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United Nations Convention against Torture: New Zealand's sixth periodic review, 2015 – shadow report

EXECUTIVE SUMMARY

1. The New Zealand Law Society is the statutory body, established in 1869, that regulates New Zealand's 12,000 lawyers. One of its functions is to "assist and promote, for the purpose of upholding the rule of law and facilitating the administration of justice in New Zealand, the reform of the law".¹ This shadow report has been prepared by the New Zealand Law Society's Human Rights and Privacy Committee, which monitors adherence to domestic and international human rights standards in New Zealand.
2. New Zealand has a longstanding commitment to human rights, and a generally good record. It is therefore concerning that a number of legislative measures have passed into law despite raising serious questions of consistency with the New Zealand Bill of Rights Act 1990 (Bill of Rights), corresponding protections in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention) and other international human rights treaties.
3. The Law Society focuses in particular on:
 - a. **Sentencing and Parole Reform Act 2010**, "three-strikes" sentencing legislation (article 16);
 - b. **Corrections Amendment Act 2013**, invasive prisoner strip-searching (article 16);
 - c. **Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act 2013**, which restricts awards of compensation to prisoners for rights breaches (article 14);
 - d. **Immigration Amendment Act 2013**, the detention of "mass arrivals" of asylum seekers; and

¹ Lawyers and Conveyancers Act 2006, s 65(e).

- e. **Bail Amendment Act 2013**, which reverses the onus of proof for specific defendants and increases the likelihood of youth being held in custody on remand.

The Law Society's focus is restricted to legislative developments in the current reporting period, on which it has made public submissions to Parliament.

4. Legislation has been passed notwithstanding the Attorney-General reporting to Parliament that it appeared inconsistent with the Bill of Rights. In the Law Society's view, that reporting mechanism should be further strengthened to ensure it operates in a robust and effective manner to forestall legislative inconsistency with New Zealand's domestic and international human rights obligations (article 2).
5. The Law Society's shadow report also considers:
 - a. New Zealand's reservation to article 14 of the Convention; and
 - b. the limited influence of United Nations treaty bodies' concluding observations on New Zealand State party reports and of international human rights norms in New Zealand.
6. The Law Society does not address the broader legal and policy issues arising out of New Zealand's review.

SPECIFIC CONCERNS ABOUT THE CONSISTENCY OF LEGISLATION WITH THE CONVENTION

Sentencing and Parole Reform Act 2010 (article 16)

7. The Sentencing and Parole Reform Act 2010 is "three-strikes" sentencing legislation, providing for full sentences, including life sentences, to be served without parole for repeat violent offenders convicted of a second or third specified serious violent offence. While the Law Society usually refrains from commenting on the policy behind a bill, it regarded the "three-strikes" sentencing regime as an exceptional case, noting that the legislation had caused disquiet among legal practitioners experienced in the criminal justice system.
8. The Attorney-General reported that the provision for a life sentence to be imposed for a third listed offence appeared to be inconsistent with the right not to be subjected to disproportionately severe treatment affirmed by section 9 of the Bill of Rights, noting that the Bill might result in disparities between offenders that are not rationally based and gross disproportionality in sentencing. The Law Society endorsed the Attorney-General's analysis and conclusions.
9. The Law Society considers that the mandatory sentencing regime introduced by the Sentencing and Parole Reform Act 2010 constitutes cruel and disproportionately severe treatment or punishment in breach of section 9 of the Bill of Rights, and may result in inhuman treatment in breach of article 16 of the Convention because of restrictions on the ability of the courts and the Parole Board to consider the individual circumstances of each case.

Recommendation: That the Sentencing and Parole Reform Act 2010 be repealed or amended to the extent required to remove its apparent inconsistency with the Convention.

Corrections Amendment Act 2013 (article 16)

10. The Corrections Amendment Act 2013 authorises mandatory strip-searching of prisoners in a broader range of circumstances, in a more invasive manner and with fewer safeguards than previously provided for. While the Law Society accepted that strip-searching of prisoners is necessary in certain circumstances, it noted that it was obviously degrading and that its use must be carefully circumscribed.
11. In the Law Society's view, the justification for the following legislative measures was not evident:
 - a. providing that a prisoner may be required to bend his or her knees, with legs spread apart, until his or her buttocks are adjacent to his or her heels in *all* strip searches (rather than only where there are reasonable grounds for believing that a prisoner has in his or her possession an unauthorised item);
 - b. extending authority to use an illuminating or magnifying device to conduct a visual examination around the anal and genital areas to all strip searches (rather than only where there are reasonable grounds for believing that a prisoner has in his or her possession an unauthorised item); and
 - c. providing for mandatory strip-searching when prisoners are placed in, and each time the prisoner is returned to, segregation areas when subject to a segregation direction because of a risk of self-harm (the Law Society noted that provision for *discretionary* strip-searching would better allow for the traumatic and potentially risk-exacerbating nature of the strip-search to be balanced against the need to mitigate the risk of self-harm).
12. The Ministry of Justice's legal advice to the Attorney-General was that while a physical search is a restraint on freedom and an affront to human dignity, the Bill was consistent with the Bill of Rights (focusing on the right against unreasonable search of the person affirmed in section 21 of the Bill of Rights).
13. The Law Society respectfully disagreed with the legal advice to the Attorney General, noting that it did not address the right not to be subjected to degrading treatment, and the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the person, affirmed by sections 9 and 23 of the Bill of Rights respectively.
14. The Law Society considers that the Act breaches sections 9, 21 and 23 of the Bill of Rights, and may well result in degrading treatment in breach of article 16 of the Convention.

Recommendation: That the Corrections Amendment Act 2013 be repealed or amended to the extent required to remove its apparent inconsistency with the Convention and the corresponding protections under the New Zealand Bill of Rights Act 1990.

Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act 2013 (article 14)

15. The Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act 2013 continues the application of the Prisoners' and Victims' Claims Act 2005 (which would otherwise have expired under a sunset clause), in restricting awards of compensation to prisoners for rights breaches. In order for a court or tribunal to make an award of damages, it must be satisfied that there has been "reasonable use" of internal and external complaint mechanisms that are reasonably available, and that another remedy would not be effective in addressing the complaint.
16. The Attorney-General concluded that the Bill was consistent with the right to an effective remedy and the right to freedom from discrimination affirmed in section 19 of the Bill of Rights.
17. The Law Society believes the 2005 and 2013 Acts are unnecessary given the approach outlined by the Supreme Court in 2007 in *Taunoa v Attorney-General*,² which would apply if the Acts were not in place. *Taunoa* was not decided under the Act and so represents the law if the Act were allowed to expire. The ruling establishes that: (a) the courts should award compensation for a breach of the Bill of Rights if remedies other than compensation would not provide an effective remedy for the breach; and (b) the courts should consider certain factors when assessing whether and how much compensation should be awarded. The Law Society believes that the courts should be able to determine when it is necessary to compensate prisoners in order to provide an effective remedy for rights abuses.
18. The Law Society notes that the Committee observed in its 2009 concluding observations that the 2005 Act would limit the award of compensation to prisoners in breach of article 14 of the Convention.³

Recommendation: That those parts of the Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act 2013 and the Prisoners' and Victims' Claims Act 2005 which are inconsistent with the Convention be repealed.

Immigration Amendment Act 2013

19. The Immigration Amendment Act 2013 allows for the detention of "mass arrivals" (more than 30 people) of asylum seekers into New Zealand for up to six months, and further restricts judicial review proceedings. The detention period can be extended for up to 28 days by a District Court Judge.

² *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

³ *Concluding observations of the Committee against Torture: New Zealand* CAT/C/NZL/CO/5 (2009) at [14].

20. The Ministry of Justice's legal advice to the Attorney-General concluded that the Bill was consistent with the right not to be arbitrarily detained and the right to judicial review affirmed in sections 22 and 27(2) of the Bill of Rights respectively.
21. The Law Society respectfully disagreed with the Ministry of Justice's legal advice. It noted that despite the Bill being directed at asylum seekers, the legal advice was silent as to New Zealand's obligations under the Refugee Convention. The Law Society considers that the Act is inconsistent with section 22 of the Bill of Rights, the corresponding article 9 of the International Covenant on Civil and Political Rights, the right to seek asylum contained in article 14 of the Universal Declaration of Human Rights and the elaboration of that right in article 31 of the Refugee Convention.
22. The Law Society notes that the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment expressed concern at the Immigration Amendment Bill, prior to it coming into force, in its latest report to New Zealand.⁴ The Subcommittee noted that the amendments might have the effect of depriving persons in need of protection of their liberty based solely on the manner of their arrival in the state party.

Recommendation: That the Immigration Amendment Act 2013 be repealed or amended to the extent required to remove its apparent inconsistency with the Convention.

Bail Amendment Act 2013

23. The Bail Amendment Act 2013 reversed the onus of proof for bail for defendants of or over the age of 17 who are charged with murder, serious Class A drug offences, or an extended list of specified offences when previously the defendant has been convicted of a specified offence. It also makes young defendants aged 17 subject to the standard test for bail if they have previously been sentenced to imprisonment and makes amendments to the Children, Young Persons and their Families Act 1989. A child or young person may now be arrested without warrant if the constable believes they have breached a bail condition in a significant respect or have previously repeatedly breached a bail condition, and a child or young person who repeatedly breaches bail conditions or who is likely to repeatedly breach bail conditions may be detained in custody by the court.
24. The Crown Law Office's legal advice to the Attorney-General stated that the presumption of innocence does not directly apply to the consideration of bail prior to trial.
25. The Law Society respectfully disagreed with this advice. It is concerned that reversing the onus of proof is not a proportionate response and is contrary to the presumption of innocence and the right to liberty affirmed in section 22 of the Bill of Rights. The Law Society is also concerned that the provisions relating to youth offenders are inconsistent with New Zealand's

⁴ *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand* CAT/OP/NZL/1 (2014) at [22]. Similar concern was also raised by the Committee on the Elimination of Racial Discrimination in its last report (*Concluding observations of the Committee on the Elimination of Racial Discrimination: New Zealand* CERD/C/NZL/CO/18-20 (2013) at [20]).

international obligations under the UN Guidelines for the Prevention of Juvenile Delinquency, and are in direct conflict with the UN Convention on the Rights of the Child.

26. The Law Society notes that the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment expressed deep concern at these amendments (prior to their being brought into force) in its most recent report to New Zealand. The Subcommittee recorded that the amendments will have a negative impact on the number of youth held on remand and the length of time spent on remand, which is a matter of grave concern.⁵

Recommendation: That the Bail Amendment Act 2013 be repealed or amended to the extent required to remove its apparent inconsistency with the New Zealand Bill of Rights Act 1990 and international human rights standards.

BILL OF RIGHTS REPORTING MECHANISM (ARTICLE 2)

27. The principal means by which New Zealand implements international human rights standards is the Bill of Rights. In its 2009 Concluding Observations, the Committee correctly observed that the Bill of Rights has no higher status than ordinary legislation, “which may result in the enactment of laws that are incompatible with the Convention”.⁶
28. The sole formal mechanism to ensure the consistency of domestic law with human rights standards is the Bill of Rights reporting mechanism. Section 7 of the Bill of Rights requires the Attorney-General to report to Parliament on any draft legislation that appears inconsistent with the Bill of Rights. The Ministry of Justice and the Crown Law Office examine all draft legislation and advise the Attorney-General accordingly.
29. Legislative compliance with the Convention and other human rights standards therefore depends in significant part upon the robustness and effectiveness of this vetting by the executive branch of government, and political restraint by both the legislative and executive branches. This is especially so given New Zealand’s unicameral legislature and the ability to pass legislation under urgency.
30. Many aspects of the Bill of Rights reporting mechanism function well. Successive Attorneys-General (including the current Attorney-General) have reported in a fair, politically impartial and robust manner on a number of bills. That said, the Law Society has on occasion expressed concern about the rigour of section 7 advice and reporting. It is illustrative, for example, that the Ministry of Justice’s legal advice on the strip-searching provisions of the Corrections Amendment Act 2013 (referred to in paragraphs [12] – [13] above) did not consider the right not to be subjected to degrading treatment.
31. The Law Society’s specific comments, concerns and recommendations follow.

⁵ *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand* CAT/OP/NZL/1 (2014) at [21].

⁶ *Concluding observations of the Committee against Torture: New Zealand* CAT/C/NZL/CO/5 (2009) at [4].

Inadequate consideration of section 7 advice/reports of the Attorney-General

32. It is important that where Bill of Rights implications are raised they are subject to systematic and comprehensive parliamentary scrutiny. The Law Society welcomes the recent amendment of Parliament's Standing Orders to require all section 7 reports to stand referred to a select committee for consideration,⁷ and hopes that this will improve the systematic consideration of these issues.

Recommendation: That the Committee welcomes the recent amendment of Parliament's Standing Orders to require all section 7 reports to stand referred to a select committee for consideration, with the expectation that this will improve the systematic consideration of these issues.

Enactment of legislation despite a negative section 7 report of the Attorney-General

33. The reporting mechanism is intended to ensure that legislation complies with the Bill of Rights. However, on a number of occasions Parliament has enacted legislation despite a negative section 7 report, including the Sentencing and Parole Reform Act 2010 (referred to at paragraphs [7] – [9] above) which raises questions of consistency with the Convention.
34. Legislation enacted despite a negative section 7 report should be subject to a "sunset clause" to enable it to be periodically reconsidered.

Recommendation: That New Zealand consider amending the New Zealand Bill of Rights Act 1990 so that any bill enacted despite a section 7 report of the Attorney-General ceases to have effect after three years (the length of the New Zealand parliamentary term) from the date of its enactment unless re-enacted or affirmed by Parliamentary resolution before that date, following in either case consideration by a select committee with the opportunity for public submissions.

Failure to report on substantive Supplementary Order Papers

35. Supplementary Order Papers (SOPs) propose amendments to bills after their introduction into Parliament. SOPs are not routinely subject to Bill of Rights reporting. In the Law Society's view, this is problematic. For example, a 2012 SOP proposing greater mandatory use of invasive strip-searching of prisoners (a measure referred to in paragraph [11.c] above) was not considered for consistency with the Bill of Rights despite raising questions of compliance with both domestic and international human rights standards.
36. Where proposed amendments engage domestic and international human rights obligations, the usual reporting mechanism ought to apply.

⁷ See SO 265(5). The recommended amendments to Standing Orders were debated and adopted by the House on 30 July, and came into effect on 15 August 2014: <http://www.parliament.nz/resource/en-nz/00HOHPBReferenceStOrders4/eb7c8b9e4a6c7aa88a47d14dc4100513b2557e60>.

37. The Standing Orders Committee of the House of Representatives has recommended that Bill of Rights reporting be required on substantive SOPs.⁸ The Law Society has also formally suggested to the Attorney-General that Bill of Rights advice and reporting on substantive SOPs ought to be standard procedure. In its view, this would be in the spirit of section 7 of the Bill of Rights and would provide the necessary assurance that the rights implications of SOPs had been considered as closely as if the proposed amendments had been in the Bill as originally introduced.

Recommendation: That New Zealand amend its New Zealand Bill of Rights Act 1990 reporting mechanism to require section 7 advice and reporting on substantive SOPs.

NEW ZEALAND'S RESERVATION TO ARTICLE 14

38. New Zealand has entered a reservation to article 14 of Convention:

The Government of New Zealand reserves the right to award compensation to torture victims referred to in Article 14 of the Convention against Torture only at the discretion of the Attorney-General of New Zealand.

39. When New Zealand entered that reservation in 1989, the Bill of Rights was yet to pass into law (it followed in 1990). The New Zealand courts have since held that a person who has suffered a violation of rights guaranteed by the Bill of Rights can seek compensation in respect of that violation. There have been a number of cases, including cases involving prisoners, where the courts have awarded compensation for inhuman and degrading treatment. The Law Society notes that in its follow-up responses to the concluding observations of the Committee dated 19 May 2010 (CAT/C/NZL/CO/5/Add1 at [61]-[62]) the New Zealand government indicated that it was reviewing the further steps, if any, necessary to withdraw this reservation in light of various developments, including redress available under the Bill of Rights.
40. In the Law Society's view, it is now appropriate for the government to withdraw the reservation which has been in place for 25 years. There is no reason in principle why victims of torture or other ill-treatment should not receive compensation, as assessed by the courts, in an appropriate case.
41. As regards compensation, the Law Society notes that the Prisoners' and Victims' Claims Act 2005 significantly restricts the circumstances in which the courts are able to make compensation awards to victims of torture or degrading treatment, who are detained in prison and, further, restricts the ability for prisoners to have access to any award of compensation that is made (with first claim on such compensation being given to the victims of the plaintiff prisoner). The Law Society's recommendation in respect of this legislation is set out at paragraph [18] above.

⁸ *Review of Standing Orders* (Report of the Standing Orders Committee, September 2011) at 37.
http://www.parliament.nz/en-nz/pb/sc/documents/reports/50DBSCH_SCR56780_1/review-of-standing-orders-2014-i18a

LIMITED INFLUENCE OF CONCLUDING OBSERVATIONS AND INTERNATIONAL HUMAN RIGHTS NORMS IN NEW ZEALAND

42. In the List of Issues prepared by the Committee before the submission of New Zealand's sixth periodic report, the Committee requested information on:
- (a) developments in the legal and institutional framework for the protection and promotion of human rights;
 - (b) the new political, administrative and other measures taken to protect and promote human rights; and
 - (c) any other new measures and developments undertaken to implement the Convention and the Committee's recommendations.
43. In this regard, the Law Society wishes to draw the Committee's attention to the limited visibility and impact of UN treaty bodies' concluding observations and of international human rights obligations in New Zealand, and note its concern about the effect of this on adherence to these obligations.⁹
44. The concluding observations of the Committee and other UN treaty bodies on New Zealand State party reports, and the treaties themselves, have only a very limited influence on policy and law-making in New Zealand.¹⁰ The New Zealand government has no formal process for publicising, considering and responding to concluding observations.¹¹ Recent empirical research indicates that knowledge in the New Zealand public sector and by parliamentarians of New Zealand's international human rights obligations is limited.¹²
45. Scant (if any) attention is paid in Parliament to concluding observations or New Zealand's international human rights obligations.¹³ Concluding observations regarding New Zealand have been referred to by New Zealand courts and tribunals in only a very limited number of cases.¹⁴ Further, while the courts have cited the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child on various occasions, other human rights treaties have only been referred to sporadically.¹⁵ The media pay little attention to concluding

⁹ The Law Society earlier raised these concerns in a shadow report dated 17 June 2013, to the 18th Session of the Human Rights Council on New Zealand's 2nd Universal Periodic Review.

¹⁰ Jasper Krommendijk *Can Mr Zaoui Freely Cross the Foreshore and Seabed? The Effectiveness of UN Human Rights Monitoring Mechanisms in New Zealand* (2012) 43 VUWLR 579 at 585, 600-604 and 615.

¹¹ Krommendijk, above n 10 at 583.

¹² Krommendijk, above n 10 at 585 and 591-592.

¹³ Krommendijk, above n 10 at 591.

¹⁴ To the Law Society's knowledge, the only instances are *Sutton v Accident Compensation Corporation* [2014] NZACC 344 (District Court) at [23]; *Zanzoul v Removal Review Authority* (CIV-2007-485-1333, 9 June 2009, High Court) at [243]; *Taunoa v Attorney-General* [2008] 1 NZLR 429 (Supreme Court) at for example [228]; and *Re New Truth & TV Extra 4 November 1994* (1996) 3 HRNZ 162 (Film and Literature Board of Review) at 176. In *Re BG (Fiji)* [2012] NZIPT 800091 (Immigration and Protection Tribunal) observations regarding Fiji were referred to at [18], and in *Ye v Minister of Immigration* [2009] 2 NZLR 596 (Court of Appeal, overturned on appeal to Supreme Court) observations regarding Canada and Germany were referred to at [140]. See further Krommendijk, above n 10 at 592-593.

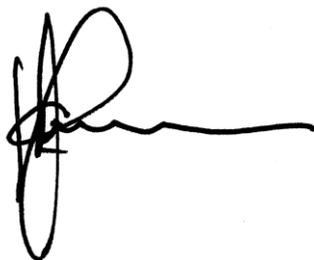
¹⁵ Krommendijk, above n 10 at 593.

observations or international human rights obligations,¹⁶ and there is a low level of awareness about them amongst the New Zealand public.¹⁷

Recommendation: That New Zealand establish a formal process for publicising, considering and responding to concluding observations, and take concrete, targeted steps to develop knowledge of international human rights within the state. In this regard, consideration should be given to the establishment of a Parliamentary Human Rights Committee.

CONCLUDING RECOMMENDATION

Recommendation: That the Committee's Concluding Observations be tabled in the House of Representatives.

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a series of loops and a long horizontal tail.

Chris Moore
President, New Zealand Law Society

¹⁶ Krommendijk, above n 10 at 606.

¹⁷ Krommendijk, above n 10 at 612.