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Wellington

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UN Committee Against Torture: New Zealand's seventh periodic review 2019 – draft report

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the draft report of the New Zealand Government (draft report), to be submitted to the United Nations Committee Against Torture (Committee).
2. The Committee's aim in its work under article 40 is to "engag[e] in a constructive dialogue with each reporting State".¹ In the Law Society's view, that aim is best facilitated by State reporting that is objective, transparent, non-selective, constructive and non-politicised.² The Law Society's comments on the draft report are directed to that end.
3. In the Law Society's view, the draft report should be amended to provide a more objective and transparent response to a number of the issues it covers.
4. The report, when finalised, will play an important role in promoting fulfilment of New Zealand's human rights obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture), and it is therefore important the report presents New Zealand's response to these obligations in a full, objective and transparent manner. Accordingly, the Law Society recommends that the report should provide a full account of the concerns expressed below.

Article 3: Refugees and asylum seekers

Draft report

5. The Committee has asked for information about the way New Zealand will ensure that detention of asylum seekers is used only as a last resort.³ The draft report addresses the way that New Zealand responds to asylum applications at [72] – [95] and [255] – [257]. At [74] the draft report notes that amendments to the Immigration Act 2009, introduced by the Immigration Amendment Act 2013, relating to mass arrivals of asylum seekers, remain in force, but have not been applied.

¹ See Human Rights Committee Guidelines Regarding the Form and Contents of Periodic Reports from States Parties CCPR/C/20/Rev.2 (1995) at [4].

² Compare the principles of the universal periodic review mechanism: Resolution on Institution-building of the United Nations Human Rights Council GA Res 5/1 (2007) at [3(g)].

³ United Nations Committee Against Torture List of issues prior to submission of the seventh periodic report of New Zealand at [23].

Concerns previously expressed

6. In the concluding observations on the sixth periodic report, the Committee expressed concern about the Immigration Amendment Act 2013,⁴ which allows the detention of mass arrival groups of asylum seekers for an initial period of up to six months with a limited right to apply for judicial review. Both the Committee on the Elimination of Racial Discrimination⁵ and the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁶ also expressed concern about the proposed legislation prior to enactment.
7. As stated in its shadow report for New Zealand's sixth periodic review, the Law Society considers the 2013 Act is inconsistent with section 22 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), the corresponding article 9 of the International Convention 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.
8. The Law Society also considers that the Immigration Amendment Act 2013 raises issues under article 3 of the Convention against Torture. As noted by the Subcommittee, the Act may have the effect of depriving persons in need of protection of their liberty based solely on the manner of their arrival in the New Zealand.
9. The Law Society notes General Comment No.4:⁷
 - 12. Any person found to be at risk of torture if deported to a given State should be allowed to remain in the territory under the jurisdiction, control or authority of the State party concerned so long as the risk persists. The person in question should not be detained without proper legal justification and safeguards. Detention should always be an exceptional measure based on an individual assessment and subject to regular review. ...*
 - 14. States parties should not adopt dissuasive measures or policies, such as detention in poor conditions for indefinite periods, refusing to process claims for asylum or prolonging them unduly, or cutting funds for assistance programs to asylum seekers, which would compel persons in need of protection under article 3 of the Convention to return to their country of origin in spite of their personal risk of being subjected to torture and other cruel, inhuman or degrading treatment or punishment there. (Footnotes omitted.)*
10. Similar comments have been made by the Special Rapporteur: any detention of migrants must be justified on an individual basis, brief, re-assessed over time, and take into account less invasive means of achieving the same ends.⁸

⁴ United Nations Committee against Torture Concluding observations on the sixth periodic report of New Zealand at [18], CAT/C/NZL/CO/6 (2015).

⁵ United Nations Committee on the Elimination of Racial Discrimination Concluding observations on the eighteenth to the twentieth periodic reports of New Zealand, adopted by the Committee at its eighty-second session (11 February-1 March 2013) at [20], CERD/C/NZL/CO/18-20 (2013).

⁶ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand at [22], CAT/OP/NZL/1 (2017).

⁷ General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, CAT/C/GC/4 (2018).

⁸ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment at [21]-[24], A/HRC/37/50 (2018).

Comments on draft report

11. The Immigration Amendment Act 2013 creates a risk that people who have a genuine asylum claim may be subjected to lengthy periods of detention before that claim is determined. Whilst the offending provisions have not been applied in practice, the Act may have the effect of dissuading asylum seekers from seeking refuge in New Zealand and increase their personal risk of persecution elsewhere. In those circumstances, the Act may breach article 3 of the Convention.
12. The Law Society considers that the significant concerns about these provisions should be acknowledged, in order to more fully address the request in the Committee's list of issues.

Article 11

Prison overcrowding – cell-sharing

13. The Committee has asked New Zealand to describe the measures taken to reduce prison overcrowding,⁹ having previously noted concerns that overcrowding remains a problem in many places of detention.¹⁰
14. The draft report reflects on the growing prison population in New Zealand, noting that the reasons for the increase are complex, and that the rising prison population means that double-bunking is necessary.¹¹
15. The draft report goes on to say that reforms aim to reduce overcrowding. In order to be objective and accurate, the assessment should include the fact that New Zealand is in the process of enacting legislation to reverse the preference for single-cell accommodation, contrary the United Nations Standard Minimum Rules for the Treatment of Prisoners.
16. Under those rules, cell-sharing is intended to be the exception, not the norm. That is reflected in the current New Zealand legislation, but that presumption would be reversed under the Corrections Amendment Bill 2018. The Law Society has raised concerns about that reversal.¹²

Privacy in at-risk prison cells

17. The draft report states that there are ongoing legislative amendments aimed at developing a comprehensive framework for the management of prisoners at risk of self-harm.¹³ The privacy of at-risk prisoners is an important part of these considerations, which should be reflected in the report.
18. Part C of Schedule 2 of the Corrections Regulations 2005 requires that at-risk cells contain "[n]o privacy screening or any other barrier that prevents a full view of the cell from the door window". In addition, apparently all at-risk cells are constantly monitored by CCTV footage. As a result, prison staff may observe prisoners in real time as they use toilets or are in states of

⁹ United Nations Committee against Torture List of Issues prior to submission of the seventh periodic report of New Zealand at [18], CAT/C/NZL/QPR/7 (2017).

¹⁰ United Nations Committee against Torture Concluding observations on the sixth periodic report of New Zealand at [13], CAT/C/NZL/CO/6 (2015)

¹¹ New Zealand's Seventh Periodic Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Draft] at [139] – [140] and [155].

¹² New Zealand Law Society submission on the Corrections Amendment Bill [15] to [23].

¹³ New Zealand's Seventh Periodic Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Draft] at [192].

undress. It appears this may include any staff member who is present at staff base or master control.¹⁴

19. In a March 2018 OPCAT Report, the Chief Ombudsman considered that this amounted to degrading treatment or punishment for the purposes of the Convention.¹⁵ He recommended that Part C of Schedule 2 be amended. The Chief Ombudsman made similar recommendations in April 2018,¹⁶ August 2018¹⁷ and April 2019.¹⁸
20. The Chief Ombudsman's March 2018 report noted that a project led by the Corrections Chief Custodial Officer, specifically addressed to the issue of prisoner privacy, was expected to report back in August 2018. The Law Society is not aware of the outcome of that project but, given there are no proposed amendments to Part C of Schedule 2 in the Corrections Amendment Bill currently before Parliament, it appears that the Chief Ombudsman's recommendation has not been addressed.
21. The findings of the Chief Ombudsman should be specifically referred to in the report, and an update on the project led by the Corrections Chief Custodial Officer should also be provided.

Strip searching

22. The Committee has asked New Zealand to address in the report, the measures that have been taken to address concerns about the excessive resort to strip searches.¹⁹ As the Committee noted in its concluding observations on the sixth periodic report, the Corrections Amendment Act 2013 authorises the mandatory strip-searching of prisoners in a broad range of circumstances.²⁰
23. The draft report notes at [167] that the Corrections Amendment Bill 2018, currently before Parliament, would introduce an individualised approach for at-risk prisoners and would provide that a scanner search using imaging technology may be undertaken in place of strip searches.²¹ The Law Society acknowledges that the Regulatory Impact Statement for the Corrections Amendment 2018 Bill says that scans are less intrusive and could reduce reliance on strip searches.²² However, the Law Society notes that the opportunity has not been taken in that Bill to amend the provisions of the Act governing strip searches that have been criticised by the Committee. These provisions may include invasive or disproportionate measures, such as:

¹⁴ Chief Ombudsman "OPCAT Report: Report on an unannounced inspection of Whanganui Prison Under the Crimes of Torture Act 1989" (29 August 2018) at 13.

¹⁵ Chief Ombudsman "OPCAT Report: Report on an unannounced inspection of Upper Hutt (Arohata) Under the Crimes of Torture Act 1989" (22 March 2018) at 13.

¹⁶ Chief Ombudsman "OPCAT Report: Report on an unannounced follow up inspection of Christchurch Women's Prison Under the Crimes of Torture Act 1989" (4 April 2018) at 4, 6 and 9.

¹⁷ Chief Ombudsman "OPCAT Report: Report on an unannounced inspection of Whanganui Prison Under the Crimes of Torture Act 1989" (29 August 2018) at 13-14.

¹⁸ Chief Ombudsman "OPCAT Report: Report on an unannounced follow up inspection of Hawke's Bay Regional Prison Under the Crimes of Torture Act 1989" (April 2019) at 12-13.

¹⁹ United Nations Committee Against Torture List of issues prior to submission of the seventh periodic report of New Zealand at [18].

²⁰ United Nations Committee against Torture Concluding observations on the sixth periodic report of New Zealand at [13], CAT/C/NZL/CO/6 (2015).

²¹ Corrections Amendment Bill 2018, clause 25.

²² Box L.3, page 25 of the Regulatory Impact Statement, 13 February 2018.

- a. requiring a prisoner to bend their knees, with legs spread apart, until their buttocks are adjacent to their heels;
 - b. the use of illuminating or magnifying devices; and
 - c. mandatory strip-searching of at-risk prisoners.²³
24. Those concerns remain, and the Law Society recommends amending the draft report to acknowledge these risks.

Mechanical restraints

25. The draft report states that legislative proposals will allow use of restraints for more than 24 hours when prisoners are treated in hospital.²⁴ This is a reference to the Corrections Amendment Bill 2018 which, if passed, will amend the Corrections Act 2004 to allow the use of mechanical restraints for more than 24 hours if it is “necessary to secure a prisoner who has been temporarily removed to a hospital outside the prison for treatment”.²⁵
26. As the Ministry of Justice notes in its advice on the Bill’s consistency with the Bill of Rights Act, the “use of mechanical restraints has significant implications for individuals’ humanity and dignity, particularly in relation to the most restrictive types of restraint such as a ‘tie-down bed.’”²⁶
27. The use of restraints for lengthy periods is plainly degrading treatment and inconsistent with the right of detained persons to be treated with humanity and dignity. The Ministry of Justice cites the March 2017 report of the Ombudsman, which found that the use of tie-down beds and/or waist restraints in the circumstances of five prisoners amounted to cruel, inhuman or degrading treatment or punishment for the purpose of Article 16 of the United Nations Convention against Torture.²⁷ It notes that tie-down beds are not used in comparable jurisdictions that have ratified the Optional Protocol to the Convention Against Torture, including England and Wales, Scotland and Sweden.²⁸
28. In light of this, the current summary lacks transparency, and should be amended to acknowledge the rights-infringing nature of these measures.

Typing error

29. The draft report makes a reference at [198] to [131131]. That should be amended to [131].

²³ New Zealand Law Society submission on the Corrections Amendment Bill [35] to [41].

²⁴ New Zealand’s Seventh Periodic Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Draft] at [198]

²⁵ Corrections Amendment Bill 2018, clause 20(1).

²⁶ Advice to the Attorney-General on consistency of Corrections Amendments Bill with NZBORA, 2 March 2018, at paragraph 29.

²⁷ Office of the Ombudsman A question of restraint – Care and management for prisoners considered to be at risk of suicide and self-harm (1 March 2017)

²⁸ New Zealand Law Society submission on the Corrections Amendment Bill [9] to [10].

Non-consensual commitment on mental health grounds

30. The draft report summarises the manner in which persons can be detained on mental health grounds.²⁹ It notes that the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 is considered to be a last resort and acknowledges that its use relies on legal and clinical threshold criteria being met. The time limit for consultation with health professionals is also stated.
31. The Law Society raised several concerns prior to the enactment of this legislation.³⁰ In particular:
 - a. The timeframe for concluding the review of a patient’s compulsory detention status is too long. The combined effect of sections 29 and 31 of the Act is to allow for compulsory detention of up to 17 days (if the person is under the age of 18) or 27 days before a review of their compulsory treatment is finally determined by a court. The Law Commission recommended that the maximum period of detention and treatment without final determination should be 14 days. The Law Society agrees.
 - b. Notwithstanding the right of a patient to apply for “urgent review” of their compulsory detention status, there is no prescribed timeframe in which that review must take place. Without a clear timeframe for review there is potential for the arbitrary detention of persons who no longer meet the criteria for compulsory treatment. By way of comparison, an application for writ of habeas corpus is typically given priority over any other matter in the High Court and, in any event, to be heard within three working days of being filed.³¹
32. The draft report should be amended to explicitly refer to the maximum period for which a patient can be detained under this legislation.

Articles 12 and 13: Criminal Cases Review Commission

33. The government’s draft report states that the Criminal Cases Review Commission was established in 2018.³² At the time of writing, that is not correct: the Criminal Cases Review Commission Bill 2018 remains under consideration by Parliament, and the draft report should be amended to record this.

Article 14: Prisoners’ and Victims’ Claims (Continuation and Reform) Amendment Act 2013

34. The draft report notes that under the Prisoners and Victims Claims Act 2005, courts can and have awarded compensation and other remedies for breaches of the Bill of Rights Act.³³
35. 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

²⁹ New Zealand’s Seventh Periodic Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Draft] at [267] – [270].

³⁰ New Zealand Law Society submission on the Substance Addiction (Compulsory Assessment and Treatment) Bill 2016.

³¹ Habeas Corpus Act 2001, section 9.

³² New Zealand’s Seventh Periodic Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Draft] at [322].

³³ New Zealand’s Seventh Periodic Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Draft] at [344].

expired under a sunset clause), in restricting awards of compensation to prisoners for rights breaches. 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. The 2005 Act further restricts the right of prisoners to access any awards made by giving first claim to any victims of the plaintiff prisoner.

36. Prior to the enactment of the 2005 Act, the Attorney-General concluded that the Act would be consistent with the right to an effective remedy and the right to freedom from discrimination affirmed in section 19 of the Bill of Rights Act. When it came to the 2013 Act, the Attorney-General reached the opposite conclusion, following a change of government, that the Bill leading to the 2013 Act was inconsistent with the Bill of Rights Act for failure to provide an effective remedy.
37. The Law Society considers that the 2005 and 2013 Acts are unnecessary given the approach outlined by the Supreme Court in 2007 in *Taunoa v Attorney-General*,³⁴ 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 was allowed to expire. The ruling establishes that: (a) the courts should award compensation for a breach of the Bill of Rights Act 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 considers that the courts should determine when it is necessary to compensate prisoners in order to provide an effective remedy for rights abuses.
38. The Law Society notes that the Committee recorded 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.³⁵ In its 2015 concluding observations, the Committee also recommended that the government amend those provisions of the 2013 Act that might be inconsistent with the aim of the Convention.³⁶
39. No steps have been taken to amend the 2013 Act and the substance of the 2005 Act has not been amended since that time. The Law Society remains of the view that those Acts are unnecessary and recommends amending the report to acknowledge the Committee’s 2009 and 2015 observations, and to more fully address the request in the Committee’s list of issues.³⁷

New Zealand’s reservation to article 14

40. New Zealand entered a reservation to article 14 in 1989:

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.

³⁴ *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

³⁵ United Nations Committee against Torture Concluding observations of the Committee against Torture: New Zealand at [14], CAT/C/NZL/CO/5 (2009).

³⁶ United Nations Committee against Torture Concluding observations on the sixth periodic report of New Zealand at [19], CAT/C/NZL/CO/6 (2015).

³⁷ United Nations Committee Against Torture List of issues prior to submission of the seventh periodic report of New Zealand at [29].

41. The draft report acknowledges this reservation,³⁸ but concludes that the availability of compensation for victims of torture means that removing the reservation “would not affect the legal position of claimants.”
42. The Committee has repeatedly recommended the withdrawal of the reservation.³⁹ As noted in its shadow report on the sixth periodic review,⁴⁰ the Law Society also considers that there is no good reason why the reservation should not be withdrawn. Withdrawing the reservation to article 14 would affirm New Zealand’s commitment to the aims of the Convention and the principle of effective redress.
43. It is correct that New Zealand courts can award compensation for breaches of the Bill of Rights Act, including for breaches of section 9 (the right not to be subjected to torture or cruel, degrading or disproportionately severe treatment or punishment). However, as noted above, the Prisoners’ and Victims’ Claims Act 2005 significantly restricts the circumstances in which the courts can make compensation awards to victims of torture or degrading treatment where the victim was a prisoner at the time, and further restricts the ability of the victim to access any award of compensation that is made.
44. This section of the draft report should be cross-referenced to the paragraphs addressing the Prisoners’ and Victims’ Claims Act 2005, and should be amended to refer to the impact of that Act on the ability and likelihood of prisoners actually being awarded compensation.

Conclusion

45. The Law Society trusts this submission will assist the Ministry in finalising the draft report. If further information or discussion would assist, please contact the convenor of the Law Society’s Human Rights and Privacy Committee, Dr Andrew Butler, through the Law Society’s Law Reform Advisor, Dunstan Blay (dunstan.blay@lawsociety.org.nz).

Yours faithfully



Tiana Epati
President

³⁸ New Zealand’s Seventh Periodic Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Draft] at [355].

³⁹ United Nations Committee against Torture Concluding observations of the Committee against Torture: New Zealand at [14], CAT/C/NZL/CO/5 (2009), United Nations Committee against Torture Concluding observations on the sixth periodic report of New Zealand at [20], CAT/C/NZL/CO/6 (2015), and Subcommittee on Prevention of Torture and Other Cruel, inhuman or Degrading Treatment or Punishment - Country Visit Report 2017 CAT/OP/NZL/1 at [19] and [23a].

⁴⁰ New Zealand Law Society “United Nations Convention against Torture: New Zealand’s sixth periodic review, 2015 – shadow report”, 13 February 2015, at [38]-[41].