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HUMAN RIGHTS FOUNDATION OF NEW ZEALAND
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Alternative report on the

5th periodic report of the New Zealand Government under the International Convention Against Torture

being considered by the

United Nations Committee Against Torture

April 2009

1. Introduction

1.1 This submission is on behalf of the Human Rights Foundation of Aotearoa New Zealand. It is an alternative report on the New Zealand government's 5th periodic report to the United Nations Committee Against Torture.

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 alternative 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 the use of Taser stun guns by New Zealand Police, and immigration issues.

2.2 In our discussion of the Taser stun gun we provide the Committee with information about the trial process itself; an analysis of incidents during the trial; and comment on international developments. In relation to immigration issues we provide information on asylum seeker detention; and discuss the provisions of the Immigration Bill, which passed its second reading in Parliament in March, which will impact immigration detention and the prevention of *refoulement*. We then make brief comment on New Zealand's implementation of the Optional Protocol.

ARTICLE 2

3. USE OF TASER STUN GUNS BY NEW ZEALAND POLICE

3.1 From 1 September 2006 to 1 September 2007, the TaserX26 weapon was trialed by frontline police officers in Waitemata, Auckland City, Counties Manukau and Wellington districts. Although the Taser trial raised very real and disturbing concerns about the use of the Taser by police officers, these have not been addressed. In August 2008 the

Police Commissioner made a decision to introduce Tasers to the New Zealand Police force and the initial rollout of weapons occurred in December 2008.

Transparency and decision making: the trial process

3.2 The trial was marked by a lack of transparency and openness, such that a complaint was lodged by the Foundation with the Ombudsman in May 2007 when the Police withheld the majority of information from Taser incident reports. The police claimed that this was to protect the identity of officers and members of the public involved in the incidents. However, personal identifying details of the officers or members of the public had not been sought.

3.3 In June 2008 the Chief Ombudsman upheld the complaint, saying that the deletion of information about the trial was unjustified in the light of the strong public interest in the Taser issue. The Ombudsman recommended that police release the wrongly withheld information, and the incident reports were eventually made available online by the Police, but not until well after the decision to introduce the Taser had been announced. This effectively prevented any opportunity for meaningful assessment and comment by civil society and other independent commentators before the Tasers were introduced.

3.4 The Ombudsman stated in her decision that the information initially provided by the Police was "*extremely brief, and have the effect of "sanitising" the original reports."* She emphasised the need for greater accountability in the trial. She wrote: "*As the Police have recognised, the use of Tasers is an issue that is of major importance to all New Zealanders. Given that the decision on whether to equip Police with Tasers is an executive one, with no provision for Parliamentary oversight, Cabinet approval, or Ministerial sign off, I consider that there is a particularly strong public interest in the accountability and transparency of the Commissioner's decision-making on this issue."*[1]

3.5 There is concern that Tasers remain unacknowledged as potentially lethal weapons, despite increasing numbers of deaths overseas following Taser use. There is also concern that the Taser will be used as a tool of routine force as opposed to one of last resort; and that vulnerable groups - such as those with mental health issues or children – will be subjected to electric shocks. Data reported in the Police trial evaluation do not alleviate these concerns, showing that 21% of Taser incidents involved people with mental health issues. The disproportionate use of the Taser on Maori and Pacific peoples was also demonstrated by the trial data, with 58% of incidents involving them.[2]

Breaches of Standard Operating Procedures during the trial

3.6 It is clear that there have been repeated breaches of the Standard Operating Procedures (SOP), the regulations drawn up by police to regulate Taser use during the trial. One aspect of this was the proportion of incidents involving Tasers in which the

[1] Chief Ombudsman Beverley Wakim, 27 May 2008, quoted in Campaign Against the Taser press release 'Call for Police to release 'sanitised' Taser info', 6 June 2008, http://scoop.co.nz/stories/PO0806/S00064.htm.

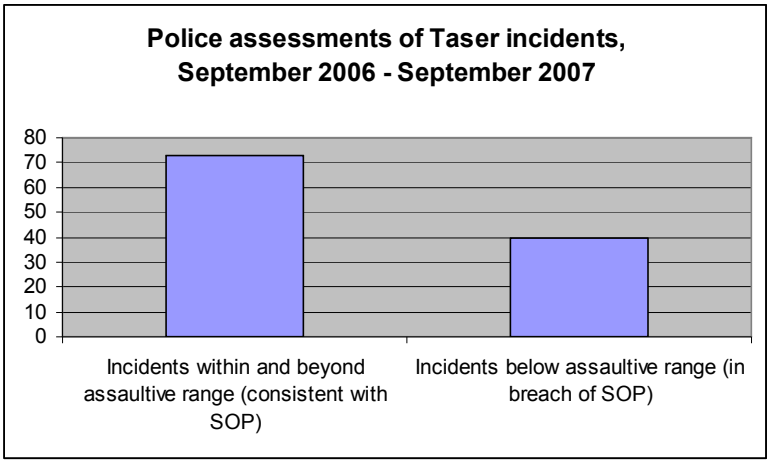
[2] New Zealand Police, February 2008, *Operational Evaluation of the New Zealand Taser Trial*, a report prepared Police Operations Group and the Evaluation Team at Police National Headquarters, pp.14, 63, 65-70. http://www.police.govt.nz/resources/2008/operational-evaluation-of-nz-Taser-trial/Operational_Evaluation_of_the_NZ_Taser_Trial_August_2008.pdf.

subject was assessed below the behavioural threshold for Taser use as stipulated in the SOP. The SOP are very clear about allowing the use of the Taser only when an offender is assessed as 'within or beyond' the assaultive range. However, a significant proportion of Taser incident reports from September 2006 to August 2007 record an assessment *below* assaultive. Of the 120 reports analysed, 9 recorded 'active resistant', 17 recorded 'passive resistant', 11 recorded 'compliant', 3 recorded 'cooperative' and 7 recorded 'other.'

3.7 Of the incident reports analysed, 35% percent of incidents involving the Taser between September 2006 and August 2007 were in breach of SOP in this way.[3] This inability to conform to regulations, even in the heightened monitoring environment of a trial, raises grave concerns. It demonstrates the potential for the Taser to be misused or used in inappropriate situations. This has not been taken into account in the Police evaluation of the trial.

	Officer assessment prior to use of Taser, September 2006 – August 2007							
Police District	**GBH**	**Assaultive**	**Active Resistant**	**Passive Resistant**	**Compliant**	**Co-operative**	**Other**	**TOTAL**
Auckland City	7	10	4	3	2	1	1	28
Waitemata	4	14	2	4	1	0	0	25
Manukau City	4	10	1	1	4	0	0	20
Wellington	4	20	2	9	4	2	6	47
TOTAL	19	54	9	17	11	3	7	120

3.8 The graph below illustrates the number of incidents (numbers on left) during the trial which were in breach of the SOP, in that officers assessed the behaviour of the individual concerned to be below assaultive range (this omits the two recorded as 'other,' as further information on these incidents is unavailable). Thirty five percent of the total number of incidents included in the graph below were in breach of the SOP in this respect.



[3] This is an updated analysis of that found in the Campaign Against the Taser report, *Stun Guns in Aotearoa New Zealand? The Shocking Trial: a report on the New Zealand Police Taser trial, 1 September 2006 – 1 September 2007*. http://www.converge.org.nz/pma/Tasertrial.pdf. The Human Rights Foundation is a member of the Campaign Against the Taser.

3.9 In three of the cases recorded that were below assaultive range, the Taser was fired. In all of those three, behaviour was recorded as 'active resistant.' In an incident in Auckland City on 1 October 2006, the Taser was fired 5 times, three times discharging probes and twice in 'drive stun' or contact mode. An innocent bystander was shocked in the process, which will be elaborated further below. On 11 December 2006, the Taser was fired twice in another Auckland incident. The third incident occurred in Manukau on 29 January 2007, when the Taser was fired twice. However, the majority of the 'below assaultive' cases employed presentation, laser painting or arcing. In this sense, the analysis of the trial above graphically demonstrates the temptation to use the tactic of 'laser painting' as a compliance mechanism in situations below assaultive.

3.10 This reflects the concern noted by the Auckland District Law Society in December 2006, around the '*erosion of the weapon's 'last resort' status through 'laser painting'…and the risk of a casualness developing amongst police officers in their approach to the weapon and being tacitly endorsed through a lack of insistence on strict compliance with the guidelines…there is a very fine line between the tactic of laser painting and actually firing the weapon*.'[4]

3.11 It needs to be emphasised that the analysis above relies on police documents and the assessments recorded by police officers themselves. The question of whether assessments are accurate is raised by several incidents. These include an incident which occurred in Waitakere on 20 March 2007. In this incident, a woman suffering a mental health crisis was Tasered twice in a bathroom, despite the presence of at least three police officers. The incident report records that it was believed the woman had a weapon. The weapons believed present are listed as 'razors, chemical sprays, glass.' The reason for this belief is recorded as her location in a bathroom. The report then records that the woman did not, in hindsight, actually have a weapon.

3.12 The officer writes that the use of options other than the Taser in this incident would have resulted in injury and '*damage to property*', and that '*physical restraint was going to be extremely hazardous in the confined space where there are numerous sharp edges with the walls and floor covered with water.*' In this situation, incapacitating the woman with multiple Taser shocks was totally inappropriate, dangerous given the amount of water present, and her designation as 'assaultive' highly questionable. The Human Rights Foundation is aware that mental health practitioners have serious concern about the actions of police officers in this case, but that the woman concerned was not able or willing to lodge a complaint. Therefore the incident has not been investigated further.

3.13 Another incident, which occurred on 27 September 2006 in Manurewa, records the subject behaviour as 'assaultive.' In this incident the Taser was presented and the subject laser painted while he lay in a bathtub half filled with water and blood. Not only was the subject compliant as stated by the officer himself in his description of the incident, but the use of the Taser in this situation would be extremely dangerous both

[4] Auckland District Law Society Public Issues Committee, *Less Lethal? The trial of Tasers as part of policing in New Zealand*, December 2006, pp. 1,2,8, http://www.adls.org.nz/doclibrary/public/committees/LessLethal-TaserGunPaper.pdf.

because it would involve electrical discharge in water and the risk of drowning while incapacitated in water. The description follows:

3.14 "*I pushed the bathroom door open after clearing a few rooms and caught sight of him lying in the bath. I brought my Taser up and laser painted him asking him to show me his hands, the Stanley blade was on the bath tub edge close to him. I removed it and put the Taser away once I was satisfied that it was safe. I did not have to shout a warning as he was compliant but he could see the Taser. The presentation was only for several seconds until he showed me his hands. He was in a half filled bathtub with blood in the near vicinity. He was dressed only in his underwear and was compliant*."

3.15 Further, in at least two incidents, people have been repeatedly Tasered while already lying on the ground. In Porirua on 12 November 2006, a second shock was administered to a man due to reported resistance to attempts to handcuff him while on the ground. Again, in Manukau on 29 January 2007, a man was Tasered twice. In this incident, the officer recorded that '*when the initial probes were deployed he rolled over onto his back. I told him to remain still at which time he spun around and tried to decamp, so he was Tasered again by depressing the trigger using the same cartridge*.'

3.16 The Police evaluation report notes that '*the concept of being 'within and beyond the assaultive range' caused some operational challenges for officers where the reality of highly volatile situations made it difficult to assess. Officers felt there was a risk they might under-assess the situation and elect not to use the Taser when it could be effective. Officers also described a 'grey' area where a subject's behaviour could be assessed as actively resistant bordering on assaultive, and believed there were differences in interpretation about the point at which the Taser could be presented todeescalate a situation.*'[5] As the Human Rights Commission notes in its submission to the Committee, from this the likelihood of officers tending to err in favour of Taser use can be inferred.[6]

3.17 There have also been a number of incidents involving blunders with the Taser, perhaps reflecting the inadequate qualification of police officers to wield such weapons. A two day training course was all that was made available to qualify officers for its use during the trial. These incidents were a result of accident or ignorance, and raise real concerns due to the potentially serious consequences of receiving a Taser shock.

3.18 The most serious blunder resulted in an innocent bystander receiving a Taser shock. Initially unreported by police, an officer deployed the Taser five times in an incident on 1 October 2006. The officer repeatedly missed his target. Instead, he Tasered the man's 16 year old son, and also shocked himself while attempting to reload the weapon. The officer then attempted to use pepper spray, which hit the target's daughter rather than the alleged offender.[7]

3.19 In an incident report created on 29 November 2006, an officer noted that he used the LED light on the Taser in order to see better in a dark space, and then unintentionally fired the weapon. Notes from the report read '*Deployed tazer (sic)…used the led light*

[5] Supra note 2, p.16.
[6] New Zealand Human Rights Commission, *Comments of the New Zealand Human Rights Commission on New Zealand's implementation of the United Nations Convention Against Torture*, p.5.
[7] New Zealand Herald, 'Constable zaps himself and innocent teen with Taser', 18 November 2006, http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10411372.

to illuminated (sic) dark area of warehouse. Unintentional discharge of tazer (sic) while clearing address of Headhunter member, offender not present no person hit or injured prongs fired into floor.'

International developments

3.20 There have been substantial developments regarding Taser use since the Taser trial began which should be taken into account, including the Committee's comments on Taser use in Portugal, the Canadian review and Standing Committee report, the Amnesty International 2008 report on Taser use in the United States, and the June 2008 interim report of the US Justice Department's National Institute of Justice, on its study into deaths from 'Electro-muscular Disruption Devices', which raised serious questions about the safety of certain vulnerable groups in relation to the devices.[8]

3.21 While the evaluation does mention the comments of the Committee in relation to the Taser it is only to note, in the context of a media analysis, that critics of the Taser referred to the Committee's comments: "*media coverage not supportive focused on the potential risk of fatalities; the risk that police will not adhere to guidelines or use Tasers appropriately; and Tasers can be considered a form of torture, largely following a United Nations panel comment to this effect in regards to a report submitted by police in Portugal.*"[9]

[8] NIJ Special Report, *Study of Deaths following Electro Muscular Disruption: Interim Report*, June 2008. The NIJ study found 'no conclusive evidence within the state of current research that indicates a high risk of serious injury or death from the direct effects of CED exposure.' However, the purported safety margins of CED deployment 'may not be applicable in small children, those with diseased hearts, the elderly, those who are pregnant and other at-risk individuals…research suggests that factors such as thin stature and dart placement in the chest may lower the safety margin for cardiac dysthythmias…studies examining the effects of extended exposure in humans to CED are very limited.' It advised that use of CEDs on 'at-risk' populations should be avoided and urged caution in the use of multiple shocks, p.4.

[9] Supra note 2, p.144.

ARTICLE 3

4. IMMIGRATION DETENTION

Asylum seeker detention

4.1 The issue of asylum seeker detention has been raised by both the Committee, and the Committee on the Elimination of al forms of Racial Discrimination.[10] The issue 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.

4.2 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.

4.3 The New Zealand government's fifth periodic 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.

Asylum seeker detention since 2002

4.4 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.

4.5 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 post 9/11 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.

[10] 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.

4.6 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 legal counsel this issue remains unresolved, but further court action by the Human Rights Foundation to test this has been hampered by lack of funding.

4.7 In the meantime, in the light of the High Court decision, the Immigration Service issued a new Operational Instruction.[11] 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.[12] However, lack of travel documentation cannot be a sufficient basis to detain refugee claimants given that refugees are often forced to travel without a genuine passport.

4.8 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 have their detention reviewed in either the District Court or the High Court.'[13]

4.9 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 2003/2004, 115; in 2004/2005, this number dropped to 81. The number dropped further in 2005/2006 to 67 successful claimants.[14]

4.10 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.

4.11 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 Human Rights Foundation and other NGOs that the Borders and Investigations unit of the Immigration Service has agreed to refer all 'interdicted' persons to a UNHCR office, which is encouraging. This agreement was first reported in 2006. It remains unclear at present whether this is occurring, but it does not appear

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[11] 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.

[12] Amnesty International, *Amnesty International Report 2003: New Zealand,* http://web.amnesty.org/report2003/Nzl-summary-eng.

[13] Deborah Manning, *Council for International Development: Refugee Policy Development Discussion Paper*, January 2005, p.1. Available as PDF through www.cid.org.nz.

[14] Department of Labour, Te Tari Mahi, *Migration Trends 2005/2006*.

to be the case, especially in countries of first asylum which are not signatories to the UNHCR Convention.

4.12 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 with respect to their suitability as custodians of asylum seekers. This issue is included by the Committee in its list of issues in relation to Article 10.

4.13 Once a Warrant of Commitment is obtained, the majority of asylum seekers 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 up to June 2007, 14 (the most recent information we have available).[15]

4.14 A small percentage of asylum seekers are detained at the Auckland Central Remand Prison. In 2004, 9 were detained there; in 2005, 16; in 2006, there were 6. Up to June 2007, 2 asylum seekers were detained there. Asylum seekers have also been detained in other penal institutions, including Mt Eden Prison, Waikeria Prison, and Arohata Prison.[16]

4.15 Asylum seekers who 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 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.

4.16 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.[17]

4.17 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

[15] Information obtained from Refugee Status Branch, June 2007.
[16] Information obtained from Refugee Status Branch, June 2007.
[17] Deborah Manning, *Council for International Development: Refugee Policy Development Discussion Paper*, January 2005, p.3.

detention of asylum seekers is extended for seven days.'[18] Difficulties are compounded by a lack of legal aid.

4.18 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.[19]

5. NEW ZEALAND IMMIGRATION BILL

Provisions in pending immigration legislation affecting immigration detention

5.1 A major review of immigration legislation was undertaken by the previous government. Following the election the Immigration Bill passed its second reading in early March 2009.[20] The Foundation has a number of concerns about the provisions which relate to immigration detention.

5.2 In particular, the current Bill at Clause 271(a) rules out bail for any offence under the Bill whatsoever, effectively eliminating the right of *habeus corpus*. In addition, Clause 285(10) prevents the Courts from considering the length of time someone has been detained as a factor in whether they should be released, making detention potentially indefinite. It should be noted that these clauses are additions made after the select committee process, which is the only opportunity for public input into the legislative process in New Zealand.

5.3 In certain circumstances, particularly where either the individual might be stateless or where an involuntary repatriation is not possible, indefinite detention may result with no effective mechanism for judicial review, given the removal of the time factor as a consideration. The proposed legislation will remove all effective opportunities in some cases for judicial oversight of long term detention in unusual (but tragic) cases.

5.4 Other provisions of concern relating to immigration detention include Clause 289(2)(c), on the use of classified information as a basis for detention. At present, a person can be detained on the basis of classified security information. If a person is detained on this basis, they can go to court to seek release on conditions or challenge their detention, as natural justice demands. However, under the Bill, the Court must treat the secret information as accurate. Clause 289(2)(c) reads, 'the classified information must be treated as accurate.' The court's ability to supervise detention is completely undermined by this process – the courts will be powerless to assess the information. Effectively an unsupervised power of detention is given to those officials classifying the

[18] *Ibid.*
[19] 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.
[20] Immigration Bill, as reported from the Transport and Industrial Relations Committee. http://www.parliament.nz/en-NZ/SC/Reports/b/a/e/48DBSCH_SCR4142_1-Immigration-Bill-132-2.htm

information. This is a considerable concern particularly given that the power to classify information is extended by the Bill to the Chief Executive Officers of a wide range of government agencies.

5.5 Other provisions relating to immigration detention include the extension of police powers of detention from 72 to 96 hours (Part 9 Clause 275); and the extension of powers of detention to Immigration Officers, who can detain individuals at the airport for up to four hours (see Part 9, Clause 274).

Provisions in pending immigration legislation affecting non-refoulement

5.6 The Bill includes a number of measures that will undermine the basic entitlements of refugees and asylum seekers to physical access to New Zealand, followed by fair and effective procedures in which the validity of their claims can be assessed. Cumulatively, measures such as interdiction, restricted access to appeal, and restricted access to asylum determination procedures, will result in the systematic dismantling of the institution of asylum and increased risk of refoulement.

"Safe Third Country"

5.7 Clause 125 introduces the safe third country concept, providing that an asylum claim can be refused for consideration if 'in light of any international arrangement or agreement' the claimant may have lodged, or had the opportunity to lodge, a claim for refugee status or protection in another country. There are as yet no such agreements. The clause requires that any country with which an agreement is reached must be party to the Refugee Convention, the ICCPR and CAT.

5.8 This is commendable, however the Human Rights Foundation remains of the view that such provisions carry an enormous and unjustifiable risk of refoulement, or placing the asylum seeker into an endless "orbit" between States. The provision will deny access to fair and effective procedures for determining the protection needs of asylum seekers, seriously undermining the institution of asylum. We note that the Committee has requested the government to provide a list of 'safe third countries' and, if so, how this list is created and maintained, and we await the government's response with interest.

Protected persons status

5.9 The Bill provides for the recognition of protected persons at Clause 120 and 121. In the revised Bill, which is a vast improvement on the original draft, this status is conferred based on definitions found under the CAT and ICCPR. This is to be commended, but the legislation is drafted to meet obligations at a bare minimum and reserves the right to deport to other countries perceived as safe. The Transport and Immigration Select Committee noted in its report on the Bill: "*New Zealand's fundamental immigration related obligation arising from the CAT and the ICCPR is not to return a person to a country where he or she would be in danger of particular human rights abuses. We therefore recommend that the bill be amended to make it clear that protection status only prevents a noncitizen from being returned to a country where he or she would be in danger of torture, arbitrary deprivation of life, or cruel treatment; and it does not bestow a particular immigration status or prevent deportation to other countries where the noncitizen would not face that danger*."

5.10 The Bill specifies the possibility of deportation to any place other than the country of origin at Clause 153(4): “A protected person may be deported to any place other than a place in respect of which there are substantial grounds for believing that the person would be in danger of being subjected to torture or being subjected to arbitrary deprivation of life or cruel treatment.”

5.11 The Bill expands the definition of classified information, allowing for its use in immigration processes. Importing ‘classified information’ into the Immigration Act would result in a lack of transparency and accountability in the system, to breaches of the New Zealand Bill of Rights Act, and failures to meet human rights norms and therefore our international obligations. However, the Bill includes a broad definition of ‘classified information’ and allows for its use in immigration decisions of all kinds, including detention and refugee determination.

5.12 There is provision for a special advocate system. The Special Advocate model was adopted by the Inspector-General in the *Zaoui* case. Special Advocates are in theory able to see the classified information, and then fairly represent the person concerned in relation to it. The concern with Special Advocates relates to whether they can in practice provide individuals with a sufficient opportunity to challenge information on the basis of which decisions about them are made. Restrictions on, among other things, communication between advocate and appellant mean that sufficient opportunity is not granted under the Bill.

5.13 The Bill allows classified information to be used in refugee determinations. Clause 30 provides that classified information be referred to the Tribunal for decisions to be made under Part 5 (which concerns refugee determination procedures). This is of great concern to the Human Rights Foundation. Refugee status determination should be fair and transparent, and determined in accordance with natural justice principles; that is, an applicant should be informed of information being used against him or her and be given a reasonable opportunity to rebut and/or provide evidence. The asylum system in New Zealand is adversarial in nature, and therefore due process means that classified information should not be relied upon.

5.14 The use of classified information is controversial in all cases. However, in the case of refugee status determinations, the matter takes on great urgency, as it is possible that classified information may be provided by an aggressive or oppressive state. Refugee and protection decision making is different from standard immigration decision making. Introducing classified information into the process leaves it dangerously open to abuse.

5.15 The Bill also effectively eliminates appeal processes for those whose refugee determination cases involve classified information. Such cases are referred directly to the Tribunal, which would otherwise serve as an appeal body for those whose first claim has been considered by a refugee status determination officer. In combination with Clause 234, which shuts down opportunities for appeal or review in all immigration cases involving classified information, an individual in such circumstances would be left with no appeal avenue. Such a system not only undermines the principles of natural justice, but increases the risk of refoulement and contributes to the dismantling of the institution of asylum.

Exclusion of Human Rights Commission from immigration cases

5.16 Clause 350 of the Immigration Bill prevents immigration issues from being considered by the Human Rights Commission (reproducing the proscription found in section 149D of the Immigration Act 1987).

Security Risk Certificate legislation and the case of Ahmed Zaoui

5.17 Section 1140 in Part IVA of the Immigration Act 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. There is nothing in the legislation to prevent human rights abuses such as indefinite detention without charge or prolonged solitary confinement.

5.18 The case of Ahmed Zaoui, which lasted from 2003 to 2007, illustrated the flaws in this process. The allegations against him were eventually withdrawn by the Government's Security Intelligence Service, but only after Mr Zaoui had endured months in solitary confinement and years of curtailed liberty, separation from family and uncertainty and challenged the process in a long succession of court hearings.

5.19 Section IVA was exempt from the review of the Immigration Act which resulted in the Immigration Bill, and the legislation remains in place.

6. OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

6.1 The government ratified the Optional Protocol to the Convention Against Torture in 2007. The designated National Preventive Mechanisms (NPM) are working towards meeting their responsibilities under the Protocol. Some of them are facing resourcing constraints however, which need to be addressed if they are to be effective.

6.2 The Human Rights Foundation is concerned that the designation of NPM is a ministerial decision, and not specified in legislation. This leaves designation, and its removal, open to political expediency. NPM so appointed are not functionally independent, as the Optional Protocol requires..The importance and nature of independence in this context is addressed comprehensively in the Paris Principles – the Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights. Indeed, Article 18.4 the Optional Protocol specifically requires States Parties to *"give due recognition"* to these Principles.

6.3 Specifically, the Paris Principles require that in order to ensure independence from the Executive, Commissions should be established by "constitutional or legislative text". National institutions not so established (such as those set up by Presidential decree or ministerial order) are not admitted to membership of the International Coordinating Committee of National Institutions, nor to the regional body of such institutions, the Asia Pacific Forum. This is because without constitutional or legislative mandate, they are not considered to be "independent". Accordingly, the HRF considers the NPMs should be designated in the legislation.

The Human Rights Foundation recommends that the New Zealand government:

- **Suspend the introduction of Tasers pending a full and independent enquiry into their use and effects**
- **End the detention of asylum seekers in correctional facilities**
- **Ensure that interdiction practices and other border control activities do not compromise the right to asylum**
- **Review the Immigration Bill, including Section IVA of the Immigration Act**
- **Ensure sufficient resourcing for National Preventive Mechanisms under the Optional Protocol to the Convention Against Torture, and specify the National Preventive Mechanisms in legislation**