APOLOGY IN NEW ZEALAND'S MENTAL HEALTH LAW CONTEXT: AN ENIGMATIC JUXTAPOSITION?

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Apology has particular significance for historic psychiatric abuses in New Zealand. In 2001 the New Zealand Government announced that personal apologies had been expressed for mistreatment of children and adolescents at Lake Alice Hospital during the 1970s. Additionally, the Government offered a financial settlement to some survivors and responded to victims' needs by establishing a Confidential Forum and later a Confidential Listening and Assistance Service. The latter has been depicted as a constructive, reconciliatory response to historic incidents that deeply affected people at the time of confinement and that still impact upon their present lives.

Yet people who participate in the service may also make a claim for damages through litigation. This is a potentially peculiar juxtaposition because aggrieved people may pursue conventional, adversarial litigation while simultaneously expressing their distress to an independent panel "in the journey to a place of internal peace, resolution and calmness".[1] This chapter examines New Zealand's apology and reconciliatory process through Marrus' definition of "complete apology",[2] aiming to understand New Zealand's effort to achieve closure.

I. INTRODUCTION

The New Zealand Government offered a range of responses to the revelation of historic abuses against psychiatric patients. The following analysis explains the findings within Sir Rodney Gallen's report on Lake Alice Hospital (the Gallen Report),[3] the announcement of the Government's apology, and the genesis of the Confidential Listening and Assistance Service (the Service). The conciliation process is contrasted with a recent lawsuit by a person who was detained in Porirua Hospital under similar conditions. The focus is New Zealand's combination of apology, reconciliation and litigation for historic wrongs.

The international backdrop of this phenomenon has been described as "apology mania",[4] and a vast spectrum of scholarship explores its many permutations. According to Professor Marrus:[5]

> We are ... awash in apologies, both trivial and highly consequential. Reaching backwards and forwards, hard and soft, macro and micro, and extending across cultures, apologies have become a

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1 Department of Internal Affairs "Confidential Listening and Assistance Service" (2009) Confidential Listening and Assistance Service <www.listening.govt.nz>.

2 M Marrus "Official apologies and the quest for historical justice" (2007) 6 Journal of Human Rights 75.

3 Sir Rodney Gallen "Report on the Lake Alice Incidents" (2001) (Obtained under Official Information Act 1986 Request to the Ministry of Health).

4 B Amiel "Saying sorry is fine, but only to a point" *MacLean's* (Canada, 25 May 1998) at 11.

5 Marrus, above n 2, at 75.

> familiar part of our relational landscape. In particular, apologies have emerged as an instrument for promoting justice for historic wrongs.

Drawing upon select scholarship on apology, this analysis inquires whether New Zealand's apology, and subsequent responses, achieve the outcomes of a complete apology.

To date, information about historic injustices within New Zealand's institutions has received intermittent, sporadic and fragmented publicity and analysis. Yet Thompson asserts that meaningful reconciliation and a genuine political apology requires more concerted official action:[6]

> The government should take steps to demonstrate that the injustice and the sufferings of the victims have become embedded in the official history of the nation and this historical account should be something that the victims can endorse.

The following analysis attempts to contribute to that reckoning.

II. Overview of Events

The series of official responses to institutional abuse in New Zealand may be viewed as part of an international trend for states to be held accountable.[7] In New Zealand, abusive practices within mental health services generated a range of official responses. The genesis began when serious concerns regarding patient care were reported from the inception of the Lake Alice Hospital Child and Adolescent Unit in 1972.[8] Within six years the unit was closed, and the entire hospital was eventually closed in 1999. Amongst the young patients, "many [were] from troubled backgrounds" with few social supports;[9] most did not have medical conditions and were not admitted under mental health legislation.

Abuse allegations focused on the administration of electric shocks and injections as behaviour modification or punishment. A Commission of Inquiry in 1976 and 1977 did *not* find that electric shocks were used as punishment. However, the Ombudsman Inquiry in 1977 determined that the use of electro-convulsive therapy (ECT) should play little part in the treatment of children and only be used as a last resort where other treatments have been exhaustively tried. The Ombudsman found that the use of ECT without anaesthetic or muscle relaxant was not justified in most circumstances.[10]

In May 2001 the Government established a process to respond to the allegations. In July, Sir Rodney Gallen commenced his report on events and conditions at the Child and Adolescent Unit. Sir Rodney summarised the evidence he heard, determined who might have a valid claim and

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6 J Thompson "Apology, justice and respect: A critical defence of political apology" in M Gibney, R Howard-Hassmann, JM Coicaud and N Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 31 at 41.

7 JM Coicaud and J Jonsson "Elements of a road map for a politics of apology" in M Gibney, R Howard-Hassmann, JM Coicaud and N Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 77.

8 Annette King "Crown settles with 95 former Lake Alice patients" (press release, 8 October 2001) <www.beehive.govt.nz>.

9 King, above n 8.

10 King, above n 8.

decided how the government fund would be apportioned.[11] On 8 October 2001 the Prime Minister and the Health Minister announced that, for the 95 patients who were in the Unit between 1972 and 1977, the Government had offered a written apology and reached a settlement of $6.5 million.[12] On the same day, the Government urged any claimants who had not already come forward to do so. During the second resolution and settlement process, additional funds were distributed for a total disbursement of $10.1 million.[13] A Confidential Forum was established and later the Confidential Listening and Assistance Service. However, the issue was not resolved.

In terms of civil litigation, by February 2010 there were 527 claims before the High Court according to the Attorney General's office.[14] Also, the Legal Services Agency reported that over 900 people applied for state-funded legal aid to sue for damages. Although $11 million in legal aid was paid or approved to pursue the claims, few have been heard despite some being filed over 10 years ago. However, up to 1,000 victims could be offered "wellness payments" by the Government to settle their claims, according to the Crown Health Finance Agency.[15]

In terms of criminal proceedings, in late March 2010 the police dismissed claims by 40 people who wanted criminal charges laid against a former psychiatrist who now resides in Australia, Selwyn Leeks, and others.[16] In April 2010 a complaint to the United Nations Committee Against Torture inquired how the Government was ensuring that allegations were investigated, perpetrators prosecuted and victims compensated.[17]

Clearly, many victims who suffered the destructive effects of institutionalisation still want to register their dissatisfaction. What was the nature of New Zealand's apology and reconciliatory strategy? A closer examination of New Zealand's response informs that analysis.

A. The Gallen Report

According to the former judge Sir Rodney Gallen in 2001, the children within the Unit were between eight years and 16 years of age. He reported:[18]

> Some had been subjected to severe physical and sexual abuse before their admission (and) others had suffered some kind of trauma which affected their ability to integrate into the community of which they were a part ... All were in need of understanding, love and compassionate care. That is not what they received at Lake Alice.

The dominant approach was aversive therapy, involving "imposition of rigid discipline and the application of punishment [for] what was seen as unacceptable behaviour".[19] Also, ECT "was in constant use on children", and although it was justified as therapy, "that is not the way it was

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11 Gallen, above n 3; L Hood "Reliable evidence and due process" (28 October 2005) NZLawyer 5.

12 King, above n 8.

13 G Cameron "Reliable research and due thought?" (27 January 2006) NZLawyer 8.

14 "Govt looks to settle historic abuse cases" *The New Zealand Herald* (online ed, Auckland, 25 February 2010).

15 *The New Zealand Herald*, above n 14.

16 "'Justice remains to be done' over Lake Alice" *The Dominion Post* (online ed, Wellington, 6 April 2010).

17 *The New Zealand Herald*, above n 14.

18 Gallen, above n 3, at [3]–[4].

19 At [6].

constantly used at Lake Alice".[20] Complainants and medical records verified that the administration of ECT without muscle relaxants or anaesthetics "was not only common but routine".[21] According to Sir Rodney:[22]

> Claimant after claimant emphasised that the accumulation of unsatisfactory grades during the week meant the likelihood of the administration of ECT at the end of the week in an unmodified form … Quite apart from occasions when ECT was administered to them, they were required to assist by bringing it into the room where it was used, and on some occasions actually watched its use on other patients … [It] was brought into the dining room and placed in a prominent position in order to encourage children to eat their meals if they were reluctant to do so … There can be no doubt at all that the children saw the administration of ECT, at least in an unmodified form, as being a punishment and intended to dissuade them from certain forms of conduct.

As a deterrent for attempts to escape, it was applied to children's legs. As punishment for unacceptable sexual behaviour, it was used on their genitals:[23]

> The ECT was plainly delivered as a means of inflicting pain in order to coerce behaviour. ECT delivered in circumstances such as those I have described could not possibly be referred to as therapy, and when administered to defenceless children can only be described as outrageous in the extreme.

Paraldehyde was "a peculiarly unpleasant sedative" used as punishment and injection was "extremely painful".[24] It is no longer in use. During solitary confinement, children were entirely naked. The room had a bucket for a toilet and a bed.

Although Lake Alice was an institution for "criminally insane" adults, children were both threatened with, and were placed amongst, adult inmates or in maximum security as punishment. Sir Rodney established that the allegations of serious sexual abuse by staff and other inmates did occur:[25]

> Perhaps the most appalling story contained in all the materials placed before me was of a 15 year old boy who claims that he was locked in a wooden cage with a seriously deranged adult who was kept locked in that cage and who was known to all the people at Lake Alice as being totally insane. He describes a situation where, for a considerable period, he was crouched in the corner being pawed by the particular inmate, screaming to be released, and unable to get out or to get away from the contact to which he had been exposed.

Sir Rodney concluded:[26]

> The best summary which I can make of the large number of statements I have made and the interviews I have conducted is that the children concerned lived in a state of extreme fear and hopelessness. Statement after statement indicates that the child concerned lived in a state of terror during the period they spent at Lake Alice ... *Almost every complainant asks that some system be put in place which would prevent any such situation developing again.*

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20 At [8].

21 At [11].

22 At [11]–[12].

23 At [16].

24 At [17].

25 At [19].

26 At [22]–[23] (emphasis added).

These findings laid the foundation for New Zealand's later strategies.

B. The announcement of the Government's apology

The Prime Minister issued a personal apology to all claimants with whom settlements were reached. That apology is not available. However, the Government's press release from Prime Minister Helen Clark and Health Minister Annette King on 8 October 2001 stated:[27]

> The government came into office determined to resolve the grievance of this group of former patients and we have kept our word. The people involved were young—some of them children—and many from troubled backgrounds, including wards of the state. Some were sent to the Child and Adolescent Unit primarily because there was nowhere else for them to go …
>
> Whatever the legal rights and wrongs of the matter, and whatever the state of medical practice at the time, our government considers that what occurred to these young people was unacceptable by any standard, in particular the inappropriate use of electric shocks and injections. The government has now achieved a settlement with the majority of former patients who had brought claims, but there are others who may have been subject to similarly unacceptable events and who have not been part of the settlement. Their concerns will be considered as they come forward.

This official response was supplemented with additional, novel victims' programmes.

C. The Confidential Forum

Subsequently, the Government created a complementary approach for aggrieved former patients. In 2004 the Government established the Confidential Forum (the Forum) for former in-patients of psychiatric hospitals, their families and staff members to formally speak about their experiences of psychiatric institutions in the period prior to November 1992.[28] The initiative aimed to create an accessible, informal and confidential environment for the hearings that were held by a panel of (usually) three members. Between 2005 and 2007, 493 people attended interviews and were provided with customised information about local and national support services and networks. A broad overview of the Forum process and patients' perspectives was published as the Report of the Confidential Forum for Former In-Patients of Psychiatric Hospitals.[29]

The Forum was described by Attorney-General Michael Cullen as a new reconciliation initiative. Therapeutic terms were used to describe the Forum at an event hosted by Women's Health Action in 2007:[30]

> [The Forum] is a journey towards truth in the belief that being heard and believed is fundamental; towards reconciliation in the hope that making peace with the past helps in the journey to a place of internal peace, resolution and calmness.

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27 King, above n 8, at 1.

28 Department of Internal Affairs "Te Aitonga: Report of the Confidential Forum for Former In-Patients of Psychiatric Hospitals" (2007) Confidential Forum <www.confidentialforum.govt.nz>.

29 At 1.

30 Women's Health Action Trust "Truth and reconciliation in the twilight zone" (invitational flyer, 2007). (Copy on file with author.)

People participated because "they wanted to make sense of their experiences, wanted the Government to know of their experiences and the effects upon them and *hoped that others might benefit* from the Forum".[31] Importantly, participants wished that their revelations would have preventive effects:[32]

> Many participants said that they wanted the Government to know what had happened to them and to others. They hoped that the cumulative effect of the confidential narratives told at the Forum might *affect changes in mental health services* in New Zealand.

Participants were invited to express their views on their experiences *prior* to November 1992. This cut-off date was selected because "it reflects the time by which these sectors had modernised their standards and improved mechanisms to manage complaints".[33] On 1 November 1992 the Mental Health (Compulsory Assessment and Treatment) Act 1992 came into force, which applies to involuntary patients and explicitly lists patients' rights. The Act includes a complaints procedure and access to the District Inspector, who has the power of investigation and who may make recommendations to the Director of Area Mental Health Services. Dissatisfied complainants may be referred to the Mental Health Review Tribunal for further investigation. Also, further protections were established under the Health and Disability Commissioner Act 1994 and within the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.[34]

Although the interviews related to events prior to 1992, the participants wanted assurances that improvements and safeguards in current mental health services would be implemented. Although this priority on prevention was repeatedly expressed, it is unclear whether the confidential systems that New Zealand subsequently developed are able to achieve this objective, without further evaluation.

D. The Confidential Listening and Assistance Service

In 2009 the Government created a similar but broader Confidential Listening and Assistance Service (the Service) with an intended duration of five years. According to the Service facilitator, by February 2010 approximately only 20 per cent of the participants were former psychiatric patients; this may indicate that many former patients participated in, and were satisfied with, the original Forum.[35]

The Service's scope widened to include people who lived in health camps, child welfare facilities and special education homes.[36] According to the invitation pamphlet, this highly private project:

- Provides an opportunity to talk.

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31 Department of Internal Affairs, above n 28, at 2 (emphasis added).

32 Department of Internal Affairs, above n 28, at 3 (emphasis added).

33 Confidential Listening and Assistance Service: Frequently Asked Questions <www.listening.govt.nz>.

34 Health and Disability Commissioner "The Act and Code" (2010) <www.hdc.org.nz>.

35 Phone communication with Claire Booth, Confidential Listening and Assistance Service facilitator (Kate Diesfeld, 8 February 2010). (Communication on file with author.)

36 Confidential Listening and Assistance Service "Confidential Listening and Assistance Service" (pamphlet, 2010); and see <www.listening.govt.nz>. (Copy on file with author.)

- Helps participants to identify needs and obtain assistance (for example contact details for the Health and Disability Commissioner, Accident Compensation Corporation, counselling and related services).
- Enables participants to access information held about them by the State.
- Assists participants to come to terms with their experience as far as is reasonable.

The Service does not supplant other legal remedies; a civil claim for damages may be pursued. In describing what the Service is, the website also defines what the Service is not. The Service is not a commission of inquiry to test or evaluate evidence. Legal representatives are not allowed to accompany participants to interviews. The Service will not produce findings or recommendations:[37]

> [It] is not intended to determine liability or make judgements about the truth of participants' experiences or stories, nor recommend the payment of compensation ... but [it] is designed to assist people with their present practical and emotional needs arising from their experiences in State care.

As demonstrated by the informational material, the Service is designed to offer a safe and free means to express dissatisfaction with past mistreatment. But the project's boundaries raise questions. First, the Service applies to events that occurred before 1992. What is the evidence that conditions in state residential facilities satisfactorily improved after 1992? Second, the service is confidential. Are *participants* free to disclose the nature of the interviews and whether the process was satisfactory? Third, the revelations from the interviews are not intended to be analysed, published or assessed. How could participants' anonymous information be utilised to establish future safeguards for vulnerable individuals living in conditions of dependence? Fourth, the juxtaposition of the Service's formal reconciliation process with New Zealand's adversarial legal system poses a philosophical conundrum. How does New Zealand reconcile the adversarial litigation process with the Service's benevolent intent to heal and achieve "internal peace"?

Despite the Government's range of reconciliation efforts, grievances continue as evidenced by some former patients' efforts to pursue criminal prosecutions and the submissions to the United Nations High Commissioner for Human Rights. In response, the Government may issue "wellness payments" to 1,000 individuals to settle their claims.[38] How might the acts of apology and reconciliation achieve closure in New Zealand?

III. THE APPLICATION OF MARRUS' CONCEPT OF "COMPLETE APOLOGY"

Professor Marrus examined official apologies for historic abuses and offers an analytic foundation for exploring New Zealand's approach.[39] The application of clear, defined criteria may assist governments to produce more meaningful apologies, which in turn may increase the

37 .Confidential Listening and Assistance Service, above n 33.

38 *The New Zealand Herald*, above n 14.

39 Marrus, above n 2.

long-term prospects of final reconciliation.[40] According to Marrus, with minor variations complete apologies include the following four features:[41]

- An acknowledgement of a wrong committed, including the harm it caused.
- An acceptance of responsibility for having committed the wrong.
- An expression of regret or remorse both for the harm and for having committed the wrong.
- A commitment, explicit or implicit, to reparation and, when appropriate, to non-repetition of the wrong.

The first stage of analysis focuses on the Prime Minister's press release. This public announcement may be distinguished from the personal (unpublished) written apology. Arguably the announcement was less effective than it might have been because it lacked transparency and did not reveal the explicit content of the personal apology to the 95 patients.

However, the press release may be conceptualised as a form of Marrus' official apology, whereby a communication is sent by representatives of one group to another, "from the Many to the Many".[42] From this vantage, the Government effectively made an official communication both to the wider community and to the former patients. However, it was not a complete apology because it did not attribute responsibility to the Government. In avoiding the word "apology", the announcement did not explicitly express regret or remorse for the harm and having caused it. There is an implication that the activities at Lake Alice may have been legally justified ("whatever the legal rights and wrongs of the matter"). An explanation of the hundreds of recent lawsuits may be the perception that the official statement was an inadequate apology and a justification; some victims may respond to justifications with anger and litigation.[43] Another critique is that the phrases within the public apology had a distancing effect because the apologists attribute the statement to "our government".

New Zealand's announcement of private apologies may be contrasted with other official apologies which Marrus views as "complete" and, presumably, more effective. New Zealand's announcement may be compared with President Clinton's apology in May 1996, sixty years after the syphilis experimentation upon black sharecroppers in Tuskegee, Alabama.[44] Both the New Zealand and the United States medical injustices were followed by formal investigations, out-of-court settlements and (in some instances) litigation. However, the United States apology had distinctive features. According to Marrus, the President "spoke generously, and sought, through his apology, to document the wrong, to make a broader admission, and to extend a commitment to doing better in the future".[45]

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40 M James "Wrestling with the past: Apologies, quasi-apologies, and non-apologies in Canada" in M Gibney, R Howard-Hassmann, JM Coicaud and N Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 137.

41 Marrus, above n 2, at 79.

42 N Tavuchis *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, Stanford California, 1991) at 45.

43 B White "Saving face: Benefits of not saying I'm sorry" (2009) 72 LCP 261.

44 Marrus, above n 2, at 84.

45 At 84.

Marrus considered the President's apology a "model of the genre" and referred to the following excerpt:[46]

> The eight men who are the survivors of the syphilis study at Tuskegee are a living link to a time not so very long ago that many Americans would prefer not to remember, but we dare not forget. It was a time when our nation failed to live up to its ideals, when our nation broke the trust with our people that are the very foundation of our democracy. It is not only in remembering that shameful past that we can make amends and repair our nation, but [it] is in remembering that past that we can build a better present and a better future ... So today America does remember the hundreds of men used in research without their knowledge and consent. We remember them and their family members. Men who were poor and African American, without resources and with few alternatives, they believed they had found hope when they were offered free medical care by the United States Public Health Service. They were betrayed ... No power on earth can give you back the lives lost, the pain suffered, the years of internal torment and anguish. What was done cannot be undone. But we can end the silence. We can stop turning our heads away. We can look you in the eye and finally say on behalf of the American people, what the United States government did was shameful, and I am sorry.

Any comparison must take account of variations in the political context, the cultural norms of official announcements, and the personalities of the apologists. As Renteln[47] noted, apology may not have the same meaning in all societies. Another confounding factor is that the New Zealand and United States pronouncements were addressed to different audiences for different forms of abuse. However, dimensions that are present in the Tuskegee apology and central to Marrus' "complete apology" are: explicit expression of the wrong and the consequent harm; acceptance of responsibility; and remorse.

To achieve closure, a fulsome apology is particularly necessary in the health care context because the nature of the relationship "necessitates a high degree of trust and intimacy".[48] More broadly, apology may be viewed as the "centrepiece in a moral dialectic between error and forgiveness".[49] The effectiveness of New Zealand's announcement may be examined from Taft's perspective: [50]

> Its purpose is to give voice to repentance through expression of sorrow and admission of wrongdoing ... the absence of either renders the apology incomplete and interrupts its moral dimension.

Also, Marrus observed another justification for revealing the complete content of the apology in the public record: the apology has current relevance. Marrus asserted that official apologies are issued for historic wrongs because the "persistent grievances" are "damaging to present-day institutional credibility and civic responsibility".[51] In New Zealand, although legislative reforms

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46 At 85, citing Bill Clinton "Remarks by the President in Apology for Study Done in Tuskegee" (16 May 1997) White House <http://clinton4.nara.gov/>.

47 AD Renteln "Apologies: A cross-cultural analysis" in M Gibney, R Howard-Hassmann, JM Coicaud and N Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 61.

48 J Robbennolt "What we know and don't know about the role of apologies in resolving health care disputes" (2005) 21 Ga St U L Rev 1009 at 1009.

49 L Taft "Apology and medical mistakes: Opportunity or foil?" (2005) 14 Annals Health L 55.

50 At 71.

51 Marrus, above n 2, at 84.

may have occurred, there were significant opportunities to learn preventive lessons for improvement of mental health services and to enhance the credibility of the current government. Another critique is that while Marrus' notion of reparation is achieved through New Zealand's early payments, the announcement made no claims that the past wrongs would not be repeated. These assurances are central to a full and effective apology.[52] To this extent, the Government's public statement does not have the hallmarks of a complete apology.

The Forum and Service could be viewed as supplemental reparative strategies. Although both invited participants to "tell the government what happened", the outcome of the Service will not be reported or analysed due to its highly confidential nature. Neither initiative was designed to address prevention through systemic review and reform. Yet a key element of preventing future adverse outcomes is gathering information about the events that have occurred.[53] In fact, neither panel heard (or hears) complaints that relate to events after November 1992, based on the assertion that the legislation and services have been adequately reformed in the interim.

IV. In defence of New Zealand's approach

Admittedly, not all strategies will satisfy everyone and in many ways the strategies can never be complete. However, New Zealand employed a range of novel, pro-therapeutic techniques to apologise, address victims' desires to be heard and (in some instances) compensate. This combination could certainly be viewed as an "indicator of sincerity"[54] and a strenuous effort to "make trustworthy institutions trusted".[55]

Action is an essential feature of effective apology, to achieve reparation that addresses the victims' tangible needs.[56] On an international scale of official apologies for historic injustice, New Zealand could be highly rated for its relevant, responsive engagement with victims. The Government went beyond mere pronouncements to provide concrete, safe and non-adversarial arenas for victims to voice their experiences, with referrals to appropriate services.

Also, there may be several explanations for the Government's confidential, personal apology. Due to multiple constraints, governments may choose to not publish apologies, thereby averting accusations that victims are being used for political purposes or that the apology is used as a means to avoid accountability.[57] Private apologies may be appropriate when some victims want to avoid publicity. Thus New Zealand's efforts may be viewed as a complex balancing process; the Government may have prioritised some patients' preferences for a private apology while addressing the public's interest in transparent processes.

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52 Thompson, above n 6; J Kleefeld "Thinking like a human: British Columbia's *Apology Act*" (2007) 40 UBC Law Rev 769.

53 JR Cohen "Toward candor after medical error: The first apology law" (2004) 5 Harvard Health Policy Review 21.

54 A Allan "Apology in civil law: A psycho-legal perspective" (2007) 14 Psychiatry, Psychology and Law 5.

55 P De Greiff "The role of apologies in national reconciliation processes: On making trustworthy institutions trusted" in M Gibney, R Howard-Hassmann, JM Coicaud and N Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 120.

56 D Slocum, A Allan and MM Allan "The relationship between apology, sorriness and forgiving: The findings of a qualitative and quantitative study" (paper presented at the Third International Conference on Therapeutic Jurisprudence, Perth, Western Australia, June 2006).

57 Coicaud and Jonsson, above n 7.

Arguably, New Zealand struck the appropriate balance in choosing how it announced its apology, taking account of: the severity of the injustice; the extent to which the abuse was publicly known and "ingrained in the public psyche";[58] and the importance of the underlying value of public trust in official bodies and services for dependent individuals.

Of relevance to New Zealand, some governments that apologise for wrongs committed by previous regimes are criticised regarding the authenticity of the apology.[59] The difficulty is that the giver of the apology and those responsible for the injustices are separated by time. Hopefully, the specific conditions and regimes that tolerated or ignored abuse have been eliminated. Marrus helpfully explained how officials may overcome the authenticity challenge. They may "relay credibly a message of historic responsibility" by establishing the truth about violations, acknowledging the state's responsibility, and expressing the continuity of the state and rule of law.[60] To that extent, New Zealand's multiple strategies effectively communicated its aspirations symbolically and offered concrete services.

Regarding New Zealand's failure to promise reform, it could be argued that a promise to reform is easy to give and difficult to implement. The 1992 time limit was due to a change in medico-legal policy and practice, and the Government has expressed its belief that the same misconduct could not be repeated. While there is an argument that no government can guarantee perfect practice, governments do have an obligation to establish accessible and effective processes to address substandard practice. Further research with mental health consumers on standards within services would indicate whether the Government's beliefs are well-founded and whether its protections are robust.

V. A PECULIAR JUXTAPOSITION?

New Zealand's Service is portrayed as a therapeutic effort towards reconciliation. But aggrieved persons may also pursue a civil claim through the adversarial legal process. To understand the tensions that arise, the benevolent aims of the Service described above will be contrasted with the unsuccessful civil lawsuit by plaintiff J. In a neutral tone, the High Court decision reported the evidence offered by J and her witnesses regarding their harrowing institutionalisation at Porirua Hospital, under conditions similar to those at Lake Alice. Simultaneously, the Government sponsored a non-legal, benevolent listening Service for former victims of psychiatric abuse. Although the Service was functioning during the course of J's lawsuit, the Government's reconciliatory intent was not expressed in the decision; nor were the Gallen Report or the Government's reconciliation services referenced.

A. J v Crown Health Financing Agency

The following New Zealand case portrays a standard legal process within the court system and is representative of its kind. The High Court decision in *J v Crown Health Financing Agency*[61] addressed J's admission at age 18 in 1954 to Porirua Hospital and events that allegedly had

58 BT White "Say you're sorry: Court-ordered apologies as a civil rights remedy" (2005-2006) 91 Cornell L Rev 1261 at 1309.

59 Marrus, above n 2; Thompson, above n 6.

60 Marrus, above n 2, at 82.

61 *J v Crown Health Financing Agency* HC Wellington CIV-2000-485-876, 8 February 2008.

occurred between 1956 and 1960. The claim was based on assault and battery and negligence. J did not bring the claim earlier because she believed she could not sue. She claimed general damages of $650,000, exemplary damages of $45,000, and special damages for pecuniary loss of $250,000.

The 100-page decision related to J's claim that she was subject to cruel treatment, crossing the line into deliberate emotional and physical harm, while hospitalised by the State. She alleged that nurses assaulted her on a regular basis. A non-exhaustive list of alleged abuses included: dragging J by her hair; dragging J by the collar or with her arm twisted up her back to seclusion for punishment; striking J when she was stripped of her clothes; slapping J across the face and body; punching and pinching J; and being forced to the ground by a nurse while being sat on in the small of her back and struck around her head and ears. Also, J reported that she was routinely assaulted by other patients.[62]

The Court identified that the essential legal issues were:

1. whether J proved that she was subjected to indecent and physical assaults by nursing staff, was punished or threatened to be punished through use of electro-convulsive therapy (ECT), insulin therapy and seclusion, and/or suffered harm through breaches of duties of care;
2. whether Crown Health Financing Agency was vicariously liable for damages; and
3. whether the proper measure of compensatory and/ or exemplary damages in event liability was established.

The Court held that for therapies to have been administered for reasons of punishment, there had to have been improper and unethical behaviour fuelled by vindictive motives. However, J had not proved on the balance of probabilities that ECT, insulin therapy or seclusion were administered or threatened for punishment. Despite J's perception that the treatment was a threat of punishment, the Court was satisfied that justification for the treatments existed.

The Court held that the nature and inadequacy of J's evidence did not meet the evidentiary burden for the majority of allegations. However, the cause of action in assault and battery through physical assaults by junior nurses or nurse aides was established. Yet the claims were barred because J's failure to make the present claim earlier was not because of her disability. But for the Limitations Act 1950, J would have been entitled to a modest award of damages for distress and suffering at the time of the incidents. Exemplary damages were not appropriate. J's claim was dismissed.

B. Lessons from the J case

Although J's case did not succeed, it established in the public record that State officials were aware of substandard conditions in psychiatric institutions for decades. For example, in 1954 the District Inspector reported that there was the equivalent of 2.5 full-time doctors, "which is quite inadequate to properly supervise and care for some 1600 patients".[63]

Likewise, in 1957 the Official Visitor (who had 40 years' experience in this capacity) complained:[64]

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62 At [124].

63 At [111].

64 At [115].

> The institution has become a ward of the Wellington Public Hospital. When an old patient there becomes too troublesome to be looked after, this patient is removed to Porirua Hospital and in many cases is dead in under a month. Such patients should never be sent to this institution but unfortunately there is no other home provided for them ... In this land of plenty, the conditions at present existing are somewhat astounding.

Also, the case revealed the social conditions of adolescents who were institutionalised. The vulnerability of eight witnesses who were hospitalised at the relevant period is indisputable. Most were adolescents when admitted (although at the time of the hearing, their ages ranged from 60 to 76). Ms ZLC was 14 years old and from a family of 16. Ms JH was 15 and from a family of 11. Ms BMY was 15 and hospitalised after experiencing childhood sexual abuse. When Ms CS was 13, her father was imprisoned for sexual abuse on a family member; she was institutionalised two years later and reported that she was raped by another patient in his 30s at Porirua Hospital. The Court responded:[65]

> Given the layout of the grounds, and what is known to have occurred in other mental institutions as to sexual acts, or contact, between patients (with or without consent) this event probably occurred.

The Court's rendering of the legal issue seems to avoid acknowledging the destructive effects upon the victim. Yet the expression of compassion is essential to peaceful co-existence in society and an appropriate response to the perception of unjustified suffering, including in the context of civil litigation.[66] Proponents of therapeutic jurisprudence would inquire whether the legal process itself could better acknowledge victims' and witnesses' mental and physical distress, both during the initial incidents and during the process of litigation.[67] Offering a patient's perspective, Stevens eloquently documented the impact of anti-therapeutic legal proceedings surrounding her hospitalisation.[68] Also, she expressed the potential of therapeutic jurisprudence for both recovery and closure.

Many of the witnesses in the J case had a common purpose: advocacy for others. Ms DNJ claimed: "All I'm doing is trying to stick up for some people who were treated badly."[69] Likewise, Ms BMY harboured "no ill will towards those at Porirua Hospital" but wished to "tell her own story so as to be able to help others".[70] A recurring and urgent goal expressed by witnesses, litigants and Forum participants[71] is that their histories are documented in the public record to assist others.

Evidently this Court did not adopt the healing ethos of the Government's other services for aggrieved psychiatric victims. The question remains whether that ethos could be brought to bear

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65 At [187].

66 NR Feigenson "Merciful damages: Some remarks on forgiveness, mercy and tort law" (1999) 27 Fordham Urb L J 1633.

67 D Wexler and B Winick *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, Durham, 1996); K Diesfeld and I Freckelton (eds) *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, Aldershot, 2003).

68 S Stevens "Where is the asylum?" in K Diesfeld and I Freckelton (eds) *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, Aldershot, 2003) 95.

69 *J v Crown Health Financing Agency*, above n 61.

70 At [199].

71 Department of Internal Affairs, above n 1.

on legal processes for survivors of historic injustice. In the interim, what additional recourse have victims sought?

VI. AN INTERNATIONAL SOLUTION?

A New Zealand lawyer who represents former patients of Lake Alice and other hospitals has described the institutional practices as inhuman, degrading treatment or punishment. Sonja Cooper made submissions to the Committee Against Torture at the Office of the United Nations High Commissioner for Human Rights in 2009.[72] Citing the Forum's reports to the Government, Cooper reported that "many participants hoped for a public acknowledgement or apology".[73] Most of the clients did not make a police complaint because the police are reluctant to investigate historic abuse allegations. Importantly, due to the damage from mistreatment most clients were not "emotionally robust enough to deal with the trauma of giving evidence about the abuse they suffered in a criminal investigation".[74]

For over five years Cooper's firm advocated for a non-adversarial, out-of-court resolution:[75] [76]

> New Zealand is lagging behind other Commonwealth countries in investigating and addressing abuses of children in State care and of former psychiatric patients. In recent years, there have been formal Government Inquiries in Australia, Canada, Ireland and England into the treatment of children in residential institutions. These Inquiries have found patterns of widespread and systemic abuse extending over many years. Mechanisms have been created outside of the court system for recognising the harm done and providing redress to victims. New Zealand also has its own precedents for undertaking such investigations and resolving claims out of court.

The complainants to the United Nations in 2009 reported that the Government has: "contested almost all claims vigorously; relied heavily on technical defences ... ; denied the existence of any systemic problem or culture of abuse; refused to conduct an official inquiry ... ; and refused to implement out-of-court settlement".[77] Finally, the Government failed to promptly and impartially examine the cases, which is in breach of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[78] Article 13 states:

> Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

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72 S Cooper *Information for the Consideration of the Fifth Periodic Report of the Government of New Zealand* (2009) Committee Against Torture: Forty Second Session (2009) <www2.ohchr.org>.

73 At 2.

74 At 2.

75 At 2.

76 For discussion of New Zealand's Treaty of Waitangi settlement activity, see M Gibbs "Apology and reconciliation in New Zealand's Treaty of Waitangi settlement process" in M Gibney, R Howard-Hassmann, JM Coicaud and N Steiner (eds) *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2008) 154.

77 Cooper, above n 72, at 3.

78 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

The six-year delays of litigation caused considerable distress to Cooper's clients, "who ask how a moral and just State, which has obligations to protect them, can allow this to happen without providing any redress".[79] She predicts that it would take approximately 150 years for the currently filed claims to progress through the courts.

More recently, New Zealand's response has come to the attention of the international human rights community. In May 2012 the United Nations Committee Against Torture requested an explanation from the New Zealand Government. The Committee raised concerns over the decision by the police to end its investigation in 2009 without prosecuting any staff. Felice Gaer, Committee representative, asked if the Government "intends to carry out an impartial investigation into the nearly 200 allegations of torture and ill treatment against minors at Lake Alice". While the Ministry of Justice reported that the Government will respond, the Ministry did not indicate the nature of its eventual response.[80]

VII. Reflections upon Litigation: The Challenges a Government Faces

New Zealand, like other jurisdictions, faces difficulties in delivering a fully satisfactory response to historic abuses. First, further financial settlement with complainants could have far-reaching effects. For example, settlement by the Government signals it was responsible for historic abuses. This acknowledgement of responsibility through a settlement could be the basis for the Government's liability in existing and future proceedings. Also, a settlement may encourage others to pursue litigation and their claims would not be barred by the settlement. The financial impact could be enormous, particularly for New Zealand, a country with a population of 4.43 million people[81] which is absorbing the impact of the Pike River Mine disaster, recent Christchurch earthquakes and the Tauranga oil spill.

Second, there are legal barriers to litigation, as demonstrated in the above case. They include limitation periods, the inadequacy of proof, and the death of relevant witnesses and defendants. Third, arguably the legal and professional standards of 2012 must not be applied to the conduct of mental health workers from four decades ago; justice requires acknowledgement of the historical context, resources and scientific knowledge of the previous era.

Given these factors, New Zealand is contemplating how to demonstrate its continuing commitment to former, existing and future mental health service consumers. The Government has expressed its dedication to upholding patients' rights and monitoring health providers' conduct from the 1990s. For example, it has enacted a range of domestic legislation, including the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Human Rights Act 1993, the Health and Disability Commissioner Act 1994 and the Health Practitioners Competence Assurance Act 2003. Importantly, in 2008 New Zealand ratified the United Nations Convention on the Rights of Persons with Disabilities.[82] Given this stated commitment to

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79 Cooper, above n 72, at 3.

80 Martin Johnston "UN asks Govt to re-open hospital abuse probe" *The New Zealand Herald* (Auckland, 23 May 2012).

81 Statistics New Zealand "National Population Estimates: March 2012 quarter" (14 May 2012) <www.stats.govt.nz>.

82 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008).

protection of mental health consumers, New Zealand grapples with how to remedy the past injustices.

New Zealand is poised to respond to these competing demands. It has provided a range of strategies that have been accepted by some former patients. However, litigation is under way and the United Nations has been alerted. New Zealand's future response may be instructive for other jurisdictions that face similar historic abuses.

VIII. What does the New Zealand approach tell us about justice seeking in our time?

New Zealand offered a non-legal strategy for victims of historic psychiatric abuse through its public announcement and personal apology, settlement for some, reconciliatory programmes and the (potential) wellness payment. New Zealand has not blocked access to civil litigation. Yet grievances still exist. How satisfied are survivors with the Government's incremental and complex response?

Victims' recent efforts to pursue civil litigation, criminal prosecutions and the complaint to the United Nations are evidence that many victims were not satisfied with New Zealand's reconciliation techniques and apology. As Allan observed, "victims may have a much more complex understanding of apology" than others appreciate.[83] Equally, the New Zealand Government may have been unaware of this complexity. What might be required for resolution?

Perhaps there is a need for a new, official, public acknowledgement of the destruction caused by the past abuses. According to White, "[w]hen governments apologise for past injustices, they acknowledge these evolving norms and establish a new social contract".[84] It would appear that a new social contract would be beneficial at this impasse and a renewed apology, with additional commitments, may be a partial solution.

To reflect the Government's reconciliatory intents, this apology might more clearly resemble an "authentic expression of sorrow meant to facilitate healing".[85] The nature of the official, political apology is very significant. According to Thompson:[86]

> The ceremony that surrounds the apology, who performs the role of apologising and the other roles that the ceremony demands—should be endorsed by victims and their representatives.

This renewed apology could include collaboration with, and an explicit commitment from, the Health and Disability Commissioner and other relevant officials who safeguard the legal rights of dependent individuals. Ideally, the communication would be an explicit assurance by the Government that victims' and service users' views will meaningfully inform future improvements to relevant services.

An essential, imperative priority for New Zealand is prevention, which is also a core element of Marrus' complete apology. Typically, official apologies provide assurances that the events will not recur. Likewise, Taft asserted that official recognition of wrongdoing includes the

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83 Allan, above n 54, at 8.

84 White, above n 58, at 1282.

85 L Jesson and P Knapp "My lawyer told me to say I'm sorry: lawyers, doctors and medical apologies" (2008–2009) 35 Wm Mitchell L Rev 1410 at 1444.

86 Thompson, above n 6, at 41.

expectation that "a culture of honesty and openness will disrupt those cultures of silence that tend to hide systemic problems".[87] Clearly, prevention is a priority for New Zealand survivors because repeatedly and in diverse fora they have revealed their abuse in hopes of averting similar injustices. The recurring call for prevention indicates that problematic practices continued after 1992. Logically, patients' priorities would guide the platform of assessment, monitoring and safeguards. Regarding the process of litigation, perhaps legal decisions could better acknowledge the trauma that claimants and their witnesses express (regardless of whether the claimants are ultimately awarded damages). While New Zealand established laudable strategies for reconciliation with victims of historic abuse, the final analysis of its success may depend on how it integrates victims' priorities in the next stage of resolution.

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87 Taft, above n 49, at 87.