of torture and ill-treatment, see eg CAT Committee *Concluding Observations on Russia* UN Doc CAT/C/RUS/CO/5 (11 December 2012) at [20] ; CAT Committee, *Concluding Observations on Armenia* UN Doc CAT/C/ARM/CO/3 (6 July 2012) at [15].
[98] CAT Committee *General Comment No. 3 on implementation of article 14 by States parties* above n 41 at [15].
[99] At [12].
[100] At [13]. For a reference to, and more information on the Istanbul Protocol, see above n 43.
[101] Ibid.

trauma as a result of systemic discrimination. There is thus a heightened "need to create a context of confidence and trust in which assistance can be provided" including via the provision of confidential procedures where necessary[102]. The State must also ensure that victims are able to select service providers that suit their needs – which may be funded directly by the State or via State funding to private medical, legal or other facilities.

75. Once such programmes and services are established, States should establish mechanisms to assess their effective implementation using appropriate indicators and benchmarks via, for example adequate monitoring and reporting mechanisms. The establishment of such mechanisms aligns with – and is described in more detail under the right to guarantee of non-repetition.

Satisfaction and the right to truth

76. Satisfaction as a form of reparation is closely tied to the State's fulfilment of Articles 12 and 13 through providing a sense of justice to victims and their families in "acknowledg[ing]… their suffering, the acceptance of responsibility by the State, the establishment of the truth (with regard to both the individual victim and his or her family and with regard to the general public), and the punishment of perpetrators".[103] Accordingly, as in the case of *Zentveld* described above, a State's failure to carry out its obligations under Article 12 and 13 may also constitute a denial of redress and thus a violation of Article 14.[104]

77. The right to truth encompasses more than disclosure of facts establishing human rights violations but it also "carries a collective dimension in relation to society as a whole: for facts and events of the past to become truth, they must be acknowledged as such by the community or society, and information about them must to that end be widely disseminated".[105]

78. Besides criminal prosecutions, satisfaction and the right to truth can also include full and public disclosure of the truth (to the extent that such disclosure does not cause further harm to the victim or their relatives), sanctions against those liable for the violations, a public apology by the State acknowledging the facts and accepting legal responsibility[106], and commemorations and tributes to victims[107].

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[102] Above.

[103] Johanna Lober and Andrea Schuechner "Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Part I Substantive Articles, Art. 14 Right of Torture Victims to Adequate Remedy and Reparation" in Nowak, Birk, Monina (2019), above n 37, at 405.

[104] CAT Committee *General Comment No. 3 on implementation of article 14 by States parties*, above n 41 at [17].

[105] Manfred Nowak, Moritz Birk, Giuliana Monina (eds), above n 37 at 413-414.

[106] When referring to *Japan*'s dealing with WWII military sexual slavery, the Committee demanded that the State party must publicly acknowledge legal responsibility for the crimes of sexual slavery, stop the repeated denial of the facts by State authorities and public figures, investigate and punish the perpetrators, and educate the public as preventive measure. See CAT Committee *Concluding Observations on Japan* UN Doc CAT/C/JPN/CO/2 (28 June 2013) at [18].

[107] In the case of CAT Committee's *Concluding observations on El Salvador* UN Doc CAT/C/SLV/CO/2 (9 December 2009) at [15], the Committee recommended symbolic forms of satisfaction in relation to *El Salvador*, such as constructing a national monument bearing the names of all the victims, and to declare a national holiday in memory of the victims.

Guarantees of non-repetition

79. While other reparative measures focus on repairing the harm that has already occurred, guarantees of non-repetition focus on preventive measures to combat impunity going forward, as set out in Articles 1 to 16 of the Convention.

80. Such measures include structural reform measures such as training on the Istanbul Protocol for health and legal professionals and law enforcement officials, promotion of the observance of international standards and codes of conduct by public servants, and continuing to review and reform laws that allow torture and ill-treatment to occur with impunity.[108]

81. The CAT Committee notes further that in order to ensure the adequacy of the State's redress mechanisms and prevent such abuses in the future, State parties must implement adequate procedural mechanisms "to oversee, monitor, evaluate, and report on their provision of redress measures and necessary rehabilitation services to victims of torture or ill-treatment". The reports should then include "data disaggregated by age, gender, nationality, and other key factors regarding redress measures afforded to victims of torture or ill-treatment, in order to meet their obligation to provide continual evaluation of their efforts to provide redress to victims.[109]

New Zealand's approach to providing substantive redress to victims of torture

82. In New Zealand, the courts have affirmed the right of individuals to obtain redress, including declarations of a breach of NZBORA[110] as well as compensation[111] for breaches of the NZBORA, especially the right to freedom from torture given its egregious nature[112].

83. When assessing whether and how much compensation should be awarded, the courts should consider the nature of the right and the nature of the breach – noting that a violation against s 9 (freedom from torture and ill treatment) constitutes such an egregious breach so as to demand compensation, as set out by Blanchard J in *Taunoa*:[113]

> … breaches of some rights of a very different character will inevitably demand a response which must include an award of damages whether in tort or under the Bill of Rights Act. The obvious example is any breach of s 9. The infliction or condoning by the State of cruel or degrading or severely disproportionate treatment, something which society regards as outrageous, must be marked by an order that the State pay the victim a sum which will provide a public acknowledgement, by a judicial officer, of the wrongfulness of what has been done as well as solace for injured feelings. The sum awarded should of course reflect any intention behind the conduct which gave rise to the breach and the duration of the breach.
>
> [262] The level of the monetary sum should also reflect the other ways in which the State has acknowledged the wrongdoing: whether, and with what speed, it has brought to an end the wrongful conduct and put in place measures to prevent reoccurrence; and whether it has publicly apologised to the victim in appropriate terms.

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[108] CAT Committee *General Comment No. 3 on implementation of article 14 by States parties*, above n 41 at [18]. See also Istanbul Protocol, above n 43.
[109] CAT Committee *General Comment No. 3 on implementation of article 14 by States parties,* above n 41 at [45].
[110] *Attorney-General* v *Taylor* [2018] NZSC 104.
[111] *Simpson v Attorney-General* (***Baigent's Case***) [1994] 3 NZLR 667 (CA).
[112] *Taunoa v Attorney-General*, above n 14 at [183].
[113] Above.

84. In *Taunoa,* the Supreme Court observed – with reference to the broad discretion of the Human Rights Review Tribunal to award damages under s 92M of the Human Rights Act 1993 – that "[e]verything relevant to compensating for what the plaintiff has suffered as a result of the breach is potentially available here" as part of the "remedial package" including economic loss as well as "compensation for non-economic or intangible damage or detriment".

85. The Court also that compensation provided by the Accident Compensation Corporation must be treated separately.[114] This is an important distinction to draw, as it indicates that measures that provide redress and remedy for human rights breaches should be not intermingled with the compensatory framework provided under the ACC scheme.

86. The Commission also notes that the New Zealand courts have traditionally awarded reasonably moderate monetary awards for breaches of NZBORA, including for s 9. In *Taunoa*, the Supreme Court was not unanimous in its approach to calculating the quantum for damages in that case. The Commission would accordingly caution against using the sums variously arrived at by the Supreme Court judges in *Taunoa* as a benchmark for assessing appropriate compensation for human rights violations for survivors.[115]

87. Firstly, the gravity and nature of the human rights violations that occurred in care institutions can be distinguished from *Taunoa.* Whereas *Taunoa* regarded the use of solitary confinement in a men's prison, this matter involves a range of sustained and varied human rights violations perpetrated against children in care institutions. The vulnerability of the children and the environment (and related duties of the state) in which the abuse occurred, and the permanent effect of those abuses of the victims, are significant aggravating characteristics.

88. Secondly, the Commission also notes the much higher levels of individual compensation available (as compared to *Taunoa*) to survivors following similar overseas Inquiries into abuse in care institutions. It is submitted that these approaches provide a more congruent comparator for assessing monetary compensation. See the appendix to this submission for further details.

89. As indicated at paragraph 43 above, New Zealand has however maintained its reservation to Article 14 of UNCAT, which hinders the right of redress for victims of violations of UNCAT by leaving the award of compensation at the discretion of the Attorney-General.

90. With respect to the Crown's approach to providing redress to survivors, the CAT Committee noted in the *Zentveld* decision[116] that following a civil claim, the Government provided compensation to Lake Alice survivors by way of "ex gratia payments" and each survivor received a "general apology". However, the Crown did not accept legal liability for torture or ill-treatment but "acknowledged that there were some actions which were unacceptable, in particular the use of electric shocks and painful injections".[117]

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[114] At [322].

[115] We do note however that the Human Rights Review Tribunal awarded general damages of $98,000 for hurt, humiliation and injury to feelings under its Privacy Act jurisdiction, in doing so affirming the requirement that remedies for human rights breaches are consistent with the Article 2(3) of the ICCPR and noting the "devastating if not irreparable" harm such breaches can have on an individual. See *Hammond v Credit Union Baywide* [2015] NZHRRT 6 at [188].

[116] At [2.3].

[117] While the Confidential Forum and Confidential Listening and Assistance Service established in 2005 and 2008 provided avenues for victims to tell their stories as well as practical support through counselling and referrals to relevant agencies, it could not establish liability on the part of the Crown nor determine the truth of

91. As noted in paragraph 68 above, compensation alone is inadequate for the State party to uphold its obligations under Article 14[118] The Lake Alice survivors, for example, were not only dissatisfied with the amounts of compensation[119], but also the lack of additional measures that failed to provide them with adequate redress including:

    a. Lack of regard for possible avenues for restitution, such as education or vocational programmes.
    b. Lack of provision for rehabilitative measures following specialised assessments by qualified independent medical professionals.
    c. No acknowledgement of legal liability following investigation into the matters complained of – in breach of Articles 12 and 13 and the right to satisfaction and truth under Article 14.
    d. Lack of regard for the guarantee of non-repetition, through for example steps needed to redress systemic, structural breaches consistent with Te Tiriti, relevant training of public officials, or oversight and reporting mechanisms to monitor the implementation of redress schemes.

Redress in overseas jurisdictions

92. Allegations of abuse in care in New Zealand resemble those made in similar countries, such as Australia, Canada and Ireland, where formal inquiries, similar to the present Inquiry, have been held.[120] Across these jurisdictions, abuse of vulnerable children in state institutions, particularly indigenous children in the cases of Canada and Australia, were widespread.

93. The appendix below sets out a summary of the outcomes from inquires held in Ireland, Australia and Canada. It is notable that all have provided some form of substantial monetary compensation to victims.

94. The 2015 Call to Action report of the Canadian Truth and Reconciliation Commission (TRC) offers the most comprehensive example, through its 94 calls to action which seek to redress both the harm done while also preventing further harm in the future.[121] The TRC's calls to action include a call for affirmation of the right of aboriginal governments within Canada to maintain their own child welfare agencies, among other things.[122] Furthermore, the TRC called upon Canadian governments, from federal through to municipal, to fully adopt and implement the UNDRIP as

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the victims' stories – thus undermining survivors' rights to satisfaction and truth. While the services offered provided some practical support to survivors, without the Crown accepting responsibility and acknowledging the truth of their stories, and the fact that survivors were not offered specialised, holistic support, these services also failed to provide the full these services fell short of the holistic, individualised rehabilitative services required, these for also failed to uphold their rights to "as full rehabilitation as possible" as required under Article 14.

[118] See above n 97.

[119] In this instance, the amount of compensation provided was insufficient and undermined by the large expenses required for legal aid, which could quickly lead to large debts for victims, especially when the Crown used delay tactics. In the Royal Commission's Interim Report, *Taawharautia: Puurgono o te Wa* Volume 1 p 108 Leonie McInroe describes the difficulty in having to re-apply for legal aid debt due to the Crown's delay tactics while the Crown as a "formidable opponent" with endless resources.

[120] See the Appendix to this submission for further details.

[121] *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, 2015) available at http://caid.ca/TRCFinCal2015.pdf

[122] See Call to Action 4.

the framework for reconciliation.[123] It is notable that these calls to action in many ways align with the recommendations that the Waitangi Tribunal issued it its recent report on Oranga Tamariki and referred to above in this submission.

Conclusion

95. In conclusion, the scale and scope of the human rights and Te Tiriti violations that occurred in state and faith-based care facilities require an extensive redress framework to be implemented to provide the survivors with appropriate vindication of their rights.

96. The submissions set out above provide a human rights-based and te Tiriti-based framework for doing so. The framework must contain remedies that are both restorative and preventative, as well as individual and systemic.

97. The framework must not overburden an individual to prove the validity of their complaint or navigate a complex system in order to obtain redress. Rather, the burden is on the State to conduct a fulsome investigation, support complainants, and provide ready access to clear, comprehensible complaints mechanisms and effective reparations. As highlighted in paragraphs 40 – 41 above, the State's obligation to provide redress applies equally to state functions performed directly by the State as well as to services conducted by third parties on behalf of the State, including via the provision of care to children by faith-based institutions.

98. At a systemic level, the framework must include measures that address the structural causes of the human rights violations that occurred to ensure they never occur again, address intergenerational trauma and discrimination and incorporate a Te Tiriti-based approach that enables tangata whenua to effectively realise and exercise tino rangatiratanga within the care system.

99. The Commission thanks the Royal Commission for this opportunity to submit on the issue of redress and would be grateful for further opportunities to participate in the Royal Commission's future engagements, investigation hearings and any roundtables, hui and fono, where the Commission may assist.

100. The Commission sets out its key recommendations on redress below:

Recommendations on redress

Te Tiriti o Waitangi-specific considerations

1. **The Commission recommends:**

    a. **That in recognition of the disproportionate numbers of tamariki Māori in state-and faith-based care, tangata whenua must be actively engaged in the process of establishing a redress framework. The Commission endorses Recommendation 4 in the redress submissions made by the OCC, as to the constitution of the redress system development group being at least 50% Māori;**

[123] See Call to Action 43.

b. **That redress for Māori acknowledges intergenerational impact, disconnection from culture, whakapapa, loss of te reo and cultural identity;**

c. **That steps are taken to remove the structural causes of racial discrimination in state care through actively devolving power, resources, and functions relating to state care facilities to Māori, for Māori [124].**

Disability-specific considerations

2. **The Commission recommends:**

a. **That survivors with disabilities and experts on disability rights are involved in the process of establishing a redress framework;**

b. **That persons with disabilities have access to redress on an equal basis with others through appropriate measures and support they may require;**

c. **That information about any redress process is communicated in accessible formats and technologies appropriate to different kinds of disabilities;**

d. **That accessibility of any redress process is effectively monitored in line with the CRPD;**

e. **That redress for persons with disabilities acknowledges the higher rates of abuse inflicted on survivors with disabilities, as well as their disproportionate and discriminatory placement in institutions and separation from families, because of their impairment alone.**

Survivors' rights to an effective and impartial investigation

3. **The Commission recommends:**

a. **That any allegations of abuse in care must be investigated and facilitated by a fully independent and impartial body, without delay; regardless of whether the State has received a complaint from an individual;**

b. **That investigations conducted with respect to redress must be focussed on ascertaining all the facts relating to all allegations of torture and ill treatment, including a full investigation into all persons potentially responsible, in order to address both the individual and systemic nature of the abuse;**

c. **The State must provide a supportive framework to survivors by ensuring:**

i. **that any processes engaging with survivors are conducted according to trauma-informed principles and practices set out in the Istanbul Protocol[125];**

[124] New Zealand Office of the Children's Commissioner *Te kuku o te manawa : Moe ararā! Haumanutia ngā moemoeā a ngā tūpuna mō te oranga o ngā tamariki*, June 2020.
[125] See above n 43.

ii. **survivors are actively involved and informed throughout the process, according to their needs and wishes (including cultural, gender and disability needs and wishes), and through the provision of sufficient legal aid if necessary;**

iii. **survivors have access to clear, readily accessible information in a language and format that they can easily understand, with access to communication intermediaries where necessary;**

iv. **any investigation is grounded in Te Tiriti o Waitangi and carried out in a culturally safe environment, ensuring active participation of tangata whenua is maintained throughout the investigation process.**

Survivors' rights to complain

4. **The Commission recommends:**

   a. **That any complaints mechanisms must be clear, accessible, and based on principles of supported decision-making for disabled persons;**

   b. **That information about any relevant complaints mechanisms are widely communicated and disseminated through various media with accessibility in mind.**

Survivors' rights to redress – removal of procedural barriers

5. **The Commission recommends:**

   a. **That Article 14 reservations to UNCAT are removed, along with the requirement that prosecutions of torture and ill treatment are conducted by the Attorney-General;**

   b. **That evidential burdens and procedural requirements set out in the prosecution guidelines conform with the standards on the right to redress as set by the CAT Committee[126];**

   c. **That the application of the Limitations Act 2010 is removed in respect of civil proceedings seeking monetary damages for allegations of torture and ill treatment.**

Survivors' substantive rights to redress

Restitution

6. **The Commission recommends that the Crown establishes sufficient funding and support for survivors to access educational and vocational programmes;**

Compensation

7. **The Commission recommends:**

[126] See in particular CAT Committee *General Comment No. 3 on implementation of article 14 by States parties*, above n 41 at [38].

a. **That compensation for abuse should cover both economic and non-economic loss;**

b. **Noting the judgment of the Supreme Court in *Taunoa*[127], compensation for torture or ill treatment must be treated separately from compensation provided under the ACC scheme;**

c. **That the level of monetary compensation must be set a level proportionate to the significant human rights violations that have occurred, including taking account of:**

   i. **the children's young age;**
   ii. **the severity of the trauma inflicted on them;**
   iii. **the impact of the abuse on their development, economic opportunities, relationships, and families/whanau;**
   iv. **the State's persistent failure to hold anyone accountable for the abuse.**

Rehabilitation

8. **The Commission recommends:**

   a. **That rehabilitation must be provided without delay following an assessment by qualified, independent, culturally appropriate and gender-sensitive medical professionals;**

   b. **That long-term, effective rehabilitation services are established to provide specialist services for survivors in a manner that is available, appropriate and readily accessible, taking account of individuals' needs and backgrounds without discrimination, that are:**

      i. **Gender-sensitive;**
      ii. **Disability-sensitive;**
      iii. **Culturally appropriate, grounded in tikanga where appropriate;**
      iv. **Available for survivors to select service providers to suit their needs.**

   c. **That services should cover a range of inter-disciplinary measures including medical, physical and psychological rehabilitation as well as community-based, re-integrative and social services through community and family-oriented assistance and services, vocational training and education;**

   d. **That once such services are established, that State should regularly review and monitor their effectiveness through robust reporting mechanisms.**

Satisfaction and the right to truth

9. **The Commission recommends:**

   a. **That all allegations of torture and ill treatment, and all those potentially responsible are fully investigated without delay and perpetrators are brought to justice;**

   b. **That the State publicly acknowledges and widely disseminates the facts relating to state abuse in state and faith-based institutions, acknowledging the environment of impunity**

[127] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429, see above at [11] and [80] – [85].

that allowed such abuse to occur, taking responsibility for its role in allowing the abuse to occur, and signalling steps that it intends to take to ensure that such widespread systemic abuse does not occur in the future.

Guarantees of non-repetition

10. **The Commission recommends:**

    a. **That structural reform measures are implemented to prevent abuse from occurring in the future, including:**

        i. **Mandatory training on international human rights, particularly UNCAT, CRPD and the Convention on the Rights of the Child, as well as training on te Tiriti o Waitangi, unconscious bias and Pacific cultural competencies for those working in the sector;**

        ii. **Removal of procedural barriers for survivors of torture and ill-treatment as set out at recommendation 5 above;**

        iii. **Implementation of adequate procedural mechanisms that enable independent oversight, monitoring, evaluation, and reporting on the implementation of redress measures. and rehabilitation services to survivors. This should include the development of indicators or benchmarks, disaggregating the data by age, gender, ethnic origins and other key factors, against which implementation progress can be tracked and measured over time.**

    b. **Finally, the Commission supports the call from survivors and advocates for a formal apology to be made by the Crown and faith-based institutions to survivors of abuse in care and their affected families/whānau.**

Appendix One: Response to Allegations of State Abuse in International Jurisdictions

Ireland

1. In Ireland in 1999, the Government established the Committee to Inquire into Child Abuse (the Laffoy Committee) to investigate allegations of child abuse by the State and publish a report on its findings. Thereafter, the Government established the Compensation Advisory Committee (CAC) to devise a fair and responsible compensation scheme, leading to the Ryan Report which noted the importance of providing redress to "allow many of those victims to pass the remainder of their years with a degree of physical and mental comfort which would otherwise not be readily obtainable." Claimants were eligible for up to €300,000 in compensation, based on a scale that measured the severity of the abuse, severity of medically verified physical/psychiatric illness, severity of psycho-social consequences and how the abuse caused them loss of opportunities.[128]

2. The CAC concluded that "no amount of money can truly compensate those who have been abused [and] … that it is vital that a comprehensive package of services and other forms of assistance is put in place for the benefit of survivors."[129] Accordingly, the Residential Institutions Redress Act 2002 set up the Residential Institutions Redress Board (RIRB) to provide ex-gratia payments to provide some solace to victims rather than as a way to put right the wrong they suffered. The RIRB also set up a Money and Budgeting service to provide financial advice to applicants who received awards. [130]

Australia

(i) State inquiries

3. In the 1980s and 1990s there were a number of State inquiries and reports. The Report of the Queensland Commission of Inquiry into Abuse of Children in Queensland Institutions (Forde Report)[131] led to an official apology;[132] a review of legislation to ensure better protection of the young and vulnerable; funding of services for former residents; and a fund of $100 million for compensation.[133]

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[128] The Compensation Advisory Committee *Towards Redress and Recovery: Report to the Minister for Education and Science,* (Ireland, 2002): See also Reclaiming Self *Ryan report Follow-Up Submission to the United Nations Committee Against Torture* (June 2017); Jane Campbell "Briefing note to Northern Ireland Assembly: The Inquiry into Institutional Child Abuse in Ireland" (April, 2010)

[129] The Compensation Advisory Committee (2002) at pp v-vi.

[130] The National Counselling Service, a free, confidential, community-based service for adults who were hurt by childhood abuse in Ireland operates throughout Ireland through its 10 health boards.

[131] *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions*, (31 May 1999), available at: https://www.qld.gov.au/__data/assets/pdf_file/0023/54509/forde-cominquiry.pdf. The inquiry investigated the treatment of children in licensed government and non-government institutions in Queensland, covering 159 institutions from 1911 to 1999. It excluded foster care and institutions providing care for children with disabilities or those suffering from acute or chronic health problems. The report made 42 recommendations relating to contemporary child protection practices, youth justice and redress of past abuse.

[132] The government apology in 1999 was extended in 2010 to cover all those who, while under the care and protection order of the State, suffered maltreatment or neglect or were inappropriately placed in Queensland adult mental health facilities. See Queensland Government Apology to those who as children in the care of the State of Queensland suffered in any way while resident in an adult mental health facility, available at: https://www.health.qld.gov.au/__data/assets/pdf_file/0022/643081/2010-apology-statement.pdf.

[133] *Royal Commission into Institutional Responses to Child Sexual Abuse: Queensland Government Summary of Redress Scheme*, available at:

(ii) Federal inquiries

4. In 1977 the Human Rights and Equal Opportunities Commission (HREOC) published "Bring Them Home", the findings of a major investigation into the removal of Indigenous children from their families.[134] In 1985, the Senate Standing Committee on Social Welfare tabled a Report on Children in Institutional and Other Forms of Care – A National Perspective.[135] In 2001 the Senate Committee initiated an inquiry into child migration during the twentieth century.[136] In 2004 a further study was undertaken into the abuse that children suffered in State care.[137]

5. The Federal Government then led by Prime Minister John Howard responded to the HREOC Inquiry recommendations by establishing a $63 million fund to support programmes to index and preserve files, provide family support and establish projects for Indigenous culture and language maintenance and oral histories.

6. In 2012, the Federal Government established the Royal Commission into Institutional Responses to Child Sexual Abuse leading to a formal apology by Scott Morrison.[138] The royal commission also assessed the issue of compensation – leading to the overturning of laws that protected churches from liabilities as well as other laws of limitation that had previously prevented survivors from accessing justice. In some of the most serious cases, survivors received compensation of more than $1 million.[139]

7. However, for those who cannot provide the level of proof required to substantiate a claim of sexual abuse, the National Redress Scheme was established in July 2018 to compensate those who may not have enough evidence to support a claim in Court, where the average payment is $61,864 AUD.[140]

8. In 2015, the Royal Commission into Institutional Responses to Child Sexual Abuse released a report on Redress and Civil Litigation to assess the extent to which justice for victims had been

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https://www.childabuseroyalcommission.gov.au/sites/default/files/EXH.005.036.0001.pdf. For more information on the implementation of the Forde Report and follow-up inquiries, see Queensland *Government Response to Recommendations of the Commission of Inquiry into Abuse of Children in Queensland Institutions Progress Report* (11 September 2001), available at: https://web.archive.org/web/20120407070719/http://www.communities.qld.gov.au/resources/communityservices/community/forgotten-australians/forde-govtresprogress.pdf;
Queensland Child Protection Commission of Inquiry *Taking Responsibility: A Roadmap for Queensland Child Protection* (June 2013), available at http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0017/202625/QCPCI-FINAL-REPORT-web-version.pdf.

[134] Human Rights and Equal Opportunity Commission *Bringing them home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney, 1997) available at: https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf

[135] *Children in Institutional and Other Forms of Care: a national perspective - Report of the Senate Standing Committee on Social Welfare* (Australian Government Publishing Service, Canberra, June 1985).

[136] Lost Innocents: Righting the Record – Report on child migration (30 August 2001), available here:

[137] Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children (30 August 2004): available here: https://www.aph.gov.au/parliamentary_business/committees/senate/community_affairs/completed_inquiries/2004-07/inst_care/report/index

[138] Transcript of National Apology Address of Prime Minister (Parliament House, Canberra, 22 October 2018), available at: https://www.pm.gov.au/media/national-apology-address

[139] Al Jazeera "Survivors reflect on Australia sex abuse inquiry, three years on" (15 December 2020): https://www.aljazeera.com/news/2020/12/15/royal-commission-reflections-of-sexual-abuse-survivors

[140] Ibid.

or can be achieved through previous and current redress processes and civil litigation systems.[141]

9. A survivor has applauded the work of the Royal Commission in providing satisfaction and the right to truth through exposing the crimes of the State, believing the victims and validating their stories. However, by focusing only on sexual abuse it ignores the effects of psychological and physical abuse, neglect and unpaid child labour. She notes further that the level of compensation awarded through the National Redress Scheme is "insulting" given the detriment the abuse caused to their education and vocational training opportunities[142].

Canada

10. In Canada the 1996 Royal Commission on Aboriginal Peoples and the Law Commission Report roused particular concerns for First Nation children who had been in the residential care system.[143] By 2006 some 15,000 cases relating to Indian Residential Schools had been filed.

11. In response the Government issued an apology,[144] established a $350 million fund "for community-based healing as a first step to deal with the legacy of physical and sexual abuse at residential schools"[145] and developed a four-pronged approach for community development and strengthening indigenous governance.[146]

12. In 2006 the Indian Residential School agreement set aside $2 billion for compensation following a class action suit. Common experience payments were to be available for victims of abuse at residential schools – being $10,000 and $3,000 for each additional year spent at a residential school.[147] In addition, former students who claimed some form of physical, sexual or psychological abuse can file separate claims for additional compensation through the "Independent Assessment process". Compensation was capped at $275,000.

13. In June 2008, the Prime Minister of Canada, Stephen Harper, apologised for Residential Schools in the Canadian House of Commons.[148] Following the class action settlement, a Truth and Reconciliation Commission (TRC) was established to document the truth of what happened through the provision of $60 million and a five-year mandate to "create as complete a historical record as possible of the residential school system and legacy." It was also tasked with a $20 million commemoration fund and $125 million Aboriginal Healing Fund. The Commission could not however name individual perpetrators[149].

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[141] Royal Commission into Institutional Responses to Child Sexual Abuse *Redress and Civil Litigation Report* (September 2015) available at: https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation

[142] Above n 139.

[143] Royal Commission on Aboriginal Peoples *Volume 1: Looking Forward, Looking Back. Report of the Royal Commission on Aboriginal Peoples* (October 1996)

[144] Ibid, see Statement of Reconciliation.

[145] Facing History and Ourselves "The Government Apologizes: Stolen Lives: The Indigenous Peoples of Canada and the Indian Residential Schools" available at: https://www.facinghistory.org/stolen-lives-indigenous-peoples-canada-and-indian-residential-schools/chapter-5/government-apologizes

[146] Ibid.

[147] The Canadian Encyclopedia "Indian Residential Schools Settlement Agreement" (July 11, 2013), https://www.thecanadianencyclopedia.ca/en/article/indian-residential-schools-settlement-agreement

[148] Government of Canada "Statement of apology to former students of Indian Residential Schools" (11 June 2008): https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655

[149] Truth and Reconciliation Commission of Canada: "TRC Findings" (June 2015), available at: http://www.trc.ca/about-us/trc-findings.html

14. In June 2015, the TRC released a summary report of its findings and "94 Calls to Action" to "redress the legacy of residential schools and advance the process of Canadian reconciliation" through publishing 93 "calls to action" urging all levels of government to work together to repair the harm caused by the legacy of residential schools and move forward with reconciliation.[150] The "legacy" section focuses on:
    a. child welfare – such as reducing the number of Aboriginal children in care;
    b. education – such as eliminating education gaps between Aboriginal and non-Aboriginal Canadians;
    c. language and culture – such as calling on the government to acknowledge Aboriginal language rights;
    d. Health – such as acknowledging harm caused to Aboriginal communities by previous Government policies and establishing goals to close the gaps in health outcomes;
    e. Justice – such as removing statutes of limitations to defend against claims by Aboriginal people and establishing the independence of the Commission to investigate crimes in which the government has its own interest as a potential party in civil litigation.

15. The "Reconciliation" section calls on all levels of government to fully adopt and implement UNDRIP as a framework for reconciliation, and for the federal government to jointly develop with Aboriginal people a Royal Proclamation to be issued by the Crown, reaffirming the nation-to-nation relationship between Aboriginal peoples and the Crown. It also seeks to establish Indigenous law institutes, a National Council for Reconciliation, professional development and training for public servants, and a reconciliation framework for heritage and commemoration such as through establishing a statutory holiday to honour survivors.

16. By April 2021, a website developed by CBC Canada to track progress of the 94 calls to action entitled "Beyond 94" records that 10 items have been completed, 23 projects are underway, 39 are in progress and 22 have not started.[151]

[150] Truth and Reconciliation Commission of Canada: Calls to Action (2015), available at: http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf

[151] Beyond 94: Truth and Reconciliation in Canada (Published March 19, 2018; Last updated April 12, 2021), available at: https://newsinteractives.cbc.ca/longform-single/beyond-94?&cta=1