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Ministry of Foreign Affairs and Trade
Private Bag 18 901
Wellington
New Zealand

By email: upr@mfat.govt.nz

Draft New Zealand National Universal Periodic Review Report

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the draft New Zealand National UPR Report (draft Report).
2. The National Report plays an important role in promoting the objectives of the Universal Periodic Review (UPR), including:¹
 - (a) the improvement of the human rights situation on the ground; and
 - (b) the fulfilment of New Zealand's human rights obligations and commitments and assessment of developments and challenges (including since the previous review)² faced by it.
3. It is therefore essential that the national report presents New Zealand's human rights situation in an "objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner", consistent with the principles of the review.³
4. The Law Society welcomed the Minister of Justice's letter of 27 August 2013 anticipating that many of the issues raised in the Law Society's **enclosed** stakeholder submission would be addressed in the national report and during New Zealand's appearance before the United Nations Human Rights Council.
5. The Law Society considers, however, that the draft Report does not completely address all the challenges identified in its stakeholder submission (a number of which have also been raised in the submissions of other non-government organisations). Many of the challenges identified go to the heart of New Zealand's human rights situation and, in particular, the effectiveness of the mechanisms that promote and protect human rights in New Zealand.

¹ Resolution on Institution-building of the United Nations Human Rights Council GA Res 5/1 (18 June 2007) at paragraph 4(a) and (b).

² See Follow-up to the Human Rights Council resolution 16/21 with regard to the universal periodic review A/HRC/DEC/17/119 (2011).

³ See Resolution on Institution-building of the United Nations Human Rights Council at paragraph 3(g).

6. The Law Society refers in particular to:

Legislation enacted in breach of New Zealand's human rights obligations

- (a) Most seriously, the Law Society referred to a number of occasions on which Parliament has enacted legislation despite a negative report of the Attorney-General under section 7 of the New Zealand Bill of Rights Act 1990 (Bill of Rights). In the Law Society's view, and indeed in the Attorney-General's (the principal legal advisor to the Crown), that legislation fails to meet the Bill of Rights standard, in breach of New Zealand's domestic and international human rights obligations.
- (b) The draft Report makes no mention of those enactments. In the Law Society's view, they represent clear and particularised breaches of New Zealand's human rights obligations in the review period. Consistent with the principles and objectives of the universal periodic review, it is essential that the national report:
 - (i) address those developments in an objective, transparent and non-selective manner;
 - (ii) explain why those developments have occurred; and
 - (iii) identify the commitments that New Zealand intends to make to overcome the challenges presented by those developments and improve the human rights situation on the ground in the relevant respects.⁴

The need to strengthen the Bill of Rights reporting mechanism

- (c) The draft Report refers (at paragraph 12) to the role the Bill of Rights reporting mechanism plays in protecting fundamental human rights. The Law Society's stakeholder submission likewise emphasised the central importance of the Bill of Rights reporting mechanism, noting that protection of civil and political rights in New Zealand depends in significant part upon its robustness and effectiveness.
- (d) While noting that many aspects of the Bill of Rights reporting mechanism function well, the Law Society made a number of recommendations (echoing those of the Standing Orders Committee of the House of Representatives):
 - (i) that Bill of Rights advice and reporting be required on substantive Supplementary Order Papers;
 - (ii) that where Bill of Rights implications are raised, they are subject to systematic and comprehensive parliamentary scrutiny (including being considered by select committees and addressed in regulatory impact statements).
- (e) The Law Society also made a number of concrete recommendations directed at the underlying objective of Bill of Rights reporting – that all legislation complies with the Bill of Rights. These included mandatory select committee scrutiny of draft legislation the subject of a section 7 report, and automatic sunset provisions applying to legislation enacted despite a section 7 report.

⁴ See Follow-up to the Human Rights Council resolution 16/21 with regard to the universal periodic review (and in particular the general guidelines for the preparation of information under the universal periodic review at paragraph 2(F)).

- (f) The draft Report does not address the above deficiencies (which the Law Society notes have been identified for a number of years). Rather it presents the reporting mechanism as adequately protecting fundamental human rights.

Recent legislative measures that are in conflict with the rule of law

- (g) The Law Society's stakeholder submission referred to a number of recent and proposed legislative measures that:
- (i) oust or seriously limit the review jurisdiction of the courts;
 - (ii) inhibit access to legal representation in proceedings in the Family Court; and
 - (iii) enact Henry VIII clauses without proper justification and absent the necessary constraints.

The Law Society's concerns in respect of the above matters are not addressed in the draft Report.

7. The challenges (and corresponding recommendations) identified and more fully detailed in the Law Society's stakeholder submission are – in the New Zealand context – serious ones. The Law Society had expected them to have been addressed in the draft Report, as anticipated by the Minister of Justice, and is disappointed that they have not been. The Law Society recommends that the draft Report be revised to address the challenges identified.

Specific submissions

8. The Law Society also has a number of submissions directed at specific paragraphs of the draft Report which it sets out below.

Draft Report	Law Society's submission (cross-references to its earlier stakeholder submission in bold)
<p>I Methodology and consultation process</p> <p>...</p> <p>6 The consultations were attended by a range of civil society organisations, iwi, and private individuals. Stakeholders highlighted a number of areas where they felt further work was required to address specific human rights issues in New Zealand. Major themes included: disability rights; New Zealand's constitutional framework for the protection and enforcement of human rights (including economic, social and cultural rights); Treaty of Waitangi issues and the partnership between Government and Māori; access to justice; women's issues; child abuse/neglect; social-economic inequalities between social/ethnic groups; over-representation of Māori and institutional racism (real and/or perceived) in the criminal justice system; gender discrimination; aged persons concerns; cultural preservation and the environment against economic development; and the human rights impact of the Christchurch earthquake. The Government acknowledges these concerns and is committed to finding ways to overcome the challenges identified.</p>	<p>The Law Society welcomes the Government's acknowledgement of stakeholders' concerns and its commitment to finding ways to overcome the challenges identified.</p> <p>The Law Society considers that the national report should set out the Government's position on the serious concerns the Law Society identifies.</p>

<p>II Background and framework: developments since the previous review</p> <p>A. Constitutional and legislative framework</p> <p>...</p> <p>Recommendation 15: Further incorporate, as appropriate, its international human rights obligations into domestic law</p> <p>10 New Zealand gives effect to international human rights obligations by general and specific legislation and by government policies and practices. New Zealand will continue to review whether further legislation, policies or practices are required, including where it takes on new international human rights obligations. In June 2013, Cabinet agreed to legislative changes that will enable New Zealand to ratify the UN Convention Against Corruption. It is intended that these amendments will be included in an Organised Crime and Anti-Corruption Bill that will be introduced in Parliament in 2013.</p>	<p>The Law Society considers that the national report should state why some international human rights obligations are given effect to by general legislation and others by specific legislation. The report should also state which international human rights obligations are only reflected in "government policies and practices", but not in legislation. The basis for such differentiation between international human rights obligations should be made clear (eg the differentiation between the civil and political rights affirmed in the Bill of Rights, and the economic, social and cultural rights recognised in the ICESCR: see [19]–[21] of the Law Society's stakeholder submission).</p> <p>In addition, there should be a summary of all international human rights obligations New Zealand has not incorporated into the Bill of Rights or by legislation generally (perhaps in an appendix to the national report).</p>
<p>Recommendations 16, 17, 18: Ensure that the Bill of Rights Act appropriately reflects all of New Zealand's international human rights obligations and that all subsequent legal provisions, including immigration laws, are in accordance with it and cannot limit its scope (16); Consider integrating the provisions of the International Covenant on Economic, Social and Cultural Rights into domestic legislation to ensure the justiciability of these rights (17); Take appropriate measures to bring domestic law in to full compliance with the International Covenant on Civil and Political Rights (18)</p> <p>11 New Zealand agrees that all international human rights obligations should be appropriately implemented domestically. The New Zealand Bill of Rights Act 1990 (NZBORA) covers primary civil and political rights. New Zealand implements other rights through subject-specific legislation and government policies and practices. For example, the right to Privacy (Article 17 of the International Covenant on Civil and Political Rights) is protected by the Privacy Act 1993 and tort law.</p> <p>12 To the extent possible, New Zealand courts will interpret domestic legislation consistently with international obligations (this stems from the basic constitutional presumption that Parliament does not intend to legislate in a manner contrary to the State's international obligations). There is also a broad range of non-judicial and quasi-judicial mechanisms for the protection of fundamental human rights. Section 7 of the NZBORA requires the Attorney-General to alert Parliament to any provision in a Bill that appears to be inconsistent with the NZBORA. Consistent with New Zealand's present constitutional structure, the NZBORA and other subject-specific legislation do not</p>	<p>This paragraph is at odds with a number of recent and proposed legislative measures which appear to breach New Zealand's international human rights obligations (see [15], Appendix B, [25] and Appendix C). The paragraph should be revised to address those developments (which are within the review period) in an objective, transparent and non-selective manner in accordance with paragraph 6(b)(i) above.</p> <p>In its submission (at [10]), the Law Society states that "New Zealand has responded to earlier criticism that the Bill of Rights does not directly limit Parliament's legislative powers, by reference to the protection afforded by the Bill of Rights reporting mechanism" (footnote omitted). The draft Report appears to follow this approach, without addressing the concerns the Law Society identifies in its submission about the Bill of Rights reporting mechanism. Those are:</p> <ul style="list-style-type: none"> • the failure to report on substantive Supplementary Order Papers (SOPs) (see [12]-[13]); • the inadequate consideration/notification of section 7

<p>directly limit Parliament's legislative powers.</p> <p>13 Consideration of NZBORA issues, including whether new rights such as property or social, economic and cultural rights should be included, is one of the terms of reference of the Constitutional Review. The Panel is also tasked with consulting New Zealanders on the status of the Act in relation to other legislation.</p>	<p>advice/reports of the Attorney-General (see [14]); and</p> <ul style="list-style-type: none"> the enactment of legislation despite a negative section 7 report (at [15]-[16], and Appendix B). <p>The Law Society considers, as already stated, that the national report should refer to these concerns and set out the Government's position on them, as well as its position on the Law Society's recommendations 4-8.</p> <p>While the Constitutional Review is a valuable initiative, the Constitutional Advisory Panel's May 2012 terms of reference only provide for it to report to the Deputy Prime Minister and the Minister of Māori Affairs "with advice on the constitutional topics, including any points of broad consensus where further work is recommended" (see paragraph 15(d) of the terms of reference). The Law Society considers that the national report should make it clear that the Constitutional Advisory Panel does not have any power to make recommendations on whether any particular constitutional changes should occur.</p> <p>The Law Society further notes that the Constitutional Advisory Panel's terms of reference do not expressly refer to economic, social and cultural rights. Paragraph 11 of the terms of reference refers to "Bill of Rights issues (for example, property rights, entrenchment)." Paragraph 13 of the draft Report should be amended to reflect this.</p>
<p>III Promotion and protection of human rights</p> <p>A. Cooperation with human rights mechanisms</p> <p>21 New Zealand cooperates with treaty bodies and special procedures, and supports the work of OHCHR, including through the provision of regular non-earmarked financial contributions. New Zealand's treaty body reporting is up to date. New Zealand has a standing open invitation to all United Nations Special Procedures mandate holders and this will continue without restrictions. In July 2010, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples visited New Zealand. The Government is already acting on many of the Special Rapporteur's recommendations and will continue to draw on his report. In April 2013, the Sub Committee on the Prevention of Torture visited New Zealand, and the Government is looking forward to receiving the Committee's report and continuing a constructive dialogue.</p>	<p>The Law Society expressed its concern (see [22]–[24] and R11) at the lack of a formal process for publicising, considering and responding to concluding observations of treaty bodies (see also the Law Society's enclosed submission on the May 2009 draft New Zealand National UPR Report). Paragraph 21 of the draft Report is at odds with empirical evidence suggesting that concluding observations have only a very limited influence on policy and law-making in New Zealand (see [22], [23] and Jasper Krommendijk <i>Can Mr Zaoui Freely Cross the Foreshore and Seabed? The Effectiveness of UN Human Rights Monitoring Mechanisms in New Zealand</i> (2012) 43 VUWLR 579). The Law Society recommends that paragraph 21 of the draft Report be revised to address that challenge and consider a formal process for publicising, considering and responding to concluding observations (see R11).</p>
<p>Recommendations 19, 20, 23 and 24: Take further measures to ensure full and consistent protection of human rights in domestic law and policies, taking into account recommendations made by several United Nations human rights bodies in this regard (19); Take action to provide constitutional protection to both national and international human rights acts and standards (20); Seriously consider implementing the observations and recommendations of different treaty bodies and special procedures on indigenous people (23, 24)</p> <p>22 New Zealand has always acted consistently with the recommendations of treaty bodies and special</p>	<p>See the Law Society's comments on paragraph 21 of the draft Report above.</p>

<p>procedures on indigenous peoples. The four implementing agencies work closely together with MFAT and other relevant government agencies to assess treaty body recommendations and identify where progress can be made. In many cases, the recommendations align with existing Government objectives and can therefore be advanced as a priority. The recommendations of the Committees on: the Elimination of Racial Discrimination (2013), the Elimination of Discrimination Against Women (2010), and Rights of the Child (2011) are under active consideration.</p>	
<p>1. Equality and non-discrimination</p> <p>27 New Zealand has comprehensive legislation and policy measures in place to promote equality for vulnerable groups. These include robust non-discrimination provisions in human rights legislation, and a variety of laws, policies and practices in the education, employment, health and social welfare sectors. New Zealand is committed to identifying gaps in information to better understand the causes of inequality.</p> <p>28 Under the Cabinet manual, all government departments must identify the human rights implications, including unlawful discrimination, of proposed policies and legislation. MoJ and the Crown Law Office consider all legislation introduced into the House of Representatives for consistency with the NZBORA including the right to freedom from discrimination.</p>	<p>The recently enacted New Zealand Public Health and Disability Amendment Act 2013 (see [15], Appendix B, R8 and [18]) effectively removes the protection of non-discrimination provisions in human rights legislation in respect of persons providing health and disability support services to family members by ousting the courts' review jurisdiction. Paragraph 27 of the draft Report is incorrect to describe the legislative measures in place as "comprehensive". The New Zealand Public Health and Disability Amendment Act 2013 should be addressed in the national report.</p> <p>The Law Society recommends that the national report consider committing to amend the Cabinet manual to require that human rights implications of proposed policies and legislation be included and given prominence in regulatory impact statements supporting the introduction of draft legislation (see [14(c)] endorsing this recommendation of the Standing Orders Committee of the House of Representatives).</p> <p>While MoJ and the Crown Law Office consider all legislation for consistency with the Bill of Rights (as recorded in paragraph 28 of the national report), Supplementary Order Papers are not routinely subject to section 7 advice and reporting. The Law Society recommends that the national report consider committing to requiring section 7 advice and reporting on substantive Supplementary Order Papers (see [12]–[13] and R13 endorsing this recommendation of the Standing Orders Committee of the House of Representatives).</p>
<p>(c) Persons with disabilities</p> <p>70 New Zealand was a leader in negotiations on the UN Convention on the Rights of Persons with Disabilities (CRPD), modelling the spirit of participation with disabled people throughout the consultation process, and involvement of disability sector representatives in New Zealand delegations to the UN. The Government recognises the importance of involving disabled persons' organisations in the on-going development of new policy on disability issues. It is also aware that progress remains to ensure the full realisation of human rights for persons with disabilities, including with respect to physical protection and support, independent living, equal employment opportunities, access to health services and information, pay equity, accommodation and</p>	<p>See the Law Society's comments on paragraph 27 of the draft Report above in relation to the New Zealand Public Health and Disability Amendment Act 2013.</p>

<p>accessibility and family impacts. New Zealand submitted its first report on implementing the CRPD in March 2011, following a broad public consultation process.</p>	
<p>3. Administration of Justice and the rule of law</p>	<p>The rule of law is essential for the protection of the human rights. It is disappointing that the draft Report fails to address the serious concerns expressed in the Law Society's stakeholder submission at a number of legislative measures within the review period that are in conflict with the rule of law (see paragraph 6(g) above and [4]–[8], R1–3 and Appendix A). The Law Society recommends that this section of the national report be revised to address these concerns.</p>
<p>7. Refugees and Asylum Seekers</p> <p>110 The Immigration Amendment Bill has been passed and enacted. The Bill and associated policy measures aim to ensure New Zealand is able to manage effectively and efficiently a mass arrival of irregular and potentially illegal migrants, and to make New Zealand a less attractive destination for people smugglers.</p>	<p>The draft Report does not refer to the serious concerns raised by the United Nations High Commissioner for Refugees, the Law Society, the Human Rights Commission and many other non-government organisations about the compliance of the Immigration Amendment Act 2013 with the Bill of Rights and New Zealand's obligations under the Refugee Convention. Nor does the draft Report refer to why, notwithstanding those concerns, the legislation was still enacted. Such concerns should be addressed in the national report.</p>

Yours sincerely

E J Unsworth

John Unsworth
Vice-President

Encl. (1)