

Update Paper



Listening, learning, changing
Mā Whakarongo me Ako ka huri te tai
Crown Response to the Abuse in Care Inquiry

Establishing a redress package for torture at the Lake Alice Unit

For: Ministerial Group – Crown Response to the Abuse in Care Inquiry

Date: 13 September 2024

Security level: [REDACTED]

Purpose and recommendation

1. This paper provides an update to the Ministerial Group on the work to establish a redress package for survivors of torture at the Lake Alice Unit and on related matters which survivors have raised with Ministers during engagements and through other channels.
2. It is recommended that you:
 - a. **note** and **provide feedback** at the next Ministerial Group meeting on the updates provided in this paper.
 - b. **note** that the Attorney-General has confirmed that the Solicitor-General can engage external counsel on specific questions where specialist expertise would help to inform the Law Officer's view of significant questions of law, such as our obligations under the Convention Against Torture.

The findings of the UN Committee Against Torture

3. Mr Zentveld submitted a case to the UN Committee Against Torture (UNCAT) in 2017, and Mr Richards submitted a case to UNCAT in 2020. Both men made complaints regarding their experiences and investigations into the Lake Alice Unit, and the settlements they had received in the early 2000s.
4. The UNCAT determined that in each case New Zealand had breached Articles 12, 13, and 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention). Articles 12 and 13 of the Convention require states to have complaint processes and to conduct prompt and impartial investigations by competent authorities. Article 14 of the Convention requires states to provide redress with a right to 'fair and adequate compensation'.
5. The UNCAT decision report on Mr Zentveld's claim, issued in 2019, urged New Zealand to:
 - a. conduct a prompt, impartial and independent investigation into all allegations of torture and ill-treatment made by Mr Zentveld, including considering filing charges against the perpetrators;
 - b. provide Mr Zentveld with access to appropriate redress, including fair compensation and access to the truth, in line with the outcome of the investigation; and
 - c. make the decision publicly and widely known, to help prevent similar violations of the Convention in the future.

- [REDACTED]
6. The UNCAT decision report on Mr Richards' claim, issued in 2022, had similar recommendations and urged New Zealand to:
 - a. proceed with a timely consideration by the courts of all allegations of torture made by Mr Richards including, where appropriate, the application on perpetrators of the corresponding penalties under domestic law;
 - b. provide Mr Richards with access to appropriate redress, including fair compensation and access to the truth, in line with the outcome of the trial; and
 - c. make the decision publicly and widely known, to help prevent similar violations of the Convention in the future.
 7. The New Zealand Police completed a new investigation into allegations of ill treatment of children at Lake Alice in 2021, resulting in charges being filed against a former nurse. The proceedings against the former nurse were halted in June 2023 as the High Court was not satisfied that the defendant's physical and mental impairments could be accommodated to enable a fair trial (in part due to the individual having advanced terminal cancer). The Police investigation identified that all former Lake Alice senior staff and most other former staff are deceased. The position of Police is that investigatory options have therefore largely been exhausted, unless new evidence or testimony is provided on any surviving junior staff.

Survivors have raised New Zealand withdrawing its reservation against Article 14 of the Convention

8. When New Zealand ratified the Convention in 1983 it made the following reservation: 'The Government of New Zealand reserves the right to award compensation to torture victims referred to in Article 14 of [the Convention] only at the discretion of the Attorney-General of New Zealand.'
9. The UNCAT noted a concern about New Zealand's reservation it is most recent (2023) periodic review and included a recommendation that New Zealand considers withdrawing its reservation. The Ministry of Justice is leading the cross-agency consideration of the full set of UNCAT periodic review recommendations, which are due to be reported back to Cabinet in October 2024.

The UN Committee Against Torture guidance on redress is a key referral point for survivors

10. The UNCAT periodically issues guidance to help in the interpretation of different parts of the Convention. Among the guidance the UNCAT has published is 'General Comment No. 3 of the Committee against Torture' which explains the Committee's views on obligations under article 14 of the Convention.
11. Article 14 of the Convention states:
 - a. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
 - b. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

12. General Comment No. 3 notes that ‘the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate in relation to gravity of the violations committed against them.’
13. General Comment No.3 then goes on to describe five elements that are considered to form part of redress for torture, expanding on the concepts of ‘effective remedy’ and ‘reparation’ which the Committee considers the term ‘redress’ encompasses. The following table summarises the five elements and how they are reflected in the proposed redress for torture at Lake Alice.

Element set out in guidance on the provision of redress for torture	How this is reflected in the proposed redress for torture at the Lake Alice Unit and wider work underway as part of the Crown Response programme
<ul style="list-style-type: none">• Restitution – to re-establish the victim in his or her situation before the torture was committed.	<ul style="list-style-type: none">• Since the Lake Alice Unit survivors were abused as children and young people and there has been a significant passage of time, there is limited ability to re-establish survivors to a prior situation – which is reflected in the guidance on rehabilitation that survivors of torture might never fully recover.
<ul style="list-style-type: none">• Rehabilitation – medical and psychological care as well as legal and social services to restore and repair the harm suffered by the victim, acknowledging the pervasive effect of torture means the victims life might never fully recover.	<ul style="list-style-type: none">• For the Lake Alice Unit survivors, as individual elements, restitution is therefore closely aligned to rehabilitation.• It is proposed support and rehabilitation services are provided as part of a redress package. However, work is still to be undertaken on the details of the support services to be provided.

Element set out in guidance on the provision of redress for torture	How this is reflected in the proposed redress for torture at the Lake Alice Unit and wider work underway as part of the Crown Response programme
<ul style="list-style-type: none"> • Compensation – recompensate for any economically assessable damage resulting from torture or ill-treatment. 	<ul style="list-style-type: none"> • The proposed redress package includes a payment. • In recognition of the potential trauma for a detailed (and likely invasive) assessment process, Ministers previously considered that the payment treats Lake Alice Unit torture survivors as a cohort with a similar overall category of torture experiences as young people and likely resulting impacts. However, a potential tiered approach to the payment is also now under active consideration. • A consistent amount would not be directly assessed compensation. A tiered approach could reflect different levels of experience and damage, but would still not be a highly individualised assessment. • Part of the work to be completed on the support and rehabilitation services includes better understanding Lake Alice Unit survivors' access to ACC. Coverage by ACC would include consideration of the full set of ACC entitlements which includes payments that reflect compensation for the injury and harm caused by physical abuse. • A payment alone is unlikely to meet some survivors' expectations around what redress could be made for economically assessable damage. However, redress needs to be seen encompassing the overall package for torture (acknowledging further work is to be undertaken on support services) and previous redress payments reflecting the abuse experienced at the Lake Alice Unit.

Element set out in guidance on the provision of redress for torture	How this is reflected in the proposed redress for torture at the Lake Alice Unit and wider work underway as part of the Crown Response programme
<ul style="list-style-type: none"> • Satisfaction and the right to truth – verification of the facts, judicial and administrative sanctions against the perpetrators, and an acknowledgement of wrongdoing. May include a public apology to the victim. 	<ul style="list-style-type: none"> • The Abuse in Care Royal Commission of Inquiry's report on the Lake Alice Unit, <i>Beautiful Children</i>, provides a full public outline of the facts of what occurred at the Unit. • The opportunity for judicial sanctions against the perpetrators of torture has been largely exhausted. • The Government's formal acknowledgment of torture and statements in the House as part of the tabling of the Royal Commission's final report provide a public acknowledgement of wrongdoing. Reference to Lake Alice in the public apology on 12 November will also acknowledge wrongdoing. • The proposed apology to survivors as part of the redress package provides a further direct acknowledgment of wrongdoing. • We also recommend further work on any corrections required to medical and ACC records and how they reference survivors' experiences of unmodified ECT. • The New Zealand Police and Crown Law have acknowledged failings associated with their role in bringing perpetrators to account during the Royal Commission inquiries. • The Public Service Commission has been tasked with providing assurance that claims of individual public servant misconduct made by the Royal Commission are adequately addressed as these raise issues of trust, confidence, and integrity in the Public Service that require a substantive response.

Element set out in guidance on the provision of redress for torture	How this is reflected in the proposed redress for torture at the Lake Alice Unit and wider work underway as part of the Crown Response programme
<ul style="list-style-type: none"> Guarantees of non-repetition – measures to counter the impunity of perpetrators and the recurrence of torture. Such measures range, depending on the context, from external oversight and monitoring mechanisms, to establishment of judicial remedies, strengthening of the judiciary's independence, and adequate training for law enforcement officials. 	<ul style="list-style-type: none"> Non-repetition is not a specific element of the proposed redress package to be provided directly to survivors though survivors can submit on the Mental Health Bill which has the use of ECT within its scope and is expected to have its first reading in October (see below). There have been significant legislative and operational reforms in the mental health sector in the decades since the Lake Alice Unit operated. This includes external monitoring bodies such as the Health and Disability Commissioner and the Mental Health and Wellbeing Commission. The New Zealand Police have advised they are considering the development of a specific training package for investigators on the offence of torture. New Zealand has a strongly independent judiciary.

Officials are exploring a stepped payment to recognise the experience of torture

14. At its meeting on 31 July, the Ministerial Group endorsed a proposed redress package for Lake Alice torture survivors which included a consistent one-off payment for eligible survivors. s9(2)
15. Following engagement with some Lake Alice survivors and their advocates, officials are further exploring the possibility of a stepped payment recognising different experiences of torture, with the steps potentially reflecting relevant considerations like length of time a person spent in the Unit. This would be similar to the tiered redress payment already administered by the Ministry of Health for abuse at Lake Alice.
16. Ministers could also consider the potential of an approach similar to that of Justice Gallen in the early 2000s on what is known as the Round 1 settlement. In this instance, the then Labour Government offered \$6.5m to settle a class action relating to Lake Alice. Justice Gallen then undertook an entirely independent process to determine how the funds were split amongst survivors based on their individual experiences in the Unit. Legal fees of 40% were then deducted by Grant Cameron Lawyers, who represented the Lake Alice survivors in the group action.

Compensation and other entitlements

17. To discharge our duties under the Convention, the Crown is obliged to provide redress to victims (i.e. survivors) of torture under Article 14 of the Convention. The Crown is not obliged

[REDACTED]

to provide full compensation directly, but to ensure that survivors of torture have a legal right to seek fair and adequate compensation.

18. It is important to clearly maintain the distinction between 'redress' and 'compensation'. A financial payment made as part of a redress package is to meaningfully acknowledge that torture took place. A compensatory approach, akin to that taken through civil litigation, would seek to calculate the full extent of the impact the abuse has had on an individual (including subsequent impacts on their ability to work) and to compensate monetarily for all identifiable losses.
19. Crown Response, MBIE and ACC officials are working to improve the understanding of what survivors of torture can access under current legislative settings from the ACC system. In particular, in the recent court case of M vs ACC the High Court found that the modified use of ECT at the Lake Alice Unit had directly caused cognitive impairment/a brain injury to M and needed to be covered by ACC. Should ACC accept the evidence that the use of ECT and/or paraldehyde at the Lake Alice Unit constituted a physical injury then additional access to compensation, support and rehabilitation for survivors of Lake Alice will be possible within current legislative settings.
20. The upcoming Cabinet paper to be considered in October will bring advice (and options if relevant) to Cabinet on ensuring torture survivors have the legal right to access compensation, and other entitlements raised in UN guidance on reparations under the Convention, including access to independent legal representation when seeking redress.
21. Some survivors have enquired about their ability to challenge the Crown's approach to redress (and/or compensation) in court. For example, Cabinet could instruct the Solicitor-General not to use limitation defences should a Lake Alice torture survivor want to challenge some aspect of the Crown's response to torture in court. Subject to Ministers preferences, the Cabinet paper could also seek Cabinet decisions on survivors' access to the courts.

Survivors are requesting the Crown provide them with independent legal representation

22. Survivors spoken to have an expectation the Crown should provide them with independent legal representation to support them through any detailed discussions about the personal redress they should receive. Any such discussions would occur once Cabinet has made initial decisions on the overall redress package for torture, including that further work is undertaken on the supports and services.
23. Survivors have expressed that having access to legal representation is critical to the Crown acknowledging its past actions in failing to appropriately deal with their complaints, including that ongoing Police failings have meant that no one was ever prosecuted for what occurred at Lake Alice. Survivors have spoken of how, in the past, the Crown has had all the power and provided them with "take it or leave it" approaches when it has come to offers of redress. Survivors who were part of the first round of settlements consistently bring up how the Crown "did a deal" with Grant Cameron Lawyers who then took 40% of their settlement. They see the Crown providing access to independent legal advice as an important gesture of good faith.
24. s9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]

Information in survivor records is limiting their access to financial services

25. Lake Alice survivors have informed the Lead Coordination Minister that records from their time at Lake Alice have been used to deny or make it prohibitively expensive to access financial services like insurance, as survivors may have the administering of ECT or paraldehyde injections listed on their medical records.
26. Paul Zentveld noted that he had successfully had his medical records sealed so that they cannot be accessed for these purposes; other survivors have raised their desire to correct or amend the ACC and health records, to remove reference to abusive acts which have been recorded in a way that states (or implies) that they were legitimate medical procedure.

27. s9(2)(f)(iv)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Mental Health Bill intends to further limit the use of ECT, although it would still allow it to be administered without a person's consent in some situations

28. Some Lake Alice survivors have asked for a ban on the use of ECT in New Zealand as a way to demonstrate the Crown's commitment to ensuring the torture at Lake Alice cannot happen again and to meeting the non-repetition obligations under the Convention. Under current legislative settings, ECT may be given with a person's written consent, or if the person is unable or unwilling to consent, then on agreement of a second opinion psychiatrist appointed by the Mental Health Review Tribunal. In 2021/22, a total of 256 people received ECT in New Zealand. Of those, 102 people received ECT who did not have capacity to consent, and one person received ECT who had capacity but refused to consent.
29. The proposed Mental Health Bill will further limit its use and will only allow it where a person:
 - c. has capacity to consent and gives their informed consent in writing to the treatment; or
 - d. has a valid compulsory care directive in place approving the use of ECT; or
 - e. lacks capacity to consent and a second opinion practitioner agrees that the use of ECT is in the patient's interest.
30. This means that ECT cannot be given to a person with decision-making capacity who does not consent to it, including where the person has refused consent in a compulsory care directive. It could be provided to someone without capacity to consent if a second practitioner agrees it is in the person's interest. For patients under 18 years, it will only be allowed to be used if a second opinion practitioner considers it to be an emergency.
31. Some survivors are strongly opposed to the use of ECT on any person who does not have the capacity to consent. They also want ECT to be banned for anyone under the age of 18 as they do not believe anyone should be able to approve a child receiving ECT.
32. The Mental Health Bill is expected to have its first reading in October. It is recommended that survivors and/or their advocates be encouraged to provide submissions on that Bill through the Select Committee process.