IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2025-485-240
[2025] NZHC 2833

UNDER	Part 30 of the High Court Rules and s 2 of the Declaratory Judgments Act 1908 and the inherent jurisdiction of the Court
IN THE MATTER	of an application for judicial review of a decision made by Cabinet
AND	
IN THE MATTER	of an application for a declaratory judgment
BETWEEN	MALCOLM JOHN RICHARDS Plaintiff
AND	ATTORNEY-GENERAL Defendant

Hearing: 26 August 2025

Appearances: C J Griggs and P C Kelly for Plaintiff
K Laurenson and S R Hiha for Defendant
K Anderson KC and F Everard for Te Kahui Tika Tangata | Human Rights Commission, Intervener
B Keith and A Hill for Leonie McInroe, Intervener

Judgment: 29 September 2025

JUDGMENT OF McQUEEN J

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Introduction

[1] The plaintiff, Malcom Richards, is a former patient of the Child and Adolescent Unit of Lake Alice Psychiatric Hospital (Lake Alice). On 24 July 2024 the New Zealand Government formally acknowledged and apologised for torture that occurred at Lake Alice by the use of improperly administered electroconvulsive therapy and paraldehyde injections. The Government subsequently confirmed it would provide redress to survivors of this torture at Lake Alice. On 16 December 2024, Cabinet made certain decisions adopting a redress scheme (the Cabinet Decisions). The redress scheme includes a payment (either an expedited payment fixed at $150,000 or an individualised payment based on an independent assessment), a written apology acknowledging torture from the Prime Minister and the Minister for Mental Health, and help to access support and rehabilitative services.

[2] Mr Richards has applied for judicial review and a declaratory judgment in respect of the Cabinet Decisions establishing the redress scheme. The application is brought on the grounds that the redress scheme does not comply with s 9 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) nor New Zealand's obligations under international human rights law. Mr Richards says the Cabinet Decisions should be set aside and declarations made as to this non-compliance.[1]

[3] The Crown opposes the application on the basis that the Cabinet Decisions are not amenable to review by this Court for compliance with New Zealand's international human rights obligations and that, in any event, they comply with s 9 of the Bill of Rights Act and those international human rights obligations. The Crown's opposition to the application is not premised on any attempt to excuse what happened at Lake Alice or the delays in investigating or offering redress.

[4] Both the Human Rights Commission (the Commission) and Leoni McInroe, a former patient at Lake Alice,[2] were granted leave to intervene in the proceeding.

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1 The determination of Mr Richards' application is urgent as eligible Lake Alice survivors have until 30 September 2025 to register for the fixed payment of $150,000 and, for survivors who selected the individualised payment pathway (registration for which closed on 30 April 2025), the arbiter is to complete the assessments by 30 September 2025.

2 See, Abuse in Care Royal Commission of Inquiry *He Purapura Ora, he Māra Tipu from Redress to Puretumu Torowhānui Volume Two – Leoni McInroe: A Nine-year Battle and a Woefully Inadequate Apology* (December 2021).

[5] It is important to say immediately that torture is unlawful in New Zealand. Everyone has the right not to be subjected to torture under s 9 of the Bill of Rights Act. This reflects the common law position over centuries. Further, torture is prohibited as a norm of customary international law, and this is a peremptory norm not capable of derogation.

[6] This case is not about the torture that is accepted to have occurred at Lake Alice; it is about the redress scheme adopted by Cabinet in response to the breach of the right not to be subjected to torture. Cabinet was not exercising a power under a statute in creating the redress scheme so there is no statutory framework against which to consider the Cabinet Decisions. Rather, Cabinet was exercising a prerogative power. The exercise of such a power may be reviewed by the Court but only when a legal framework exists against which it may be appropriately measured. Thus, much of this case is concerned with whether there is a legal framework against which this Court can (and should) measure the Cabinet Decisions to adopt the redress scheme. Mr Richards relies on international instruments as providing the necessary legal framework. A key issue is therefore determining the extent to which those international instruments are binding on Cabinet under New Zealand's domestic law. If the redress scheme were to be found unlawful under such a legal framework, the Court must then decide whether or not the relief sought by Mr Richards should be granted.

[7] In summary, I conclude that there is no binding legal framework that should be used by this Court to measure the lawfulness of the Cabinet Decisions to adopt the redress scheme. The legal frameworks relied on by Mr Richards are not binding on Cabinet under domestic law. In the absence of a legal framework against which to assess the lawfulness of the Cabinet Decisions, this Court will not intervene in Cabinet's discretionary policy decisions. Policy decisions such as the adoption of the redress scheme with its budget of over $26 million are characteristically a function of the executive which are not suitable for judicial review. The Cabinet Paper provided to Cabinet refers to New Zealand's international law obligations and indicates legal advice was received in preparation of the Paper. To the extent that New Zealand's international law obligations are a mandatory relevant consideration for Cabinet in making the Cabinet Decisions, Cabinet did not fail to consider them. New Zealand

may nonetheless be subject to further international scrutiny in relation to its compliance with international human rights obligations.

[8] Mr Richards' application is therefore dismissed. I set out my reasons in more detail below.

Background

Lake Alice Child and Adolescent Unit

[9] Approximately 400 to 500 children and young people went through Lake Alice between 1970 and 1980. The dedicated Child and Adolescent Unit at Lake Alice operated between 1972 and 1980.

[10] Children at Lake Alice were subject to unacceptable treatment. Some treatment including electric shocks without anaesthetic and paraldehyde injections were administered for the purpose of punishment and control and amounted to torture. Children were also subjected to physical and sexual abuse by staff and other patients, the misuse of solitary confinement and emotional and psychological abuse.

[11] Mr Richards was admitted to Lake Alice on 19 October 1975 at the age of 15 years and was discharged on 20 December 1975. While he was at Lake Alice Mr Richards was subjected to solitary confinement in degrading conditions, physical beatings, paraldehyde injections as a punishment, as well as electric shocks as a punishment on his legs, genitals (causing a permanent scar) and on his head to the point he was rendered unconscious. On one occasion Mr Richards was sexually violated while unconscious. He was also made to witness other children being subjected to electric shocks, and on one of those occasions a boy died in front of him as a result.

[12] Lake Alice is now permanently closed. The hospital's lead psychiatrist at the time, Selwyn Leeks, is deceased.

Previous settlements

[13] In 2000 the New Zealand Government accepted the circumstances of 95 claimants' residence at Lake Alice and its impact on them meant an "apology/recognition award" was appropriate to be paid in settlement of litigation. A maximum of $6.5 million was approved for such payments. Retired High Court Judge Sir Rodney Gallen was appointed to determine how to divide that money between the claimants. Sir Rodney Gallen was clear in his report to the Government that electric shocks were administered at Lake Alice not as therapy but as punishment. The Prime Minister and Minister of Health at the time also apologised to each claimant for the treatment they underwent at Lake Alice.

[14] A second round of payments was set up in late 2001 for the purpose of settling any outstanding or potential claims by people who were not parties to the original litigation. Sir Rodney Gallen was appointed once again to determine the quantum each claimant should receive. $5.7 million was originally paid to 90 claimants. The Prime Minister and Minister of Health at the time also apologised to each claimant for the treatment undergone at Lake Alice.

[15] Since the second round of settlements closed in 2002, the Ministry of Health has dealt with any further claims that have arisen in a separate claims process, following the same approach as was followed by Sir Rodney Gallen to determine quantum. In 2009, the Government agreed not to enforce a cut-off date and that ongoing claims may be considered.

Cases taken to the UNCAT by Mr Zentveld and Mr Richards

[16] Two survivors of abuse at Lake Alice, a Mr Zentveld and the plaintiff in this matter, Mr Richards, successfully took cases to the United Nations Committee Against Torture (UNCAT). These cases were brought in 2017 and 2018 respectively. The UNCAT found in December 2019 and May 2022 respectively that the New Zealand

Government failed to properly investigate Mr Zentveld's and Mr Richards' complaints and denied them an appropriate remedy.[3] The Crown does not dispute that acknowledgment of the fact Mr Richards and Mr Zentveld were tortured ought to have come many years ago.

Royal Commission of Inquiry into the Lake Alice Child and Adolescent Unit

[17] In December 2022 the report of the Royal Commission of Inquiry into the Lake Alice Child and Adolescent Unit was released (the *Beautiful Children* report).[4] The inquiry found that some of the treatment of children and young people in Lake Alice amounted to torture when they were subject to electric shocks and paraldehyde injections. The Royal Commission also found that solitary confinement had been misused. In the final report of the Royal Commission of Inquiry into Abuse in State Care and in the Care of Faith-based Institutions (the Royal Commission Report),[5] the Royal Commission found some survivors of state care were subjected to lengthy periods of solitary confinement and where they were imposed as punishment, they were inconsistent with human dignity.[6] This group would have included some survivors of Lake Alice.

[18] On 24 July 2024 the Prime Minister moved that the House of Representatives take note of the Royal Commission Report. He apologised to the survivors of Lake Alice and acknowledged the experience of some children and young people at Lake Alice amounted to torture.

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3 United Nations Committee Against Torture *Decision Adopted by the Committee under Article 22 of the Convention Concerning Communication No.852/2017* UN Doc CAT/C/68/D/852/2017 (4 December 2019) [Mr Zentveld's UNCAT Claim]; and United Nations Committee Against Torture *Decision Adopted by the Committee under Article 22 of the Convention Concerning Communication No.934/2019* UN Doc CAT/C/73/D/934/2019 (12 May 2022) [Mr Richards' UNCAT Claim].

4 Abuse in Care Royal Commission of Inquiry *Beautiful Children – Inquiry into the Lake Alice Child and Adolescent Unit by Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions* (December 2022) [Beautiful Children Report].

5 Abuse in Care Royal Commission of Inquiry *Whanaketia – Through Pain and Trauma, From Darkness to Light* (June 2024).

6 Abuse in Care Royal Commission of Inquiry *Whanaketia: Part 6* (June 2024) at [59].

The Cabinet Decisions

[19] In 2024 the Crown Response Office was established, following a recommendation in the Royal Commission Report for a central government agency to coordinate, monitor and report on the Government's response to the Royal Commission Report. The Office also administers the redress scheme for survivors of torture at Lake Alice.

[20] The Lead Coordination Minister for the Government's Response to the Royal Commission Report (the Lead Coordination Minister) put forward a paper for Cabinet consideration in December 2024 (the Cabinet Paper). As this paper is fundamental to Mr Richards' case, I set out key aspects of it here. The Cabinet Paper records that legal advice was provided by Crown Law (informed by independent legal advice) and the Ministry of Foreign Affairs and Trade. Parts of the Cabinet Paper in evidence before me have been redacted under s 9(2)(h) of the Official Information Act 1982 on the grounds that withholding the information is necessary to maintain legal professional privilege.

[21] The Cabinet Paper explains that the Government will progress its full response to the Royal Commission Report in the following year and that will focus on support for survivors of abuse in care and preventing future abuse. In the Cabinet Paper, the Lead Coordination Minister seeks agreement to provide redress to the survivors of Lake Alice who were tortured when they were children "as defined in the Torture Convention" (being the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (the Torture Convention)). The Cabinet Paper states:[7]

> … While it is not possible for this response to right or fully compensate for the wrongs of the past it will provide important recognition to the remaining survivors of torture at the Lake Alice Unit and an expression of our regret as to the many ways in which they were failed.

[22] The Cabinet Paper records that the Crown has formally acknowledged that torture occurred at Lake Alice. It notes the tabling of the Royal Commission Report in

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7 Cabinet Paper "Redress for Survivors of Torture at the Lake Alice Child and Adolescent Unit" (December 2024) [Cabinet Paper] at [5].

the House on 24 July 2024 where the Prime Minister formally acknowledged that some survivors of the Lake Alice Unit were tortured when they were children. The UNCAT was informed of the Crown's acknowledgment in a report submitted in August 2024. The Cabinet Paper describes the three elements that must be present to meet the definition of torture under the Torture Convention:

> 14.1 any act causing severe pain or suffering, whether physical or mental; and
>
> 14.2 intentionally inflicted for such purposes as: obtaining from the victim or a third person information or a confession; punishing them for an act they or a third person has committed or is suspected of having committed; intimidating or coercing them or a third person; or for any reason based on discrimination of any kind; and
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> 14.3 the pain or suffering is inflicted by or at the instigation of or with the acquiescence of a public official or person acting in an official capacity.

[23] The Cabinet Paper recognises the Crown's failings and obfuscation in relation to torture at Lake Alice have taken place over decades.

[24] Particularly relevant to this case is the discussion in the Cabinet Paper of making specific redress available to survivors of torture in relation to New Zealand's obligations under international human rights instruments. The Cabinet Paper states:[8]

> New Zealand has obligations under human rights instruments, most notably the Convention against Torture and the International Covenant on Civil and Political Rights (ICCPR) [to] provide redress to individuals whose rights have been breached. Specific redress for torture would also demonstrate New Zealand's continuing commitment to universal human rights and to the international system.
>
> Providing redress is also part of the UNCAT recommendations. In December 2019, UNCAT found New Zealand in breach of Article 12 of the Convention for failing to carry out prompt and impartial investigations into allegations of torture at Lake Alice in relation to Mr Paul Zentveld. It recommended that we conduct a prompt, impartial and independent investigation into the complainants' allegations and provide the complainants with access to appropriate redress, including fair compensation in line with the investigation. This was followed by a further report in June 2022 in relation to Mr Malcolm Richards. Further complaints to UNCAT by other survivors are possible. New Zealand's application of the Convention is also subject to regular periodic review by the UNCAT, meaning this matter will continue to be raised if it is not satisfactorily addressed. In addition, New Zealand is subject to

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8 Cabinet Paper, above n 7, at [26]–[31].

> periodic reviews by the United Nations Human Rights Committee (UNHRC) where the issue is expected to be raised if our response is seen as inadequate.
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> In developing this proposal, I have sought advice on our obligations under the Convention, and under other relevant international agreements such as the ICCPR (which also requires States provide effective remedies for torture). [Redacted]
>
> Article 14 of the Convention against Torture requires States to ensure victims (survivors) of torture obtain redress and have a legal right to seek fair and adequate compensation. When New Zealand ratified the Convention in 1989, it also made a reservation that "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." By agreeing to provide the redress proposed in this paper, we are therefore exercising the Government's discretion to award compensation to survivors of torture.
>
> The UNCAT has issued guidance to assist interpretation of Article 14. The guidance is not legally binding but is seen as an authoritative interpretation of its meaning and redress agreed by the Crown will be assessed against it. An overview of the key features of the UNCAT guidance is in Appendix Two.
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> [Redacted.] This view has been informed by advice from Crown Law, the Ministry of Foreign Affairs and Trade, and independent legal advice received from [redacted].

[25] The Cabinet Paper goes on to explain that the redress proposal is a specific response to torture at Lake Alice. The Lead Coordination Minister recommends that making this decision at that time is the best approach as since 2001, there has been a unique and specific redress response to Lake Alice survivors without having a clear impact on expectations of other survivors, and there is a widely held and accepted view that the nature of abuse, and now acknowledged torture, that occurred there was exceptional. The Cabinet Paper states:[9]

> In addition, torture is a distinct and particularly egregious form of abuse because it entails a public official intentionally inflicting harm on an individual in order to advance a specific and banned purpose of the state, in this case, punishment. Torture is the only form of abuse to have its own international convention. This is reflected in New Zealand's Crimes of Torture Act 1989.
>
> We have also been clear since the tabling of the Royal Commission's final report that torture redress for the victims of Dr Leeks and others at the Lake Alice Unit was going to be a priority for our Government given the age and vulnerable health of many of the remaining survivors. These survivors have already waited five years since the first UNCAT decision for redress. Delaying

9 Cabinet Paper, above n 7, at [40]–[42].

> decisions would also damage the credibility and authenticity of the commitments we have made to prioritise Lake Alice torture redress.
>
> Communications will be clear that the Government is responding specifically to torture at the Lake Alice Unit and that these decisions have been taken independently of future redress design decisions for abuse in care. Information will also clearly explain why certain acts have been acknowledged as torture, with reference to the three elements as defined in the Convention.

[26] The Cabinet Paper proposes that redress for torture at the Lake Alice Unit consist of a one-off financial payment which recognises the experience of torture, a new written apology to individual survivors which explicitly acknowledges torture, and access to appropriate support and rehabilitative services for the experience of torture. Two options were proposed for the amount under an expedited pathway—either $100,000 or $150,000.

[27] The Cabinet Paper records that the payment, alongside the apology, are to acknowledge not only an individual survivor's experience of torture as a child but also the Crown's regret that due to the State's failure to conduct prompt and effective investigations, no successful prosecutions were made, and survivors have never seen direct justice against their abusers. It also notes that the payment would be on a final settlement basis. The Cabinet Paper records that the Lead Coordination Minister has been advised that "as far as we are aware" New Zealand would be the first country in the world to acknowledge and provide redress for the torture of children and young people. The Cabinet Paper states:[10]

> … There are no legal parameters that define what range the payment should sit within and officials have advised me that there are no directly comparable international cases that could serve as a precedent. This means determining an appropriate payment that recognises the experience of torture within our specific context has been difficult. …

[28] The Cabinet Paper records that it is proposed that redress for torture is administered through the Crown Response Office. The recommended approach to the financial payments is set out, noting the two options of an expedited pathway or an individualised pathway. The latter pathway includes the appointment of an independent arbiter, who would then consult with the legal representatives of survivors

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10 Cabinet Paper, above n 7, at [45].

to determine the principles or considerations to be used to determine individualised redress payments.

[29] Appendix Two to the Cabinet Paper provides a summary of the UNCAT guidance on implementing art 14 of the Torture Convention. Reference is made to the UNCAT *General Comment No 3 (2012): Implementation of Article 14 by State Parties* to assist governments in interpreting the article of the Convention relating to redress. The Cabinet Paper then states that "[g]uidance issued by the UNCAT is not legally binding on States, but it is seen as an authoritative interpretation of its meaning". It then sets out the terms of art 14 and New Zealand's reservation to it. This includes a footnoted statement that:

> The UNCAT noted a concern about New Zealand's reservation to article 14 in its 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 later in 2024.

[30] The Cabinet Paper says that the UNCAT considers that the term "redress" in art 14 encompasses the concepts of "effective remedy" and "reparation", and the concept of reparation itself entails five components. It also notes that the UNCAT emphasises the importance of survivor participation in the redress process. A table is then set out which compares the proposals in the Cabinet Paper against the UNCAT guidelines. The table addresses the five components of restitution, rehabilitation, compensation, satisfaction and the right to truth, and guarantees of non-repetition.

[31] It is further explained that a new written apology explicitly acknowledging torture will be given by the Prime Minister and Minister of Health. The Cabinet Paper discusses provision of appropriate support and rehabilitative services to torture survivors and also notes that there are a number of aspects to the guarantee of non-repetition (including that the ongoing use of electric shock therapy is further limited in the Mental Health Bill).

[32] The Cabinet Paper records that the proposals are consistent with the Human Rights Act 1993 and the Bill of Rights Act, providing recognition of the right under s 9 not to be subjected to torture or cruel treatment. It also states that the proposal

relates to international agreements to which New Zealand is signatory, namely the Torture Convention and the International Convention on Civil and Political Rights (ICCPR).

[33] A Cabinet Minute records that on 16 December 2024, Cabinet agreed to provide redress to the survivors in addition to what had already been received through the earlier settlement processes and authorised up to $19.56 million for redress payments (the Cabinet Minute).[11] Cabinet adopted the sum of $150,000 as the amount under the expedited pathway. A further $3.12 million was authorised for administration costs and the legal costs, advice, services and wellbeing supports to claimants.

Implementation of redress scheme

[34] The General Manager Enabling Services at the Crown Response Office (the Crown Response Manager) has been responsible for administering the redress scheme since December 2024. The Crown Response Manager has provided evidence about aspects of the redress scheme other than the compensation payments.

[35] The evidence illustrates that ACC has accepted claims from Lake Alice survivors. As of 30 April 2025, there have been 126 Lake Alice related claims to ACC of which 82 have been accepted for cover, 39 have been declined and the remaining claims have either been identified as duplicates or are still awaiting a cover decision. ACC records show it has paid $15,298,987 in support for Lake Alice related claims.

[36] In addition, claimants are entitled to have their legal representation paid for under the redress scheme. They can choose from lawyers on a panel arranged by the Crown Response Office, or they can choose their own lawyer.

[37] In relation to further support for Lake Alice survivors, the Crown Response Manager explains:

> There have been thirty instances of some form of financial, or wellbeing, support, advice and services provided to claimants. These include the

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[11] Cabinet Minute "Redress for Survivors of Torture at the Lake Alice Child and Adolescent Unit" (16 December 2024) CAB-24-MIN-0516 [Cabinet Minute].

> provision of support to some who have been determined to be ineligible for a redress payment. Supports have covered a range of assistance, such as therapeutic and wellbeing support, legal and financial assistance, process and communications support and other support as required.
>
> Supports are provided using a culturally responsive and trauma-informed approach by ensuring that services provided to survivors of the Lake Alice Unit are grounded in principles of safety, choice, and empowerment, with specific recognition of the cultural identities and lived experiences of those affected. In practice, this means claimants can access wellbeing support in ways that reflect their preferences.
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> Reflecting specific needs, supports also often includes arranging assistance from other agencies or liaison with other agencies to provide assistance. This has included referrals to social workers, help with mental health including short term counselling, other forms of health care, liaising with Kāinga Ora around accommodation needs, assistance with wills and budgeting or how to establish a family trust. We take a reasonably broad and practical approach to the kinds of assistance that we can provide.
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> Some claimants lack legal capacity to make decisions about the options available under the Lake Alice redress scheme…
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> The supports provided through the Lake Alice torture redress scheme have two purposes, one is to assist claimants with their wellbeing as they go through the process, and with needs that result from engaging with the process… The second purpose is to assist claimants in receiving longer term supports. We do this by assisting claimants to get assistance from other agencies. Linking claimants into other organisations is important, because both the Crown Response Office and the Lake Alice redress scheme are time limited and many claimants will need help on an ongoing basis. We are therefore working to connect them with agencies who will be able to assist them on an ongoing basis.

[38] Under the Cabinet Decisions, survivors can choose between an expedited payment of $150,000 or can enter into the individualised process where the independent arbiter, the Hon Paul Davison KC, will assess their particular case and award them compensation, within the fiscal cap imposed by Cabinet. Mr Davison made it clear that the claimants who choose the individualised pathway will not receive any less than those who choose the expedited pathway, thus a minimum of $150,000. He is required, under the terms of reference of his appointment, to have completed all assessments by 30 September 2025 and report his decisions on payment to the Lead Coordination Minister and the Attorney-General. Mr Davison developed a framework to assess the claims, as was also required under the terms of reference. In doing so he consulted with survivors' legal representatives to seek the views of the survivors regarding the approach and criteria for making redress payment assessments and decisions.

[39] On 9 June 2025 Cabinet agreed to increase the amount authorised for redress payments by $7 million; $26.56 million has now been approved for redress payments.

[40] As of 10 July 2025, 237 people have registered for the redress process in respect of Lake Alice. Of these, 137 have been found to be eligible, 92 not eligible and eight have eligibility decisions still pending. Of those survivors, 98 had chosen the expedited pathway, and 38 the individual assessment pathway, and one has withdrawn. Ms McInroe, an intervener in this proceeding, had opted for the individual assessment pathway. I understand that Mr Richards has withdrawn his claim.

[41] Concerns about the redress scheme (similar to those raised in this proceeding) were raised with Mr Davison by Mr Griggs as counsel for Mr Richards and Mr Keith on behalf of other panel counsel.

[42] Mr Davison addressed these submissions in a minute dated 17 March 2025. He declined to adopt the submissions made by Mr Griggs and Mr Keith, concluding that the approach they proposed would involve acting well outside and beyond the terms of reference. Mr Davison went on to state:

> [23] The Government's torture redress scheme establishes a mechanism for those survivors who choose to participate in it to obtain torture redress promptly, and with a minimum of procedural complexity and delay. Once the Crown Response Office confirms that a claimant was a patient at the Unit at the relevant time, survivors are eligible to receive financial redress. The only other requirement is that survivors make a statutory declaration stating that they spent time in the Lake Alice Unit as a child or young person, and that while a patient in the Unit they received unmodified ECT and/or paraldehyde injection/s which they believe was administered for the purpose of punishment, intimidation or coercion. This is a quick and straight forward process involving a minimum of procedural requirements compared to filing and prosecuting civil proceedings through the courts. The scheme allows eligible survivors to either elect the expedited pathway and receive the sum of $150,000 straightaway or alternatively elect the individualised pathway and have their redress amount determined by the Independent Arbiter taking account of their personal experiences of torture in the Unit, on the basis that the survivor's account is to be accepted unless contradicted by other information. Although a survivor's individualised redress assessment will necessarily take longer than the expedited pathway process, it is nevertheless a relatively quick and straightforward method by which those survivors who wish to avail themselves of it can have their account of what they were subjected to, considered by the Independent Arbiter and a decision on their redress made within a matter of months - namely by 30 September 2025.
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> …

> [25] The clear objective of the scheme is to enable claimants choose to do so to move swiftly to obtain financial redress and the counselling and other support now being made available to them through the [Crown Response Office]. The redress scheme is a discrete and separate process by which those survivors who wish to do so can have their torture redress claims rapidly resolved. If claimants are confirmed as having been a child/adolescent patient at the Lake Alice Unit during the relevant period and they make the required statutory declaration and choose the expedited pathway, their claim will be resolved without the necessity of them producing any other or further supporting evidence. Where eligible survivors elect the individualised pathway, they are not bound to accept the redress amount allocated to them as final settlement. It will be open to survivors not to accept the Independent Arbiter's allocation in final settlement of their torture redress claim and not enter into the Deed of Settlement with the Crown. By participating in the individualised assessment process and then declining the Independent Arbiter's redress allocation, they are not precluded from commencing proceedings through the New Zealand courts to seek an amount of redress or damages for the torture they were subjected to for an amount greater than they could achieve by means of an allocation from the available envelope of funds notified to the Independent Arbiter.
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> [26] The utility of the Government's torture redress scheme which is characterised by its comparative procedural simplicity and certainty for claimants, all of whom are eligible to receive at least $150,000 by way of financial redress, appears to have received a broadly positive response from claimants to date. Although it is still early days, to date over 100 claimants have registered and have been confirmed as eligible, and of them 20 have elected the expedited pathway and have either already received their redress payments or are currently in the process of doing so.
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> [27] Thus the scheme established and described in the Terms of Reference and which provides for Lake Alice Unit torture survivors can elect to have an individualised assessment of financial redress is the mechanism by which the New Zealand Government in accordance with the reservation it lodged in connection with the United Nations Convention Against Torture has provided for compensation for torture to be paid "only at the discretion of the Attorney-General of New Zealand." Participation in the scheme by survivors is entirely voluntary and the scheme does not preclude survivors seeking remedies through the courts if they choose to do so. …

[43] The redress scheme has continued to be implemented. Those claimants who have chosen the expedited pathway have already been or will shortly be paid. The Crown confirms that irrespective of the outcome of this case, it will not seek to recover the payments made. Those who have chosen the individualised pathway have, over the last some months, been having their cases considered by Mr Davison. Mr Davison acknowledges in his framework that until most of the individualised claims have been considered it will not be possible for him to undertake a comparative assessment. But this time is close now, as Mr Davison is required to provide his recommendations by 30 September 2025.

[44] Under both pathways, the redress scheme provides for the redress payments to be made by the Crown and accepted by the survivor in final settlement of all issues arising in connection with the events at Lake Alice. The relevant provision of the Deed of Settlement states:

> This agreement constitutes a final settlement of all issues arising between the parties in connection with the events at the Child and Adolescent Unit and the claimant agrees not to commence or institute in their own name or that of any related entity any action or proceeding against the Crown (or agent or employee or former employee of the Crown), arising out of or in connection with these matters.

[45] As the Crown notes, once claimants are advised of their redress sum, there is no obligation on them to accept it. But if they do, it is in full settlement of all issues arising between the Crown and the survivor in connection with the events at Lake Alice and there is no right of appeal. If a survivor chooses not to participate in the redress scheme, whatever rights they have outside it remain.

The challenge to the redress scheme

Mr Richards' claim

[46] In his first cause of action, Mr Richards seeks judicial review of the Cabinet Decisions, being the decisions made by Cabinet on 16 December 2024 following receipt of the Cabinet Paper, recorded either explicitly or by necessary implication in the Cabinet Minute, as to how redress for some survivors of Lake Alice will be provided. Those Cabinet Decisions are as follows:[12]

(a) Redress for the survivors of torture at Lake Alice would be made via ex gratia payments.

(b) The process for considering the claims of individual survivors would be established in terms of reference approved by Cabinet and not by the establishment through legislation of a competent, independent and impartial tribunal.

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[12] As pleaded in the plaintiff's statement of claim dated 5 May 2025.

(c) Only survivors who had received "improperly administered electroconvulsive therapy or paraldehyde injections for the purpose of punishment" at Lake Alice would be eligible for redress.

(d) The total amount available to provide redress to the survivors would be capped at a maximum of $19.56 million.[13]

[47] Mr Richards pleads that the Cabinet Decisions were the exercise of prerogative power and that:

> The Crown's prerogative power to determine New Zealand's response to its international human rights obligations to individuals under its jurisdiction must be exercised in accordance with law, including the New Zealand Bill of Rights Act 1990 and international law.

[48] Two grounds of review are pleaded under the first cause of action. The first ground of review is illegality—that the Cabinet Decisions are in breach of:

(a) section 9 of the Bill of Rights Act; and

(b) international law, namely:

(i) New Zealand's international obligations under art 2(3), 7 and 14 of the ICCPR; and

(ii) New Zealand's international obligations under art 14 of the Torture Convention.

[49] The Cabinet Decisions are said to breach s 9 because that section incorporates the right under art 2(3) of the ICCPR to an effective remedy for torture and the Cabinet Decisions exclude survivors who have been tortured other than by the infliction of electric shocks or paraldehyde injections at Lake Alice, prejudge quantum, allow only for ex-gratia payments and fail to establish a judicial process for remedy. The Cabinet Decisions are said to breach international law because New Zealand's reservation to art 14 of the Torture Convention is invalid. It is claimed that that the Cabinet Decisions

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[13] As noted above, on 9 June 2025, Cabinet increased the total amount available to $26.56 million.

do not lawfully exercise the Attorney-General's discretion under the reservation in respect of remedies for torture.

[50] Even if valid, it is pleaded that the reservation to art 14 does not permit a process which excludes survivors who have been tortured other than by the infliction of electric shocks or paraldehyde injections at Lake Alice, prejudges quantum, allows only for ex-gratia payments and fails to establish a judicial process for remedy.

[51] The second ground of review is that in making the Cabinet Decisions, Cabinet failed to consider a mandatory consideration, namely, what would constitute fair and adequate compensation for each survivor of torture at Lake Alice, for the purposes of art 14 of the Torture Convention, art 2(3) of the ICCPR and s 9 of the Bill of Rights Act.

[52] Under the first cause of action, Mr Richards seeks the following relief:

(a) an order setting aside the Cabinet Decisions; and

(b) declarations that:

(i) the imposition of an arbitrary financial cap on the total amount of compensation which may be granted to the survivors of torture at Lake Alice is in breach of Mr Richards' right to fair and adequate compensation under art 14 of the Torture Convention, arts 2(3) and 7 of the ICCPR and s 9 of the Bill of Rights Act;

(ii) the prescription of a system of ex gratia payments by way of remedy for the torture of Mr Richards does not provide him with an enforceable right to compensation and is therefore in breach of art 14 of the Torture Convention, arts 2(3) and 7 of the ICCPR and s 9 of the Bill of Rights Act; and

(iii) the prescription of a redress framework for the torture inflicted at Lake Alice which does not provide for a fair and public

> hearing by a competent, independent and impartial tribunal established by law is in breach of art 14 of the Torture Convention, arts 2(3), 7 and 14 of the ICCPR and s 9 of the Bill of Rights Act.

[53] In his second cause of action, Mr Richards pleads that the implementation of the redress scheme in the Cabinet Decisions breaches his rights under art 14 of the Torture Convention, arts 2(3), 7 and 14 of the ICCPR and s 9 of the Bill of Rights Act. For relief, Mr Richards seeks binding declarations of right pursuant to s 2 of the Declaratory Judgments Act 1908 and the inherent jurisdiction of the Court, in the terms sought under the first cause of action, as set out above.

The Crown's opposition

[54] The Crown says the Cabinet Decisions are not reviewable. The Crown accepts that New Zealand's domestic legislation should be interpreted consistently with international law where possible but submits no such interpretation question arises in the present case. There is no legal framework here against which the Court can review the Cabinet Decisions, rather they are a policy decision by Cabinet to provide redress to survivors, including those who participated in earlier settlement processes, as a discretionary response on the Government's part to the Royal Commission Report. The Crown says the Bill of Rights Act does not apply given the torture at Lake Alice took place prior to its enactment but that the Cabinet Decisions have provided a remedy that, together with other avenues available to Lake Alice survivors, is consistent with and can amount to a sufficient remedy under s 9 of the Bill of Rights Act and New Zealand's obligations under international human rights law.

The interveners' positions

[55] The Commission and Ms McInroe were granted leave to intervene on specific terms.[14]

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[14] The Crown raised concerns about the interveners making submissions outside the scope of their respective terms of intervention: see *Richards v Attorney-General* HC Wellington CIV-2025-485-240, dated 29 September 2025 (Minute of McQueen J).

[56] The Commission emphasises that the Court should begin its analysis at a starting point of the inherent dignity of every person. Counsel for the Commission, Ms Anderson KC and Ms Everard, submit that human dignity must be to the forefront when analysing the Cabinet Decisions relative to New Zealand's domestic and international human rights obligations. They say this is because "gross violations of international law…by their very grave nature, constitute an affront to human dignity".[15]

[57] The Commission submits that the redress and other rights contained in the ICCPR, the Torture Convention and the Bill of Rights Act cannot be viewed in isolation from New Zealand's other human rights obligations due to the fundamental premise of the indivisibility and interdependence of all human rights.[16] Nonetheless, the Commission accepts that the Court's analysis of the issues in this proceeding will focus on the redress rights in the ICCPR, the Torture Convention and the Bill of Rights Act.

[58] The Commission says this Court should use the internationally-recognised concept of redress in considering this case, involving full reparation including restitution, compensation, rehabilitation and measures of satisfaction, as well as measures aimed at preventing the reoccurrence of similar violations in the future (guarantees of non-repetition).[17] The Commission emphasises the importance of viewing the Cabinet Decisions in context,[18] including against the UNCAT decisions relating to Mr Zentveld and Mr Richards as well as the steps New Zealand has taken (or not taken) in response to the UNCAT's recommendations about New Zealand's reservation to art 14 of the Torture Convention. The Commission submits that this Court should consider that the art 14 reservation is of no legal effect here.

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15 *United Nations 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* GA Res 60/147 (16 December 2005) [UN Basic Principles].

16 *World Conference on Human Rights Vienna Declaration and Programme of Action* UN Doc A/CONF.157/23 (12 July 1993) [Vienna Declaration] at [5].

17 UN Basic Principles, above n 15, at [15]–[23].

18 This includes the findings in by the Royal Commission that the lack of accountability or redress from the Crown has compounded the effect of abuse suffered at Lake Alice: *Beautiful Children Report*, above n 4, at 533. In addition, the Commission highlights the findings in the Royal Commission's interim report on redress that the current system has failed to recognise the harm in a way that acknowledges survivors' dignity and offers justice on their terms: Abuse in Care Royal Commission of Inquiry *He Purapura Ora, he Māra Tipu from Redress to Puretumu Torowhānui Volume One* (December 2021) at 264.

[59] The Commission's overall position is that the Cabinet Decisions are inconsistent with the effective redress obligations under the Bill of Rights Act, the Torture Convention and the ICCPR, as is advanced by Mr Richards. The Commission submits that the Cabinet Decisions reflect a political compromise that falls short of these obligations.

[60] Ms McInroe was granted leave to intervene and make submissions in relation to "the terms of any relief that would be open to the Court if the plaintiff is successful in his claim".

[61] Counsel for Ms McInroe, Mr Keith, submits that the principal point for Ms McInroe is that not only does the Court have a broad remedial discretion, including to take account of interests of affected third parties, but it must exercise that remedial power so as to afford a principled and effective remedy.[19] Mr Keith says that the appropriate remedy would be a continuation of the current compensation steps under the redress scheme alongside directions that the Crown adopt a lawful scheme. The term that any payment under the redress scheme is in final settlement of a survivor's claim should also be removed. Mr Keith emphasises:

(a) Ms McInroe would be adversely affected if the redress scheme were simply halted;

(b) the obligations in respect of redress are well-settled, as a matter of treaty obligation and under customary international law, and that the executive must act consistently with those obligations;[20]

(c) the record of the Cabinet Decisions discloses that the redress scheme proceeded from an error of law in that the Cabinet accepted the obligations under the Torture Convention reservation and the ICCPR but relied on the art 14 reservation without addressing that the ICCPR is not subject to that reservation;

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19 *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429 at [366]–[369]; and *Ontario (Attorney-General) v G* 2020 SCC 38; [2020] 3 SCR 629 at [89], [94]–[96], [111] and [116].

20 *Attorney-General v Zaoui (No 2)* [2005] NZSC 38; [2006] 1 NZLR 289 at [42], [76] and [90].

(d) as a result, the redress scheme does not meet (and the Cabinet Decisions acknowledge the scheme does not to meet) those obligations; and

(e) redress obligations include expedition and avoidance of re-traumatisation.

[62] Mr Keith emphasises that it is difficult to conceive of a more grave obligation than to make redress to children who were tortured. He notes that Ms McInroe and another person brought the first litigation in 1992, thus demonstrating the lack of expedition on the part of the Crown in dealing with redress.

[63] Mr Keith also says that it is possible to say that the compensation will be inadequate as the redress scheme is not intended to meet the Crown's obligations. "Meaningful acknowledgment" is not the obligation, rather the obligation is to make full redress, which includes the lost opportunity suffered by survivors.

[64] Mr Keith submits none of these matters were made adequately clear to Cabinet for its decision-making.

Approach to the case

[65] The core of the claim is in judicial review. The grounds of review are illegality and failure to consider a mandatory relevant consideration. Before addressing those grounds there are several issues that arise as to the justiciability of the Cabinet Decisions. They are not decisions made under a statute. Instead, Cabinet used its prerogative power in creating the redress scheme. The royal prerogative is a set of discretionary powers held by the Crown (or in practice the executive) that do not require legislative approval and can be exercised without parliament's authority. These are the remaining discretionary powers of the head of state, existing at common law, which can be limited or modified by statute, and the exercise of which can be subject to judicial review.

[66] For this Court to judicially review a decision of that nature there needs to be a binding legal framework against which to measure the Cabinet Decisions. As mentioned, Mr Richards submits that two international instruments, the Torture

Convention and the ICCPR, constitute such legal frameworks. International instruments are not automatically binding in New Zealand unless incorporated into domestic law. Therefore, the justiciability of the Cabinet Decisions falls on whether either or both of the international instruments are binding under domestic law, such that they provide a legal framework against which to measure the lawfulness of the Cabinet Decisions.

Legal framework required

[67] It is common ground between the parties that the Cabinet Decisions involved the exercise of prerogative powers and that as a matter of principle such decisions are not always immune to review.[21] Before the Court will intervene in Cabinet decisions involving high-level questions of policy and political judgment, there needs to be a basis on which the decision can be identified as not being in accordance with law.[22]

[68] As Kós J held in *McLellan v Attorney-General*:[23]

> …the real question is whether their exercise was in some way unlawful, and the question that precedes that is: by what legal framework or yardstick is legality versus illegality to be assessed?[24] If the decisions are a pure exercise of prerogative power, it is unlikely that the Court could find them to be unlawful. If they are prerogative powers exercised within a context akin to a framework of law, then the Court may more likely find them to be either lawful or unlawful.

[69] Thus, the first (and main) point of contention between the parties is whether there is a legal framework against which the legality of the Cabinet Decisions can be assessed.

[70] Mr Richards, supported by the interveners, say there is. Counsel for Mr Richards, Mr Griggs, submits that there are two legal frameworks: the Torture

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21 *Akatere v Attorney-General* [2006] 3 NZLR 705 (HC) at [24]; *McLellan v Attorney-General* [2015] NZHC 3218, [2016] NZAR 859 at [57]; *Afghan Nationals v Minister for Immigration* [2021] NZHC 3154, [2022] 2 NZLR 102 at [133]; and *MKD v Minister of Health* [2022] NZHC 1997 at [95].

22 *New Zealand Greyhound Racing Association Inc v Attorney-General* [2025] NZHC 2665 at [36], citing *Afghan Nationals v Minister for Immigration*, above n 21, at [133].

23 *McLellan v Attorney-General*, above n 21, at [57].

24 *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [23], [27]–[28]. The Court of Appeal observed that the situation where there is no satisfactory legal yardstick will often arise in cases into which it is also constitutionally inappropriate for the Court to embark.

Convention and the ICCPR. Mr Griggs submits that the application of these legal frameworks was within the contemplation of Cabinet. Mr Griggs submits that this is in contrast to the cases of *Akatere v Attorney-General* and *XY v Attorney-General*, where this Court found that there were no applicable legal frameworks and so the relevant decisions were non-justiciable.[25]

[71] In support of his submission, Mr Griggs refers particularly to the following aspects of the Cabinet Paper:

(a) It is described as progressing the Government's response to the Royal Commission Report. It also says that it responds to the UNCAT findings in 2019 and 2022 that New Zealand breached the Torture Convention (the findings in relation to Mr Zentveld and Mr Richards).

(b) It acknowledges that while Cabinet could decide to defer decisions in relation to redress for torture at Lake Alice until 2025, responding to torture is a separate matter to responding more broadly to abuse in care. Torture requires three specific elements to be present and is the only form of abuse to have its own international convention. This is reflected in New Zealand's Crimes of Torture Act 1989.

(c) It includes a section under the heading "Making specific redress available to survivors of torture is consistent with obligations under international human rights".

(d) An appendix to the Cabinet Paper summarised the UNCAT guidance to governments on implementation of art 14 of the Torture Convention and compared this to the Crown's proposed redress package.

[72] The Crown's position is that, apart from the application of the Bill of Rights Act, in principle, there is no legal framework here against which the Court can review the Cabinet Decisions. Counsel for the Crown, Ms Laurenson, submits that:

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[25] *Akatere v Attorney-General*, above n 21, at [23]; and *XY v Attorney-General* [2016] NZHC 1196, [2016] NZAR 875 at [35].

(a) The redress scheme arises from a policy decision of Cabinet to provide redress to survivors of torture at Lake Alice including those who had participated in earlier settlement processes. It is part of the Government's response to the Royal Commission Report, done at its discretion.

(b) Cabinet was not exercising a statutory power, nor have the Cabinet Decisions subsequently been given statutory force.

(c) Cabinet was under no domestic legal obligation to propose a redress scheme or to incorporate certain criteria into the boundaries of such a scheme.

[73] As Mr Richards is asserting that international law instruments are the legal frameworks against which I can assess the Cabinet Decisions, it is necessary to first set out what those instruments are and then briefly canvass how international law may become binding in New Zealand as domestic law.

International Convention on Civil and Political Rights

[74] New Zealand became a State party to the ICCPR with effect from 28 March 1979.

[75] Article 7 of the ICCPR provides (relevantly) that:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…

[76] Article 2(3) of the ICCPR provides that:

> Each State Party to the present Covenant undertakes:
>
> (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the

> legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) to ensure that the competent authorities shall enforce such remedies when granted.

[77] Article 14(1) of the ICCPR, relevantly provides that, in the determination of "rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

[78] Article 14(6) of the ICCPR states:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

[79] In depositing its instrument of ratification of the ICCPR on 28 December 1978, New Zealand deposited a reservation, which states (relevantly):

> The Government of New Zealand reserves the right not to apply article 14(6) to the extent that it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[80] New Zealand became a State party to the Torture Convention with effect from 9 January 1990.

[81] The term "torture" is defined under art 1 of the Torture Convention. Article 2 provides that each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Article 4 provides that each State party shall ensure that all acts of torture are offences under its criminal law.

[82] Article 14 of the Torture Convention states:

> 1. 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.
>
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

[83] Article 19 of the Torture Convention provides for State parties to submit to the UNCAT, reports on the measures they have taken to give effect to their undertakings under the Torture Convention. Articles 21 and 22 respectively provide for optional individual and inter-state complaints procedures.

[84] In depositing its instrument of ratification of the Torture Convention, on 10 December 1989, New Zealand:

(a) declared the competence of the UNCAT to receive and consider communications under arts 21 and 22 of the Torture Convention; and

(b) deposited 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 Against Torture only at the discretion of the Attorney-General of New Zealand.

Other relevant international material

[85] There are additional international instruments that provide guidance on State parties' obligations under the ICCPR and the Torture Convention.

[86] For example, New Zealand is a State party to the Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969 (the Vienna Convention). The Vienna Convention is known as "the treaty on treaties", providing for the creation, interpretation, amendment and termination of treaties between states.

[87] Article 19 of the Vienna Convention provides:

> A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> (a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

[88] Article 28 of the Vienna Convention states:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

[89] On 16 December 2005, by consensus, the United Nations General Assembly adopted 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* (also known as the van Boven principles).[26]

[90] Relevantly, under principle 12:

> A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws…

[91] International bodies may also provide comments, recommendations and findings. On 13 December 2012, the UNCAT adopted *General Comment No. 3 (2012) on the implementation of art 14 of the Torture Convention by States parties* (UNCAT General Comment No 3).[27] The UNCAT stated that:

> [20] To give effect to article 14, States parties shall enact legislation specifically providing a victim of torture and ill-treatment with an effective remedy and the right to obtain adequate and appropriate redress, including compensation and as full rehabilitation as possible. Such legislation must allow for individuals to exercise this right and ensure their access to a judicial remedy. While collective reparation and administrative reparation

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26 UN Basic Principles, above n 15.

27 United Nations Committee Against Torture *General Comment No. 3: Implementation of Article 14 by States Parties* CAT/C/GC/3 (13 December 2012).

> 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.

When international law becomes binding in New Zealand

[92] The protection of individuals' human rights and the duties of countries to uphold such rights are recognised at both international and domestic levels. Without doubt, New Zealand has obligations at an international level by ratifying the ICCPR and Torture Convention. However, those obligations are not automatically binding in domestic law.

[93] This is because, in the context of international treaties, New Zealand is traditionally said to have a dualist system, which means that the obligations arising from any particular treaty are effective only at an international level and are not directly enforceable in New Zealand law.[28] Rather, to be enforceable, they must be incorporated into domestic law, which may occur in several ways. Apart from direct legislative incorporation, two further ways are first, where the treaty obligation represents a rule of customary international law it is incorporated as part of the law of the land, and second, the courts may have regard to international treaty obligations when interpreting domestic legislation and will attempt to achieve an interpretation consonant with international obligations.[29]

[94] This is reflected in the differing roles of the three branches of government. The role of Cabinet in signing or taking binding action in relation to international treaties is discussed in the Cabinet Manual, which provides the following guidance:[30]

> A treaty is a written agreement between states or international organisations that is governed by international law. Treaties (whatever their particular title) create international legal obligations for the states that have expressed their consent to be bound.

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28 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 224.

29 *Bin Zhang v Police* [2009] NZAR 217 (HC) at [20]. This approach has been reiterated in several other judgments: *Zaoui v Attorney-General (No 2)*, above n 20; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104; and *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551. See also *Students for Climate Solutions Inc v Minister of Energy and Resources* [2024] NZCA 152, [2024] 2 NZLR 822 at [70], citing *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143]–[144].

30 Cabinet Office *Cabinet Manual 2023* at [5.78]–[5.81].

> The steps required to become bound depend on the terms of a given treaty. Sometimes there are two steps: signature, followed by binding treaty action (often called ratification). Sometimes there is only the binding treaty action (for example, accession or definitive signature). Other examples of binding treaty action include changing an existing reservation to a treaty, and termination of or withdrawal from a treaty. An amendment to a treaty may also involve a new treaty (and therefore a binding treaty action).
>
> Any proposal for New Zealand to sign a treaty or to take binding treaty action must be submitted, with the text of the treaty, to Cabinet for approval. Domestic implementation (including any legislation and consultation) must be completed before binding treaty action is taken. For detailed guidance, see the *CabGuide*.
>
> Where the Standing Orders require a treaty to be presented to the House for examination before binding treaty action is taken, a national interest analysis must also be prepared and submitted to Cabinet…

[95] Thus, the Cabinet Manual confirms that it is the executive branch of Government, specifically Cabinet, that must approve New Zealand's treaty-making activity. It is then parliament's role to consider enacting legislation to change domestic law as required, either incorporating the international instrument or giving effect to New Zealand's obligations under any given instrument in some way. As the Supreme Court stated in *Helu v Immigration and Protection Tribunal*:[31]

> Parliament takes differing approaches to the implementation of international obligations.[32] It sometimes gives them effect by incorporating their exact terms into New Zealand law. At other times, it enacts legislation, with the purpose of giving effect to such obligations, using language which differs from the terms or substance of the international text. In such cases, the legislative purpose is that decisionmakers will apply the New Zealand statute rather than the international text. Resort may still be had to the international instrument to clarify the meaning of the statute under the long-established presumption of statutory interpretation that so far as its wording permits, legislation should be read in a manner consistent with New Zealand's international obligations.[33] But the international text may not be used to contradict or avoid applying the terms of the domestic legislation.

[96] The role of the judiciary is to apply domestic law, and in the context of judicial review, it is to ensure public decision-makers act within the bounds of the law.

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31 *Helu v Immigration and Protection* Tribunal, above n 29, at [143].

32 See Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996).

33 *Ye v Minister of Immigration*, above n 29, at [24]; and *New Zealand Airline Pilots Association Inc v Attorney-General*, above n 29, at 289.

Relevant also is the role of "soft" international law in judicial decision making.[34] This includes international instruments which are not binding on New Zealand at a domestic level but can still influence decision making.

[97] In this way, international human rights instruments that are not formally incorporated into domestic law may form relevant considerations when discretionary decisions are made under statutory powers even when such instruments are not expressly mentioned: the Court of Appeal in *Tavita v Minister for Immigration* made general observations to this effect.[35] There is an analogy to the presumption that New Zealand will act in accordance with its international obligations and that legislation will comply with those obligations. This is acknowledged in the Legislation Guidelines.[36] The Guidelines also state:[37]

> New Zealand must give full effect to a treaty, or it will risk breaching its international obligations. In such instances, considerable resources will be required to remedy any non-compliance with the relevant treaty. Non-compliance places New Zealand's international reputation at risk and exposes it to any applicable sanctions under the treaty.

[98] Similarly, statements, findings and recommendations from international bodies may provide authoritative guidance as to the interpretation of international instruments (and carry significant moral and political weight), but they are not binding under New Zealand domestic law. The Court of Appeal in *R v Goodwin (No 2)* observed that:[38]

> Whether a decision of the Human Rights Committee is absolutely binding in interpreting the New Zealand Bill of Rights Act may be debateable, but at least it must be of considerable persuasive authority. I do not consider such material binding on the Executive.

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34 Treasa Dunworth "Sources of International Law in Aotearoa New Zealand" An Hertogen and Anna Hood (eds) *International Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2021) 15 at 26–36.

35 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

36 Legislation Design and Advisory Committee *Legislation Guidelines – Fundamental Constitutional Principles and Values of New Zealand Law* (2021) at [4.9].

37 At 45.

38 *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA) at 393.

[99] Leading commentary on the Torture Convention reinforces this position regarding decisions made under art 22 of the Torture Convention:[39]

> As with all other treaty monitoring bodies of the United Nations, the Committee's decisions on the merits, from a strictly legal point of view, are not binding under international law. This is certainly one of the major weaknesses of UN human rights treaty bodies in general. On the other hand, the Committee's decisions can be considered as authoritative interpretation of the Convention under international law.

Is there a binding legal framework in this case?

[100] The status of the ICCPR and Torture Convention in New Zealand's domestic law is contested between the parties in the present case. Accordingly, I turn to consider:

(a) whether the Torture Convention provides a legal framework against which the Cabinet Decisions may be measured; and

(b) whether s 9 of the Bill of Rights Act and/or art 2(3) of the ICCPR provides a legal framework against which the Cabinet Decisions may be measured.

Does the Torture Convention provide a binding legal framework against which the Cabinet Decisions may be assessed?

[101] The first legal framework that Mr Richards contends can be used to measure the Cabinet Decisions against is the Torture Convention. Mr Richards argues that:

(a) New Zealand's reservation to art 14 of the Torture Convention is invalid; and

(b) the Torture Convention is part of New Zealand's domestic law because it is incorporated by the Crimes of Torture Act.

[102] Mr Richards says that art 14 of the Torture Convention has the force of law in New Zealand and Cabinet was obliged to give effect to it when it made the Cabinet

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[39] Manfred Nowak, Moritz Birk and Giuliana Monina *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd ed, Oxford University Press, 2019) at 631 (footnotes omitted).

Decisions. The Commission supports this view, submitting that the reservation does not preclude a finding by this Court that the Cabinet Decisions are in breach of art 14. The Crown disagrees, saying it is not for this Court to assess the validity of the reservation, and the Crimes of Torture Act does not provide a basis for a blanket obligation on Cabinet to comply with the Torture Convention.

[103] I address the validity of the reservation to art 14 of the Torture Convention and the effect of the Crimes of Torture Act in turn.

The validity of New Zealand's reservation to art 14

[104] Two possible issues arise in considering the validity of New Zealand's reservation to art 14 of the Torture Convention. The first is whether the Court can undertake such an exercise. If it can, then the second issue is whether art 14 is lawful at international law.

[105] Mr Richards (supported by the Commission) submits that New Zealand's reservation in relation to art 14 of the Torture Convention is invalid. Their overall point is that there is powerful interpretive guidance in international law in relation to the art 14 reservation which this Court should follow.[40]. They rely on art 19 of the Vienna Convention to argue that a State party may not formulate a reservation where "the reservation is incompatible with the object and purpose of the treaty".[41]

[106] They also rely on the approach of the Human Rights Committee to reservations under the ICCPR[42] and the UNCAT recommendations that New Zealand should withdraw the reservation.[43] They say the UNCAT decisions on the claims of

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40 For example, United Nations Committee Against Torture *Concluding Observations on the Seventh Periodic Report of New Zealand* UN Doc CAT/C/NZL/CO/7 (24 August 2023)

41 Mr Griggs also says that the Court can determine the matter because the Torture Convention is part of New Zealand law and must be interpreted in accordance with art 19 of the Vienna Convention, which itself is part of New Zealand's common law as it represents customary international law.

42 United Nations Human Rights Committee *General Comment No 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant* UN Doc CCPR/C/21/Rev.1/Add.6 (11 November 1994).

43 United Nations Committee Against Torture *Concluding Observations on the Sixth Periodic Report of New Zealand* UN Doc CAT/C/NZL/CO/6 (2 June 2015) at [20]. See also *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 (25 August 2014) at [19] and [23(a)].

Mr Zentveld and Mr Richards implicitly proceeded on the basis that the art 14 reservation is invalid or it was to be set to one side because the UNCAT found their rights under art 14 had been violated.[44]

[107] The Commission refers to international caselaw relating to whether reservations to treaties are valid.[45] Mr Griggs highlights the two express references in the Torture Convention to making a reservation (in arts 28 and 32) and submits that neither authorise the art 14 reservation by New Zealand. Mr Griggs also submits that even if the art 14 reservation is valid, it is in limited terms. It reserves the right for New Zealand to award compensation to torture victims "only at the discretion of the Attorney-General". Mr Griggs says that the purported reservation does not permit a process that excludes a category of torture survivors on arbitrary grounds, prejudges the quantum of compensation through imposition of an arbitrary cap, has ex-gratia payments, and is not provided for in legislation.

[108] The Crown submits that no case has been put before the Court in which a domestic court assesses the legality of a reservation to an international treaty in the way the Court is being asked to do here. Ms Laurenson says while the Commission has cited some cases that discuss reservations, none of those cases go so far as Mr Richards and the Commission propose here, which is that a domestic court can effectively declare a reservation invalid and then proceed to consider domestic law as if the reservation did not exist.

[109] I have considered the caselaw cited by the Commission. I agree with the Crown that it does not provide authority for such a proposition. In *Akatere*, the Court noted that a reservation had been made (there, regarding compensation for miscarriages of justice) and could not be "construed out of existence".[46]

[110] I consider it is not for this Court to assess the legality of New Zealand's reservation in relation to art 14 of the Torture Convention. As is the case for

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44 Mr Zentveld's UNCAT Claim, above n 3, at 10; and Mr Richards' UNCAT Claim, above n 3, at 8.11.

45 *Belilos v Switzerland* App No 10328/83 (ECHR, 29 April 1988); and *Wong King Lung v Director of Immigration* [1994] 4 LRC 1 (HKHC).

46 *Akatere v Attorney-General*, above n 21, at [23]. See also *Pora v Attorney-General* [2017] NZHC 2081 at [20]–[25] and [96].

compliance with the Torture Convention, the validity of the reservation is an international law matter relating to an agreement between states. Accountability of State parties arises in the international forum. Other State parties may raise any concerns they have with the reservation, and there is no suggestion that there has been such an objection to the reservation.

[111] Relevant international bodies such as the UNCAT may comment on the reservation, as they have done several times.[47] While Committee decisions may be an authoritative interpretation of reservations by State parties, they are not binding as a matter of international law. This is reflected in the leading commentary on the Torture Convention, as already mentioned above.[48]

[112] As highlighted by Mr Griggs and the Commission, I acknowledge that the commentary of Nowak, Birk and Monina also observes:[49]

> Whether a reservation is compatible with the object and purpose of the Convention is a question which needs to be determined by the Committee against Torture. If the Committee finds a certain reservation to be incompatible with the object and purpose of the Convention, this reservation must be considered as invalid and can be severed from the instrument of ratification, so that the reserving State is fully bound by the treaty, including the provisions to which the reservation related. In practice, the Committee has on several occasions voiced its concern over broad and imprecise reservations, as well as reservations having a limiting effect on the Convention, and has issued recommendations to these States parties to withdraw them.

[113] In my view, this reinforces the accepted importance of international decisions and commentary but as it is "soft" international law, any strictly legal effect may be limited. State parties may become reluctant to enter treaties if they cannot be confident in their ability to make reservations. Ultimately, a State party's decision whether to make or withdraw a reservation is a matter for that State party—in New Zealand, this is a matter sitting with the executive, specifically Cabinet, with its treaty-making powers.

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47 *Concluding Observations of the Committee Against Torture*: see UN Doc CAT/C/NZL/CO/5 (4 June 2009) at [14]; UN Doc CAT/C/NZL/CO/6 (2 June 2015) at [20]; and UN Doc CAT/C/NZL/CO/7 (24 August 2023) at [51].

48 Nowak, Birk and Monina, above n 39, at 631.

49 At 11 (footnotes omitted).

[114] It is also relevant context, as the Commission records, that New Zealand is not the only State party to have entered a reservation to art 14 of the Torture Convention.

[115] New Zealand advised the UNCAT in its first State party report in 1992 that New Zealand made its reservation to art 14 to ensure consistency with its longstanding position that it is advisable to deal with compensation to victims of crime, or to persons who suffer as a result of a miscarriage of justice, on an ex gratia basis so that every case can be considered entirely on its own merits.[50] New Zealand advised that, for the same reasons, it made a similar reservation to art 14(6) of the ICCPR.[51]

[116] This Court's role is to interpret domestic law. Domestic law may include international law obligations where they have been incorporated into domestic law. This is not to say the Court may not comment on or consider whether a reservation aligns with New Zealand's international law obligations, even where those obligations are not part of domestic law. To do so is the Court taking part in constitutional dialogue where fundamental human rights are concerned.[52] In this context, the Court has an important role in ensuring that the ratification of treaties is not mere "window-dressing".[53] However, this does not extend to assessing the validity of a reservation to an international instrument nor undertaking an interpretation exercise as Mr Griggs seeks.

[117] I conclude that it is not for this Court to reach any conclusion about the validity of New Zealand's reservation to art 14 of the Torture Convention.

Is the Torture Convention a binding legal framework as a result of the Crimes of Torture Act?

[118] I now consider Mr Richards' submission that the Torture Convention is a legal framework against which the Cabinet Decisions may be assessed because of its incorporation into domestic law through the Crimes of Torture Act.

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50 United Nations Committee Against Torture *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention* UN Doc CAT/C/12/Add.2 (20 September 1992) at [14.3].

51 United Nations Committee Against Torture *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention* UN Doc CAT/C/12/Add.2 (20 September 1992) at [14.3].

52 See for example, *New Zealand Maori Council v Attorney-General* HC Wellington CIV-2007-485-95, 4 May 2007 at [93].

53 *Tavita v Minister for Immigration*, above n 35 at 266 per Cooke P.

[119] The Crimes of Torture Act was enacted on 13 November 1989 with a long title stating the Act was "to make better provision for the punishment of crimes of torture, and to implement the [Torture] Convention". The Torture Convention was not annexed to the Act although it was defined in the interpretation section. While it has been subject to minor amendments by several statutes, the Crimes of Torture Act was substantively amended on 5 December 2006 by the Crimes of Torture Amendment Act 2006.

[120] The amended Crimes of Torture Act contains two parts. Part 1 relates to the prosecution of crimes of torture. The purpose of pt 1 is to enable New Zealand to meet its international obligations under the Torture Convention.[54] The Convention is defined in s 2(1) of the Act as:

> …the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984, a copy of the English text of which is set out in Schedule 1.

[121] Section 3 of the Crimes of Torture Act creates an offence in relation to acts of torture. Section 5 of the Act provides for victims of torture to be compensated but restricts that right to compensation by providing it as at the discretion of the Attorney-General. Importantly, this is different from the wording in art 14 of Torture Convention. Section 5 states:

> (1) Where any person is convicted of an offence against section 3, the Attorney-General shall consider whether it would be appropriate in all the circumstances for the Crown to pay compensation to the person against whom the offence was committed or (if that person dies as a result of the offence) to that person's family.
>
> (2) Nothing in subsection (1) shall limit or affect any right to compensation that any such person may have under any other enactment.

[122] Part 2 of the Crimes of Torture Act concerns the prevention of crimes of torture. The purpose of pt 2 is to enable New Zealand to meet its international obligations under the Optional Protocol to the Torture Convention (the Optional Protocol itself appears in sch 2 of the Act).[55]

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54 Crimes of Torture Act 1989, s 2A.
55 Crimes of Torture Act 1989, s 15.

[123] Mr Griggs submits that the effect of including the Torture Convention and the Optional Protocol as schedules to the Crimes of Torture Act is that parliament has formally incorporated them into domestic law.[56] He says the Torture Convention is therefore domestic law. He contends that parliament did not amend the application of art 14 in line with the reservation deposited by New Zealand and so the Torture Convention must be given effect to as a whole, as it is presented in sch 1. He says the courts cannot pick and choose to which parts of a statute they give effect.

[124] Mr Griggs says that the remainder of the operative provisions of pt 2 simply refer to articles in the Optional Protocol on the basis that they are New Zealand law, for example, the reference to art 17 in s 26 of the Crimes of Torture Act. He submits that if parliament had not intended to fully incorporate the Torture Convention, it would have only referred in the Crimes of Torture Act to the various articles that it intended to incorporate or made specific provision in domestic law for the obligations that New Zealand intended to adopt.

[125] Mr Griggs therefore submits that, because of this incorporation, art 14 of the Torture Convention (without the reservation) has the force of law in New Zealand and Cabinet was therefore obliged to give effect to that provision when it made the Cabinet Decisions.

[126] I am not persuaded that this is the correct interpretation of the Crimes of Torture Act. I accept that it is significant that the Torture Convention is attached to the Crimes of Torture Act, but a closer examination of the Act leads to a different conclusion as to its impact in the present case.

[127] The provisions that now comprise pt 1 of the Act were first introduced into parliament by the Law Reform (Miscellaneous Provisions) Bill 1988 (122-1). The explanatory note to that Bill stated that cls 42–54 (which later became the Crimes of Torture Bill) were "designed to give effect, so far as legislation is required" to the Torture Convention. Until this point there was no stand-alone offence of torture in

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[56] By contrast to the United Kingdom, see *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 1 All ER 527 at [42].

New Zealand's domestic law—although there were other offences in the Crimes Act 1960 that would capture offending likely part of torture.

[128] The legislative history of the Crimes of Torture Act was not addressed in detail by counsel, but my research reveals the following accounts.

[129] When introducing cls 42–54 of the Law Reform (Miscellaneous Provisions) Bill to parliament, then Minister of Justice and Attorney-General Geoffrey Palmer stated that:[57]

> The Bill also gives effect to the United Nations convention against torture adopted by the United Nations General Assembly in December 1984. Under the convention each State party undertakes to ensure that all acts of torture as defined are offences under its criminal law. The convention establishes a universal obligation for parties to try those suspected of torture or extradite them to other countries where they may be lawfully tried. When the clauses contained in the Bill are passed the Government will be able to ratify that convention. …

[130] In its second reading, (now Sir) Geoffrey Palmer further noted that the Bill "makes provision for the Attorney-General to consider whether it would be appropriate to pay compensation to a person against whom an offence of torture has been committed".[58]

[131] At that second reading, Labour Party Member of Parliament Bill Dillon said that:[59]

> …clause 42 makes provision in relation to crimes of torture, and puts into legislative form the provisions of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment adopted by the United Nations General Assembly on 10 December 1984, which New Zealand has signed and has yet to incorporate into domestic law. By incorporating the convention the measure completes what New Zealand undertook to do when it signed the convention outlawing crimes of torture.

[132] At the third reading, cls 42–54 of the Law Reform (Miscellaneous Provisions) Bill were split off and incorporated into a separate Crimes of Torture Bill. The Bill was passed at its third reading with no discussion or debate recorded in Hansard. The

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57 (13 December 1988) 495 NZPD 8932.
58 (18 July 1989) 499 NZPD 11318.
59 (18 July 1989) 499 NZPD 11325.

Act passed into law did not contain the Torture Convention. This only occurred in 2006, with the passage of the Crimes of Torture Amendment Act 2006. Neither the debates and commentary in Hansard, nor the explanatory note to the Amendment Bill, discuss why the Torture Convention was being included as a schedule to the Act. However, during the Committee of the Whole House, National Party Member of Parliament Dr Richard Worth noted that:[60]

> New Zealand entered an important reservation to [the Torture Convention], and that reservation was in respect of compensation. So the Government of New Zealand, in an expressed reservation, reserved 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. We now, of course, are dealing in the amendment bill with the optional protocol, and although New Zealand signed the optional protocol to the convention, it has not yet ratified it. We see here a working of constitutional principle—that international conventions are not incorporated into domestic law, in the absence of relevant statutory implementation.

[133] Thus, it is clear that the Crimes of Torture Act is responding to two specific aspects of the Torture Convention—prosecuting torture as a crime under domestic law and taking steps to prevent crimes of torture. This is a limited legislative response. While the Act was intended to give effect to the Torture Convention "so far as legislation is required", there is nothing to suggest that it intended to adopt it wholesale into New Zealand domestic law. This is despite the fact it sets out the Torture Convention in a schedule to the Act.[61] It does not seem to me that the particular verb used, for example, "incorporated", can be a definitive factor in such an assessment, rather it is necessary to consider also the broader context.

[134] Section 5 of the Crimes of Torture Act contemplates how compensation is to be considered where there is a conviction under the Act. Despite the terms of the purpose provision in s 2, it is not tenable to read the Crimes of Torture Act (which criminalises acts of torture in s 3 and provides for the Attorney-General to consider compensation for victims of those crimes in s 5) as imposing any requirements on Cabinet when considering compensation for victims of torture where, as here, there

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60 (16 November 2006) 635 NZPD 6615.

61 In contrast to the approach taken in the New Zealand Bill of Rights Act 1990, for example, which affirms New Zealand's commitment to the International Convention on Civil and Political Rights in its long title but does not annex it to the Act.

has been no conviction under s 3.[62] International obligations cannot be invoked to defeat the scheme and purpose of an Act where those are unambiguous.[63]

[135] I consider the position is similar for the Optional Protocol. So for example, the reference to art 17 of the Optional Protocol in s 26 of the Crimes of Torture Act is consistent with parliament specifically contemplating the relevance of an article of the Optional Protocol in domestic law.

[136] Given Dr Worth's comment about the reservation, members of parliament were aware of the reservation to art 14. No concerns are recorded that setting out the Torture Convention in a schedule to the Act could be read as meaning the whole Convention was being adopted, undermining the reservation. Instead, it seems likely the inclusion of the Torture Convention in a schedule to the Act was meant to act as a convenient reference point for the matters being dealt with at the time. I consider this tacitly recognises the fact that parliament did not consider art 14 of the Torture Convention to be one of New Zealand's obligations under the Torture Convention, given its reservation.

[137] Further, New Zealand did not take the steps necessary in an international context to withdraw its reservation to art 14 when the Crimes of Torture Act was amended, as indeed it has not to date. It cannot be the case that in passing this legislation parliament caused such a result. As already noted, New Zealand's treaty-making powers reside with the executive, subject to the involvement of parliament as provided for under the Standing Orders.

[138] The UNCAT's *Concluding Observations on the Seventh Periodic Report of New Zealand (August 2023)* addresses aspects of New Zealand's compliance with the Torture Convention and make various recommendations.[64] This includes concerns about New Zealand's reservation to art 14 and a strongly worded recommendation that New Zealand consider withdrawing its reservation to art 14 and ensure the provision

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62 Nor could there be a conviction, given the Crimes of Torture Act 1989 is not retrospective.

63 *Students for Climate Solutions Inc v Minister of Energy and Resources*, above n 29, at [70].

64 United Nations Committee Against Torture *Concluding Observations on the Seventh Periodic Report of New Zealand* UN Doc CAT/C/NZL/CO/7 (24 August 2023).

of fair and adequate compensation through its civil jurisdiction to all victims of torture and the means for as full a rehabilitation as possible.[65]

[139] Nonetheless, the UNCAT states:[66]

> While taking note of the fact that New Zealand has a dualist legal system and that a combination of policies and legislation has been put in place to give effect to the Convention, the Committee remains concerned that the State party has not yet fully incorporated the Convention into the domestic legal order. …

[140] This suggests that the UNCAT does not consider that art 14 and therefore the Torture Convention as a whole is presently fully incorporated into New Zealand's domestic law.

[141] I conclude then that the Crimes of Torture Act does not have the effect advanced by Mr Griggs of fully incorporating the Torture Convention into New Zealand domestic law.

[142] I briefly record two further arguments raised by counsel as to the applicability of the Torture Convention.

[143] The first is whether the Torture Convention is inapplicable for timing reasons. The Crown submits that as the Torture Convention did not come into existence until 1984, and New Zealand did not ratify it until 10 December 1989, on a conventional interpretation of international law, the Torture Convention (including art 14) cannot be applied to actions or omissions in New Zealand prior to 10 January 1990.[67] As already mentioned, the torture at Lake Alice occurred between 1972 and 1980. The Crown notes that despite this, Cabinet has taken steps to provide redress to Lake Alice survivors.

[144] Mr Griggs and the Commission highlight that the Crown made this argument unsuccessfully before the UNCAT in relation to the communications made by Mr Zentveld and Mr Richards. They rely on the UNCAT decisions and the United

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65 At [51].
66 At [8].
67 Being the period provided for in the Torture Convention for ratification to come into effect: art 27(2).

Nations Human Rights Committee decision in *Singarasa v Sri Lanka* to submit that the remedial obligation is a stand-alone and ongoing obligation, such that even if the act that gives rise to the remedy occurs after the relevant treaty comes into force, the Committee can examine an allegation of such a procedural violation.[68] Mr Griggs emphasises that these decisions must be highly persuasive in a domestic law context, suggesting that otherwise this risks a decision of this Court being inconsistent with New Zealand's international obligations as determined by the international tribunals which are the arbiters of those obligations. He further argues that parliament, in enacting the Crimes of Torture Act, must have intended the Court to apply it in such a manner, making an analogy to the comments of the Chief Justice in *Fitzgerald v R*:[69]

> … The courts will be very slow to conclude that Parliament wished to direct another branch of government to breach a right as fundamental as that affirmed in s 9, and in a manner that implicates that branch in a breach of New Zealand's international obligations.

[145] Mr Griggs also argues that this timing issue creates an issue estoppel in the present case and prevents the Crown from raising the same argument in this Court. Mr Griggs accepts that he has been unable to find any caselaw directly supporting this proposition but contends that it is consistent with the weight placed by New Zealand courts on the decisions of international bodies to ensure compliance with international law obligations. He says it is also consistent with *Greymouth Petroleum Holdings v Empresa Nacional Del Petrōleo*, where the Court of Appeal concluded that an issue estoppel may arise from the decision of a foreign arbitral tribunal (although noting caution must always be exercised in dealing with foreign judgments).[70]

[146] The Crown says to establish issue estoppel there needs to be a binding decision of a court. Ms Laurenson submits that the United Nations process fails on both requirements, as the Committee is not a court, nor does it give a binding decision.

[147] It might be said unlikely that a New Zealand court would accept that a decision of an international body could support the establishment of an issue estoppel given the

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68 *Singarasa v Sri Lanka Communication No 1033/2001* UN Doc CCPR/C/81/D/1033/2001 (21 July 2004).

69 *Fitzgerald v R* [2021] NZSC 131; [2021] 1 NZLR 551 at [119].

70 *Greymouth Petroleum Holdings v Empresa Nacional Del Petrōleo* [2017] NZCA 490; [2017] NZAR 1617 at [49].

accepted position that such decisions provide authoritative guidance but are not binding. Whether a decision of the International Court of Justice could be regarded differently is a question for another day. In any event, given my earlier conclusions about the Torture Convention, I do not need to determine these matters in this context.

[148] Mr Griggs also argues that the same obligations also arise under arts 2, 3, and 7 of the ICCPR to which New Zealand has no reservation—and further the reservation to art 14(6) of the ICCPR assists in interpretation of the reservation against the Torture Convention. That reservation reserves the right not to apply art 14(6) of the ICCPR to the extent that New Zealand is not satisfied by the existing system for ex-gratia payments to persons who suffer as a result of the miscarriage of justice. Mr Griggs says New Zealand's reservation to art 14 of the Torture Convention does not state that remedies for torture may be dealt with by ex-gratia payment. From this, Mr Griggs contends that arts 2, 3 and 7 of the ICCPR have the same substantive effect as art 14 of the Torture Convention—the Lake Alice torture is a serious human rights violation and the Human Rights Committee has said that in such circumstances administrative measures are not a permissible form of redress.[71]

[149] To the extent that these are matters of interpretation of art 14 of the Torture Convention, for the reasons I have already given, such matters are properly left to the international sphere. As for the relevance of the ICCPR, I consider the arguments raised in that context below.

[150] Accordingly, I conclude that the Torture Convention does not provide a legal framework against which the Cabinet Decisions can be reviewed by this Court.

Does art 2(3) of the ICCPR (through s 9 of the Bill of Rights Act) provide a binding legal framework against which the Cabinet Decisions may be assessed?

Where there is a right there must be a remedy

[151] The second legal framework advanced by Mr Richards is the ICCPR in its application through the conduit of s 9 of the Bill of Rights Act. The arguments about

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71 *Bautista de Arellana v Colombia Communication No 563/1993* UN Doc CCPR/C/55/D/563/1993 (27 October 1995).

this legal framework are somewhat complicated because they relate to the application of international and domestic law in the following context:

(a) The breach of the right not to be subject to torture occurred at Lake Alice in the early 1970s;

(b) New Zealand ratified the ICCPR in 1979;

(c) The Bill of Rights Act was enacted in 1990; and

(d) The Cabinet Decisions about the redress scheme were made in November 2024.

[152] Before turning to the arguments of the parties, it is convenient to set out the relevant aspects of the Bill of Rights Act and the ICCPR. As is well-known, the long title to the Bill of Rights Act records that the Act was enacted:

(a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and

(b) to affirm New Zealand's commitment to the ICCPR.

[153] Section 9 of the Bill of Rights Act provides that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. This provision is in similar terms as art 7 of the ICCPR, which relevantly provides "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

[154] The Courts have recognised that effective remedies should be available for breaches of the Bill of Rights Act, including (and not limited to) public law damages.[72] This recognises art 2(3) of the ICCPR, which states that a judicial remedy should be available for breach of such rights. The then Chief Justice reinforced this in *Taunoa v Attorney-General* when Her Honour stated:[73]

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72 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*].
73 *Taunoa v Attorney-General*, above n 19, at [106].

> … Under the [ICCPR],[74] it is the responsibility of the State Parties to provide in their domestic legal systems "effective remedy" for breaches of rights. In the New Zealand legal system it is the responsibility of the courts to provide appropriate remedies to those whose rights and interests recognised by law have been infringed. …

[155] Thus, New Zealand domestic law provides that remedies for breaches of rights contained in the Bill of Rights Act are available through the Courts.

[156] The Bill of Rights Act applies to acts done by the legislative, executive, or judicial branches of the Government of New Zealand and by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.[75]

[157] The Bill of Rights Act also includes a process under which the Attorney-General must bring to the attention of parliament any provision in any Bill introduced into parliament that appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights.[76] Further, if a Court makes a declaration that an enactment is inconsistent with the Bill of Rights, the Attorney-General must draw that declaration to the attention of parliament.[77]

[158] For ease of reference, I repeat that art 2(3) of the ICCPR provides:

> Each State Party to the present Covenant undertakes:
>
> (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) to ensure that the competent authorities shall enforce such remedies when granted.

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74 Article 2(3).
75 New Zealand Bill of Rights Act 1990, s 3.
76 New Zealand Bill of Rights Act 1990, s 7.
77 Section 7A.

[159] In his statement of claim, Mr Richards pleads that the Cabinet Decisions breach s 9 of the Bill of Rights Act on the basis s 9 incorporates the right to an "effective remedy" under art 2(3) of the ICCPR. Mr Richards pleads separately that the Cabinet Decisions breach New Zealand's obligations under arts 2(3), 7 and 14 of the ICCPR. However, as I understood Mr Griggs' submission, the first point is the critical argument. This is because Mr Griggs acknowledges that the ICCPR is not directly enforceable under New Zealand domestic law.

[160] In essence, Mr Richards' claim is that the right not to be subjected to torture has always existed and so has the principle that where there is a right there is a remedy. As the Bill of Rights Act merely codifies the right not to be subjected to torture, the necessary implication of enacting the Bill of Rights Act to affirm New Zealand's commitment to the ICCPR is that art 2(3) prescribes the remedy that is available for a breach of right under the Bill of Rights Act, irrespective of when an act of torture was committed. Therefore, Mr Griggs submits that s 9 and art 2(3) form a legal framework against which the Cabinet Decisions may be measured.

[161] Mr Griggs' submissions rely on the common law principle that where there is a right there must be a remedy. He refers to *Simpson v Attorney-General (Baigent's Case)* where McKay J stated:[78]

> What is more difficult to comprehend, however, is that Parliament should solemnly confer rights which are not intended to be enforceable either by prosecution or civil remedy, and can therefore be denied or infringed with impunity. Such a right would exist only in name, but it would be a misnomer to call it a right as it would be without substance. The maxim *ubi jus ibi remedium*, where there is a right there is a remedy, has a long history. According to *Broom's Legal Maxims* … it led to the invention of the action on the case, which was affirmed by the Statute of Westminster II in 1285. The same principle is referred to in *Blackstone's Commentaries*… As was said by Holt CJ as long ago as 1702 in *Ashby v White*…:
>
> > If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. …

[78] *Baigent's Case*, above n 72, at 717.

[162] Mr Griggs says that in enacting s 9 of the Bill of Rights Act, parliament cannot be taken to have thought that it was creating a new right. He says the remedial rights incorporated in s 9 must therefore apply from the commencement of the Bill of Rights Act to any act of torture, irrespective of when that act was committed. Thus, he argues that the Cabinet Decisions are subject to (and in breach of) s 9. Mr Griggs finds support for this in the decision of the United Nations Human Rights Committee in *Singarasa*, where the Committee found the relevant treaty does apply to questions about whether the remedial obligations have been given effect to after ratification.[79] Mr Griggs submits that this Court must follow that approach in interpreting the Bill of Rights Act to ensure that the interpretation given is consistent with New Zealand's international obligations.

[163] As the right not to be subject to torture in s 9 of the Bill of Rights Act is in substantially the same terms as in art 7 of the ICCPR, Mr Griggs submits that the remedial rights in art 2(3) must be regarded as implicit in the right itself. In making this submission, Mr Griggs refers to the dicta of Casey J in *Baigent's Case*:[80]

> … the long title to the [Bill of Rights Act] states that it is to affirm and promote human rights and freedoms in New Zealand, and its commitment to the [ICCPR].
>
> The Act contains no provision for enforcement or vindication of the rights and freedoms it contains. It applies only to acts done by the legislative, executive or judicial branches of government, or by persons performing public functions powers or duties (s 3). This focus on public responsibility suggests that appropriate remedies for the breach could also be in the public law sphere, reflecting the state's (ie New Zealand's) undertaking in art [2(3)] to ensure that any person whose rights or freedoms are violated should have an effective remedy.
>
> I do not regard the absence of a remedies provision in the Act as an impediment to the Court's ability to "develop the possibilities of judicial remedy" as envisaged in art [2(3)(b)]. The rights and freedoms affirmed are fundamental to a civilized society and justify a liberal purposive interpretation of the Act, even though it has not been constitutionally entrenched and has the same status as ordinary legislation. Its purpose being the affirmation of New Zealand's commitment to the Covenant (including art [2(3)(b)]), it would be wrong to conclude that Parliament did not intend there to be any remedy for those whose rights have been infringed. …

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79 *Singarasa v Sri Lanka Communication No 1033/2001* UN Doc CCPR/C/81/D/1033/2001 (21 July 2004) at [6.3].

80 *Baigent's Case*, above n 72, at 691.

[164] Mr Griggs also cites the statement of the United Nations Human Rights Committee in 1992 in *General Comment No 20*:[81]

> Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant… The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective…

[165] The Commission agrees with Mr Richards' submissions, saying the art 2(3) right to an effective remedy is an essential element of the s 9 right to freedom from torture.

[166] The Crown's position is that while s 9 of the Bill of Rights Act incorporates a right to a remedy, it does not generate one for rights breaches that pre-date the enactment of the Bill of Rights Act. Ms Laurenson says that at the time of the Lake Alice events, a claim in tort only would have been available to survivors of torture. She accepts that if a post-1990 claim for torture under s 9 succeeded before the courts, the likely remedy would be public law damages.

[167] Ms Laurenson says that, in any event, the redress scheme has provided a remedy that, when coupled with other avenues available to Lake Alice survivors, can amount to a sufficient remedy for a breach of s 9 (noting that the Cabinet was aware of the right now available to seek public law damages for such a breach). She submits that the redress scheme should be judged by whether it provides effective redress for those eligible under it and quantum needs to be assessed in the context of a particular survivor and their experiences. Ms Laurenson submits that the redress scheme offers individualised redress to those who do not wish to go through further court processes. She also notes the other means of support for survivors, including earlier settlements, ACC entitlements to compensation for personal injury, and ongoing support from the Crown Response Office.

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[81] United Nations Human Rights Committee *CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* UN Doc CCPR/C/GC/20 (10 March 1992) at [14].

Discussion

[168] Thus, the second legal framework that Mr Richards contends can be used to measure the Cabinet decisions against is, in effect, art 2(3) of the ICCPR (through its incorporation and application in the Bill of Rights Act).

[169] As submitted by Mr Griggs, it is clear that the Bill of Rights Act does not create new rights. It affirms already existing rights including the right not to be subjected to torture or cruel treatment. Although now codified under s 9 of the Bill of Rights Act, such a right exists at common law and has also been recognised as part of international law under art 7 of the ICCPR. There has therefore always been a right not to be subjected to torture. The Crown accepts and, in 2024, formally acknowledged, that children at Lake Alice were tortured. This torture was unlawful at common law when it occurred (prior to the enactment of the Bill of Rights Act) and any acts of torture now would also be unlawful in accordance with the Bill of Rights Act.

[170] Key to Mr Richards' case is the contention that at common law, where there is a right there is a remedy. I accept this principle exists and is particularly important in this case in relation to a fundamental human right, where the breach of right was egregious. If Mr Richards had brought a claim for breach of his common law right not to be subjected to torture prior to the enactment of the Bill of Rights Act, it seems inconceivable that the courts would not have responded to that by considering a remedy was necessary, although I acknowledge an issue of limitation could arise. I therefore do not agree with the Crown that at the time of the acts of torture at Lake Alice, only a claim in tort would have been available. The parties also acknowledge that a claim under the Bill of Rights Act brought now may be impeded by the rule against retrospectivity and the law of limitation. The impact of these matters was not developed by the parties beyond this acknowledgement, so I do not address it in detail. But it is important to note that, putting aside legal difficulties in bringing such a claim, there would in principle be a remedy for a breach of right.

[171] The focus of the claim is on Mr Richards' entitlement to a remedy. Mr Richards submits the remedy available to him for the breach of his right not to be subjected to torture under s 9 of the Bill of Rights Act should comply with art 2(3) of the ICCPR.

He says his entitlement to a remedy that complies with art 2(3) was breached when the Cabinet Decisions were made establishing the redress scheme, rather than the events of torture. Mr Richards submits the redress scheme therefore breaches s 9 and so is unlawful. In this way, the Bill of Rights Act is said to be the "hook" for making art 2(3) part of domestic law.

[172] This argument assumes that, because there must be a remedy for the Lake Alice survivors, the Bill of Rights Act applies to any act of torture, irrespective of when the act was committed, as the Bill of Rights Act merely affirms existing rights. Ms Laurenson submits that if this position is correct, then Mr Richards or any of the survivors could bring a claim for public law damages under the Bill of Rights Act in the usual way. I agree with that submission. However, the retrospectivity and limitation issues that may arise are matters that would have to be determined in the context of any individual claim, not in this proceeding.

[173] Coming back to the issue at hand, being whether the ICCPR is a legal framework that can be used to measure the Cabinet Decisions against, I would first need to be satisfied that the Bill of Rights Act applies to the circumstances, and second, I would need to accept that art 2(3) of the ICCPR is incorporated into domestic law through the Bill of Rights Act.

[174] As for the first point, there is certainly some merit in a judicial review context to say that the decision to be reviewed is the Cabinet Decisions. Clearly, the Bill of Rights Act was binding on the executive at the time the Cabinet Decisions were made. The Cabinet could not have sought to make a decision allowing torture as this would plainly breach s 9. However, on the second point, I am not satisfied that art 2(3) is directly incorporated into domestic law through the Bill of Rights Act.

[175] The Bill of Rights Act affirms particular rights and freedoms (rather than every right and freedom provided in the ICCPR). It also did not expressly provide remedies. Although remedies were proposed as part of the Bill contained in the White Paper,[82] Parliament chose not to include those remedy provisions in the Act as ultimately

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[82] Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* (Government Printer, April 1985).

enacted. Rather, the Court of Appeal in *Baigent's Case* found that a remedy must be implicit in the Act, including public law damages.[83] Such a remedy is available to an individual whose rights have been breached.

[176] Following parliament's decision not to include an explicit remedy in the Bill of Rights Act, the appropriate remedies in response to breaches have been and are being developed by the Courts. In those circumstances and given the Bill of Rights Act does not expressly adopt art 2(3) of the ICCPR, I consider it would be wrong to conclude that, in affirming New Zealand's commitment (through enacting the Bill of Rights Act) to only some of the rights and freedoms contained in the ICCPR and deliberately not including a remedy provision, parliament envisaged that this Court would find that art 2(3) was binding (in a domestic law sense) in any further way. There is no statutory basis for the Cabinet Decisions, and neither Mr Richards nor the interveners suggested that there are grounds on which this Court could compel Cabinet to make a redress scheme.

[177] Although Mr Griggs and the Commission rely heavily on caselaw where the courts have placed considerable weight on New Zealand's international law commitments, those cases are of less assistance in the present case.[84] That caselaw arises where statutory powers are being exercised. Sometimes, there is a direct reference in the statute to a relevant international instrument. Here, as just discussed, parliament has deliberately not included express remedies in the Bill of Rights Act and left the courts to develop remedies. I am not suggesting that these differences mean that it is not desirable for the executive to have regard to New Zealand's international obligations.

[178] I consider that a remedy may be available to Lake Alice survivors who bring a claim before the courts under the Bill of Rights Act or at common law. The question remains whether, where Cabinet creates a scheme in an attempt to provide redress for a breach of rights, there is a binding obligation on Cabinet to comply with art 2(3) of the ICCPR in creating that scheme. It is significant that under the Bill of Rights Act

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83 See *Baigent's Case*, above n 72.

84 *Zaoui v Attorney-General (No 2)*, above n 20, at [90]; *Fitzgerald v R*, above n 69, at [42] and [119] per Winkelmann CJ; and see generally, above n 29.

and common law, it is the courts who provide remedies for breaches of rights. Here, Cabinet is making a policy decision to create a redress scheme for Lake Alice survivors. Cabinet has deliberately adopted a redress scheme that does not derogate from other rights survivors have under the Bill of Rights Act or common law, thus allows their policy decision to sit within to New Zealand's overall legal system for protecting rights.

[179] The Cabinet Decisions must be viewed in the context that there may be the difficulties already mentioned for Lake Alice survivors to successfully bring a claim in the courts. In creating the scheme, Cabinet was aware that a majority of the survivors are older persons, and some are unwell. Cabinet considered it was necessary to act promptly to make redress available, not least because the torture occurred over 50 years ago. Cabinet wanted to offer a practical response to the breach of rights for Lake Alice survivors. However, it remains that the redress scheme is entirely voluntary, and the Lake Alice survivors can pursue a claim in the courts if they wish to. Limits on rights and remedies under the Bill of Rights Act are matters for the courts, not the executive.

[180] I conclude that New Zealand's obligations under the ICCPR do not amount to a binding legal framework against which the Cabinet Decisions may be measured in the manner argued for by Mr Richards.

[181] In this novel set of circumstances, the executive would appropriately make policy decisions in relation to redress. I consider the Cabinet Decisions acknowledge a strong moral obligation to provide redress for the Lake Alice survivors, mindful of the recommendations of the Royal Commission and international human rights considerations, as well the Bill of Rights Act. In this regard, I accept that Mr Richards is not asking this Court to say what Cabinet must do to provide redress, rather he is asking for a declaration that what is reflected in the Cabinet Decisions is insufficient. However, in the absence of a binding legal framework against which to assess the Cabinet decisions it is not for this Court to suggest to Cabinet how it should make decisions about the issues posed by the events at Lake Alice. Moral obligations cannot be conflated with legal obligations.

[182] Importantly, art 2(3) of ICCPR is broadly phrased. It requires an "effective remedy" to be provided. I consider that the Cabinet Decisions respond to the particular set of circumstances faced by the executive when dealing with the very unfortunate circumstances of a breach of the right not to be subjected to torture occurring decades ago. I am satisfied that these extraordinary circumstances strengthen the weight that should be given to the scope of the executive's decision-making.

[183] As the Crown submits, the Cabinet Decisions reflect consideration of redress beyond provision of a money sum. Mr Richards and the Commission argue that those other aspects are insufficient against the guidance from international material mentioned above. As I have concluded earlier, such material is not binding on the executive.

[184] The parties also made submissions as to whether the redress scheme in the Cabinet Decisions substantively meets redress obligations under art 14 of the Torture Convention and art 2(3) of the ICCPR. Given my earlier conclusions, I do not need to determine this question. I simply record the following matters.

[185] The parties have different views about what compliance with each of those articles might require, if applicable. Mr Griggs and the Commission emphasise the exclusion of other acts of torture and the constraint imposed by a financial cap. Ms Laurenson says that it is not possible to assess the cap in the abstract and notes that while there is much case law in New Zealand for breaches of s 9 of the Bill of Rights Act, public law damages awards are not generally high (although she acknowledges the significance of this case involving the torture of children). The parties also have different views as to the need for non-repetition and whether steps already taken and planned to be taken are sufficient.

[186] As I have already observed, New Zealand may nonetheless be subject to further commentary and questions from the UNCAT and other international human rights bodies as to their views about the sufficiency of the redress scheme.

Did Cabinet fail to consider New Zealand's international law obligations as a mandatory relevant consideration?

[187] While I have concluded that there is no legal framework against which the Cabinet Decisions may be measured and they are not reviewable, I briefly address Mr Richards' second ground of review under the first cause of action for completeness.

[188] Mr Richards' second ground of review is that Cabinet failed to consider a mandatory relevant consideration when it made the Cabinet Decisions. That consideration is pleaded in the statement of claim as being "what would constitute fair and adequate compensation for each survivor of torture at Lake Alice for the purposes of art 14 of the Torture Convention, art 2(3) of the ICCPR and s 9 of the Bill of Rights Act". However, Mr Griggs expanded on this argument orally, and so I address the specific point within his broader argument that Cabinet failed to properly consider New Zealand's international obligations as a mandatory relevant consideration.

[189] Counsel for Mr Richards and the interveners say *Tavita* is binding on this Court such that the Cabinet must have had regard to New Zealand's international obligations. Ms Laurenson takes a more limited position, accepting that *Tavita* is authority for the proposition that in judicial review there will be some circumstances where international obligations are mandatory relevant considerations for a decision-maker whether or not they are incorporated into domestic law.[85] I do not consider that the other caselaw referred to by counsel directly assists in the present case, given Mr Richards' focus on whether Cabinet adequately considered New Zealand's international obligations, rather than the Bill of Rights Act.[86] This is also not a case where the Cabinet Paper was silent on the existence of relevant international obligations.

[190] It is convenient to consider this ground of review on the basis that New Zealand's international obligations were a relevant mandatory consideration for

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85 *Tavita v Minister for Immigration*, above n 35.

86 Ms Laurenson referred to *New Health New Zealand Inc v Director-General of Health* [2023] NZHC 3183, [2024] 2 NZLR 1 (note the decision is under appeal). Mr Griggs referred to *A v Minister of Internal Affairs* [2024] NZSC 63, [2024] 1 NZLR 372 at [138] citing *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [8].

Cabinet.[87] It is certainly desirable Cabinet does consider such obligations, even if it is not mandated.

[191] Mr Griggs' essential submission under this ground is that the Cabinet Paper makes it clear that Cabinet thought it was bound by international obligations and that the proposed redress scheme was consistent with those obligations—but this latter conclusion was incorrect. When the Cabinet Paper is considered in the overall context of my earlier discussion about the application of international law obligations in the domestic sphere (and the Cabinet being the decision-making body charged with responsibility for international treaties), I consider the Cabinet Paper does not go as far as Mr Griggs contends.

[192] Mr Griggs says that in the Cabinet Decisions, Cabinet considered itself bound by the Torture Convention without the art 14 reservation. He cites the Cabinet Minute where it states:

> …responding to torture is a separate matter to responding more broadly to abuse in care. Torture requires three specific elements to be present and is the only form of abuse to have its own international convention. This is reflected in New Zealand's Crimes of Torture Act 1989.

[193] Mr Griggs says that it is clear that Cabinet thought it was giving effect to its international obligations under the Torture Convention and the ICCPR. However, he says that the Cabinet Paper did not address the necessary question which was what would constitute fair and adequate compensation for each survivor at Lake Alice. He submits that this was due to Cabinet's approach of deciding how much compensation was to be paid overall, that is, setting a financial cap, before assessing what would be fair and adequate in each case. On this basis alone, Mr Griggs says the Cabinet decision should be set aside.

[194] I do not agree. I accept Ms Laurenson's submission that Mr Richards (and the interveners) overstate the position in suggesting that the Cabinet Paper records that it is subject to binding international law obligations.

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87 Although see *Students For Climate Solutions Inc v Minister of Energy and Resources*, above n 29, at [70].

[195] Ms Laurenson submits that New Zealand's international obligations were brought to the attention of Cabinet when it settled on the redress scheme. She says that the Cabinet Paper refers extensively to those obligations and notes that the Lead Coordination Minister has received legal advice, including independent advice, on them. I accept there is discussion of these matters. The full advice is not available to the Court (or Mr Richards) and so it is not possible to know its complete scope. From what can be read in the Cabinet Paper, the nature of the international obligations and their relationship to domestic law could have been more clearly articulated.

[196] Nonetheless, I consider the Cabinet Paper shows an awareness of the international law context, including what has been said to New Zealand in the international sphere in relation to international obligations and a desire to respond to that. Ms Laurenson highlights that the Cabinet Paper records that the proposed redress scheme "progresses" the Government's response to the Royal Commission Report (that is, there is more to come) and "responds" to the UNCAT findings in 2020 and 2022 that New Zealand breached the Torture Convention. The Cabinet Paper also recognises that it is not possible for the torture of children to ever be rectified by a monetary payment, but that the response is to provide meaningful compensation, important recognition and an expression of regret by the Crown.

[197] It is logical that with its key decision-making role in relation to international treaties, Cabinet would aspire to be aware of those treaty obligations and the guidance offered on such obligations by relevant international bodies. After all, it is the executive that will need to lead communications with the international bodies like the UNCAT and the Human Rights Committee as to what New Zealand is doing domestically to fulfil its commitments under relevant international instruments.

[198] This does not amount to the Cabinet Paper stating that Cabinet is bound by the international human rights material referred to, and I have already concluded that the material does not have such a binding effect.

[199] I am also not persuaded by Mr Griggs' submission that the Cabinet Paper needed to address what would be fair and adequate compensation in each case. This highlights it is the role of the Courts to provide effective remedies (including under

the Bill of Rights Act), and using the language of Mr Richards' claim, this would include what amounts to "fair and adequate compensation". Cabinet has provided a quasi-judicial and independent mechanism through the individualised payment pathway so that individuals could receive the compensation that is appropriate in their case. Such assessments under that mechanism are being undertaken by the Hon Paul Davison KC, an experienced and recently retired former Judge of the High Court.

[200] For these reasons, I am satisfied that Cabinet was alive to its obligations at the international level. It is not this Court's role to critique in detail the discussion of those obligations, particularly given my conclusion that there is no legal framework against which to measure the Cabinet Decisions.

Conclusion on Mr Richards' claim

[201] For the reasons above, I conclude that Mr Richards' claims are not made out. Under the first cause of action, I find that there is no legal framework against which the Cabinet decisions are appropriately reviewable. Rather, the Cabinet Decisions are prerogative decisions by the executive as a policy response to the accepted torture of Lake Alice survivors. Cabinet considered New Zealand's international legal obligations in reaching the Cabinet Decisions, and criticism of the extent to which that is compliant with international obligations is not for this Court. Under the second cause of action, I conclude that the implementation of the redress framework under the Cabinet Decisions do not breach Mr Richards' rights as claimed.

[202] Given my conclusions, it is unnecessary to consider the question of relief.

Result

[203] The application is dismissed.

Costs

[204] Costs should normally follow the event; however, Ms Laurenson advised the Court that the Crown would not seek costs in the proceeding should it succeed. In the circumstances, the terms of intervention granted to the Commission and Ms McInroe

do not entitle nor make liable either intervener to costs.[88] In these circumstances, there appears to be no issue as to costs. In case I have misunderstood the position, leave to apply is reserved.

McQueen J

Solicitors:
Stephens Lawyers, Wellington for Plaintiff

[88] A direction was made that Ms McInroe was not to seek costs and not be liable to costs: *Richards v Attorney-General* [2025] NZHC 2092 at [40(c)]. In regard to the Commission, see generally, s 178 of the Senior Courts Act 2016.