BEFORE THE UNITED NATIONS COMMITTEE AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

C/- Secretariat, Committee Against Torture
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
8-14 Avenue de la Paix,
CH- 1211 Geneva 10, Switzerland

IN THE MATTER OF NEW ZEALAND'S 5TH PERIODIC REPORT

ALTERNATIVE SHADOW REPORT - FILED BY TONY ELLIS AND ANTONY SHAW, BARRISTERS OF THE HIGH COURT OF NEW ZEALAND

AUTHOR: STATE PARTY: NEW ZEALAND

TONY ELLIS/ANTONY SHAW
Barristers
Blackstone Chambers
P.O. Box 24347
Wellington
New Zealand
Email: ellist@ihug.co.nz

INDEX

A. INFORMATION NOTE

Who is this report written for?

1. This Shadow Report is primarily written for the independent members of the United Nations Committee Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment **("the Committee")** for their formal consideration of New Zealand's fourth[1] periodic report under the Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment[2] **("the Convention" or "CAT"),** which is scheduled for 1 and 4 May 2009 in Geneva.

Who are the authors?

2. This Shadow Report is jointly submitted by two practicing human rights lawyers in New Zealand - Mr. Tony Ellis,[3] and Mr. Antony Shaw.[4] It was prepared on a pro-bono basis[5] with the assistance of Mrs

---

1 New Zealand has presented four periodic reports under Article 40 of the ICCPR – 1983, 1990, 1995, and 2002.

2 One of the principal instruments of international human rights law is the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [the "ICCPR" or the "Covenant"], to which New Zealand is party.

3 LL.B (Monash, Australia), LL.M, (Victoria University Wellington, NZ), M.Phil (Law) (Essex, UK), SJD candidate (La Trobe, Australia); Barrister of the High Court of New Zealand and Australia; Counsel in several leading human rights cases in New Zealand courts (e.g. *Taunoa* [2007] NZSC 70 in which the Supreme Court found a breach of Section 23(5) of the Bill of Rights Act and affirmed monetary compensation for affected prisoners); *R v Taito* [2003] 3 NZLR 577 in which the Privy Council found a breach of the right to legal aid representation, and subsequently *R v Smith* [2003] 3 NZLR 617 where the Court of Appeal determined that 1500 appellants were also entitled to a new appeal if they sought one; and *Moonen v Board of Film and Literature Review* (1999) 5 HRNZ 224).Counsel for several individual communications to the UN Human Rights Committee in Geneva, including *Rameka v New Zealand* (finding of a breach of Article 9(4), ICCPR), and *EB v New Zealand* (finding of a breach of Article 14, ICCPR); former President of the New Zealand Council for Civil Liberties for eight years until Dec 2008.

4 B.A, LL.B (Auckland, NZ); Barrister of the High Court of New Zealand; former Lecturer, Faculty of Law, Victoria University of Wellington; Consulting Editor of the Human Rights Reports of New Zealand; Counsel in several leading human rights cases in New Zealand courts: *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC); *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (SC); *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (PC); *Police v Kohler* [1993] 3 NZLR 129 (CA); *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA); *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA); *Shortland v Northland Health Limited* [1998] 1 NZLR 433 (CA); *Manga v Attorney-General* [2000] 2 NZLR 65 (CA); *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA); *R v Pora* [2001] 2 NZLR 37 (CA); *Brown v Attorney-General* [2005] 2 NZLR 40 (CA); *R v Timoti* [2006] 1 NZLR 323 (CA); *Simpson v Attorney-General [Baigent's case]* [1994] 3 NZLR 667 (CA), and *Beggs v Attorney-General* [2006] 2 NZLR 129 (HC); .

5 As New Zealand's Legal Aid scheme does not cover shadow reports submitted to UN human rights treaty bodies, this report was prepared pro-bono. The authors thank Mr. Naresh Perinpanayagam - B.A, LL.B, LL.M (*Victoria University of Wellington)*, a Barrister of the High Court of New Zealand, (and from 2005-2007 an Associate Human

Susanne Ruthven.[6]

What is a 'Shadow Report'?

3. A Shadow Report is a report to the Committee from a source other than the Government. By becoming a party to the Convention (ratification in 1989), New Zealand voluntarily agreed to participate in the Committee's reporting and monitoring process.

4. Every few years there is an exchange of reports and correspondence, and an interactive dialogue session in Geneva between the Committee and the Government.

5. The last examination under the Convention was concluded in May 2004[7], following which the Committee released a report with recommendations[8] **("concluding observations").** The Committee's concluding observations (along with its 'views' on individual communications submitted under the Article 22 communications procedure) while not formally binding as a matter of law, constitute authoritative interpretations of international human rights law.

6. International courts, as well as national courts in both common and civil law jurisdictions (including New Zealand), have regularly relied on the Committee's statements when interpreting/applying the Convention.

7. As required, New Zealand has submitted its fifth Periodic Report to the Committee, which the Committee will consider alongside any other new information it receives. Other such information includes recent reports of New Zealand by other UN human rights treaty bodies and independent experts, plus a variety of national sources.

8. One of the most useful national sources for the UN's human rights treaty bodies is the independent 'alternative reports' also known as 'Shadow Reports'. Like third-party 'amicus curie briefs' in national courts or expert submissions to Parliamentary Committees, Shadow Reports are now commonly submitted to the UN human rights treaty body committees by interested national parties. Examples of such parties include independent national human rights institutions, non-governmental organisations **("NGOs")** working in the field of human

---

Rights Officer in the Office of the United Nations High Commissioner for Human Rights) - for his technical advice on format.

6 The authors thank Mrs Susanne Ruthven - LL.B (Victoria University of Wellington, New Zealand); Barrister of the High Court of New Zealand; Vice-President and Acting President of the New Zealand Council for Civil Liberties – for providing legal research, analysis and drafting.

7 The Committee considered New Zealand's third periodic report (CAT/C/49/Add.3) under the Convention at its 604th, 607th and 616th meetings, held on 11, 12, and 19 May 2004 (CAT/C/SR.604, 607, and 616)

8 Conclusions and recommendations of the Committee against Torture: New Zealand CAT/C/CR/32/4 (11 June 2004)

rights, or lawyers who act on behalf of victims of human rights abuses.[9] While this 'Shadow Reporting process' is regularly utilized in commonwealth and western countries, it is rarely used by organisations in New Zealand. While this can be attributed to a lack of staffing/funding, unawareness that such a possibility exists is also a major barrier. The authors hope that, as a secondary goal, this report raises awareness in New Zealand of the Shadow Reporting process.

What is the 'added value' of preparing a separate Shadow Report, especially when there was the option of commenting on the Government's draft fifth periodic report?

9. Experience has shown that most Governments especially those with upcoming national elections - are highly unlikely to give equal weight, as they should, to 'the not so good' as well as 'the good.'

10. In the Foreword of the fourth periodic report, the Minister of Justice (the Hon. Mark Burton) claims *"**considerable** progress has been made in further addressing New Zealand's obligations under the Convention"*

11. With respect, the authors simply cannot agree. By highlighting some of the 'not so good' areas, this Shadow Report aims to fill some of the gaps in the fourth periodic report.

What does the Shadow Report say?

12. As Justice Louise Arbour, the United Nations High Commissioner for Human Rights from 2004-2008, recently noted:[10]

> A State's compliance with its obligations under the [International Covenant on Civil and Political Rights] and other human rights treaties [including the Convention Against Torture] reflects its basic commitment to the rule of law… in developed democracies, national standards of protection will often meet, or even surpass, the requirements of international law. That result cannot be assumed, however. Whether national standards fully satisfy the requirements of international law must be carefully assessed on a case-by-case basis.

13. In 2005, two leading New Zealand human rights lawyers, Dr Andrew Butler[11] and Dr Petra Butler,[12] published "The New Zealand Bill of

---

9 For example, see the national Shadow Reports (from the Australian Human Rights Commission, NGO's and lawyers groups) submitted for Australia's CAT examination. http://www2.ohchr.org/english/bodies/cat/cats40.htm

10 Brief of Amicus Curie, Cite with website

11 Dr Andrew Butler; BCL (NUI, Dub), LLM (Osgoode), PhD (EUI, Florence); Barrister and Solicitor of the High Court of New Zealand, Solicitor (England); former Counsel, Human Rights Team, Crown Law Office; former Lecturer, Faculty of Law, Victoria University of Wellington (VUW); Senior Solicitor, Russell McVeagh Barristers and Solicitors, Wellington.

12 Dr Petra Butler; LLM (VUW), PhD (Georg-August University); Barrister and Solicitor of the High Court of New Zealand; former Judge's Clerk on South African Constitutional Court; former Legal Advisor, Bill of Rights Team, Ministry of Justice, Wellington; Senior Lecturer, Faculty of Law, Victoria University of Wellington (VUW). Member of the New

Rights Act: a commentary." (Their commentary "is intended to be the authoritative text on the law relating to the New Zealand Bill of Rights Act 1990,"[13] and is thus cited in support of this Shadow Report).

14. In the foreword of that commentary, Sir Geoffrey Palmer,[14] repeats the widespread belief in this country that:

> New Zealand has always prided itself on respecting fundamental human rights…[Historically] the rhetorical political tendency was to say that New Zealand always honoured fundamental human rights without looking to see whether the claim was valid. Too often it was not. Administrative convenience, a tendency to trust the state and the use of its powers, and a homogenous political culture with a unicameral legislature made New Zealand in historical terms rather self satisfied and uncritical about rights.

15. In 2008/2009, a critical self-examination of New Zealand's legal and administrative framework shows many significant areas in which we can still do much better. A selection of some of these deficiencies - considerable at times in respect of our international human rights obligations - are explained in this Shadow Report, along with recommendations for the Committee to consider.

More information

16. This Shadow Report is dated March 2009. If there are substantive changes before the Committee's scheduled examination in Geneva, the authors may also submit a brief update closer to May 2009.

17. It is also common practice for authors of Shadow Reports to attend Committee examinations (which are always open to the public). Additionally authors often meet officially and privately with Committee members, including 'Country Rapporteur' (the Committee member designated to lead that particular State Party examination).

18. Though not compulsory, the primary advantage for the Committee in having authors present is the opportunity for more in-depth discussion and dialogue.

19. Thus, in addition to this brief written submission, one of the authors of this Shadow Report may also attend the Committee's examination and the Human Rights Committee's examination, as there is inevitably some overlap between the two reports.

B. COMMON THEMES AND RECOMMENDATIONS

Zealand delegations to the Human Rights Committee (2002) and Committee on Economic, Social and Cultural Rights (2003)

13 Back cover, Butler A and Butler P, 2005, *The New Zealand Bill of Rights Act: a commentary*

14 Former Attorney-General and Prime Minister of New Zealand; current President of the New Zealand Law Commission

Reservation to CAT

20. New Zealand has a 'reservation' to CAT, that:

> 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.

21. Article 14 of CAT says that:

> 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
>
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

22. Since 1989 (when New Zealand ratified CAT), there has been no review of this reservation. This is indicative of a lack of good faith at a political level - a lack of political priority to give full effect to Covenant rights in New Zealand.

23. The Human Rights Committee's General Comment 31/14 clearly noted, at paragraph 14 that:[15]

> The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

24. In its 2004 Concluding Observations, at paragraph 4(j), the Committee "noted with appreciation… the declared intent [of New Zealand] to withdraw reservations to [CAT and other international treaties]…"

The Authors urge the Committee to again recommend in stronger language that New Zealand withdraw its reservation to Article 14, in line with international best practice, and its declared intent.

In practice, the Convention/Covenant is not recognised as law

25. The Convention and International Covenant on Civil and Political Rights **("the Covenant" or "ICCPR")** is not directly enforceable in New Zealand courts. In the author's experience, Convention and Covenant claims have been 'struck out' by Judges as non-justiciable (see paragraph 63, *Clark v Attorney-General*, Associate Justice Gendall, High Court Wellington, 27 may 2005 CIV-2004-485-1902).

---

[15] Human Rights Committee, General Comment 31, ' Nature of General Legal Obligation on States Parties to the Covenant, U.N. Doc CCPR/C/21/Rev.1/Add.13 (2004).

26. There is a lack of Convention recognition - leading to the non-implementation of Convention rights - amongst the legislative, judicial and executive branches.

27. The starting point is mistakenly and commonly New Zealand law, whereas the correct starting point - for the Committee, and the Authors —is the Convention.

Limited application and interpretation of Bill of Rights Act

28. In 2002, the Human Rights Committee noted its "regret" that the Bill of Rights had "no higher status than ordinary legislation". The State Party notes in response (in the fifth report under the ICCPR[16], and with reference to information provided in earlier reports) that

> The principal concern that led Parliament to decide against according the Bill of Rights a higher status than ordinary legislation was that this would involve a significant shift in the constitutional balance of power from Parliament to the judiciary. It was also considered that such a fundamental shift might lead subsequently to some intrusion of political factors in the appointment of members of the judiciary. Although some courts cannot strike down legislation, they do wield considerable power in protecting rights and freedoms. This has been achieved in a number of ways, including the judicial creation of new remedies to give effect to the rights guaranteed by the Bill of Rights Act and the use of Section 6 of the Bill of Rights that legislation be interpreted consistently with rights and freedoms where possible.

29. In other words, the State agrees with the Committee that the application and interpretation of the Bill of Rights Act is limited. However, the State (in Bill of Rights litigation over the past decade) has also consistently opposed the creation or aimed to limit the scope of new judicial remedies (for example see the Government's legal submissions in *Baigent's case*[17]).

30. Moreover, the Courts themselves have rarely referred to ICCPR jurisprudence.[18] (In a 2005 article, Butler and Butler[19] note that of more than 200 cases reported in the specialist law report series *Human Rights Reports* and the *New Zealand Bill of Rights Reports*, only some 35 contained references to the ICCPR, only five cases referred to the

---

16 New Zealand Government's Fifth Periodic Report to the Human Rights Committee under ICCPR, paragraph 7.

17 *Simpson v Attorney-General [Baigent's case]* [1994] 3 NZLR 667 (CA). In this case, the plaintiffs sought monetary compensation for breaches of the right to be free from unreasonable search and seizure. Over Crown Law objections, the Court of Appeal found in favour of the plaintiffs and the ICCPR (in particular section 2(3)) was a prominent feature in the Judgment.

18 See the comments of Sir Ivor Richardson, retired President of the Court of Appeal, on the lack of training on the Bill of Rights Act or ICCPR for New Zealand Judges – The Rt Hon Sir Ivor Richardson, *The New Zealand Bill of Rights: Experience and Potential, including the implications for Commerce*, Canterbury Law Review 2004, p259-272, 260.

19 The New Zealand Bill of Rights Act: A Commentary New Zealand, 2005, LexisNexis, paragraph 4.5

views of the Human Rights Committee, and only two referred to General Comments).

31. In Butler and Butler's view, the overall impact of the ICCPR has been largely rhetorical rather than interpretive. This can equally be said of the Convention.

Lack of effective remedies to implement Convention rights

32. The fundamental right to an effective remedy is weak. Article 2 of the Convention provides:

> Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

33. Article 14(1) of the Convention provides:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

34. In 1982, The Human Rights Committee in General Comment No. 7 (Sixteenth session, 1982 provides:[20]

> 1. In examining the reports of States parties, members of the Committee have often asked for further information under article 7 which prohibits, in the first place, torture or cruel, inhuman or degrading treatment or punishment. The Committee recalls that even in situations of public emergency such as are envisaged by article 4 (1) this provision is non-derogable under article 4 (2). Its purpose is to protect the integrity and dignity of the individual. The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. **Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.** Among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers and family members access to the detainees; provisions requiring that detainees should be held in places that are publicly recognized and that their names and places of detention should be entered in a central register available to persons concerned, such as relatives; provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in court; and measures of training and instruction of law enforcement officials

[20] Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies HRI/GEN/1/Rev.7 pg 152-153

not to apply such treatment.

35. In 1992, The Human Rights Committee's General Comment 20 (Forty-fourth session, 1992), which reflected and further developed General Comment No. 7 (the sixteenth session, 1982) provides:[21]

> 14. **Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant**. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with.
>
> 15. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. **States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.**

The Authors encourage the Committee to mirror the recommendations made by the HRC in General Comments 7 and 20 that the State Party must read Article 7 in conjunction with Article 2(3) of the Covenant by ensuring an effective remedy is available for Convention breaches.

Optional Protocol to CAT

(a) Mental Health Problems

36. People with mental health problems are another minority group that the State has failed to provide proper protection for.

37. The State Party does not provide people with mental health problems with an advocate who understands mental health issues, to explain about the criminal justice system and how it relates to their situation, in words someone with a mental health problem can understand.

38. The State Party does not provide any funding particular to people with mental health problems to assist them when dealing with the criminal justice system.

39. Moreover, there is no national preventive mechanism mandated to protect people with mental health problems.

40. The Annual Report of The Ombudsmen 2001/2008 at page 8, states:

---

[21] Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies HRI/GEN/1/Rev.7 pg 152-153

> In our visits to prisons we observe a number of prisoners who, through no fault of their own, tend to the irrational in their behaviour. Routine contact with prisoners reveals a noticeable number who quite plainly suffer from some form of mental illness or personality disorder of a severity which would seem to require hospitalisation and/or significant medical intervention.
>
> …
>
> It appears there is a "gap" in the system which defines mental health conditions, and which results in more mentally ill people being present in prisons than would be expected by chance. Dr Sandy Simpson, Honorary Clinical Associate Professor and Clinical Director at the Mason Clinic, said in an article published in "Rethinking Crime and Punishment", Newsletter No 35, April 2008:
>
> > "In a major study of mental illness in New Zealand prisons, we found that the most serious mental illnesses (psychotic illness, bipolar mood disorder and major depression) were over represented in prison. We estimated that about 15% of all inmates should be receiving mental health care for one of these problems, as they would in the community. Lifetime substance misuse problems were present in over 80% of inmates."
>
> …
>
> This issue concerns us greatly. We would urge that all prisoners with mental illness who need access to in-patient beds should be able to be provided with this without delay.

41. The Mental Health Commission's Oct 2005 briefing to the incoming Minister of Health[22] stated at p 27:

> The Department of Corrections is responsible for primary health care for inmates; the Ministry of Health and DHBs are responsible for secondary and tertiary care. However, in mental health there is little clarity about the interface between primary and secondary care, and there are considerable gaps in service delivery for inmates. Effectively there is very little primary or secondary mental health care in prisons. There is resulting pressure on forensic mental health services, demand for secondary care and a range of negative effects for individuals and their communities arising from poor quality mental health care.
>
> > This area is complicated. We are not currently doing specific work in this area although there has been a number of discussions with the Department of Corrections. They and the Ministry of Health are largely focused on forensic care issues, which are important, but don't address the area of primary mental health need. As prison numbers rise the problem of inmates' mental health will grow. It appears that neither Corrections nor health are

[22] http://www.mhc.govt.nz/publications/documents/show/114-briefing-to-the-incoming-minister-of-health-pdf-391kb

> funded for primary mental health. Opportunities for Ministerial input may arise in decisions on prison expansion.

The Authors encourage the Committee in strong terms to urge the State Party to provide appropriate placement of prisoners with mental health issues and also proper health care without delay.

(b) National Preventative Mechanisms

42. Article 17 of the Optional Protocol to CAT, provides:

> 17. Each State party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventative mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralised units may be designated as National preventative mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

43. The Human Rights Commission as the Central National Preventive Mechanism, has the role of co-ordinating New Zealand's National Preventative Mechanism:

a) The Office of the Ombudsmen;

b) The Independent Police Conduct Authority;

c) The Office of the Children's Commissioner; and

d) The Inspector of Service Penal Establishments of the Office of the Judge Advocate General.

44. Part 2 of the Crimes of Torture Act 1989 purports to *"enable New Zealand to meet its international obligations under the Optional Protocol"*[23] by providing for the designation of several independent national preventative mechanisms.

45. However, the Crimes of Torture Act 1989 does not provide *"robust regime for compliance with the Optional protocol to the Convention."*[24]

46. It doesn't make the decisions of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture binding. As these are only recommendatory, the State Party does not have to give effect to them.

47. Moreover, the only National Preventative Mechanism that complies with the *Paris Principles* is the Office of the Ombudsmen.

48. The Independent Police Conduct Authority's recent annual report 2007 –2008 at page 7, provides that:

> The Authority is an independent Crown entity under the Crown

---

23 Section 15 Crimes of Torture Act 1989

24 State Party's Report, page 2, para 4

> Entities Act 2004**. It is funded through Vote: Justice. The responsible minister is Associate Minister of Justice the Honourable Rick Barker.** As a Crown entity, it is independently governed and operated.

49. According to the Independent Police Conduct Authority's annual report at page 42, *"the Independent Police Conduct Authority is primarily funded through revenue received from the Crown."*

50. The Annual Report records in its financial statements, at page 36, as having received a total of $2,586,000 revenue from the State Party for the year ending 30 June 2008.

51. The Independent Police Conduct Authority simply cannot be independent of the State in breach of the *Paris Principles*, if the State Party primarily funds the Independent Police Conduct Authority, and if it reports to the State Party through its Associate Minister of Justice.

52. Similarly, New Zealand's Central National Preventative Mechanism, the Human Rights Commission is not independent of the State in breach of the *Paris Principles*, in that it is primarily funded by the State Party through its Ministry of Justice, and reports to the State Party, through its Minister of Justice.

53. The Independent Police Conduct Authority's recent Annual Report 2007 –2008 at pages 8 and 14 provides:

> The Authority's investigators carry out inquiries into serious complaints and incidents such as those in which Police actions have caused or appear to have caused death or serious injury, and allegations of corruption or other serious misconduct. Investigators may also oversee Police inquiries.
>
> **All of the Authority's investigators are former senior police officers** from New Zealand or other Commonwealth nations, chosen for their experience and expertise in criminal investigation, and for their integrity.
>
> …
>
> In February 2008, Fuimaono Les McCarthy was appointed Chief Executive of the Authority. Mr McCarthy spent nine years as Chief Executive of the Ministry of Pacific Island Affairs. He has also practised as a lawyer and**, for 25 years, served as a member of New Zealand Police as a detective, prosecutor, and national head of Professional Standards (formerly known as Internal Affairs).** He holds the degrees of Master of Laws (with Honours) and Master of Business Administration, and is a Fellow of the New Zealand Institute of Management.

54. The Independent Police Conduct Authority again cannot be providing the quasi-judicial function of being impartial and independent, if all of its investigators responsible for carrying out inquiries on New Zealand Police are former or current Police Officers. It creates at least the appearance of bias, if not actual bias on behalf of the investigators to have fellow Police Officers, albeit sometimes former Police Officers,

investigating a complaint against a Police Officer.

55. Despite its name, the Independent Police Conduct Authority simply is not an independent body.

56. Although the Office of the Ombudsmen is independent in terms of the *Paris Principles*, the Ombudsmen's decisions are not binding on the State Party. They are recommendatory only. The State Party does not have to give effect to their recommendations.

The Authors encourage the Committee to urge the State Party to adopt independent National Preventative Mechanisms that fully comply with the Paris Principles.

(c) Maori overrepresentation in Prisons

57. The HRC Committee in its General Comment No. 2, provides:[25]

> **v. Protection for individuals and groups made vulnerable by discrimination or marginalization**
>
> 20. The principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to die interpretation and application of the Convention. Non-discrimination is included within the definition of torture itself in article 1, paragraph 1, of the Convention which explicitly prohibits specified acts when carried out for *"any reason based on discrimination of any kind..."*. The Committee emphasizes that the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture.
>
> **21. The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment.** State Parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum seekers, refugees or others under international protection, or any other status or adverse distinction. **States Parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection including but not limited to those outlined above.**
>
> [**Bold added**]

58. Prisoners are persons especially at risk of torture and other cruel, inhuman or degrading treatment or punishment. In New Zealand, Maori

---

[25] General Comment No. 2 of the Committee Against Torture, CAT/C/GC/CRP.1/Rev.4 (23 November 2007), paras 20-21

are over-represented in prisons. According to the Department of Corrections report of the Overrepresentation of Maori in the Criminal Justice System:[26]

> Relative to their numbers in the general population, Māori are over-represented at every stage of the criminal justice process. Though forming just 12.5% of the general population aged 15 and over, 42% of all criminal apprehensions involve a person identifying as Māori, as do 50% of all persons in prison. For Māori women, the picture is even more acute: they comprise around 60% of the female prison population.
>
> The true scale of Māori over-representation is greater than a superficial reading of such figures tends to convey. For example, with respect to the prison population, the rate of imprisonment for this country's non-Māori population is around 100 per 100,000. If that rate applied to Māori also, the number of Māori in prison at any one time would be no more than 650. There are however currently 4000 Māori in prison - six times the number one might otherwise expect.
>
> Further, a recent extraction of court criminal history data indicated that over 16,000 Māori males currently between the ages of 20 and 29 years have a record of serving one or more sentences administered by the Department of Corrections. This equates to more than 30% of all Māori males in that age band; the corresponding figure for non-Māori appears to be around 10%. At any given point in time throughout the last decade, fully 3% of all Māori males between the ages of 20 and 29 years were in prison, either on remand or as sentenced prisoners; again, the corresponding figure for non-Māori is less than one sixth of that.
>
> Over-representation in offender statistics is mirrored also by over-representation of Māori as victims of crime, a result of the fact that much crime occurs within families, social networks or immediate neighbourhoods.
>
> This state of affairs represents a catastrophe both for Māori as a people and, given the position of Māori as tangata whenua, for New Zealand as a whole. Far too many Māori, during what might otherwise be the most productive years of their lives (and, in terms of raising the next generation, some of the most critically important), end up enmeshed in the harsh, conflict-ridden and potentially alienating sphere of the criminal justice process.
>
> The effects on racial harmony are also pernicious. The figures lend themselves to extremist interpretations: at one end, some accuse the criminal justice system of being brutally racist, as either intentionally or unintentionally destructive to the interests and well-being of Māori as a people. At the other, there are those who dismiss the entire Māori race as constitutionally "criminally inclined".

59. The State Party does not provide any proper protection for Maori. The rights of minorities in the Criminal Justice System simply aren't considered, let alone given effect to.

---

[26] "Over-representation of Māori in the criminal justice system: An Exploratory Note" Policy, Strategy and Research Group, Department of Corrections (September 2007), page 6

60. The State Party's report to the Committee does not report statistics relating to minority group's representation in prison, and how they are being treated.

61. The Committee on the Elimination of Racial Discrimination in its concerns and recommendations at paragraph 425 and 426, provides:[27]

> 425. The Committee continues to be concerned at the low representation of Maori women in a number of key sectors and their particular vulnerability to domestic violence. It encourages the State party to work towards reducing existing disparities through appropriate strategies.
>
> 426. While noting the measures that have been taken by the State party to reduce the incidence and causes of crime within the Maori and Pacific Island communities, the Committee remains concerned at the disproportionately high representation of Maori and Pacific Islanders in correctional facilities. The State party is invited to ensure appropriate funding for the measures envisaged or already initiated to address the problem.

The Authors urge the Committee to report what measures the State Party has taken to address the problem of over-representation of Maori in New Zealand prisons, and what steps they have taken to provide Maori with adequate rehabilitation in an effort to prevent re-imprisonment.

C. CAT PRINCIPAL SUBJECTS OF CONCERN AND RECOMMENDATIONS

Article 2 – Structural deficiencies for the enjoyment and implementation of Convention rights

Each State Party shall take effective legislative administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction

(a) No written constitution

62. New Zealand does not have a written constitution. At best, New Zealand's constitution consists of the Constitution Act 1986 and the New Zealand Bill of Rights Act 1990 **("NZBORA")**, which lacks supreme law status and is not entrenched legislation.

63. This is of concern because, as the New Zealand Bill of Rights Act 1990 is not supreme law, the legislature is able to enact legislation contrary to the rights contained in the Bill of Rights Act 1990.

64. Of further concern is that, as former Prime Minister, Sir Geoffrey Palmer, said in his book, Bridled Power, New Zealand MPs are "the

---

[27] Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand, A/57/18, (1 November 2002) paras. 425-426

fastest lawmakers in the west".[28]

65. Moreover, despite the Governor-General's role of providing assent to New Zealand legislation before it can enter into force, there is a convention in New Zealand that the Governor-General's role is merely a token. In practice the Governor-General does not and has never withheld his/her assent to the enactment of legislation.

(b) The Crimes of Torture Act does not incorporate CAT into New Zealand law

66. The State Party at paragraph 15 of its Fifth Period Report of the New Zealand Government provides:

> The Crimes of Torture Act 1989 has specific and directly enforceable provisions to prohibit acts of torture and was enacted to give effect to the Convention in New Zealand.

67. While the Crimes of Torture Act 1989 exists, it has never been used.

68. The State Party's Report lacks any concrete information as to whether or not the State Party has considered whether to apply the Crimes of Torture Act, let alone invoke the Crimes of Torture Act 1989.

69. In the case of Mangaroa Prison, Your Committee, in its concluding observations, provided:[29]

> 175. A subject of concern to the Committee is the instances of use of physical violence against prisoners of Mangaroa prison by the members of prison personnel. The allegations are that the prisoners were molested by the guards with fists and legs, they were not provided with medical treatment and were deprived of food and proper places of detention. Although these facts, pending the results of the ongoing investigation, cannot be considered as instances of torture, they already amount to cruel and degrading treatment.
>
> **4. Recommendations**
>
> 176. The Committee recommends the completion of the investigation of the incidents of physical violence on prisoners at Mangaroa prison. The State party should inform the Committee on the results.
>
> 177. The Committee considers it important to strengthen the supervision of the prisons to prevent the misuse and abuse of power by prison personnel.
>
> 178. The Committee considers it desirable that the State party continue its efforts to adopt the new law on extradition, which would simplify the extradition procedure and thus enable it to establish the relevant relations (treaty-based or otherwise) with non-Commonwealth countries.

---

28 Bridled Power: New Zealand Government under MMP, Sir Geoffrey Palmer & Dr Matthew Palmer, Oxford University Press, 2004

29 Concluding observations of the Committee against Torture: New Zealand A/53/44 (8/05/98) paras.175-178.

70. The State Party disagrees with the Committee's finding that it amounted to cruel and degrading treatment.

(c) Impact of section 4

71. The Government at paragraph 14 of its Fifth Periodic Report provides:

> 14. The NZBORA requires public officials to ensure the recognition of these rights, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society or which are prescribed by statute. **The Government considers the prohibition of torture under article 2(2) of the Convention and section 9 of the NZBORA to be absolute and thus not amenable to reasonable limitations.**

72. However there is nothing in the wording of section 9 of NZBORA that makes the right to be free from torture an absolute right:

> **9 Right not to be subjected to torture or cruel treatment**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

73. Moreover, the section 9 is subject to section 4 of the NZBORA, which provides:

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

74. The wording of section 4 allows any enactment, including legislation and sub-ordinate legislation, to derogate from the rights contained in NZBORA. The inclusion of section 4 in NZBORA makes all rights, particularly any absolute rights, meaningless because it gives the legislature complete reign to displace the rights contained in NZBORA.

75. The State Party's assertion at paragraph 14 that the right to be free from torture and other ill-treatment or punishment is an absolute right is misleading, camouflaged and incomplete.

76. Section 4 constitutes a major fetter on CAT and the International Covenant on Civil and Political Rights **("ICCPR" or "Covenant").** Yet the Government's Fifth Periodic Report to the Human Rights Committee is silent on this major restriction on rights.

77. The Human Rights Committee in paragraph 8 of its Concluding

Observations[30] dated 7 August 2002 provides:

> 8. Article 2, paragraph 2, of the Covenant requires States Parties to take such legislative or other measures which may be necessary to give effect to the rights recognized in the Covenant. In this regard the Committee regrets that certain rights guaranteed under the Covenant are not reflected in the Bill of Rights and that it has no higher status then ordinary legislation. The Committee notes with concern that it is possible, under the terms of the Bill of Rights, to enact legislation that is incompatible with the provisions of the Covenant and regrets that this appears to have been done in a few cases, thereby depriving victims of any remedy under domestic law.
>
> > The State Party should take appropriate measures to implement all of the Covenant rights in domestic law and to ensure that every victim of a violation of Covenant rights has a remedy in accordance with article 2 of the Covenant

The Authors encourage the Committee to urge the State Party to avoid further breaching the Convention and the Covenant by repealing section 4 of the Bill of Rights Act 1990, and by giving the Bill of Rights Act 1990 supreme law status.

(d) High Threshold for Section 9

78. The Supreme Court in *Taunoa v Attorney-General*[31] set a high threshold for triggering the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment under section 9 of NZBORA, Elias CJ (dissenting) said at:

> [81] The structure of s 9 draws a clear distinction between the prohibition on subjecting anyone "to torture", on the one hand, "or to cruel, degrading, or disproportionately severe treatment or punishment", on the other. The same structure is seen in art 7 (with the inclusion of "inhuman" instead of "disproportionately severe"). Torture entails the deliberate infliction of severe suffering, often for a purpose such as obtaining information. The scope of the prohibition on "cruel, degrading or disproportionately severe treatment or punishment" and its equivalents is not as restricted. The Human Rights Committee has pointed out that the Covenant does not contain any definition of these concepts:
>
> > ". . . nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied."
>
> [82] I do not read the Committee as suggesting any sliding scale of intensity of disregard for the right contained in art 7 between "cruel" and "disproportionately severe", such as is suggested in the Court of Appeal in the present case. Although such a scale is suggested by Nowak in his authoritative commentary, I have distinct reservations

---

30 Concluding Observations of the Human Rights Committee: New Zealand 07/08/2002 CCPR/CO/75/NZL, Para 8

31 *Taunoa v Attorney-General* [2007] NZSC 70, Para 81-83

> about such an approach. It seems to me unduly refined to conduct three distinct inquiries in applying the phrase, such as was undertaken by the Court of Appeal here. Much as the Supreme Court of Canada has held in relation to the s 12 Charter reference to "cruel and unusual treatment or punishment", "cruel, degrading or disproportionately severe treatment" may be better seen as a "compendious expression of a norm". Such a norm may be seen as proscribing any treatment that is incompatible with humanity.
>
> [83] Consistently with this approach, the New Zealand White Paper emphasised the link between what became s 9 and "the dignity and worth of the human person". The provision was said to be "aimed at any form of treatment or punishment which is incompatible with the dignity and worth of the human person". That approach seems to me preferable than dwelling on precise classification of treatment as cruel or degrading or disproportionately severe. In most cases treatment which is incompatible with the dignity and worth of the human person will be all three. And, even if separately classified, I think they are properly regarded as equally serious.

79. The Supreme Court's reasoning was based on the Court of Appeal's reasoning in *Puli'uvea v RR Authority,*[32] in which the Court of Appeal held:

> The third matter to which Mr Hooker referred was the status of human rights treaties in our legal system. He contended that this Court and the Privy Council have not previously had to consider and determine the application of treaties, particularly in the area of immigration, human rights, the interests of children and the interests of the family. That seems to us to be at variance with the facts, bearing in mind such decisions as *King-Ansell v Police* [1979] 2 NZLR 531 (CA) and *Pratt v Attorney-General for Jamaica* [1994] 2 AC 1 (PC). But the significant point in this case is that on the facts it was not necessary to address some of the broader issues about the status of human rights treaties within our legal order. In the two statutory contexts in which the issue arose the Court proceeded on the assumption that the statutory powers in question could be read consistently with the relevant provisions of the covenant and convention. The Court did not address the question on any broader footing. Having made that assumption it then came to the conclusion that the actions taken under the statutory powers could not be upset in the exercise of the powers of judicial review. In respect of the broader issues the Court said at p 12 no more than this:
>
> > "All of the sections to which we have referred state powers in a broad way. None are expressly confined by standards, criteria or purposes. There might accordingly be a question, which was left open in Tavita as well [1994] 2 NZLR 257, 266, whether the powers could be subject to limits read in by reference to the treaty texts. For the moment we assume that to the extent that the statutory provisions are relevant in the present case such a limitation is possible. We earlier referred to a general consideration supporting such a reading — that the Court should strive to interpret legislation consistently with the treaty obligations of New

[32] *Puli'uvea v RR Authority* [1996] 3 NZLR 538

> Zealand."
>
> Again, on this matter, no issue arises about the status of the treaties.
>
> …
>
> Other reasons given by Mr Hooker concerned the detail of the application of the treaty principles to the facts. There is first the question, which was decided against the appellant in the circumstances of the appeal, whether those matters can be the subject of a judicial review application. In any event they are certainly not matters of great general or public importance. There was also a reference to the arguments based on the Bill of Rights but nothing was said in support of the application for leave that would persuade us that, in the circumstances of this case the Bill of Rights issues present matters of general importance.

80. To set such a high threshold simply doesn't comply with a good faith interpretation of the Convention.

(e) Convention not incorporated into NZ Law

81. The State Party at paragraph 15 of its Report suggests that the Convention has been incorporated into New Zealand domestic law.

82. However New Zealand has not incorporated CAT or ICCPR into domestic law because it lacks the political will to do so. New Zealand law only gives effect to **some** of the rights contained in the ICCPR & CAT

83. HRC General Comment 31 provides that lack of political will is not an acceptable reason not to incorporate the ICCPR into domestic law:

> 5. The article 2, paragraph 1, obligation to respect and ensure the rights recognized by the Covenant has **immediate effect** for all States parties.
>
> 7. Article 2 requires that States Parties **adopt legislative, judicial, administrative, educative and other appropriate measures** in order to fulfil their legal obligations.
>
> 13. Article 2, paragraph 2, requires that States Parties **take the necessary steps to give effect to the Covenant rights** in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, **States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant.** Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites

> those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.
>
> 14. **The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect.** A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.
>
> [**Bold and emphasis added**]

84. Furthermore, the State Party has neglected to provide the Committee with Common Law authorities for the premise that unless the ICCPR and CAT is incorporated into domestic law, they are not enforceable in New Zealand Courts.

85. Consequently, if a Covenant remedy is claimed in a domestic court, the claim is liable to be struck out and in *Clark v Attorney-General*,[33] where ICCPR, and CAT claims in issue was struck out:

> [16] The defendants appear to accept that obligations of education, review, investigation and protection of complainants in respect of torture and ill treatment do arise under the Convention. They also accept that the ICCPR creates the obligation to provide an effective remedy for breaches of rights against torture and ill treatment. However, in relation to both the Convention and the ICCPR, the defendants contend that it is settled law that obligations at international law do not provide causes of action before New Zealand courts, citing *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) and *New Zealand Airline Pilots Association v Attorney-General* [1997] 3 NZLR 269 (CA); *MacLaine Watson & Co Limited v Department of Trade & Industry in Related Appeals* [1989] 3 All ER 523 (HL); *R v Lyons & Ors* [2002] 4 All ER 1028 (HL). The defendants submit that the plaintiffs cannot rely directly on these international law obligations to found causes of action in domestic courts.
>
> [79] The plaintiff's claims with regard to the defendants' obligations of funding education and training on issues of torture and ill-treatment and for reviewing the interrogation and treatment procedures cannot succeed as they are executive matters that are not of a justiciable nature per se and have not been expressly incorporated into domestic law.
>
> [80] The plaintiff's claims that obligations of investigating alleged torture and ill treatment and protecting complainants and witnesses have been incorporated into domestic law are arguable. However, even if the plaintiff was successful in arguing that these obligations had become part of domestic law, for the reasons outlined above, I am satisfied that he would have great difficulty in arguing that the New Zealand Government has failed to fulfil these obligations. Accordingly, the cause of action contained in the second part of the plaintiff's statement of claim in terms of the *Attorney-General v Prince & Gardner* test for strike out is so clearly untenable that it could not

---

33 *Clark v Attorney-General*, Associate Justice Gendall, High Court Wellington, 27 May 2005, CIV-2004-485-1902, para 16, 79-80

possibly succeed.

86. Also see *Wellington District Legal Services Committee v Tangiora*,[34] which reinforces the position that claims in domestic courts may only be founded on domestic law, and that the influence of international law is restricted to providing an interpretative aid. In *Tangiora* Keith J stated at 138-139:

> We accordingly conclude that there is no relevant international obligation by reference to which the Legal Services Act is to be interpreted in this case.
>
> That is not however the end of the matter so far as the international texts are concerned since the respondent urged here, as in the High Court, that the Act should be interpreted in the light of "the appropriate response of the New Zealand Government and New Zealand governmental agencies towards international obligations. ...
>
> ...We do not see the interpretative role of the Courts as extending to determining "the appropriate response" of New Zealand towards its international obligations – at least if that process runs beyond the approaches mentioned in this part of the judgment.

87. It is near impossible to raise a Convention claim in New Zealand Courts. The only method is through another medium, in a form of piggy-back claim.

88. Things are now worse. Domestic law has watered down those few Convention /Covenant rights that are given effect to in New Zealand.

89. In 1994, the Court of Appeal in *Tavita v Minister of Immigration*[35] held:

> Reference was made in argument to various provisions of the Immigration Act 1987, as amended, under which the Minister and his Department may be able now to review this case, including s 130 read with s 7(3)(a)(ii), s 52A, s 65 and s 35. It would not be appropriate at this point to explore the highly complicated legislation in depth, apart from mentioning that there does not appear to be substance in the suggestion that s 63C(8) would in the circumstances of this case prevent the Minister from giving a special direction under s 130 while the applicant remains in New Zealand. Mr Carter for the respondents did not go as far as to submit that it is not possible under any provision of the Act to give the case effective reconsideration in the light of the birth and New Zealand citizenship of the child and the family situation. He pointed out correctly, however, that since the birth of the child no request had been made for reconsideration; **and the main burden of his argument was that in any event the Minister and the Department are entitled to ignore the international instruments.**
>
> **That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing**. Although, for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there must at least be hesitation about

---

34 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA)

35 *Tavita v Minister of Immigration* [1994] 2 NZLR 257, page 265-266

> accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution. For the appellant Mr Fliegner drew our attention to the Balliol Statement of 1992, the full text of which appears in 67 ALJ 67, with its reference to the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights. It has since been reaffirmed in the Bloemfontein Statement of 1993.

90. The State Party doesn't even consider the Covenant and the Convention as merely window-dressing anymore.

Articles 10, 11, 12, 13

91. The rights contained in Articles 10, 11, 12 and 13 of Convention are not covered under NZBORA.

(a) Articles 10 & 11 –Training on NZBORA and International Law

Article 10 - Each State shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil, military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

Article 11 – Each State Party shall keep under systemic review interrogation rules, instructions, methods and practices …

92. The Police training is superficial to say the least. The Police receive minimal training on NZBORA, but they are not provided with any meaningful training on any international law, including the Convention and the Covenant. Likewise, Dept of Corrections staff and management receive minimal training, which is obvious from *Taunoa.*

93. The State Party in its Report at paragraphs 111 and 112, state:

> 111. There are currently 5 best-practice manuals that are regularly updated and available to all police staff. These include best-practice information on police searches, prisoners rights and interviewing
>
> 112. The information on Police searches provides guidance on reasonable and appropriate searches. For example, prisoners must be treated with dignity, privacy and respect.

94. However, the best-practice manuals are unavailable to suspects, offenders, prisoners, or lawyers. When a lawyer requests a copy of the best-practice manual, that lawyer only gets a couple of pages, despite the document itself being lengthy.

95. The best-practice manual is not available on any publicly accessible website.

96. The State Party in its Report, at paragraphs 116 and 137-138, provides:

> 116. The Police General Instructions contain extensive guidelines on

> areas such as use of force and appropriate use of certain holds; handcuffs and Oleoresin capsicum (OC) spray; treatment and rights of prisoners; and measures to prevent harm to persons in custody such as custodial suicide risk management and separation of certain prisoners.
>
> …
>
> 137. Police General Instructions are internal rules that guide behaviour and practices. A wilful breach of a General Instruction is a disciplinary offence under regulation 9 of the Police Regulations 1992. The Police General Instructions include a specific requirement for police officers to be at all times fully conversant and comply with the Crimes of Torture Act.
>
> 138. The New Zealand Police regularly review procedures relating to the treatment of persons being interviewed, and persons in custody and subject to arrest, detention or imprisonment, in order to ensure that the procedures are properly implemented and that amendments are made in light of any deficiencies that become apparent.

97. Likewise the Police General Instructions are not available on any publicly accessible website, and are not made readily accessible to suspects, offenders, prisoners, or lawyers.

98. The 'regular review' procedure begs the question: if the only people who know the rules is the State Party, then how can the rules be regularly reviewed? If the public don't know the rules, the public cannot know if the Police are complying with the rules.

99. Similarly, the Judiciary are insufficiently trained in International Law, especially the Convention and the Covenant.

100. The issue of lack of judicial training was raised before the High Court in *Clark v Attorney-General.*[36] The High Court responded by striking out the case from being heard on the grounds that breaches of the ICCPR and CAT cannot be raised in New Zealand Courts because they are not incorporated into domestic law.

The Authors encourage the Committee to require the State to fulfil its obligations under Articles 10, 11, 12, 13 by providing training on NZBORA and International law, including the Convention.

(b) Articles 12 & 13

Article 12 – Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction

Article 13 – Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities

101. In respect of the impartial investigations and examinations under

---

[36] *Clark v Attorney-General*, Associate Justice Gendall, High Court Wellington, 27 May 2005, CIV-2004-485-1902

Articles 12 and 13, the State Party is currently being sued in the High Court in respect of *Goodyer v Capital Coast District Health Board and Midcentral District Health Boards et al*[37] in a case involving the death of a prisoner while in custody, in which the State Party's approach to the prisoner's death is superficial, with the Coroner's Report being a mere 3 pages long.

Article 14

Each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible…

(a) Lack of Effective Remedy

102. Even if the New Zealand Courts find there is a breach of a right under the Bill of Rights, the question remains as to whether the compensation awarded is an **adequate compensation.**

103. Article 14 of the Convention provides:

> 1. Each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to a fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
>
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law

104. In *Taunoa v Attorney-General,*[38] the Court of Appeal confirmed the High Court's decision to calculate damages in respect of Mr Taunoa in an indicative monthly rate of about $2100 for a 26 month period and increased the award of damages from $55,000 to $65,000 on the grounds that the High Court Judge erred in his calculation by 6 months.

105. However, Blanchard J of the Supreme Court (in the majority) in *Taunoa v Attorney-General,*[39] decreased the award of damages to a mere $35,000, and held:

> [261] In determining whether a measure of damages should form part of the remedy in a particular case the Court should begin with the nature of the right and the nature of the breach. Some rights are of a kind where a breach is unlikely to warrant recognition in monetary terms. Breaches of natural justice, for example, are likely to be better addressed by a traditional public law means, such as ordering the proceeding in question to be reheard. But breaches of some rights of a very different character will inevitably demand a response which must include an award of damages whether in tort or under the Bill of Rights Act. The obvious example is any breach of s 9. The infliction or condoning by the state of cruel or degrading or severely

---

37 CIV-2008-485-1839 High Court Wellington (Not yet heard).

38 *Taunoa v Attorney-General* [2006] 2 NZLR 457 (CA), paragraph 284

39 *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC), paragraphs 261-262

> disproportionate treatment, something which society regards as outrageous, must be marked by an order that the state pay the victim a sum which will provide a public acknowledgment, by a judicial officer, of the wrongfulness of what has been done as well as solace for injured feelings. The sum awarded should of course reflect any intention behind the conduct which gave rise to the breach and the duration of the breach.
>
> [262] The level of the monetary sum should also reflect the other ways in which the state has acknowledged the wrongdoing: whether, and with what speed, it has brought to an end the wrongful conduct and put in place measures to prevent reoccurrence; and whether it has publicly apologised to the victim in appropriate terms.

106. Whereas, Elias CJ dissenting, in *Taunoa v Attorney-General,*[40] did not agree that the award of damages was excessive:

> [10] I agree with the reasons given by Blanchard J in rejecting the principal argument on the cross-appeals by the Attorney-General that damages were not called for here. In my view an award of damages to the appellants is necessary to provide an effective remedy for the breaches of ss 9 and 23(5). As Ronald Young J found, the deprivations affected the daily lives of the appellants while they were on the regime.11 In the case of Mr Taunoa and Mr Robinson he was prepared to accept that they inevitably suffered harm, "if only the modest exacerbation of existing disabilities": "A combination of isolation, poor conditions and length of stay would have affected the strongest person**." I do not agree with other members of the Court in their views that the damages awarded were excessive. I would not disturb the awards made in the High Court and confirmed by the Court of Appeal, which I conclude are appropriate to remedy breaches of s 9.** I agree that, when considering redress for breach of the New Zealand Bill of Rights Act, analogies with awards of damages for other wrongs need to be viewed with care. They may, however, be broadly illustrative for comparative purposes. I do not consider that Ronald Young J was wrong to conclude that a rough measure of $2500 for each month of subjection to the BMR was appropriate, and I would affirm the awards he made, as adjusted by the Court of Appeal for an error in calculation in respect of Mr Taunoa. Although all other members of the Court would allow the cross-appeals and substitute lower damages than were awarded in the courts below, Blanchard J and McGrath J would set the damages for Taunoa and Robinson at a higher level than Tipping J and Henry J. There is therefore a majority view that those damages should be no lower than as assessed by Blanchard J and McGrath J. On the basis that the greater awards I would confirm include their lesser assessments, the orders made by the Court are as proposed by Blanchard J and McGrath J.
>
> [**Bold added**]

(b) Recommendation 6(g) – Inquiry into *Taunoa et al*

107. The Committee at paragraph 6 of its Concluding Comments[41] recommended that the State Party:

---

40 *Taunoa v Attorney-General* [2008] 1 NZLR 429, Para 10

41 Concluding Observations and Comments of the Committee Against Torture: New 11/06/2004 CAT/C/CR/32/4

> (g) Carry out an inquiry into the events that led to the decision of the High Court in the *Taunoa et al* case;

108. The State party at page 75, paragraph 6 of its Report provide:

> 6. Once the Supreme Court has given its decision on the current appeals, the Government will consider what, if any, further inquiry is necessary.

109. The Supreme Court on 31 August 2007 decided the *Taunoa et al* case. However, the State Party has not yet complied with the Committee's recommendation 6(g).

The Authors urge the Committee in stronger terms than the prior request to carry out an inquiry into the events that led to the decision of the High Court in the Taunoa et al case without further delay.

(c) NZ Reservation to Article 14

110. The State Party still has a reservation against Article 14 of the Convention:

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

111. This reservation is antithetical to Article 14 and indeed to the spirit of the Convention.

112. Any award of damages, in your Author's view, ought to be at judicial discretion, as opposed to the Attorney-General's discretion, in accordance with the Doctrine of Separation of Powers.

113. The State Party at para 230 of its Report is rather misleading as it suggests that Article 14 has been given effect to under New Zealand's domestic legislation:

> 230. Section 5 of the Crimes of Torture Act gives effect to article 14 of the Convention, as qualified by the reservation. Section 5 requires that where any person has been convicted of an act of torture, the Attorney-General must consider whether it would be appropriate in all the circumstances for the Crown to pay compensation to the person against whom the offence was committed or, if that person has died as a result of the offence, to that person's family. Section 5 does not limit or affect any other rights to compensation that a victim of torture may have under any other enactment.

114. However, the Prisoners' and Victims' Claims Act 2005 was passed with the purpose of:[42]

> restrict[ing] and guid[ing] the awarding of compensation sought by specified claims in order to help to ensure that the remedy of compensation is reserved for exceptional cases and used only if, and

---

42 Section 3 Prisoners' and Victims' Claims Act 2005

only to the extent that, it is necessary to provide effective redress.

The Authors encourage the Committee to again ask the State Party to withdraw the reservation.

(d) Prisoners' and Victims' Claims Act 2005

115. This piece of legislation is a disgrace in any democratic society, and plainly a breach of the Convention and numerous other international instruments.

116. Whilst *Taunoa v Attorney-General* was before the Court of Appeal, the legislature passed the Prisoners' and Victims' Claims Act 2005, under urgency which effectively curtailed any remedy, adequate or otherwise, that prisoners, who are subjected to torture or other ill-treatment

117. The purpose of Prisoners' and Victims' Claims Act 2005, is stated in section 3 of the Act, as:

> Restrict and guide the awarding of compensation sought by specified claims in order to help to ensure that the remedy of compensation is reserved for exceptional cases and used only if, and only to the extent that, it is necessary to provide effective redress.

118. Should a prisoner bring a claim of torture or ill-treatment against the perpetrators, and an award of compensation is granted, the prisoner is potentially denied that compensation. Instead the compensation is potentially granted, not to the victim of torture or ill-treatment, the prisoner, but to the prior victim of the offence the prisoner committed:[43]

> **8 Victim**
>
> (1) In this Act, victim means—
>
> (a) a person against whom an offence is committed by another person; and
>
> (b) a person who, through, or by means of, an offence committed by another person, suffers physical injury, or loss of, or damage to, property; and
>
> (c) a parent or legal guardian of a child, or of a young person, who falls within paragraph (a) or (b), unless that parent or guardian is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; and
>
> (d) a member of the immediate family of a person who, as a result of an offence committed by another person, dies or is incapable, unless that member is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned.

119. A hearing on the papers is held by a Victims' Special Claims Tribunal (District Court Judge) to determine how much the prior victim is entitled to, at that hearing the prior victim, but not the prisoner is automatically

---

[43] Section 8, Prisoners' and Victims' Claims Act 2005

entitled to Legal Aid.

(e) Ex Gratia Payments

120. The State Party in it's Report at paragraph 273 provides:

> 273. In addition to the case law noted above, claims of cruel, inhuman or degrading treatment or punishment and of disproportionately severe treatment under section 9 of the New Zealand Bill of Rights Act 1990 were made in a small number of civil proceedings. **Aside from the decisions noted above, none of these have been upheld and no compensation has been ordered.** It is noted that civil proceedings in New Zealand engage obligations of disclosure of relevant records and other material, which can be enforced r clarified by the courts in case of dispute.

121. However, the State Party can settle cases out of Court in, often, confidential agreements.

122. For transparency, the level of compensation awarded to torture and ill-treatment victims, having regard to the facts, ought to be disclosed, even if the name of the victim is withheld.

123. Section 4 of the Prisoners' and Victims' Claims Act 2005 defines compensation as:

> (a) means any form of monetary compensation or damages (however described) required by a court or tribunal to be paid (including, without limitation, an amount of, or in the nature of, exemplary damages); and
>
> **(b) for the purposes only of subpart 2 of Part 2, includes any form of monetary compensation or damages (however described) required to be paid as, or as part of, an out-of-court final settlement of a claim (including, without limitation, an amount paid in final settlement of a claim for an amount of, or in the nature of, exemplary damages); and**
>
> (c) includes an amount or award of interest related to compensation or damages in paragraph (a) or (b); but
>
> (d) does not include an amount required or agreed to be paid as, or towards, the costs of making a claim

124. This means that even out-of court ex gratia payments are caught by the Prisoners' and Victims' Claims Act 2005, further denying torture victims a remedy, adequate or otherwise.

125. Even the Taunoa successful claimants are retrospectively subject to the Act and their compensation award is subject to the Victims' Special Claims Tribunal thereby denying them an effective remedy.

The Authors encourage the Committee to urge the State Party in the strongest possible terms to repeal the Prisoners' and Victims' Claims Act 2005.

Article 15 - Evidence Act

Article 15 – Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

126. The State Party at paragraph 267 of its Report, provide:

> 267. The Act further protects the right not to be subjected to torture by providing that if any provisions of the Act are inconsistent with NZBORA, the NZBORA will prevail.

127. However, section 4 of NZBORA provides that:

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> > (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
> >
> > (b) Decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

128. This means that if a provision under the new Evidence Act is inconsistent with NZBORA, then the provision under the new Evidence Act will prevail.

129. The result is that Courts will be able to hear evidence that was received by officials in breach of NZBORA, if the balancing exercise falls in favour of admitting the evidence, despite the evidence being obtained in breach of NZBORA.

130. The case of *Chief Executive of the Department of Corrections v McDonnell*[44] challenges the lawfulness of the Parole (Extended Supervision) and Sentencing Amendment Act and refers to the Attorney-General's section 7 report on the Parole (Extended Supervision) and Sentencing Amendment Bill, which *"marks a significant departure from the standard of civil liberties enjoyed in [New Zealand] to date:"*[45]

> 1. … Although the Bill seeks to address an important and significant social issue, I have identified the following provisions as being inconsistent with the Bill of Rights Act:
>
> 1.1 The imposition of significant restrictions of liberty under the proposed extended supervision regime on individuals who

---

44 *Chief Executive of the Department of Corrections v McDonnell* (unreported, High Court, CRI 2005-404-000239, 19 May 2008) (Appeal to be heard 12 March 2009)

45 Attorney-Generals Section 7 Report on the Parole (Extended Supervision) and Sentencing Amendment Bill, paragraph 19

> wee convicted prior to the Bill coming into force (cl 10, new sections 107B and 107T) (unreasonable limit on right not to be subject to double jeopardy); and
>
> 1.2 The statutory power to impose 24 hour electronic monitoring on individuals subject to an extended supervision order (cl 6 and cl 10, new section 107I) (unreasonable search and seizure).
>
> Without further amendment to the Bill, these provisions cannot be justified under s 5 of the Bill of Rights Act.

The Authors encourage the Committee to urge the State Party to repeal the sections of the Evidence Act and the Parole (Extended Supervision) and Sentencing Amendment Act that are in breach of the Convention.

D. COMPLIANCE WITH THE COMMITTEE'S RECOMMENDATIONS OF 2004

Recommendation 8 - Dissemination of Recommendations

131. The Committee at paragraph 8 of its Concluding Comments[46] recommended that the State Party:

> 8. …disseminate widely the Committee's conclusions and recommendations, in appropriate languages, through official web sites, the media and non-governmental organizations.

132. The State Party has not properly complied with this recommendation.

133. There is no evidence that the State Party has disseminated the Committee's conclusions and recommendations in "appropriate languages". Some appropriate languages in New Zealand are our native tongue—English, Maori; sign language for deaf persons; and Braille for blind persons.

134. A search of the Ministry for Foreign Affairs website does not return a single hit containing the Committee's conclusions/recommendations.

135. Likewise, a search for "information bulletin" on the Ministry for Foreign Affairs website does not return a single hit containing the Committee's conclusions and recommendations.

E. SHADOW REPORTS

136. Though widely used in Commonwealth and other Western countries, the shadow reporting process is rarely used by human rights organisations in New Zealand.

137. While this can partly be attributed to a lack of staffing and funding. The Authors applied to the Law Foundation for a grant to cover their

---

[46] Concluding Observations and Comments of the Committee Against Torture: New 11/06/2004 CAT/C/CR/32/4

expenses in respect to the Shadow report, but were refused funding. As a result, the author(s) have prepared this report on a pro bono basis, and will be personally funding their appearance before the Committee, and in July before the HRC.

138. The leading reason for the lack of use is simple unawareness that such a possibility exists. (In addition, as the Auckland District Law Society Public Issues Committee recently noted, the practical effect of having a small legal community is that it can sometimes limit legitimate complaints (e.g. against the Judiciary).[47]

139. In the author's experience, that same effect can also sometimes be felt by lawyers who petition the United Nation's Human Rights Treaty Body Committees on behalf of alleged victims, especially when those victims are from politically 'unpopular' groups, e.g. convicted prisoners.

140. The Independent Opinion of Chief Justice Bhagwati (concurring views) in the HRC of *Young v Jamaica*[48] held:

> The Committee has to test the validity of the verdict on the anvil of article 14 of the Covenant and examine whether the trial was fair and in accordance with the standards and norms laid down in article 14.

141. The State Party needs to be tested on the anvil of the Convention.

142. By allowing time to properly comment on the State Party's draft and time to arrange funding, the State party's report can be properly tested.

The Committee may wish to encourage national human rights organisations to submit shadow reports to compliment the State Party's periodic reports, by urging the State Party to circulate its draft report's at least six months prior to filing.

Tony Ellis/Antony Shaw
Barristers of the High Court of New Zealand
12 maart 2009

47 ADLS Public Issue Papers - Judicial Complaints 14 November 2007.
48 *Young v Jamaica* CCPR/C/61/D/615/1995/Rev.1