



42nd Session 27th April- 15th May 2009
New Zealand Fifth Periodic Report
Alternative NGO Report

1. INTRODUCTION

1.1 Action for Children and Youth Aotearoa Incorporated (ACYA) is a coalition of non-governmental organizations, families and individuals whose purpose is to promote the well-being of children and young people in Aotearoa New Zealand through:

- education and advocacy on the rights of children and young people;
- encouraging the government to act on the recommendations of the United Nations Committee on the Rights of the Child; and
- promoting opportunities for the voice and participation of children and young people.

1.2 In 2003 ACYA produced and published *Children and Youth in Aotearoa 2003*, the New Zealand NGO Report on New Zealand's implementation of the UN Convention on the Rights of the Child (NGO Report). The NGO Report was presented to the UN Committee on the Rights of the Child in Geneva in June 2003, accompanied by a video funded by ACYA and produced by New Zealand children called *Whakarongo Mai / Listen Up*.

1.3 In 2006 ACYA made a response to the draft fifth periodic report to the United Nations Committee Against Torture.

1.4 ACYA made a submission dated 13th September to New Zealand's fifth periodic report to this Committee. This report brings that report up to date.

1.5 We note the List of Issues CAT/C/NZL/Q5 dated 12 February 2009, and that paragraphs 5, 22 and 30 refer to children or applies to them.

1.6 We made a submission to the Government draft 3rd & 4th periodic report to the Committee on the Rights of the Child, and that report was released in November 2008.

1.7 Since the Fifth report was submitted a new government was formed in November 2008 and from a child related stance changes in direction have been signalled which are of concern.

1.8 This submission has been prepared by the ACYA Committee and the views expressed in it may not represent the views of each ACYA member.

1.9 Unless otherwise stated reference to headings and pages refers to those in the Government report

PART ONE INFORMATION ON MEASURES RELATING TO THE IMPLEMENTATION OF THE CONVENTION.

Article 2

2.1 Optional Protocol to CAT (page 9)

New Zealand ratified the Optional Protocol to CAT ('OPCAT') in 2007, following the enactment of the Crimes of Torture Amendment Act 2006. The legislation provides for the establishment of National Preventative Mechanisms ('NPMs') and for visits by the UN Subcommittee on the Prevention of Torture, as per the requirements of OPCAT.

2.2 The Human Rights Commission has issued its initial report for the period 30 June 2007-8.

The report addresses children and is available at:

<http://www.hrc.co.nz/home/hrc/newsandissues/firstmonitoringreportonplacesofdetentionrel eased.php>.

2.3 An issue of particular concern is the detention of children and young people in police cells, a practice that has been the subject of much criticism and concern from the Office of the Commissioner for Children (OCC), the judiciary and children's advocates. It is therefore encouraging that police cell detention will subject to ongoing monitoring by the ICPA as the designated NPM.

2.4 However, we consider that the Children's Commissioner should also have NPM designation in respect of the detention of children and young people in police cells. The statutory authority for holding children and young people in police cell custody is in Children, Young Persons and their Families Act 1989 which allows children to be held in police custody where there is no bed available in a Child, Youth and Family residence. While the police are responsible for conditions in police cells their placement there is a result of CYF's chronic failure to provide sufficient residential accommodation. Whilst we have every confidence in the ICPA, we are concerned that monitoring of child detention may get somewhat subsumed within the general monitoring of adults detained by police. We consider that the particular vulnerability of children in detention requires that the OCC, given its general functions under the Children's Commissioner Act 2003, should be accorded a formal monitoring role in respect of these matters.

3. ARTICLE 3 (page 18)

Article 3 and Immigration detention

3.1 We note recent media coverage regarding the circumstances of an Iranian national who was held in custody at the Auckland Remand Prison before being bailed following a 53-day hunger strike in protest of his deportation to Iran. The man had sought asylum upon arrival in New Zealand and had been detained in prison for 20 months prior to bail being granted. His advocates fear that he will be at risk of torture, due to his religious affiliations, if deported to Iran. His application for refugee status has been rejected at the first instance. He has appealed the decision, through counsel, to the Refugee Status Appeals Authority.

3.2 Whilst we understand that the above example does not involve a child or young person, we would be deeply concerned at the impact of similar circumstances affecting a child or young person, either directly or where the deportee is a parent of children residing in New Zealand.

3.3 Further to this issue, we note that the Immigration Bill 2007 proposes amendments to the Immigration Act 1987 (Paragraph 79), which if enacted will provide for more coercive powers, including detention of minors. We are concerned at clause 294 of the Bill that if enacted would introduce the detention of children and young people aged under 18 for periods of up to 96 hours. We consider this proposal runs contrary to the established principle that detention of children and young people should be a last resort measure. In addition to any ramifications the proposed clause may have in respect of CAT, in our view it also runs contrary to Article 37(b) of UNCROC. We note that the Human Rights

Commission has also noted its concern regarding Clause 294. The current status of the Bill is unknown

Undocumented Children in New Zealand (page 18)

3.4 The Reservation to the Convention on the Rights of the Child in respect of children not lawfully in New Zealand which effectively denies or restricts their access to health and education services (including early childhood education), still remains in place despite assurances given by the previous government that it intends to withdraw all its reservations. Current law and practice is discriminatory and has severe consequences for those children who do not have immigration status.(page 18).

3.5 Limited Purpose Permits have been available since 2007 for education purposes but no evidence has been produced as to the number of children who have taken advantage of such permits. Little publicity has been given to the availability of these benefits and some parents may be reluctant to approach the Immigration Service for fear they will be removed from the country. The Immigration Bill if passed in its present form will legalise the position.

4. Article 10 (page 29) Complaints Procedures

4.1 Clause 5 of the Children Young Persons and Their Families Amendment (No 6) Bill, if enacted, will require the Chief Executive of the Ministry of Social Development to establish, and make known, complaints procedures to deal with complaints by children and young people (or their family, whanau or family groups) who are, or have been, subject to action under the Act. These procedures must be such as to promptly hear and determine such complaints and be able to take appropriate action in the event a complaint is upheld.

4.2 We note that Clause 5 does not specify a timeframe or a process for establishing these complaints procedures. We consider that for a complaint procedure of this type and nature to be sufficiently robust, transparent and effective, it should be codified in statute or regulation.

4.3 Further to this issue, the Committee may like to seek information on the National Complaints Management Policy (paragraph 222). The Office of the Commissioner for children in their Statement of Intent mentions a Youth Justice Capability Review. That report mentions 4,813 children in care and protection placements. Notifications to Child Youth and Family have increased substantially in recent years.

4.4 The current status of the bill is unknown

5. ARTICLE 11 (page 36) Tasers

5.1 In respect of tasers (paragraph 142) the Commissioner of Police announced in September 2008 that these are now authorised for use. Guidelines on the use against children have not been created although general directions for use are on page 149 of the Standard Operating Procedures and we urge the Committee to seek further information. http://www.police.govt.nz/resources/2008/operational-evaluation-of-nz-taser-trial/Operational_Evaluation_of_the_NZ_Taser_Trial_August_2008.pdf.

Deaths in custody

5.2 We note that the Government report (para 163) makes mention of the Liam Ashley tragedy. Liam Ashley was a 17 year old boy who was murdered by an adult prisoner whilst

detained in transit from the Court to prison, circumstances in breach of the abovementioned provisions of UNCROC and the ICCPR.

5.3 We consider that this tragedy was a clear example of the potential consequences where a human rights principle designed to protect the welfare of young people is compromised by the necessity of administrative expediency. The tragedy resulted in an extensive Chief Ombudsman report and ensuing recommendations and has led the amendments to practice and regulations regarding prisoner transportation tantamount to UNCROC and ICCPR compliance. However there is lack of clarity on some of the outcomes of that report.

5.4 We refer to the 'test of best interests' developed by the Department of Corrections with a view to lifting the reservation under Article 37(c) of UNCROC. The policy (and the Corrections Regulations) allow the mixing of child prisoners under 18 years with young adult prisoners aged 18 and 19 years. While it is said that young adult prisoners are only mixed with child prisoners where such mixing is in the best interests of both age groups the reality is that spare beds in the Youth Units are made available to young adults. In our view this is a breach of ICCPR and UNCROC.

5.5 It is understood that the Human Rights Commission has reservations about the introduction of waist restraints during transit. We are not aware of procedures for use on children.

Young People in Police cells

5.6 Young people in Police Cells (paragraph 175ff). This continues to be a problem. We ask that a detailed report should be made and also refer to this topic in paragraph 2.4 earlier in this report. At the time of writing we are awaiting an answer to an Official Information Act enquiry.

Anti Terrorist Police Raid (Operation 8)

5.7 In October 2007, subsequent to a lengthy surveillance operation, the police made an anti terrorist raid in a rural area often referred to as the "Ruatoki incident". Subsequently eighteen people, although originally charged with anti terrorist offences, are now under Deposition hearings on firearms and other charges. Our concern was that children were caught up in this raid and some displayed anxiety in subsequent periods and needed counselling. As the incident is still before the Courts it is difficult to obtain factual information. We ask that the facts be disclosed, recommendations made and effected in respect of protection of children in such circumstances. An Independent Police Conduct Authority investigation is under way.

5.8 A quote from the New Zealand Herald 17 October 2007 reads:

"There's a lot of talk about care of children, but they didn't give a damn about ours," said a middle-aged man who was taken in for questioning with his son. The man said the armed offenders squad officers who raided his house ordered all the adults and children out of bed and into one room, scaring the children and not allowing the adults to get them food or other necessities."

5.9 Human rights issues affecting any such children are:

- How many children and young people were caught up in the operation
- Did they received appropriate care as the incident unfolded

- Were they treated inappropriately, or discriminated against, by reason of their age or gender or their parents' or legal guardians' race or political opinion
- How are children to be protected should similar events occur?

6. ARTICLE 16 (page 63)

Tokelau

6.1 Tokelau (paragraph 275ff) have twice rejected a public referendum for independence. Tokelau children are New Zealand citizens. Although there are no prisons, there is no monitoring system to ensure the absence of cruel or degrading treatment. The current administrative practice is to devolve day-to-day administration to each atoll. While this is a pragmatic decision it needs checks and balances and appropriate independent monitoring.

New Zealand Action Plan for Human Rights

6.2 In July 2007 Cabinet approved a process for government responses to the Action Plan, asking all government departments to engage with the Human Rights Commission (with reference to paragraph 281) on the Action Plan priorities and to take account of these priorities in developing their work programme.

6.3 Information from government agencies on their implementation of the Action Plan priorities has been gathered and analysed as part of the Human Rights Commission's mid-term review of the Action Plan. The review has been issued under the heading "NZAPHR MID TERM REVIEW"

7 NEW MATERIAL

Local Authorities, District Health Boards and School Trustees

7.1 The Crimes of Torture Act, Section 2 definition of a public official under clause (v) states " a member and employee of any local authority or public body" (page 7). Arising from our work for UNCROC we have failed to obtain clarification from the Government on the need for compliance by Local Authorities, District Health Boards and School Trustees with International Human Rights Treaties. The Government has indicated such bodies are under no obligations.

7.2 We have made an Official Information Act request to the Ministry of Foreign Affairs and Trade to clarify the Government's position. The issue under CAT and OPCAT is the need for detention, medical and educational facilities to comply. This is raised in terms of searches (page 74).

Prostitution Reform Act

7.3 Although due sometime in 2006, The Prostitution Law Review Committee presented its report to the Associate Minister of Justice on 14 May 2008. The Committee's report, [*The Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003*](#), was tabled in the House of Representatives on 23 May 2008. Chapter Seven is headed " The Use of Under Age People in Prostitution".

7.4 Our concern is that if adequate services are not offered to these at risk young people by appropriate agencies there is a breach of this Convention.

Electro Convulsive Treatment

7.5 The Human Rights Commission and the Health and Disability Commissioner say the use of ECT (electro convulsive treatment) should be banned for children and never used

without informed consent in other cases unless it is the only option (media release 16th May 2007). There is evidence that ECT is sometimes used on children in this country. The committee may wish to enquire further in to this matter.

PART 111 COMPLIANCE WITH THE COMMITTEE'S CONCLUSIONS AND RECOMMENDATIONS

8. Recommendation 6 (e) of previous Committee report

Prohibition Corporal Punishment (page 67)

8.1 The Crimes (Substituted Section 59) amendment Act 2007 addressed the issue, raised on Page 67 , to prohibit corporal punishment. A two year review clause will apply. There is a citizen's initiated referendum opposing this legislation which is to be put to the public in July/August 2009. A vocal lobby group is seeking changes to the legislation and the new Government has not made its position clear.

Family Group Conferences. (page 71)

8.2 While this process has much to commend it (page 71), a review should be made to identify its shortcomings. We understand that Youth Advocates are not always available and the procedures are not robust to ensure compliance with decisions reached, see 8.3. The Committee on the Rights of the Child in its 2003 report on New Zealand recommended that there be undertaken a systematic evaluation of family group conferences (para 50(c)). No independent evaluation has since been undertaken. Details of FGC's are at: <http://www.cyf.govt.nz/1254.htm> or <http://www.justice.govt.nz/youth/fgc.html>

8.3 PUTTING YOUTH JUSTICE UNDER THE MICROSCOPE: WHAT IS THE DIAGNOSIS? A QUICK NIP AND TUCK OR RADICAL SURGERY?

HIS HONOUR JUDGE A J BECROFT

Principal Youth Court Judge for New Zealand

<http://www.justice.govt.nz/youth/media/speeches/singapore-november-2007.html>

Age mixing in Prisons. (page 70)

8.4 While substantive progress, as indicated on page 70, has been made for separating those male prisoners under 17 years by the provision of four youth offender units, our understanding is the Government is still not in a position to remove the Reservation to Article 37 (c) of the Convention on the Rights of the child, and that is to be addressed in their 3rd & 4th Periodic report. There are no separate units for female prisoners under 18 years.

Minimum Age for Criminal Responsibility. (page 71)

8.5 There is no evidence of research into or debate on increasing the age of criminal responsibility as identified on page 71, which is also a recommendation of Committee for the Rights of the Child

8.6 The new Government has introduced the "Child Youth and the Families (Youth Court Jurisdiction and Orders) Amendment Bill" which would allow 12 and 13 year olds to be brought before the Youth Court for serious offences. This effectively lowers the age of criminal responsibility in relation to serious offences. The UN Committee in 2003 expressed the view that the age of criminal responsibility in NZ was too low and proposed that it be increased (paras 20, 21) The bill is a move in the opposite direction. The bill would also introduce a three month boot camp regime for young offenders. The boot camp approach has been tried in England, Australia and New Zealand and resulted in

degradation and abuse of the young detainees and a higher rate of recidivism than community based sentences. . Such punitive approaches to youth justice breach CRC and will be strongly opposed by the child rights movement.

Upper Age of the Child Young Persons and their Families Act (page 72)

8.7 In respect of the item on page 72, legislation is under consideration in Parliament to lift the age to include 17 year olds under the CYF Amendment (No 6) Bill, which will conform to the Convention on the Rights of the Child definition.

8.8 The Select Committee report states:

“This bill makes changes to the Children, Young Persons, and Their Families Act 1989 (the principal Act), relating to the care and protection of children and young persons, youth justice, and child offending ,and addresses out of home care for children and young persons with disabilities. It also increases the upper age covered by the care and protection and youth justice systems to include young persons aged 17. The recommended amendments set out below would not make major changes to the bill, but would rather clarify its intentions and address some important omissions.”

8.9 The new Government has signalled it will not pursue this matter, and we view this with concern. Again, this move by the new government is directly contrary to recommendations made by the UN Committee on the Rights of the Child in 1997 and 2003.

9. NEW AND PENDING LEGISLATION

9.1 Since the Government report was issued the Care of Children Act has been passed affecting the treatment of children. This matter is raised because there has been a media reported case where because of domestic violence issues a Hague Convention case was over-ridden by this legislation.

9.2 Also the Evidence Act 2006 improves the environment for children to give evidence and that reduces the risk of degrading treatment.

9.3 The Public Health Bill is a lengthy Bill to review many aspects of health treatment. Its status is now unknown

9.4 The Policing Act 2008 is in force. A review of the Act by an established child rights lawyer has indicated there are potential problems for young people and we quote as follows:

Measures in the new Act of concern for under-18s

Most of the provisions of the Act deal with police employment and governance issues.

Sections 32 to 34 greatly extend police powers to take fingerprints, photographs and “biographical information” from persons who are arrested or whom the police propose to issue a summons against. These provisions apply under-18s as well as adult suspects.

(Robert Ludbrook February 2009)

It is too early to say if difficulties will arise.

9.5 The Sentencing and Parole Amendment Bill as introduced applies to young offenders as well as adult offenders. It would introduce a range of tougher measures which include a “three strikes and you are out” proposal which if passed into law would result in more youth offenders being imprisoned. Other measures in the bill would mean that some young offenders sentenced to prison would serve a longer term. New Zealand has a higher rate of youth imprisonment than other comparable countries.

9.6 The Criminal Investigations (Bodily Samples) Amendment Bill considerably extends the situations where police can require a suspect to provide a DNA sample and protections for under-17s in the current legislation will be removed.

These new tougher measures to combat crime will separately and collectively disadvantage young offenders and will place New Zealand further in breach of its obligations under international human rights instruments.

Peter Shuttleworth
ACYA Committee