



## Office of Hon Christopher Finlayson

Attorney-General  
Minister for Treaty of Waitangi Negotiations  
Minister for Arts, Culture and Heritage

27 July 2011

RECEIVED  
01 AUG 2011  
HRC AK

Ms Rosslyn Noonan  
c/o Human Rights Commission  
P O Box 6751  
Wellesley Street  
AUCKLAND 1141

Dear Ms Noonan

I understand from Crown Counsel you wish to meet with me in early August to consult over a penultimate draft of your report on the State's handling of historic claims. I do not think an eleventh hour meeting would achieve much at all. I would have preferred being consulted before you reached your penultimate draft where most of your conclusions seem pre-determined.

In *Wellington Airport v Air New Zealand* [1993] 1 NZLR 671 (CA), McKay J held that "[t]he word 'consultation' does not require that there be agreement... On the other hand, it clearly requires more than mere prior notification." He affirmed the comments of the High Court Judge who had said that "consultation must be allowed sufficient time, and genuine effort must be made. It is to be a reality, not a charade."

I have read the latest version of the report, dated 12 July. It does not appear to contain any of the major points raised with you by the agencies managing the historic claims and the Crown Law Office. In particular:

1. The report records claimants' counsels' criticism that MSD's Care Claims and Resolution team (CCRT) is not 'independent'. Articles 12 and 13 of the Convention against Torture refer to "prompt and impartial" investigation by "competent authorities." Independence is not a required measure. This point is emphasised in the leading commentary on the Convention, Nowak & McArthur *The United Nations Convention against Torture: A Commentary* (OUP, 2008) 435f:

*"Article 12 does not require an investigation by an independent body, much less by a judicial body. But the investigation must be prompt and impartial, i.e. serious, effective and not biased."*

*... Apart from the courts, this can also be undertaken by national human rights institutions, ombuds-institutions, detention-monitoring commission, public prosecutors,*

*and administrative agencies. More important than the formal structure of the investigating body is its impartiality. In principle, even police chiefs and prison directors, who have a genuine interest in preventing torture and ill-treatment within their respective detention facilities, might be in a position to fulfil the requirement of an impartial investigation under Article 12."*

2. Those persons who wish to take action about alleged wrong doing or criminal behaviour in relation to their time in State care have a number of options open to them. All options are fair, and impartial. They can complain to the New Zealand Police (who have recently successfully prosecuted several historic claims cases), seek informal resolution through discussions with either the CCRT or the CHFA, call on the State's no-fault Accident Compensation scheme, complain to the Health and Disability Commissioner (in respect of health-related complaints), engage with the Confidential Listening and Assistance Service or bring civil proceedings.
3. In 2011, the claimants, MSD and CHFA have reached the stage where informal resolution is being progressed with cooperation on both sides. Civil litigation, while on foot, is not being progressed by either claimant or State and there are no further dates scheduled for any hearings or trials.
4. You are simply wrong in your contentions about the law of limitation. The Crown parties are already not taking account of limitation defences open to the Crown when informal resolution means are being used. If claims are brought to trial for civil compensation all defences available will be relied on.

The need for a newly established independent body to resolve claims within 5 years adds nothing of value to the existing processes in train. MSD is already aiming to have resolved claims against it within a 3-5 year timeframe, and CHFA is also proposing settlement of the claims remaining against it.

The establishment of an independent body will have an associated expense in both its establishment and administration, and the report does not provide sufficient justification for additional State expense.

For these reasons (among others) I am very concerned that this error-filled report, if released in its present state, will undo some of the valuable progress made by MSD and CHFA in resolving grievances fairly and informally. The Human Rights Commission has a duty to consult properly and get the facts right. It would appear that this elementary point has been ignored on this occasion.

Yours sincerely

*Kevin Tappin Finlayson*

1 August 2011

**FILE COPY**



Hon Christopher Finlayson  
Attorney-General  
Private Bag 18041  
Parliament Buildings  
WELLINGTON 6160

Dear Attorney-General

## **REVIEW OF THE STATE'S RESPONSE TO HISTORIC CLAIMS OF ABUSE**

Thank you for your letter dated 27 July 2011 in which you have raised a number of concerns regarding the Commission's draft report on the State's handling of historic claims of abuse.

The Commission is committed to ensuring that the final report accurately conveys the situation in New Zealand. In particular the report seeks to give a balanced assessment of the established processes, identifying positive developments as well as any concerns raised by interested parties.

### *Consultation*

I agree that consultation must be a "reality not a charade". In the preparation of this report the Commission has consulted extensively with relevant government agencies (including Crown Law) and with lawyers and other persons involved in claims of mistreatment and abuse suffered while under the care of the State. Those consulted have had available to them a very initial draft of the report and two subsequent drafts.

It was our intention that you would be provided with a version of the report which agencies had, in broad terms, agreed was factually correct, enabling us to constructively discuss our conclusions and recommendations with you.

The 12 July version of the report was distributed in order for the Commission to check accuracy and to gain updated information on the resolution of historic claims. It was not sent to either you or the Minister of Justice because it was not thought to be ready for your consideration.

Subsequently we have met with MSD and Counsel, and have received comments from the Confidential Listening Service, Legal Aid Services and CHFA (through Crown Law). The report has been amended to take account of the further information and comments made. This updated version has been sent to MSD for their further review and we are currently awaiting written comments. The draft conclusions will be reviewed once those further comments have been received and considered.

I am hopeful that an updated version of the report will be available this week and I will send you a copy for your information. If at that point you wish to discuss our conclusions and recommendations I would welcome the opportunity to meet with you.

### *Independence*

Articles 12 and 13 of the Convention against Torture refer to "prompt and impartial" investigation. Nowak and McArthur refer to an investigation not being biased when discussing impartiality. The perception of bias is clearly as important as actual bias. While MSD may have measures in place to ensure that the risk of actual bias is appropriately mitigated, the fact that the Care Claims and Resolution Team (CCRT) is not independent means that there is a real risk of a perception of bias. This is reflected by Counsel's criticisms that the CCRT is not independent.

Although independence may not be expressly required by Articles 12 and 13, it is our view that it is an element of best practice and is arguably necessary to ensure impartiality.

### *Options available to those who allege wrong doing in relation to their time in State care*

There are a number of options open to people who allege wrong doing in relation to their time in State care. With the exception of the Health and Disability Commissioner (HDC), the report refers to all of the mechanisms you have mentioned. Reference will be made in the final report to the availability of the HDC process for contemporary claims.

### *MSD and CHFA informal resolution processes*

Since distributing the 12 July draft the Commission has received information on these new informal resolution processes. It is a welcome development that civil litigation is currently "on hold" and that informal resolution is being proactively pursued by the parties. The updated report recognises that this is a particularly positive step towards the resolution of historic claims of abuse.

### *Limitation*

The Commission did not intend to suggest that the Crown parties were using the limitation defence in informal resolution processes. Any confusion in this regard was most likely caused by the way the report was initially drafted in relation to the MSD process, discussing both court cases and CCRT processes simultaneously.

The report is now organised in a way that makes it clear that the limitation issue relates to civil litigation – and more specifically when claims ultimately come before the courts.

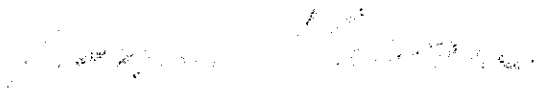
### *Conclusions and Recommendations*

As mentioned above, the Commission will be reconsidering the conclusions and recommendations in light of the updated information that has been received from relevant parties, including updated data on the progression of claims and the anticipated timeframes for resolution.

It is very clear looking at the improvements that have been made over the last three years in the State's response to historic claims of abuse that the very fact that the Commission has been undertaking a review (and has been able to raise particular issues with agencies through the consultation process) has already had a significant beneficial impact.

I will ensure you receive a copy of the updated report once departments have confirmed the accuracy of all factual aspects.

Yours sincerely



Rosslyn Noonan  
CHIEF COMMISSIONER  
*Te Amokapua*

cc:

Crown Law Office  
PO Box 2858  
WELLINGTON 6011

20 September 2011

Hon Simon Power  
Minister of Justice

Hon Chris Finlayson  
Attorney General

Hon Tony Ryall  
Minister of Health

Hon Paula Bennett  
Minister for Social Development &  
Employment

Dear Ministers

## **REVIEW OF THE STATE'S RESPONSE TO HISTORIC CLAIMS OF ABUSE**

I refer to the Human Rights Commission's letter of 31 August and the accompanying draft of the Review of the State's Response to Historic Claims of Abuse. I would like to clarify that this is the final draft of the Review and it incorporated feedback from the Attorney-General (26 July), Ministry of Social Development, Legal Aid Services and Crown Health Financing Agency through Crown Law.

The Commission has agreed to consult on this final draft with the Attorney-General and will do so.

No other Minister has asked to be consulted but I would of course be happy to meet if Ministers thought that useful.

It had been hoped that the Review would be finalised and released before the previous Chief Commissioner finished her term. This is not now possible.

The Review will not be released to the public until it is finalised following this final consultation.

Yours sincerely

**David Rutherford**  
Chief Commissioner  
Te Amokapua



## Office of the Attorney General

RECEIVED  
25 AUG 2011  
HRC AK

23 August 2011

Ms Rosslyn Noonan  
c/o Human Rights Commission  
P O Box 6751  
Wellesley Street  
AUCKLAND 1141

Dear Ms Noonan

I acknowledge receipt of your most recent correspondence. I also acknowledge your confirmation that you are making substantial changes to the report, including reconsidering your draft conclusions and recommendations.

I remain concerned about the issues I raised in my earlier letter to you. I would like to see a copy of your next draft, along with your advice as the date on which you intend to release the report publicly.

Yours sincerely

Cc: David Rutherford  
Incoming Chief Human Rights Commissioner

31 August 2011

Hon Chris Finlayson  
Attorney General  
Freepost Parliament  
Private Bag 18 888, Parliament Buildings  
WELLINGTON 6160

Dear Attorney General

## **REVIEW OF THE STATE'S RESPONSE TO HISTORIC CLAIMS OF ABUSE**

The Human Rights Commission's review of the State's response to historic claims of abuse and mistreatment while under the care of the State is now completed.

The review demonstrates the value of the international human rights treaties at the national level. In complex and difficult situations involving human rights they provide standards to guide the State, standards against which the actions of the State may be assessed and to which the State may be held accountable. A copy is attached for your consideration and is also being provided to the Ministers of Justice, Health and Social Development.

The review finds that, despite the lack of success with civil cases before the courts, the growing numbers of people initiating civil proceedings against the State were the catalyst for the establishment of mechanisms outside of the courts to respond to the claims. With the incremental improvements made to those mechanisms, particularly in the last two years during the course of this review, New Zealand can be said to generally meet the international human rights standards that apply to claims of abuse and mistreatment while in State care. Indeed the approach taken by the Confidential Listening and Assistance Service within the limits of its terms of reference and aspects of the way the MSD's Care Claims and Resolution team is now working, demonstrate elements of best practice.

The review also identifies how the process could and should be strengthened. Specifically, it notes that:

- the absence of a comprehensive, independent review, which leaves unanswered the question of the extent of systemic or institutional failure of the State's duty to those in its care
- the fact that neither agency mandated to settle claims is independent affects claimants' trust in the process and the extent to which victims and, indeed, the public can have confidence that the outcomes are just and fair.



The review makes three recommendations. The first offers three options for adding an independent dimension to the current processes; the second urges publication of the findings of the various mechanisms; and the third recommends that the use of time-bar defences cease in relation to civil proceedings relating to allegations of abuse and ill-treatment while in the care of the State.

By the time you receive this, I will have concluded my term as Chief Commissioner. The decision on when to release the review publically will be made by my successor David Rutherford, but is likely to be late September. Like me, he would, I am sure, be most willing to meet with you prior to its release to discuss the recommendations or any aspects of the review with you.

In concluding, I simply want to emphasise the importance of recognising, notwithstanding the amount that has been spent on legal aid, the imbalance of power and resources between the State and those who have been victims of abuse and ill-treatment while in State care. It is critical that the current claims are concluded in ways that deliver the strongest possible message about the State's duty to those in its care and the Government's commitment to learn from the past, in order to prevent future abuse and ill-treatment.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rosslyn - Noonan', with a stylized flourish at the end.

**Rosslyn Noonan**  
CHIEF COMMISSIONER  
*Te Amokapua*

Enc



## Office of the Attorney General

RECEIVED  
19 SEP 2011  
HRC AK

15 September 2011

David Rutherford  
Chief Commissioner  
Human Rights Commission  
PO Box 6751  
AUCKLAND 1141

Dear Mr Rutherford

**Re: Review of State's Response to Historic Claims of Abuse**

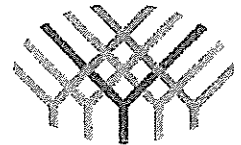
On 26 July 2011 I wrote to your predecessor, Ms Rosslyn Noonan, about the above report, of which she had provided me a draft. I told her I was very concerned that her error-filled report, if released in the state it was in, would undo some of the valuable progress made by MSD and CHFA in resolving grievances fairly and informally. I said to her that the Human Rights Commission has a duty to consult properly and get the facts right and it appeared that this elementary point has been ignored on this occasion.

Ms Noonan responded and claimed she had addressed a number of the issues I had raised.

On 23 August, I wrote to Ms Noonan and acknowledged her confirmation she was making substantial changes to the report, including reconsidering her draft conclusions and recommendations. I said in that letter that I remained concerned about the issues I had already raised, and that I wanted a copy of the next draft. I also asked for the date the Commission intends to release the report publicly. She did not reply to my letter.

I now write to you to request confirmation that the concerns raised in my letter of 26 July 2011 have been addressed, as Ms Noonan assured me they would. I would also like to know the date on which the Commission intends to release the report publicly.

Yours sincerely



Human Rights  
Commission  
*Te Kāhui Tika Tongata*

20 September 2011

Hon Chris Finlayson  
Attorney General  
Freepost Parliament  
Private Bag 18 888  
Parliament Buildings  
WELLINGTON 6160

Dear Attorney General

**REVIEW OF THE STATE'S RESPONSE TO HISTORIC CLAIMS OF ABUSE**

Further to my email yesterday, I have reviewed the documentation relating to the drafting of the Review. It appears that your letter of 15 September and the Commission's letter of 31 August to Ministers, which accompanied a further draft, crossed.

The attached letter clarifies the current status of the Review draft along with the future process.

Should you wish, I would be pleased to discuss the matter further.

Yours sincerely

**David Rutherford**  
Chief Commissioner  
Te Amokapua

20 September 2011

Hon Simon Power  
Minister of Justice

Hon Chris Finlayson  
Attorney General

Hon Tony Ryall  
Minister of Health

Hon Paula Bennett  
Minister for Social Development &  
Employment

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The Commission has agreed to consult on this final draft with the Attorney-General and will do so.

No other Minister has asked to be consulted but I would of course be happy to meet if Ministers thought that useful.

It had been hoped that the Review would be finalised and released before the previous Chief Commissioner finished her term. This is not now possible.

The Review will not be released to the public until it is finalised following this final consultation.

Yours sincerely

**David Rutherford**  
Chief Commissioner  
Te Amokapua