

## **APPENDIX B – OVERVIEW OF WHY THE RPF DOES NOT PROVIDE AN EFFECTIVE REMEDY TO SURVIVORS**

### **The right to an effective remedy**

1. The State has an obligation to provide an effective remedy for survivors of abuse in care.

#### **Common Law**

2. The right to an effective remedy for survivors of abuse in care exists as a matter of the common law, including, *inter alia*:
  - 2.1 the “want of right, want of remedy” maxim;
  - 2.2 the values of the common law and/or customary law, which includes tikanga, the principles of Te Tiriti<sup>6</sup> and international law;
  - 2.3 aspects of administrative law, including obligations relating to procedural fairness, legitimate expectations, the self-fettering of executive discretion.

#### **New Zealand Bill of Rights Act 1990 (“BORA”)**

3. The right to an effective remedy for survivors of abuse in care exists as a matter of BORA, including, *inter alia*:
  - 3.1 sections 8, 9, 22, and/or 23(5);
  - 3.2 section 19, which also relates tikanga and Te Tiriti;
  - 3.3 section 27, which applies to determinations made by any “other public authority”.

#### **Te Tiriti o Waitangi**

4. The right to an effective remedy for survivors of abuse in care exists as a matter of Te Tiriti, including, *inter alia*:
  - 4.1 Article Two, which recognises Māori retain tino rangatiratanga<sup>7</sup> over taonga<sup>8</sup>;
  - 4.2 Tamariki have been acknowledged as taonga in need of care, nurturing, and protection;<sup>9</sup>
  - 4.3 Article Three, which entails active protection by the Crown; and
  - 4.4 The concept that a redress scheme must prioritise and reflect the applicant’s mana,<sup>10</sup> tapu,<sup>11</sup> and tino rangatiratanga.<sup>12</sup>

#### **Tikanga**

5. The right to an effective remedy for survivors of abuse in care exists as a matter of Tikanga, as a source of law, including, *inter alia*:

- 5.1 The RPF fails to consider concepts of tūkino<sup>13</sup>,hara<sup>14</sup>,ea,<sup>15</sup> mana tapu, <sup>16</sup> and tatau pounamu.<sup>17</sup>
- 5.2 The RPF creates further hara by not appreciating the harm that the plaintiffs suffered as a result of the defendant's conduct.
- 5.3 The RPF lacks meaningful tikanga Māori concepts at any stage of the redress scheme, which is inconsistent with the recommendations of the Royal Commission of Inquiry into Abuse in Care<sup>18</sup> and tikanga Māori.

International law relating to the right to an effective remedy

6. The right to an effective remedy for survivors of abuse in care exists as a matter of international law relating to the right to an effective remedy, including, *inter alia*:
  - 6.1 Article 2(3) of the International Convention on Civil and Political Rights, entered into force on 23 March 1976 and ratified by New Zealand on 28 December 1978 ("ICCPR");
  - 6.2 the jurisprudence on the right to an effective remedy, as developed by the Human Rights Committee ("HRC"), whose competency was recognised by New Zealand on 26 May 1989;
  - 6.3 Article 8 of the Universal Declaration of Human Rights, proclaimed by the General Assembly on 10 December 1948 ("UDHR");
  - 6.4 Article 8(2) of the United Nations Declarations on the Rights of Indigenous Peoples, adopted by General Assembly on 13 September 2007 ("UNDRIP");
  - 6.5 the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly on 16 December 2005 ("the van Boven Guidelines"); and
  - 6.6 the jurisprudence on the right to an effective remedy from other authoritative or comparative competent bodies of international law, including, for example, the International Criminal Court ("ICC"), the American Human Rights Committee ("AHRC"), *inter alia*.

International law relating to substantive human rights

7. The right to an effective remedy for survivors of abuse in care exists as a matter of international law relating to substantive human rights, including, *inter alia*:
  - 7.1 the ICCPR,
  - 7.2 the decisions and resources from the HRC;
  - 7.3 the UDHR;

- 7.4 the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force on 26 June 1987 and ratified by New Zealand on 10 December 1989 (“UNCAT”)
- 7.5 the decisions and resources from the Committee Against Torture, whose competency was recognised by New Zealand at the time of treaty ratification on 10 December 1989 (“CAT”);
- 7.6 the Convention on the Rights of the Child, entered into force on 2 September 1990 and ratified by New Zealand on 6 April 1993 (“UNCROC”);
- 7.7 the decisions and resources from the Committee on the Rights of the Child, whose competency was recognised by New Zealand on 22 December 2022 (“CRC”);
- 7.8 Article 3 and article 19 of UNDRIP;
- 7.9 the International Convention on the Elimination of all forms of Racial Discrimination, entered into force on 4 January 1979 and ratified by New Zealand on 22 November 1972 (“ICERD”);
- 7.10 the decisions and resources from the Committee on the Elimination of Racial Discrimination, whose competency is optionally provided for under Art 14 of the ICERD (“CERD”);
- 7.11 the United Nations Convention on the Rights of Persons with Disabilities, adopted by General Assembly on, and ratified by New Zealand in 2006 (“UNCRPD”);
- 7.12 the decisions and resources from the Committee on the Rights of Persons with Disabilities, whose individual complaints mechanism came into force for New Zealand on 4 November 2016 (“CRPD”);
- 7.13 the International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly on 16 December 1966 and ratified by New Zealand on 28 December 1978 (“ICESCR”);
- 7.14 the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly on 18 December 1992 (“the 1992 Declaration”);
- 7.15 the United Nations Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 18 December 1982 (“the Principles of Medical Ethics”);
- 7.16 the Standard Minimum Rules for the Treatment of Prisoner, as adopted by the First United Nations Congress of 1955, and the revised by the General Assembly on 17 December 2015 (“the Mandela Rules”); and/or

7.17 peremptory norms, jus cogens and/or obligations erga omnes, including, inter alia, non-derogable rights relating to self-determination, slavery and torture.

### **The failure of the RPF to provide an effective remedy**

8. The RPF scheme does not and cannot provide an effective remedy to survivors of abuse in care, which includes the plaintiffs, because, *inter alia*:

8.1 it does not substantively consider or engage with claimants' allegations, and so cannot substantively vindicate and/or compensate for those allegations;

8.2 despite not substantively considering claimants' allegations, RPF offers are "full and final" and invoke *res judicata*;

8.3 the "full and final" clause in RPF offers has an exception that allows for the claimant to access a future redress scheme, but there is no guarantee that this scheme will come into existence, or if it does, whether it will reengage the claim;

8.4 it lacks mechanisms for review, and other aspects required for procedural fairness;

8.5 the RPF scheme and its payment settings fail to take relevant considerations into account and/or are significantly out of step with the following considerations, including, *inter alia*:

8.5.1 inflation;

8.5.2 closely analogous state practice, including, *inter alia*:

a. Cabinet's Compensation Guidelines for Wrongful Conviction and Imprisonment, as published and revised from time to time since 1998;

b. extra-judicial remedies paid by the Executive under the prerogative of mercy, including in settlement offers;

c. extra-judicial remedies paid by the Executive in settlement offers for litigated cases analogous to abuse in care cases;

d. extra-judicial remedies paid in settlement offers for cases against the state that related to breaches to BORA.

8.5.3 the cost of abuse in care, or any attempt at referring to a relevant evidence-based metric to assess the economic impact of abuse in care (for example, the Value of a Statistical Life, as relied on by reports provided to the Royal Commission);

8.5.4 actuarial assessments of the cost to an adult as a result of abuse in care;

- 8.5.5 the hierarchy of rights, including in the common law, in equity, and as codified in BORA under ss 8, 9, 11, 19, 21 22, 23(5), 25 and 27;
- 8.5.6 analogous judicial remedies, including damages in tort, equity and/or public law, as awarded in the courts from time to time;
- 8.5.7 in light of the RPF's express provisions for unlawful imprisonment (termed "inappropriate detention"), consideration for comparative judicial remedies relating to unlawful imprisonment and arbitrary detention;
- 8.5.8 in light of the RPF's express provisions for BORA breaches, consideration for comparative judicial remedies relating to BORA, and comparative remedies provided by other public authorities that administer aspects of BORA;
- 8.5.9 additionally, in light of the RPF's express provisions for BORA breaches, any principled consideration for how BORA applies to claims, beyond a narrowly prescribed list of placements;
- 8.5.10 consideration for bespoke payments to recognise exceptional claims, especially for claims that clearly meet high standards of proof and feature exceptionally severe abuse, imprisonment, neglect, *inter alia*;
- 8.5.11 consideration for the socioeconomic position of claimants, in consideration that socioeconomic deprivation is inherent to abuse in care, and the risk that RPF offers may inadvertently, or intentionally, take unfair or improper advantage of claimants;
- 8.5.12 consideration for the vulnerability of the claimants, in consideration of the inherent vulnerability of those who are subjected to abuse in care, and the risk the RPF may inadvertently, or intentionally, take unfair or improper advantage of claimants;
- 8.5.13 in light of the overrepresentation of Māori abused in care, incorporation of tikanga and Te Tiriti perspectives on the payment settings scheme, including, *inter alia*:
- a. the relevance of tapu and mana in responding to abuse in care and whether, *inter alia*, payment settings can restore mana;
  - b. tikanga perspectives on balance, participation, whānau, fairness and justice, including utu, ea, *inter alia*, and whether the RPF is fit for these purposes;
  - c. Articles Two and Three of Te Tiriti and the principles incidental to those Articles, including, tino rangatiratanga, the principle of options, the principle of active protection, the principle of equity, and the principle of partnership; and
  - d. domestic and international obligations relating to indigenous rights, including the rights to cultural continuity and self-determination.

- 8.5.14 consideration of international law relating to the right to an effective remedy, as set out above at [28.5];
- 8.5.15 consideration of international law relating to substantive human rights, as set out above at [28.6];
- 8.5.16 consideration of remedies offered in comparative jurisdictions, including, for example, by foreign courts, Royal Commissions and governments.

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<sup>6</sup> The Treaty of Waitangi

<sup>7</sup> Tino rangatiratanga refers to self-determination, sovereignty and autonomy.

<sup>8</sup> Taonga refers to possessions, treasures, something of high value or importance.

<sup>9</sup> Tamariki refers to children.

<sup>10</sup> Mana refers to authority, presence, reputation and control. Mana also encompasses dignity and inherent power.

<sup>11</sup> Tapu refers to something that is restricted, sacred or set apart.

<sup>12</sup> The Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *He Purapura Ora, he Māra Tipu – From Redress to Puretumu Torowhānui* (2021) at 56 and 69.

<sup>13</sup> Tukino refers to ill-treatment through abuse, torture and cruelty.

<sup>14</sup> Hara refers a violation of tapu, often caused by an offence or crime.

<sup>15</sup> Ea refers to restoration and reparation and is closely linked to utu.

<sup>16</sup> Tapu refers to something that is restricted, sacred or set apart.

<sup>17</sup> Tatau pounamu refers to peace and peace-making.

<sup>18</sup> *He Purapura Ora, he Māra Tipu – From Redress to Puretumu Torowhānui*, above at 12.