SUBMISSION

1. 194 recommendations were made at New Zealand's last UPR review in 2019. The New Zealand Government accepted 160 of the recommendations and "noted" the remaining 34.

International human rights framework

2. We note recommendation 27 from the previous review.[1] New Zealand did not accept this recommendation, noting that it agreed to consider it, but could not bypass the domestic process. We have seen no evidence that this recommendation has been formally considered.

3. Specifically, in regard to the Convention Against Torture ("UNCAT"), we note that New Zealand has reserved the right to award compensation to torture victims only at the discretion of the Attorney-General, despite being repeatedly urged to remove this reservation by other States and NGOs, among others.

4. The Royal Commission of Inquiry into Abuse in Care ("the Commission") has described survivors' experiences at the former Lake Alice Hospital as amounting to 'torture' in line with the definitions of UNCAT.[2] The Commission has further indicated that survivors' experiences at Marylands School and Hebron Trust may amount to torture.[3]

5. Please see **Appendix A at [1]** for further details on the Commission's comments about the experiences of survivors amounting to torture.

6. Section 9 of the New Zealand Bill of Rights Act ("BORA") affirms the fact that in New Zealand, "[e]veryone has the right not to be subjected to torture". To protect this right, there must be an effective remedy available to survivors of torture.

7. We believe that another, stronger, recommendation needs to be made that New Zealand withdraw its reservation to the Convention against Torture. Removing the reservation would advance human rights in New Zealand and ensure survivors can obtain an effective remedy for their rights that have been breached.

Effective remedy

8. Since New Zealand's last UPR, the Ministry of Social Development ("MSD") has implemented its new Rapid Payment Framework ("RPF").[4]

9. The right to an effective remedy for survivors of abuse in care exists as a matter of: the New Zealand common law; BORA; the Treaty of Waitangi; Tikanga,[5] as a source of law; international law relating to the right to an effective remedy; and international law relating to substantive human rights.

10. The State has an obligation to provide an effective remedy for survivors of abuse in care. The largest proportion of those survivors have claims against

MSD.

11. The RPF scheme does not and cannot provide an effective remedy to survivors of abuse in care, because:

    11.1. It does not substantively consider nor engage with claimants' allegations, and so cannot substantively vindicate and/or compensate for those allegations;

    11.2. Despite not substantively considering claimants' allegations, RPF offers are "full and final" and not open to negotiation;

    11.3. It lacks mechanisms for review, and other aspects required for procedural fairness;

    11.4. The RPF scheme and its payment settings fail to take relevant considerations into account and/or are significantly out of step with relevant considerations including inflation, the cost of abuse in care, bespoke payments, the socioeconomic position and vulnerability of survivors, and consideration of remedies offered in comparative jurisdictions; and

    11.5. There is no guarantee that any future redress scheme will come into existence, or if it does, whether it will be available to clients who have accepted "full and final" offers.

12. For a further overview of why the RPF does not provide an effective remedy to survivors, please see **Appendix B.**

Tikanga in the New Zealand law

13. In 2022, the Supreme Court allowed an appeal to continue, despite the appellant being deceased.[6] The Court unanimously recognized tikanga as a source of law in New Zealand,[7] rather than as "a part of the values of the New Zealand common law", which it had been previously recognised as.[8]

14. The majority commented that "[t]ikanga must be considered where it is relevant in the circumstances of the case" and that the appropriate method of determining if tikanga applies "will depend on the circumstances of the particular case."[9]

10. The Supreme Court recognising tikanga as a source of law means that the government departments should recognise Māori principles in their interpretation of the law and conduct, including in redress schemes for historical abuse. As mentioned above, the RPF fails to incorporate tikanga.

Inequality

15. We note recommendations 41 to 50 from New Zealand's last UPR review, which New Zealand accepted, which related to equality and non-discrimination.

16. We note, in particular, recommendation 49.[10]

17. In response to a recommendation of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain, the New Zealand Government established a Ministry for Ethnic Communities (which a major political party [ACT] intents to disestablish, if elected). In New Zealand's UPR mid-term report at [33], it was reported that:

> The Government engaged directly with ethnic communities to inform the new Ministry's initial priorities, which includes … ensuring government services are provided equitably and in ways that are accessible for ethnic communities[.]

18. We strongly support the establishment of the Ministry and the effort to reduce inequality. However, the new Ministry's initial priority of "ensuring government services are provided equitably and in ways that are accessible for ethnic communities" has not improved the delivery of non-recent redress services to survivors of abuse who are disproportionately in ethnic communities, nor has recommendation 49.

"Provided equitably"

19. Access to redress services under the Ministry of Social Development ("MSD") redress scheme, currently the primary redress scheme for survivors of abuse in care in New Zealand, is not provided equitably, or in particularly accessible ways, towards minority ethnic communities, especially Māori and Pasifika communities.

20. The MSD redress scheme covers abuse in Social Welfare care. The current scheme does not provide effective redress, because it fails to adequately compensate survivors for the actual abuse they suffered in care, the breaches of BORA attributable to that abuse, or the impact on the survivor's *mana* (personal status or prestige).

21. Māori and Pasifika youth have been historically overrepresented in care.[11] As a result, the MSD's inadequate redress schemes disproportionately affect Māori and Pasifika adults, effectively discriminating against these ethnic groups.

22. Despite their inadequacy, survivors are forced to use the out-of-court redress schemes, because litigation is not a valid option.[12]

"… in ways that are accessible for ethnic communities"

23. Further, the current redress schemes, including those operated by the Ministries of Education ("MOE") and Health ("MOH"), are not "accessible for ethnic communities". Many survivors are engaging in multiple redress schemes at once. This is confusing and negatively impacts the accessibility of obtaining redress for all survivors – who are disproportionately Māori and Pasifika, as set out above. For further information about the inaccessibility of the current redress schemes, please see **Appendix A at [5].**

Protection of vulnerable people

24. We note recommendations 40[13] and 100[14] from New Zealand's last UPR review, which New Zealand accepted.

25. Survivors of abuse in care are extremely vulnerable. They are impecunious and have high rates of unemployment, homelessness, and involvement with the criminal justice system.

26. In addition, the current redress schemes are not survivor-focused and end up retraumatising many survivors.

27. For further information about the vulnerability of survivors of abuse in care and the retraumatizing effect of the current redress schemes, please see **Appendix A at [6].**

28. In December 2021, the Government agreed that the Commission's work showed an urgent and clearly demonstrated need for a significant shift from settlement-based claims processes to an integrated support-based approach to redress. Nearly two years on, no such shift has taken place.

29. Many survivors do not have access to funded counselling. Some survivors can access counselling through ACC's Integrated Services for Sensitive Claims,[15] Emerge Aotearoa ("Emerge"), and MOE. However, not all survivors can access these options, and those survivors who can, may face long delays.

30. The options for counselling and other support available to survivors in New Zealand are inadequate and fall short of addressing the complex needs of all survivors.

31. Please see **Appendix A at [10]** for further information on the support available to survivors and why it is inadequate.

Legal Aid rates

32. We note recommendations 61 to 64 from New Zealand's last UPR review, which New Zealand accepted, which related to improving access to legal assistance for women and minorities and combatting discrimination in the criminal justice system. While minor changes have since been implemented, significant work is still required in this area.

33. Legal Aid lawyers received a 12% increase in remuneration rates in 2022, the first increase since 2008. This increase was insufficient to provide equitable access to justice in New Zealand, and far less than it needed to be, to keep up with inflation.[16]

34. The low remuneration for Legal Aid lawyers severely impacts access to justice in New Zealand. Many lawyers in New Zealand will not undertake Legal Aid work.[17] This results in the lawyers who perform Legal Aid work having high workloads, and delays in proceedings, which impedes clients' rights to be tried

without undue delay, and right to justice.

35. On 25 July 2023, the Chief High Court Judge and the Chief District Court Judge sent an open letter to all High Court and District Court Judges setting out concerns about the well-being of Legal Aid lawyers, because of the high workloads and the inability to attract younger practitioners to doing legally aided work because of, among other things, the poor pay rates.

36. If New Zealand is to have an equitable legal system, Legal Aid rates should be increased to be equal to the significantly higher rates of lawyers contracted by the Crown.

37. In addition, in 2021 the Commission recommended:[18]

> 80. The Crown should review and consider raising the [legal aid] rates available for abuse in care work.

38. To our knowledge, over 18 months later, this recommendation has not been actioned, aside from the insufficient 12% increase across the board to all legal aid remuneration rates in 2022.

Legal Aid eligibility

39. Furthermore, the income threshold to qualify for Legal Aid in New Zealand needs urgent review.

40. As of 1 July 2023, a single person with no assets and no dependents would need to have a gross income of $27,913 NZD or less to qualify for Legal Aid. [19, 20] This is significantly lower than the yearly income of an adult working 40 hours per week on minimum wage ($47,216 NZD).[21]

41. We compare this to the Legal Aid eligibility thresholds of Queensland, Australia. The same single person with no dependents and no assets would qualify for fully funded Legal Aid if they earn less than $36,140 AUD ($39,150 NZD),[22] and would qualify, but have to make an initial contribution, if their income is less than $54,080 AUD ($58,585 NZD).[23, 24]

42. A large amount of New Zealand's population is unable to access justice due to the income threshold to receive legal aid services.

43. At the beginning of 2023, Legal Aid removed the user charge that was previously required to access legal aid services for many of those who qualified. We support this change, which removed a previous barrier to justice. However, significant further work is needed to provide equitable access to legal representation in New Zealand.

Response to the Royal Commission of Inquiry into Abuse in Care

44. In New Zealand's UPR mid-term report, it is stated at [135] that "The Government will receive and consider the Commission's recommendations and

findings as they are issued. An interim report specifically related to redress will be presented in December 2021."

45. Due to the specialised nature of Cooper Legal's work, we are uniquely able to address this point.

46. Unfortunately, from our perspective, we have seen no evidence that the State agencies we engage with to obtain redress of historic abuse in care, namely MSD, MOE and MOH, have been actively considering the findings as they are issued. Despite the interim report in 2021, we have seen no major changes in their respective redress schemes, excluding the implementation of MSD's RPF process, which runs contrary to the Commission's recommendations. We have set out our concerns with the RPF above.

47. To the extent that the Government may have *considered* the Commission's recommendations and findings in creating this process, it has in fact only acted *against* those recommendations to date. It is therefore misleading to state that "[t]he Government is considering the Royal Commission's recommendations and findings as they are issued."

48. Further, the Government committed to developing a new redress scheme after the Commission's final report. However, the existence of this new redress scheme is not guaranteed, nor is it guaranteed that it will be available to survivors who have previously accepted offers under the inadequate current redress processes. Further, we are seriously concerned that this commitment may not be upheld following this month's General Election.

49. Finally, the redress system design group has been given an impossibly tight timeframe to carry out its work. It has effectively been set up to fail by the State.

Minimum age of criminal responsibility

50. We note recommendation 69 from the previous review, which New Zealand accepted.[25]

51. We also note recommendation 70.[26] New Zealand did not accept this recommendation but noted that it would consider whether the current minimum age of criminal responsibility ("MACR") should be increased to align with international standards.[27]

52. Unfortunately, from our perspective, we have seen no evidence that the Government has considered the MACR with a view to increasing it to align with international standards.

53. The Government has in fact only acted *against* those recommendations to date. The Government has introduced legislation to increase the jurisdiction to institute criminal proceedings against children aged 12 and 13 years.[28]

54. We are seriously concerned by this measure to effectively lower the MACR in relation to certain offences, and that further such measures may be introduced

following this year's General Election.

55. We note that lowering the MACR is inconsistent with modern neuroscientific research.[29]

Discrimination in the youth criminal justice system

56. We note recommendations 63,[30] 64,[31] and 155[32] from the previous review, which New Zealand accepted.

57. Māori youth continue to be consistently overrepresented in the criminal justice system.[33] Māori and Pasifika youth remain significantly overrepresented in Youth Justice residences (juvenile custodial detention centres).[34]

58. We also note recommendations 65,[35] 67,[36] and 147[37] which New Zealand accepted.

59. In July 2019, New Zealand passed legislative changes stating that children's rights under the Convention on the Rights of the Child ("the CRC") "must be respected and upheld" in Youth Justice and Care and Protection matters (see **Appendix A at [16]**).[38]

60. Since the last UPR review, New Zealand's Youth Justice and Care and Protection residences were subjected to a national review in 2021.[39] The review found that "there are significant and persistent gaps in the provision of consistent and child-specific care and treatment options provided at … the residences", particularly in mental health services. The review identified five areas for immediate attention, including:

> the significant unmet demand for acute care places and the urgent need for more options for secure therapeutic care;
>
> …
>
> the need to provide a holistic and therapeutic approach for each tamaiti [child] in the care of the residences …

61. Unfortunately, from our perspective, we have seen no evidence that the Government has implemented measures in response to the UPR or national review. In 2023, these residences were subjected to another 'rapid review' following claims of sexual misconduct by residential staff.[40] The review found similar issues in the residences (see **Appendix A at [17]**).

62. Despite the ongoing concerns regarding the conditions of Youth Justice residences, the number of children in residences, primarily Māori and Pasifika youth, has continued to increase to date.[41] In July 2023, the Government announced its intention to build two new Youth Justice residences, in response to the increased youth custodial population. The 'rapid review' called the plan "confused" and "not conducive to securing good therapeutic outcomes" (see **Appendix A at [18]**).

63. We are seriously concerned about the Government's failure to implement the recommendations of international and national reviews in this area.

Conclusion

64. Thank you for the opportunity to provide our submissions. We hope that recommendations are made concerning the issues that we have identified, ultimately improving human rights in New Zealand.

Yours sincerely,

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[1] That New Zealand should "Withdraw its reservations to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Denmark)".
[2] The Royal Commission of Inquiry (Abuse in Care), *Beautiful Children* (December 2022) at 104.
[3] The Royal Commission of Inquiry (Abuse in Care), *Stolen Lives, Marked Souls* (July 2023), at [185], [302] and [308].
[4] Ministry of Social Development "MSD Historic Claims Business Process and Guidance" (16 May 2023) <www.msd.govt.nz> at [6].
[5] Māori customary practices or behaviours.
[6] *Ellis v R (Continuance)* [2022] NZSC 114; [2022] 1 NZLR 239 at [148].
[7] At 241.
[8] *Takamore v Clarke* [2012] NZSC 116; [2013] 2 NZLR 733 at [94].
[9] *Ellis v R,* above n 37, at 241.
[10] That New Zealand should "Continue to strengthen its legal and institutional architecture for human rights to level the ground for each ethnic and cultural group with effective economic, cultural and social measures (Republic of Korea)"
[11] Māori youth have been overrepresented in Social Welfare care since at least the 1960s, and possibly earlier than this. Although there is less historical data on the representation of Pasifika youth in Social Welfare care, it is clear that from at least the early 1980s there has been an overrepresentation of Pasifika youth in Social Welfare care.
[12] Among other barriers to litigation, New Zealand has the Limitation Act (Limitation Act 1950 or Limitation Act 2010, depending on the time frame of the allegations.) This means that if a survivor is over the age of 24 years when they bring a claim, which is the vast majority of survivors, this claim can be barred for Limitation reasons. It is now well-established that the average time a survivor takes to report sexual abuse is over 20 years. Other States have incorporated exceptions to their Limitation Acts for abuse survivors.
[13] That New Zealand should "Continue to strengthen its coordination mechanisms; deepen efforts to ensure the protection of vulnerable persons and groups and continue efforts to further improve their situation (Barbados)".
[14] That New Zealand should "Progress with efforts in addressing disparities in mental health and improve services for vulnerable groups (Sri Lanka)".
[15] New Zealand's Accident Compensation Commission.
[16] For context, according to the Reserve Bank of New Zealand's inflation calculator, inflation from 2008 Q1 to 2022 Q1 was 34.1%.
[17] This is because of the low rates of remuneration, and because of the administrative workload associated with Legal Aid funding.
[18] The Royal Commission of Inquiry (Abuse in Care), He Purapura Ora he Mara Tipu, Volume 1 (December 2021) at 339.
[19] This is approximately equivalent to $16,527 USD or £13,120 GBP.
[20] New Zealand Ministry of Justice "Eligibility Resource" <www.justice.govt.nz> at 1.
[21] This is approximately equivalent to $27,959 USD or £22,196 GBP.
[22] This is approximately equivalent to $23,179 USD or £18,496 GBP.
[23] This is approximately equivalent to $34,687 USD or £27,544 GBP.
[24] Legal Aid Queensland "Can I Get Legal Aid?" (March 2019) <www.legalaid.qld.gov.au> at 3.
[25] That New Zealand should "Reconsider the relevant legal acts in the part relating to the age of criminal responsibility, with a view to its possible increase (Serbia)".
[26] That New Zealand should "Raise the minimum age of criminal responsibility in line with international human rights standards (Iceland); increase the age of criminal responsibility (Montenegro)".
[27] The current MACR in New Zealand is 10 years. However, children aged 10 and 11 years may only be subjected to criminal proceedings on charges of murder or manslaughter. Children aged 12 and 13 years may only be subjected to criminal proceedings where the maximum penalty available for the offence is imprisonment for life or at least 14 years, or where they are a 'previous offender' and the maximum penalty available for the offence is imprisonment between 10 to 14 years. See section 272(1) of the Oranga Tamariki Act 1989.
[28] In response to a perceived increase in children and young people committing 'ram raids' (a style of burglary typically involving using a stolen car to damage a storefront to enter the premises and steal goods), on 29 August 2023, the New Zealand Government introduced the 'Ram Raid Offending and Related Measures Amendment Bill' into Parliament. The Bill purports to introduce a new criminal 'ram raid' offence (defined as "using a motor vehicle to damage a building and enter the building without authority and with intent to commit an imprisonable offence in it") and allow criminal proceedings to be instituted against children aged 12 and 13 years where they are charged with this offence. Children aged 12 to 13 years are currently unable to be subjected to criminal proceedings for 'ram raid' style

burglaries, as the current maximum available penalty for burglary is 10 years imprisonment.

[29] It is now well-established that children under the age of 14 years do not have the developmental maturity to comprehend the impact of their offending behaviour or the nature of criminal proceedings, and that punitive measures are ineffective for reducing recidivism amongst children who offend, whose welfare concerns precede their offending behaviour. For example, we refer to the recent reports of the New Zealand Chief Science Advisor for the Justice Sector, Professor Ian Lambie, *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (2020) and *How we fail children who offend and what to do about it: 'A breakdown across the whole system'* (2022).

[30] That New Zealand should "Continue the efforts to prevent discrimination in New Zealand's criminal justice system (Indonesia)".

[31] That New Zealand should "Step up efforts to prevent and combat all forms of discrimination, especially in the criminal justice system (Italy)".

[32] That New Zealand should "Work to combat discrimination against vulnerable children, including Māori and Pasifika children … (Syrian Arab Republic)".

[33] Over the past decade, the proportion of children and young people who have been charged in the Youth Court who are Māori has fluctuated between 62 to 67 per cent. In 2022, 63 per cent of children and young people charged in the Youth Court were Māori. See Ministry of Justice *Children and young people with charges finalised in the Youth Court data tables* (2023).

[34] An Oranga Tamariki report examining changes in the size and composition of the youth justice custody population between July 2017 and April 2023 found that, on average, Māori youth accounted for 81 per cent of all children in custody each day (fluctuating daily between 67 and 93 per cent). On average, Pasifika youth accounted for 19 per cent of the youth justice custody population each day (fluctuating daily between 9 and 26 per cent). Over the period examined, 85% of custody placements were in a youth justice residence, 9% were in community remand homes or specialist youth homes, and 2% were in a variety of other placements. For the remaining 5%, the placement was not recorded in the structured data. See Oranga Tamariki *Youth Justice Custody Trends* (2023).

[35] That New Zealand should "Put an end to discrimination against Māori, and ensure that … detention centres comply with international human rights standards … (Bolivarian Republic of Venezuela)".

[36] That New Zealand should "Take action to ensure the provision of physical and mental health services for those in detention facilities … (United States of America)".

[37] That New Zealand should "Develop a national strategy for the promotion and protection of the rights of all children in implementation of the Convention on the Rights of the Child (Bulgaria)".

[38] See section 5(1)(b)(i) of the Oranga Tamariki Act 1989.

[39] *Review of provision of care in Oranga Tamariki residences: Report of the Ministerial Advisory Board* (August 2022).

[40] *Oranga Tamariki Secure Residences & A Sample of Community Homes – Independent, External Rapid Review* (September 2023). We note that Oranga Tamariki has referred 28 complaints regarding staff conduct to the New Zealand Police since the review began in June 2023. At the time of writing this submission, three Oranga Tamariki staff members have been charged by New Zealand Police for offences under the Crimes Act 1961.

[41] The *Youth Justice Custody Trends* report found that total daily custody numbers averaged 131 through 2017/18 and 2018/19. Numbers increased after the upper age was raised to 17 years in youth justice in 2019, reaching 161 in early-March 2020. Throughout 2020 and early 2021, the numbers dropped to an approximate average of 101 due to pandemic restrictions. As Covid restrictions eased from mid-2021, daily custody numbers have continued to increase – averaging 164 through April 2023, with a peak of 175 on 2 April 2023.