

New Zealand Law Society

Submission on the Prisoners' and Victims' Claims (Expiry and Application Dates) Amendment Bill

Introduction and Summary

1. The Prisoners' and Victims' Claims (Expiry and Application Dates) Amendment Bill proposes to continue the application of the Prisoners' and Victims' Claims Act 2005 (2005 Act) to 30 June 2012, rather than allowing it to expire on 30 June 2010 as the law currently provides.
2. The 2005 Act's restrictions on an inmates' ability to attain compensation for breaches of their human rights may no longer be necessary given the Supreme Court's 2007 decision in *Taunoa v Attorney-General*¹ (decided after the 2005 Act was passed).
3. The Society opposed the 2005 Act being enacted.² The United Nations Committee against Torture has expressed concern that the 2005 Act limits the award and payment of compensation to prisoners.³
4. The Society agrees with the Ministry of Justice that
"The best way of preventing future claims arising from breaches of prisoners' human rights is to ensure that incidents leading to such claims are kept to an absolute minimum."⁴
5. The Society does not wish to make an oral submission.
6. The Society looks forward to making a submission on any further bill to amend the 2005 Act that is introduced to the House.

¹ *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429

² See http://www.lawsociety.org.nz/_data/assets/pdf_file/0011/1145/Prisoners-VictimsClaims.pdf

³ Concluding observations of the Committee against Torture on the fifth periodic report of New Zealand (CAT/C/NZL/CO/5, 14 May 2009), paragraph 14.

⁴ Regulatory Impact Statement: Prisoners' and Victims' Claims Amendment Bills, page 1 (see <http://www.justice.govt.nz/policy-and-consultation/regulatoryimpactstatements/prisoners-and-victims-claims-amendment-bills>)

Restrictions on inmates' ability to attain compensation

7. Subpart 1 of Part 2 of the 2005 Act restricts an inmate's ability to attain compensation for the State breaching his or her human rights. The courts can only award compensation to an inmate for human rights breaches if (s13 Act):
 - (a) the inmate has made reasonable use of internal and external complaints mechanisms; and
 - (b) remedies other than compensation would not provide an effective remedy.
8. The courts are also required to consider certain factors when assessing whether and how much compensation should be awarded (s14).
9. Clause 5 amends s16 of the 2005 Act to continue the application of this Subpart to 30 June 2012, rather than allowing it to expire on 30 June 2010 as the 2005 Act currently provides.
10. This Subpart may no longer be necessary given the Supreme Court's 2007 decision in *Taunoa v Attorney-General*, (decided after the 2005 Act and a later amendment to it were passed):
 - (a) On 3 June 2005 the 2005 Act was assented to. At this time the *Taunoa* case was still proceeding through the courts. When the 2005 Act was originally passed the Subpart was due to expire on 30 June 2007.
 - (b) On 31 July 2007 the Prisoners' and Victims' Claims Amendment Act 2007 was assented to. This Act extended the expiry date of the Subpart to 30 June 2010. This Act had retrospective effect,⁵ deeming the Subpart to have continued in force from 30 June 2007 (even though the expiry date was not extended until a month after the Subpart would have otherwise expired).
 - (c) On 31 August 2007 the Supreme Court issued its decision in *Taunoa*.
11. This case was not decided under the 2005 Act and so represents the law as if the 2005 Act were not enacted, or as if it were allowed to expire. The decision in *Taunoa* establishes that:
 - (a) the courts should award compensation for a breach of the New Zealand Bill of Rights Act 1990 if remedies other than compensation would not provide an effective remedy for this breach;⁶ and
 - (b) the courts should consider certain factors when assessing whether and how much compensation should be awarded.⁷

⁵ Prisoners' and Victims' Claims Amendment Act 2007, s 6.

⁶ *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [258] per Blanchard J; at [299] and [300] per Tipping J; at [373] per McGrath J; and at [385] per Henry J.

⁷ *Ibid* at [258]-[266] per Blanchard J; at [300] and [323]-[324] per Tipping J; at [373] per McGrath J; and at [385] per Henry J.

12. This means that the law on compensation under the New Zealand Bill of Rights Act 1990 is similar to that provided in Subpart 1 of Part 2 of the 2005 Act. The decision does therefore cast considerable doubt on whether this Subpart is needed at all or whether it should instead be allowed to expire.

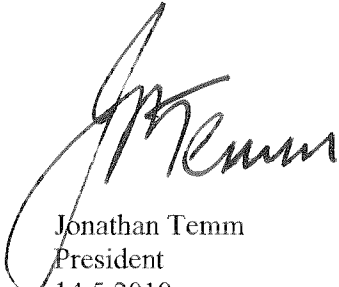
Recommendation

13. Careful consideration should be given to whether, in light of *Taunoa* it is necessary to enact this bill and extend Subpart 1 and Part 2 of the 2005 Act. The requirement that an inmate make reasonable use of available complaints mechanisms is essentially just one aspect of the explicit consideration set out in *Taunoa* that compensation is due when remedies other than compensation would not provide an effective remedy.
14. The Society does not support this Bill seeking as it does to further extend the operation of Subpart 1 of the 2005 Act. The Society believes the Subpart should now lapse as the legal principles are set out in *Taunoa*.

Proposed further amendment bill

15. The Society notes that the explanatory note to the Bill indicates that the Government intends to introduce a further amendment bill later in 2010 to:
 - (a) permanently restrict inmates from being able to claim compensation when their human rights are breached; and
 - (b) provide that any compensation awarded to inmates for human rights breaches against them (if any, given (a) above) will go towards either victims' claims or to the Victims' Services appropriation.
16. The Society understands that inmates would therefore not receive any compensation awarded to them for human rights breaches. Depending on what other remedies may be granted, this may mean that there is little value for inmates in bringing claims for human rights breaches and that such claims cease to be brought.
17. The Society will submit on that bill when it is before a select committee, but notes that these changes are likely to mean that in some cases inmates as victims of human rights breaches will not have access to an effective remedy. If that were the case then it would put New Zealand in

breach of the International Covenant on Civil and Political Rights⁸ and would also be likely to be inconsistent with the New Zealand Bill of Rights Act 1990.



Jonathan Temm
President
14.5.2010

⁸ Article 2(3) states:

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.