

Cooper Legal: submission to United Nations Universal Periodic Review:

Introduction

1. Cooper Legal is a small law firm in Wellington, which represents more than 1200 clients who have suffered abuse while in the care of the State. This could be in the care of social welfare institutions, church-run facilities, prisons, schools (private or State-run) and/or mental health facilities.
2. This submission aims to highlight the human rights breaches suffered by our clients, from when they are born into their adult lives. The submission further aims to highlight the issues that we, as lawyers funded by Legal Aid, face in trying to hold the State to account for its actions.

Inequality

3. Cooper Legal strongly supports the effort made by the State to address inequality. However, we work with New Zealand's most marginalised people and are confronted with growing inequality every day.
4. One of the key areas to come out of the New Zealand Report for the UN UPR review in 2014, was the work being done to promote equality. While the New Zealand report heralds that "New Zealand is committed to identifying and addressing gaps in information to better understand the causes on inequality"¹, our firm sees a different side of this. We see the gap widening between what is often referred to as the 'haves' and the 'have nots'; we see the State profile its citizens, especially the indigenous Māori population, vulnerable people and youth; we see prisoners denied their basic human rights; and we see access to justice become more difficult for all but the wealthiest.
5. A range of recommendations to come out of the New Zealand 2009 UN UPR review focused on equality and non-discrimination. This includes recommendations: 25-27, 28, 30-37, 40-46, 61, which looked at (amongst other things) how to support Māori and promote the rights of persons with disabilities. In its report, New Zealand said it "has compressive legislation and policy measure in place to promote equality ... [including] robust non-discrimination provision in human rights legislation and a variety of laws, policies and practices".²
6. Of note, the State rejected (amongst many others), recommendation 36:³

... [e]nshrine, in the framework of the current constitutional review, the principle of equality between men and women, and redouble efforts to improve the situation of the Māori and the Pacifica in the areas of health and employment on one hand, and strengthen the specific measures taken in their favour to raise the level of education of their children on the other hand.

and recommendation 38:

... [c]ontinue to address all forms of political, economic and social discrimination against the Māori and Pacific population by meeting their various demands for constitutional and legal reforms and recognition.

7. We disagree with the State's reasoning for rejecting these recommendations, namely that the legislative framework already provides protection from discrimination and for engaging with Māori and Pasifika people without discrimination.
8. For our clients, inequality often starts at birth when they are born into families that are well-known to multiple agencies, including the Ministry of Social Development ("MSD"), the Ministry of Justice, and the Department of Corrections. This results in profiling from a very young age. Please see Appendix two for a case study of a 13-year-old child who this firm represented in a criminal trial, where profiling was greatly to her disadvantage.
9. Recently the State has commenced an across-government 'Investment Approach' which uses statistics to further profile citizens. This included a report (labelled *under proposal*) about 'million dollar' babies. This report had a wider aim to "focus entirely on the 'information revolution' and its ability to drill down into the lives of the people behind the numbers in welfare, justice, housing and education in a way that has never been possible before".⁴

10. Through using data from welfare, education, employment and housing agencies, the project looked to identify children that would cost the State the most. Calculations showed that for children with at least one close relative who had been previously reported to child safety authorities, had been to prison and had spent a long time on welfare:⁵

... by the age of 10, their likelihood of going to prison at some point in their life was 70 per cent. They also discovered that these kids were costing the state \$1 million each - giving rise to [the description] of "the million dollar babies".

State care and abuse of children

11. As part of its UN obligations, the State owes a duty to our clients to investigate their abuse allegations. In particular, at paragraph 11 of the Concluding Observations (CAT/C/NZL/CO/5), the United Nations Committee Against Torture recommended that:

... the State party should take appropriate measures to ensure that allegations of cruel, inhuman or degrading treatment in the "historic cases" are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation.

12. Most of our clients who were involved with social welfare agencies as children followed a standard progression. This started with care and protection concerns and then gradually, as their behaviours became more anti-social, involvement through youth justice, because of offending.

MSD processes

13. The 'Historic Claims Team', which sits within MSD, deals with claims of abuse or neglect against a person placed in the care of the State before 1 January 2008.

14. MSD commends itself on having a process built around principles of respect, acknowledgement of wrong and taking a 'non-legalistic' approach. In practice, this means we engage in an out-of-court Alternative Disputes Resolution (ADR) process. However, what the exact parameters of this process are is unclear, because there is no publicly available information regarding settlement or how this is determined.

15. This process has benefits. For example, it prevents our clients from needing to go to court and the trauma associated with that, such as giving evidence and cross-examination. However, due to a number of significant flaws, this ADR process denies many clients the effective remedies they are entitled to. Amongst other things, we are concerned about the impartiality and promptness of the process (effectively MSD is investigating its own staff); the way MSD deals with the ADR process (even outside of court, MSD requires a high standard of proof, which given the historic and sensitive nature of the allegation is not available); the excessive delays in obtaining any remedy, and the quality of the remedy that is (finally) offered (which is offered as a 'take of leave it' or 'last resort' and is typically a 'bare minimum' offer).

16. As mentioned during the last UPR, the Historic Claims process has not been reviewed by the Office of the Ombudsman, and while the New Zealand Human Rights Commission ("HCR") began an investigation in 2009, this was not completed.

17. For a further overview of the MSD process, please see appendix one.

Royal Commission of Inquiry into Abuse in State Care

18. Due to wide public pressure, it was announced earlier this year that New Zealand would hold a Royal Commission of Inquiry into historical abuse in State care. The United Nations Committee on the Elimination of Racial Discrimination recommended such an Inquiry for New Zealand.

19. Public consultation on the draft Terms of Reference has now closed and will soon be confirmed.

20. Cooper Legal had some concerns about the draft Terms of Reference. Our biggest issue related to the timeframe of the Inquiry, which only covers abuse suffered by those in care between 1 January 1950 and 31 December 1999. This cut-off date is arbitrary as some of the programmes that this firm is most concerned by continued beyond 1999. For example, the Whakapakari Programme operated on a remote island off the coast of Auckland from 1986 until 2004. This firm represents over 120 clients who allege serious physical, sexual and psychological abuse perpetrated by staff and other residents at this Programme.
21. We are not only concerned about our current clients, but also potential future clients, the people who are currently passing through Oranga Tamariki. While we appreciate the need to view this as a 'historic' issue, the Royal Commission, as it currently stands, will have no ability to change current social work practices. This completely fails to appreciate that serious abuse continues to occur and contradicts the requirement for the Commission to provide recommendations to protect children currently in care.
22. Our client group is rapidly reflecting the next generation of victims. Our youngest client is 17 and had not even been born at the 31 December 1999 cut-off date. Not only were these clients' experiences radically different to those of clients who were in care in the 70s and 80s, their care was governed under different legislation,⁶ legislation which now reflects New Zealand's obligations under UNCROC. The decision to distinguish between the arbitrary date of 31 December 1999 and anything thereafter, rather than the legislative date of 1989, means the State fails to appreciate the importance of UNCROC. It also fails to appreciate that those in care after 1990 were also owed additional duties under the Bill of Rights Act 1990. The very people who fall directly under these international instruments, and whose parents did not, and therefore, should hold the key to what was done wrong and what was done right have been excluded from the Commission. In practice, this could mean a person who straddles the cut-off date is only able to tell half their story, or is made to feel like abuse post-1999 is not believed or relevant.
23. The State's reasons are that additional complaint mechanisms were put in place at the end of 1999, which served to prevent abuse. This is not supported by any evidence, such as an increase in complaints or a decrease in historic abuse claims. Australia's Royal Commission found that it took, on average, 22 years for a victim to report abuse, meaning the introduction of complaint mechanisms in 1999 would have made no difference.⁷

Redress for abuse

24. Approximately 99% of our firm's clients are funded through civil legal aid, which is funded by the State.
25. In New Zealand, legal aid is hard to access. At the time of writing, the income threshold for a single person to receive legal aid is \$23,326.00 per annum⁸ (which equates to €13,951.61 or US\$16,095.44 per annum). Even when clients do qualify for legal aid, this is granted as a loan on the basis that it will be repaid. Research has shown that this deters people who would qualify for legal aid from applying.⁹ It makes sense that our clients, who are already deeply wary of their interactions with State, do not want to enter into a loan agreement with the State.
26. In 2016, the average hourly rate for a New Zealand lawyer (across all levels of seniority, including graduate lawyers) was \$292.70 per hour.¹⁰ However, legal aid rates range between \$92.00 per hour and \$149.00, the latter rate (which equates to €89.10 and US\$102.81) is irrespective of experience.
27. While the Crown has seemingly unlimited resources at its disposal, the number of lawyers practicing civil legal aid has more than halved during the period from 2011 to 2016.¹¹ In practice, this means long waits for our constantly expanding list of clients and, unfortunately, a growing need to turn new clients away who do not fit squarely into our area of expertise.
28. Barriers to legal aid also mean there is a chronic lack of available resources to help a large portion of the population access justice for a wide range of violations committed against them, both by the State and other individuals. This includes in areas such as housing, family, criminal and ACC¹² law. Introduced to try to curb the growing legal aid debt in many of these areas, fixed-fee schedules have made it difficult for lawyers to operate. Fixed fees mean that lawyers are only able to claim a set amount, regardless of how much work has

been put in. In the Family Court this has meant separating couples are told to attend mediation to sort out childcare and other issues, instead of a lawyer being appointed.¹³ Under the new process, parties are not entitled State-funded legal representation for anything but the most urgent cases, normally those involving domestic violence.¹⁴

Criminal Justice

Victims and the Criminal Justice System

29. New Zealand's revictimization statistics report that while the number of crimes is decreasing, chronic victimisation is increasing. The 2014 New Zealand Crime and Safety Survey found that 3% of victims experienced 53% of crime. This a change from the previous survey, which showed 6% of victims experienced 52% of crime, meaning the concentration of crime has increased.¹⁵
30. Research further shows that those experiencing crime are often the same people who are committing it. Once caught up in the criminal justice system, these people are further victimised, and the cycle of repeat offending and victimisation continues to perpetuate.¹⁶ In practice, this means a small amount of people are coming into contact again and again with the criminal justice system, often leading to further disillusionment with the system and the State.

Offenders and the Criminal Justice System

31. Little has changed in the criminal justice system since New Zealand's last UPR review. A recent comprehensive report on the criminal justice system by the Prime Minister's Chief Scientist, Sir Peter Gluckman, again reported that New Zealand's prison population is increasing and is one of the highest in the OECD, at a time when crime rates were decreasing. This could only be explained by the systemic and cumulative impact of successive policy decisions over time, often in response to public demand and political positioning.¹⁷ The cost of prisons in New Zealand far exceeds those justified by the need to protect the public. The Gluckman report stated that New Zealand imprisoned people "in response to dogma not data"¹⁸. With an increased prison population came the understanding that prisons were extremely expensive training grounds for criminals and recruitment centres for gangs.
32. The need for change to our bail and parole legislation has been well canvassed.¹⁹ New Zealand is remanding a greater proportion of people in custody, and the period of the remand is becoming longer and longer. Our parole laws have become harsher. Since the high-profile escape of one prisoner, Phillip Smith, valuable rehabilitative programmes have been harder to access²⁰.
33. There has been an increase in double-bunking New Zealand. In 2016/17, Corrections added 520 extra bunks to prison cells. That meant that about 40% of prisoners were now double-bunked.²¹ This has given rise to physical and sexual assaults between prisoners, where at least one perpetrator has been convicted in relation to multiple victims²².
34. A number of Ombudsman reports have found that prisons are not fit for purpose. Previously closed units in Remutaka Prison were recently reopened to house an overflow of woman prisoners from Arohata Prison. The Upper Prison, as it is called, is not fit for purpose.²³
35. In addition, the Ombudsman has addressed the issue of the treatment of prisoners at risk of suicide and self-harm. The Department of Corrections has been found wanting in its treatment of at-risk prisoners, using tie-down beds and mechanical restraints in ways which do not adhere to the guidelines and may amount to torture.²⁴ There is an ongoing dispute between the Ombudman and the Department of Corrections about the ability of prison staff to view prisoners while they are toileting.
36. Cooper Legal has dealt with a regular stream of prisoners who have had their rights breached or suffered physical or sexual assaults while in prison. The ability of a prisoner to receive adequate redress for breaches of their rights is impeded by the Prisoners' and Victims' Claims Act 2005 ("PVCA"). The PVCA operates to restrict awards of compensation to prisoners²⁵. It also implements a process whereby victims of the

prisoner's offending can make claims on the compensation, sometimes in excess of the amount of compensation that actually exists²⁶. A prisoner is also forced to pay fines, reparation and legal aid debt out of the compensation before they receive the balance, some eight months after the compensation is paid to the Secretary for Justice.

37. The Department of Corrections is able to contract out of the provisions of the PVCA, but only agrees to do so in the most egregious cases. Even in cases where the Supreme Court has found fault with the way in which the Department has calculated sentences of imprisonment, meaning hundreds of prisoners were illegally detained, the Department has refused to contract out of the PVCA. In one recent case, the Department refused to contract out of the PVCA for a terminally ill prisoner, who is unlikely to live long enough to receive the balance of his compensation. Receiving compensation for a wrong done to a prisoner is increasingly a "poisoned chalice" in New Zealand.

Youth and the Criminal Justice System

38. The number of young people coming into contact with the Youth Justice system is decreasing in New Zealand.²⁷ In 2017, 25% fewer children and young people appeared in the Youth Court, 63% fewer than at the peak in 2007.²⁸ However, research also shows that over the past year, the Youth Justice system is "dealing with a different mix of young people who offend" and who are committing different types of offences.²⁹

39. Research also shows that the number of young people remanded in custody has changed very little since 2010/2011. This means the custodial remand rate has actually **increased**.³⁰

40. This includes New Zealand's indigenous population. Young Māori are significantly over-represented in the criminal justice system as victims and offenders,³¹ and often initial involvement as a victim progresses into involvement as an offender. Before they start offending, most young people had "experienced high rates of criminal abuse, neglect and violence, often from infancy, and have also been witness to crime and violence"³².

41. In 2016-2017, 87% of young offenders (or 86% of males and 92% of females) aged 14 to 16 years, had prior care and protection involvement with Oranga Tamariki.³³ A child with at least one parent in prison is almost 10 times more likely to be imprisoned in the future than the child of non-prisoners.³⁴ This research has led Sir Peter Gluckman to recommend that victims of crime need trauma recovery services, starting as early as when these children are in preschool³⁵ (before the age of five).

Yours sincerely

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¹ National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, (A/HRC/WG.6/18/NZL/1) at 7.

² Ibid, above at 15.

³ List of recommendation made to New Zealand during second Period Review, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/NZindex.aspx> (OHCHR, www.ohchr.org, 2014).

⁴ Watkins, Tracey *The English and Bennett show - quietly making ripples* (newspaper article, www.stuff.co.nz, published 6 June 2015).

⁵ Ibid, above.

⁶ In 1989, the Children, Young Persons, and Their Families Act (now Oranga Tamariki Act 1989) replaced the Children and Young Persons Act 1974.

⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, www.childabuseroyalcommission.gov.au (Commonwealth of Australia, 2017).

⁸ Stewart, Kayla and Toy-Cronin, Bridgette: *The New Zealand Legal Services Mapping Project: Finding Free and Low-Cost Legal Services* (Otago University, Legal Issues Centre, 2018) at 2.

⁹ Above, at 12.

¹⁰ Ibid, above at 2

¹¹ Above at 5.

¹² New Zealand's Accident Compensation Commission, a no-fault scheme providing compensation and rehabilitation for everyone injured in an accident in New Zealand.

¹³ Hutton, Catherine *Report shows Family Court systems are Failing* (Radio New Zealand, Wellington, 1 May 2018)

¹⁴ Ibid, above.

¹⁵ *New Zealand Crime and Safety Survey Results 2014* (Ministry of Justice, Wellington, 2015)

¹⁶ Ibid, above n 16 at 14.

¹⁷ *Using Evidence to Build a Better Justice System: The Challenge of Rising Prison Costs* (Office of the Prime Ministers Chief Science Advisor, 29 March 2018).

¹⁸ Ibid, above at 14

¹⁹ See the JustSpeak report *Bailing out our Justice System*, https://d3n8a8pro7vhm.cloudfront.net/justspeak/pages/129/attachments/original/1493195153/Bailing_out_the_Justice_System.pdf?1493195153; see also ibid, above n 17 at 9: 28% of prisoners in New Zealand are on remand.

²⁰ *Government Inquiry into Matters Relating to the Escape of Phillip John Smith* (Wellington, August 2015) at 60 and 64.

²¹ *Report of the Justice Committee 2016/17 Annual Review of the Department of Corrections* (Department of Corrections, Wellington, March 2018).

²² In September 2017, William Katipa was found guilty of raping three of his cellmates.

²³ *Report on an unannounced inspection of Upper Prison (Arohata) under the Crimes of Torture Act 1989* (Office of the Ombudsman, Wellington, 22 March 2018); see also report on an unannounced inspection of Christchurch Men's Prison under the Crimes of Torture Act 1989 (Office of the Ombudsman, Wellington, 5 December 2017).

²⁴ *A Question of Restraint: Care and Management for prisoners considered to be at risk of suicide and self-harm: observations and findings from OPCAT inspectors* (Office of the Ombudsman, Wellington, 1 March 2017, Chief Ombudsman).

²⁵ *Prisoners' and Victims' Claims Act 2005* at section 13.

²⁶ Ibid, above at subpart 2.

²⁷ *Youth Prosecution Statistic – date highlights for 2017*, <https://www.justice.govt.nz/assets/Documents/Publications/youth-prosecution-statistics-data-highlights-2017.pdf> (Ministry of Justice, Wellington, 2017).

²⁸ Ibid, above at 1.

²⁹ *Youth Justice Indicators Summary Report – April 2018*, <https://www.justice.govt.nz/assets/Documents/Publications/Youth-Justice-Indicators-Summary-Report-201804>, (Ministry of Justice, Wellington, June 2018) at 5.

³⁰ Ibid, above.

³¹ Policy, Strategy and Research Group, *Over-representation of Māori in the criminal justice system: An exploratory report* (Wellington: Department of Corrections, 2007).

³² Gluckman, Sir Peter *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime's Minister Chief Science Advisor, Auckland, 12 June 2018) at 6.

³³ Oranga Tamariki is the Ministry for Vulnerable Children which sits within MSD; Ministry of Justice *Youth Justice Indicators Summary Report: April 2018* (Ministry of Justice, Wellington, 2018)

³⁴ Network Research, *Causes of and solutions to inter-generational crime: the final report of the study of the children of prisoners*. Christchurch (NZ: Pillars, www.pillars.org.nz, 2011).

³⁵ *Ibid*, above at 19.