



P O Box 106343  
Downtown  
Auckland  
+64 9 3567075  
✉ [humanrightsfoundation@xtra.co.nz](mailto:humanrightsfoundation@xtra.co.nz)

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HUMAN RIGHTS FOUNDATION OF NEW ZEALAND  
TUĀPAPA TIKA TANGATA O AOTEAROA

[www.humanrights.co.nz](http://www.humanrights.co.nz)

## **Human Rights Foundation Aotearoa New Zealand**

*shadow report to the*

### **15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> consolidated report of the New Zealand Government**

**under the International Convention on the Elimination of All Forms of Racial Discrimination**

*being considered by the*

### **United Nations Committee on the Elimination of All Forms of Racial Discrimination**

June 2007

## **1. Introduction**

- 1.1 This submission is on behalf of the Human Rights Foundation of Aotearoa New Zealand. It is a shadow report to the New Zealand government's 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> consolidated periodic report to the United Nations Committee on the Elimination of all Forms of Racial Discrimination.
- 1.2 The Human Rights Foundation is a non-governmental organisation, established in December 2001, to promote and defend human rights through research-based education and advocacy. We have made submissions on new laws with human rights implications. We also monitor compliance and implementation of New Zealand's international obligations in accordance with the requirements of the international conventions New Zealand has signed, and have prepared parallel reports for relevant United Nations treaty bodies to be considered alongside official reports. Though the primary focus of the Foundation is on human rights in New Zealand, we recognise the universality of human rights and have an interest in human rights in the Pacific and beyond.
- 1.3 We appreciate this valuable opportunity to present our views to the Committee.

## **2. Executive Summary**

- 2.1 This report seeks to provide the Committee with information which will assist its consideration of New Zealand's periodic report ("the periodic report"). The periodic report covers many issues and we do not seek to address them all. Instead we focus on a number of issues of concern to us, in particular immigration issues.
- 2.2 On the detention of asylum seekers, we seek to provide broader information than that which is found in the periodic report. We then introduce two issues which are not mentioned in the periodic report, but which we believe are pertinent to the Committee's review of New Zealand's compliance with CERD. Both related to New Zealand's response to the 'war on terror'; these are the security risk certificate process and the establishment of the Immigration Profiling Group.

### **3. Detention of asylum seekers**

- 3.1 In 2002, the Committee noted its concern that almost all asylum-seekers presenting themselves at the border after the events of 11 September 2001 were initially detained. It noted the successful challenge to the Immigration Service in the High Court by the Human Rights Foundation and the Refugee Council. It further noted the appeal, still pending at the time, by the Immigration Service and the likelihood of the practice resuming if the appeal was successful.<sup>1</sup>
- 3.2 In response to the Committee's concern, the periodic report under consideration refers the Committee to the New Zealand government reports to the Committee Against Torture. At paragraphs 3 and 214, the Committee is referred explicitly to the third periodic report to the Committee Against Torture<sup>2</sup> for 'information on refugees and refugee status claims, including New Zealand's approach to asylum seekers after 11 September 2001.'
- 3.3 This is extraordinary given that the third (and fourth consolidated) report covers the period 1 January 1995 to 1 January 2001.<sup>3</sup> The report contains no information on New Zealand's approach to asylum seekers after 11 September 2001. This third (and fourth consolidated) periodic report was reviewed by the CAT at its 32<sup>nd</sup> session in May 2004. Concerns about increased asylum seeker detention after 9/11 were raised by civil society groups at this review.
- 3.4 As a result, in 2004, fully two years after the Committee on the Elimination of all forms of Racial Discrimination had first noted its concerns, the Committee Against Torture also expressed concern about asylum detention. It noted 'the significant decrease of the proportion of asylum seekers who are immediately released unrestricted into the community upon arrival, and the detention of several asylum seekers in remand prisons, with no segregation from other prisoners.'<sup>4</sup>
- 3.5 The CAT also requested further information within a year on the government's efforts implement recommendations on, among other things, ensuring that the fight against terrorism does not lead to undue hardship imposed on asylum

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<sup>1</sup> Committee on the Elimination of all forms of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand*. 1 November 2002.

<sup>2</sup> Committee Against Torture, Third periodic reports of states parties due in 1999: New Zealand. 09/08/2002. CAT/C/49/Add.3. (State Party Report)

<sup>3</sup> The third periodic report came to be considered as the third and fourth consolidated reports, presumably due to backlog issues. At paragraph 10 of the Committee's Conclusions and Recommendations the Committee considered that the third periodic report also included the fourth periodic report due on January 8 2003 (Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: New Zealand*. 11/06/2004. CAT/C/CR/32/4. (Conclusions and Recommendations), Paragraph 10). As such, the fifth periodic report covers the period 1 January 2003 to 1 January 2007. Effectively, 2001 and 2002 have not been reported on.

<sup>4</sup> Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: New Zealand*. 11/06/2004. CAT/C/CR/32/4. (Conclusions and Recommendations), Paragraph 6(b).

seekers, and establishing a time limit beyond which detention and restrictions on asylum seekers may not be continued.

- 3.6 Therefore the issue of asylum seeker detention is approached directly, albeit briefly, in the comments of the government of New Zealand to the conclusions and recommendations of the Committee Against Torture (2/08/2005, CAT/C/CR/32/4/RESP.1). Paragraphs 3 – 7 outline the legal framework, which allows detention at either approved premises (such as the Mangere Centre) or in penal institutions, with administrative and judicial review required in the first instance after 28 days and thereafter on a weekly basis. The comments declare time limits unnecessary in light of the review requirements.
- 3.7 Paragraphs 30 and 31 are also relevant. These explain how immigration detainees and asylum seekers are treated the same as accused prisoners (that is, remand prisoners); and that regulations require accused and convicted prisoners to be held separately. However, the co-habitation of asylum seekers with accused/remand prisoners is precisely the concern of the CAT. The comments also give the assurance that no immigration detainee or asylum seeker will be held in non-voluntary segregation.
- 3.8 The New Zealand government submitted its fifth periodic report to the CAT in January 2007.<sup>5</sup> The report has occasional mentions of refugee and asylum seeker issues, particularly under Article 3 on non-refoulement and under Article 11 in relation to the case of Ahmed Zaoui, to be outlined below. Neither the comments to CAT nor the fifth periodic report include information on detention policy under the Operational Instructions which inform Immigration Service practices. They do not indicate how many and which asylum seekers are subject to detention, and how many are released into the community. Thus these documents do not respond directly to the Committee's concerns.
- 3.9 The Foundation notes Recommendation 5 of General Recommendation number 30: 'States parties are under an obligation to report fully upon legislation on non-citizens and its implementation.'

### ***Asylum seeker detention since 2002***

- 3.10 The Committee will be aware that in 2002, the Human Rights Foundation and the Refugee Council initiated court proceedings against the Crown which challenged its policy regarding asylum seekers in the wake of 9/11. The High Court made important rulings on the application of national and international refugee law in relation to the detention of asylum-seekers in New Zealand.

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<sup>5</sup> The report is not yet on the Treaty Database. It can be downloaded from the website of the Ministry of Foreign Affairs and Trade, <http://www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/Human-Rights/Treaties/upcoming.php>

- 3.11 In May 2002, the Court ruled that asylum-seekers retained a right to seek bail from detention, and that their “invariable automatic detention cannot be ‘necessary’” in almost all cases as practised under the new government policy. In June, the Court found that an Operational Instruction on the detention of asylum-seekers, issued under this policy by the New Zealand Immigration Service in September 2001, was unlawful because it failed to comply with national and international refugee law.
- 3.12 The rulings were overturned on appeal in 2003. The Court of Appeal did not, however, make specific findings in relation to the claim that there was a policy of wholesale detention. The Court of Appeal stated it was not in a position to do so given there were insufficient plaintiffs. In the opinion of the counsel this issue remains unresolved, but further court action by the Foundation has been hampered by lack of funding.
- 3.13 In the meantime, in the light of the High Court decision, the Immigration Service issued a new Operational Instruction.<sup>6</sup> This was not altered following the Court of Appeal decision. Effectively, little has changed. Since the rulings, the authorities have continued to detain nearly all newly arrived asylum-seekers, reportedly on the grounds that their identity is unconfirmed and that therefore the risk that they might commit an offence or abscond can not be assessed.<sup>7</sup> However, as noted by Glazebrook J, *obiter*, lack of travel documentation could not be a sufficient basis to detain refugee claimants given that refugees are often forced to travel without a genuine passport.
- 3.14 In 2005, a discussion paper prepared by a prominent lawyer in the field stated that ‘the government has a policy to restrict asylum seekers coming to New Zealand, detaining those who do get to New Zealand as a deterrent and removing failed asylum seekers with no monitoring of their human rights. There are inadequate procedural safeguards for detained refugee claimants – the most significant being a lack of access to legal aid for proceedings seeking *habeus corpus* or for asylum seekers to review their detention in either the District Court or the High Court.’<sup>8</sup>
- 3.15 It should be noted that, since 2001, in common with other western countries, numbers of asylum seekers arriving at New Zealand’s borders have dropped significantly. This has been reflected in figures relating the number of successful claimants. In 2002/2003, there were 247 successful claimants; in

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<sup>6</sup> Concerns about lack of transparency and ad hoc decision making in the Immigration Service should be noted. Operational Instructions are typically not publicly available and need to be requested under the Official Information Act: they can also be readily suspended, amended or removed.

<sup>7</sup> Amnesty International, *Amnesty International Report 2003: New Zealand*, <http://web.amnesty.org/report2003/Nzl-summary-eng>.

<sup>8</sup> Deborah Manning, *Council for International Development: Refugee Policy Development Discussion Paper*, January 2005, p.1. Available as PDF through [www.cid.org.nz](http://www.cid.org.nz).

2003/2004, 115; in 2004/2005, this number dropped to 81. This number dropped further in 2005/2006 to 67 successful claimants.<sup>9</sup>

- 3.16 There are concerns that one of the causes of this drop in numbers is the New Zealand government's own off-shore practices, often carried out in conjunction with Australia, particularly its increased emphasis on interdiction and advanced passenger screening processes imposed upon airlines.
- 3.17 While the practice of interdiction purportedly targets people smugglers and illegal migrants - 'boatpeople' - there seem to be no mechanisms in place to ensure that genuine refugees are not being prevented from reaching New Zealand's borders. UNHCR reports to the Foundation and other NGOs that the Borders and Investigations unit of the Immigration Service agreed to refer all 'interdicted' persons to a UNHCR office, which is encouraging. It is not clear at present whether this is occurring, but it does not appear to be the case, especially in countries of first asylum which are not signatories to the UNHCR Convention.
- 3.18 Asylum seekers that do present at the border, and whose identity the authorities claim is "unclear", are taken to the Papakura Police Station until a Warrant of Commitment to detain them is obtained. They usually remain there for 24-48 hours. There are ongoing concerns about the appropriateness of facilities at the police station. These include a lack of hygiene facilities and overcrowding. Although concerns have been frequently highlighted and acknowledged, little has been done to alleviate them. There is no regular monitoring or ongoing training of police officers.
- 3.19 Once a Warrant of Commitment is obtained, the majority are detained at the Mangere Refugee Centre, an open detention centre in South Auckland. Detainees at Mangere are those who pose a low security risk and whose identity is uncertain. In 2004, 46 spontaneous arrivals were detained there; in 2005, 59; in 2006, 41; and to date in 2007, 14.<sup>10</sup>
- 3.20 A small percentage are detained at the Auckland Central Remand Prison. In 2004, 9 were detained there; in 2005, 16; in 2006, there were 6. To date in 2007, 2 asylum seekers have been detained there. Asylum seekers have also been detained in other penal institutions, including Mt Eden Prison, Waikeria Prison, and Arohata Prison.<sup>11</sup>
- 3.21 Those that are detained in penal institutions, as stated in the current Operational Instruction issued by the Immigration Service, are those who present a clearly identifiable risk of offending, absconding, or otherwise threatening national security and the public order. It is important to note that the

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<sup>9</sup> Department of Labour, Te Tari Mahi, *Migration Trends 2005/2006*.

<sup>10</sup> Information obtained from Refugee Status Branch, June 2007.

<sup>11</sup> Information obtained from Refugee Status Branch, June 2007.

- risk of absconding, in particular, is subject to a very broad interpretation. The nature of threats to national security or public order is similarly loosely defined. The Immigration Service exercises a broad discretion in ordering detention.
- 3.22 Though prison authorities claim that asylum seekers are being held separately from other inmates, in line with UNHCR Guidelines, the Human Rights Foundation maintains that a penal institution is an inappropriate place to detain asylum seekers. There have been reports of assaults in the prison and of inadequate interpreting services, among other concerns.<sup>12</sup>
- 3.23 As mentioned in government's comments to the CAT, claimants are taken before the District Court after 28 days and thereafter every 7 days for a review of their detention. However, one lawyer was led to comment: 'with all due respect to the Court, there is a weekly charade of 'review' at the Manukau District Court on a Friday whereby the detention of asylum seekers is extended for seven days.'<sup>13</sup> Difficulties are compounded by a lack of legal aid.
- 3.24 Claimants are now able to apply for conditional release to stay at either an Immigration Service funded hostel, or with a member of their family or community. In practice this unfortunately presents persistent difficulties. The hostels are usually full, and there is no financial assistance available for release into the community, nor access to identity documentation. This makes it difficult for claimants to secure, for example, medical appointments.<sup>14</sup>

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<sup>12</sup> Deborah Manning, *Council for International Development: Refugee Policy Development Discussion Paper*, January 2005, p.3. Available as PDF through [www.cid.org.nz](http://www.cid.org.nz).

<sup>13</sup> *Ibid.*

<sup>14</sup> For detailed practice issues concerning the detention of asylum seekers at the end of 2003, see Deborah Manning, *The Detention of Refugee Claimants: Law, Procedure and Practicalities*, Auckland District Law Society Seminar, 25 November 2003.

#### **4. Security Risk Certificates: flaws in immigration legislation**

- 4.1 We note that the Committee on the Elimination of All Forms of Racial Discrimination has expressed concern about the effects of security risk certificates in other jurisdictions. In its concluding statement to Canada in March 2007, the Committee noted concern 'about the use of security certificates under the Immigration and Refugee Protection Act by the State party which provides for indefinite detention without charge or trial of non-nationals who are suspected of terrorism-related activities.'<sup>15</sup>
- 4.2 New Zealand has a similar provision, with similar effect, for the issuance of security risk certificates. The Foundation raised the issue in its report to the Committee Against Torture in 2004. Section 1140 in Part IVA of the Immigration Act 1987 (as inserted by the Immigration Amendment Act 1999) establishes a process for the detention of an individual seeking asylum on the basis of a threat assessment issued by the National Bureau of Criminal Intelligence of the New Zealand Police, and for the subsequent issuing of a security risk certificate by the Director of the Security Intelligence Service (SIS).
- 4.3 This process was established prior to 9/11, but its use in the atmosphere of heightened security concerns, not all of them based on reality, has revealed a potential for the violation of New Zealand's human rights obligations. These possibilities include indefinite detention, including in a penal institution. There is nothing to prevent human rights abuses such as prolonged solitary confinement or prevention of family reunification, and the subsequent mental suffering arising from such circumstances.
- 4.4 In this context, the words of Kofi Annan, former Secretary General of the United Nations, need to be seriously considered: 'If we compromise on human rights in seeking to fight terrorism, we hand terrorists a victory they cannot achieve on their own.'

#### ***The case of Ahmed Zaoui: an illustration of the risk certificate process***

- 4.5 The flaws in the legislation are being illustrated by the case of Ahmed Zaoui, an Algerian refugee who arrived in New Zealand in 2002 and was the first recipient of a security risk certificate. His case is not an exception but an example of the weakness in the current legislative framework. Mr. Zaoui arrived on 4 December 2002 and sought refugee status. He was immediately detained. A security risk certificate was issued on 20 March 2003, based on information neither he nor his counsel are able to access.

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<sup>15</sup> Committee on the Elimination of all forms of Racial Discrimination, CERD/C/CAN/CO/18, paragraph 14.

- 4.6 On 1 August 2003, Mr Zaoui was granted refugee status by the Refugee Status Appeals Authority (RSAA). Despite this, on the basis of the risk certificate, he was kept in detention in penal institutions until December 2004. Ten and a half months of Mr. Zaoui's detention was in solitary confinement in Paremoremo Maximum Security Prison. Mr. Zaoui was finally released on bail with conditions after the Supreme Court held on 25 November 2004 that under Section IVA, 'alternative premises' for ongoing detention were permissible.
- 4.7 Mr. Zaoui now resides with the Dominican Friars in Auckland, under curfew from 10pm until 6am, and with twice weekly reporting requirements. As the Supreme Court of New Zealand has acknowledged, "release on bail is not liberty."

### ***Ongoing delays to the risk certificate review***

- 4.8 Mr. Zaoui appealed this security certificate to the Inspector General of Intelligence and Security seven days after it was issued. More than 48 months after Mr. Zaoui filed this appeal, the Inspector-General's review is yet to be completed.
- 4.9 There have been various delays. The resignation of the former Inspector General following allegations of bias against people originating from Muslim countries was an early obstacle. However Justice Paul Neazor, the new Inspector General, was appointed on 8 June 2004. His term is now nearing its end.
- 4.10 The review was suspended during an appeal relating to various aspects of the Inspector General's interlocutory decision on the scope and procedure of the review, including his decision to exclude human rights concerns from consideration. Even so, the final Supreme Court decision on this appeal was issued on 21 June 2005, almost two years ago. These events and processes cannot justify the ongoing delays in resolving Mr Zaoui's status.
- 4.11 The Solicitor-General indicated to the Supreme Court in December 2004 that the review of the security certificate would take only six to twelve months. As it currently stands, the review is reportedly expected to conclude in July 2007, just prior to the end of Justice Neazor's term as Inspector General. However, an imminent conclusion to the review has been announced before and has not eventuated.

### ***Family reunification***

- 4.12 Mr Zaoui's circumstances have been made more difficult by the New Zealand Government's refusal to allow his wife and four minor children to join him from Malaysia, where they currently reside. The United Nations High Commissioner for Refugees has recognised his wife and children as refugees in Malaysia, a country that is not a party to the 1951 Refugee Convention. They are, therefore, prone to the possibility of forced deportation or return.
- 4.13 The United Nations High Commissioner for Refugees has twice recommended and requested that the New Zealand government allow the reunification of Mr. Zaoui's family in New Zealand, but the Minister of Immigration has declined to do so.

### ***Review of the legislation: Section IVA***

- 4.14 The Foundation has serious concerns that the review remains unfinished. Zaoui's liberty continues to be restricted, and he has been unable to see his family for five years. Many NGOs and individuals, including Human Rights Watch in a recent letter to Helen Clark<sup>16</sup> and Amnesty International in its 2007 World Report,<sup>17</sup> have expressed continued and increasing concern about the New Zealand Government's handling of the Zaoui case.
- 4.15 The government is currently reviewing the Immigration Act. However, Section IVA is not included in this review process. Responding to internal pressure and a recommendation from the Committee Against Torture in 2004 that the government take 'immediate steps to review the legislation relating to the security risk certificate,' the government promised a review of this section. However this has not been done.
- 4.16 The Human Rights Foundation is concerned that, in the meantime, any legislative or structural flaws may expose future refugees arriving in New Zealand to similar periods of prolonged detention and undue delays. In the climate of hysteria created by the 'war on terror', the Foundation is concerned about the possibility that such legislative flaws may be more likely to adversely affect individuals of particular backgrounds, including race, colour, descent, or national or ethnic origin.
- 4.17 Any future amendments of the immigration legislation should reflect New Zealand's human rights obligations under the ICERD and include an explicit non-discrimination clause.

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<sup>16</sup> Human Rights Watch, New Zealand: Letter to Helen Clark asking for review of refugee standards, January 24 2007, <http://hrw.org/english/docs/2007/01/24/newzeal15179.htm>

<sup>17</sup> Amnesty International, *Amnesty International Report 2007: The State of the World's Human Rights*, p.197, <http://thereport.amnesty.org/eng/Download%20the%20Report>

## **5. Immigration Profiling Group**

- 5.1 In June/July 2005, the government established the Immigration Profiling Group (IPG) within the Immigration Service of the Department of Labour. The IPG is charged with processing all applications for entry to the country from a secret list of a fluid number of 'high risk' countries. The list of such countries is dynamic, changing according to perceptions of the local environment and global circumstances. The IPG is also reviewing all applications from these "high-risk" countries approved in the 2 years prior to its establishment. The terms of reference of the IPG have not been made public.
- 5.2 The IPG is having a clear effect. In 2006, visitor visa rejections jumped from 9% to 24%. Those having the hardest time getting a visitor visa were from the Middle East, South Asia and Africa. The government refuses to confirm or deny any particular countries or regions being targeted, though it is clear that certain countries such as Somalia, Afghanistan and Iraq are on the list.
- 5.3 The work of the IPG has impacted severely on regularising the immigration status of refugees from the listed countries. For example, no spontaneous Somali refugees (among others) have been granted residency permits since the inception of the Immigration Profiling Group. It has been the normal practice to grant such permits once refugee status has been recognised.
- 5.4 The basis on which residency is being refused to Somali refugees is reportedly inadequate proof of identity, and inadequate evidence of how they entered the country. Both types of information are extremely difficult for Somalis to procure given that the country has not had a functioning government since 1991, and their need to use clandestine modes of entry into New Zealand. It should be noted that all these individuals have been through the refugee determination process prior to IPG involvement. The RSAA carries out very thorough investigations into asylum seekers' backgrounds and history.
- 5.5 Refused residency, these refugees are usually granted 6 month work permits instead. This means they are living in a state of constant uncertainty, finding it difficult to secure employment or enter into long term commitments of any kind. They are also unable to study. This completely contradicts the government's refugee settlement policies.
- 5.6 These issues have been raised at all major refugee forums over the past two years. Concerns include the immigration status of refugees as well as wider impacts of IPG operations and criticisms of its processes and functioning. These concerns include inconsistency between the work of the IPG and the government's own policies, inconsistency in decision making, and long delays, meaning decisions are regularly made outside timeframes given, for example.

- 5.7 The potential effect of creating settlement difficulties for affected refugees, including the securing of employment, is to perpetuate racial discrimination. As in other Western liberal democracies, some New Zealand communities are already suspicious of refugees and do not support giving them asylum. They ignore the valuable contributions refugees make to the societies that take them in. It is imperative that effective settlement is encouraged in order to avoid exacerbating these attitudes.
- 5.8 More generally, the practice of profiling as a security measure has been long debated in the United States and elsewhere. Its efficacy has been questioned, with critics suggesting terrorists could, for example, easily employ 'blue eyed blonds' to bypass such race-based systems, using recruits with a 'neutral' skin colour and nationality to undertake the requisite travel. Recent events have shown that terrorists can be nationals of Western liberal democracies.
- 5.9 In other words, this obsession with national origin, fails to acknowledge the trans-national reach and strategies of terrorists. It is not effective in combating terrorism. The end result of profiling is to perpetuate stereotypes and discriminate against individuals from certain nationalities.
- 5.10 The Human Rights Foundation is seriously concerned about the discriminatory effect of the IPG reliance on nationality. We note that IPG decisions already seem to be having an adverse effect on refugees from countries in which particular conditions make it difficult to obtain identity documents.

**The Foundation recommends:**

- That government review immigration legislation, including section IVA of the Immigration Act, to clarify obligations under the International Convention on the Elimination of all forms of Racial Discrimination and other international treaties;
- The incorporation of an explicit non-discrimination clause in immigration legislation;
- That Section 149D of the Immigration Act be repealed: this excludes the jurisdiction of the Human Rights Commission in respect of government immigration policy and individual decisions giving effect to immigration policy (the repeal of this section is also an element of the Human Rights Commission's strategic framework for race relations and human rights);
- That government review the existence of the Immigration Profiling Group in light of their obligations under the International Convention on the Elimination of all forms of Racial Discrimination.