BEFORE THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

C/- Secretariat, Human Rights Committee
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 6TH PERIODIC REPORT

ALTERNATIVE SHADOW REPORT - FILED BY DR TONY ELLIS, BARRISTER OF NEW ZEALAND

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A. INFORMATION NOTE

Who is this report written for?

This Shadow Report is primarily written for the independent members of the United Nations Human Rights Committee[1] **("the Committee")** for their formal consideration of New Zealand's sixth[2] periodic report under the International Covenant on Civil and Political Rights[3] **("ICCPR" or "the Covenant")**, which is scheduled for March 2016 in Geneva.

Who is the author?

This Shadow Report is submitted by a practicing human rights lawyer in New Zealand—Dr. Tony Ellis.[4] It was prepared on a pro-bono basis.

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1 The Human Rights Committee, with 18 members serving in their independent capacity, is the expert monitoring body established under the International Covenant on Civil and Political Rights.

2 New Zealand has presented six periodic reports under Article 40 of the ICCPR – 1983, 1990, 1995, 2002, and 2010. The 6th report, prepared by the Ministry of Justice, was covers the period from January 2008 to March 2015. The report is available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fNZL%2f6&Lang=en

3 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.

4 LL.B (Monash, Australia), LL.M, (Victoria University Wellington, NZ), M.Phil (Law) (Essex, UK), SJD (La Trobe, Australia); Barrister of the High Court of New Zealand and Australia, and Pitcairn Island Defence Counsel; Counsel for individual communications to the UN Human Rights Committee, including the only three successful New Zealand cases, *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), and *Dean v New Zealand* finding a breach of Article 9(4). Counsel in *A v New Zealand* (No 21/2015 United Nations Human Rights Council Working Group on Arbitrary Detention) First victory any NZ lawyer has achieved before the Working Group on Arbitrary Detention. Mr A, 59 year old, who has been detained for the last 45 of 46 years has been found to have been arbitrary detained for the last 11 years, and discriminated against because of his intellectual disability, the Working Group called for his release from prison and compensation.
The author is a former President of the New Zealand Council for Civil Liberties for eight years until Dec 2008.
He was counsel in several leading human rights cases in New Zealand courts (e.g. *Todd Aaron Marteley v The Legal Services Commissioner* (SC 61/2014) [2015] NZSC 127. The Supreme Court allowed the appeal and restored the order made in the High Court that Mr Marteley receives legal aid for his murder conviction appeal. Moreover, found the ability to grant legal aid in circumstances where no merit is apparent is not

What is a 'Shadow Report'?

A Shadow Report is a report to the Committee from a source other than the Government. By becoming a party to the Covenant (signature in 1968, ratification in 1978), New Zealand voluntarily agreed to participate in the Committee's reporting and monitoring process.

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

The last examination under the Covenant was concluded in March 2010,[5] following which the Committee released a report with recommendations[6] **("Concluding Observations").** The Committee's concluding observations (along with its 'views' on individual communications submitted under the First Optional Protocol to the Covenant, and 'General Comments' elaborating the understanding of specific provisions of the Covenant) while not formally binding as a matter of law, constitute authoritative interpretations of international human rights law.

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 Covenant.[7]

As required, New Zealand has submitted its Sixth Periodic Report to

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confined to exceptional cases as was previously held to be the case under legislation that preceded the 2011 Act. There is a statutory right to appeal against criminal convictions, and the function of the legal aid system is not to indirectly filter this right in respect of impecunious appellants. In *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 interpreting the NZBORA).

5 Summary record of the first part (public) of the 2016th meeting: New Zealand, 15/07/2002 CCPR/C/SR.2016

6 Concluding observations of the Human Rights Committee: New Zealand, CCPR/C/NZL/CO/5, 25 March 2010.

7 See, e.g., *Minister for Immigration & Multicultural & Indigenous Affairs v. B* (2004) 219 C.L.R. 365, ¶148 (High Court of Australia) ("In ascertaining the meaning of the ICCPR . . . it is permissible, and appropriate, to pay regard to the views of the UNHRC."); *A and others v. Sec'y of State for the Home Dep't*, [2005] UKHL 71, [2006] 2 A.C. 221 (H.L.)

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.

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 such as Human Rights Commissions, non-governmental organisations **("NGOs")** working in the field of human rights, or lawyers who act on behalf of victims of human rights abuses.[8]

While this 'Shadow Reporting process' is regularly utilised in commonwealth and western countries, it use is becoming more common by New Zealand organisations. The New Zealand Law Foundation has made an annual grant availble of $10,000 to encourage such reports. The author hopes that, as a secondary goal, this report raises awareness in New Zealand of the Shadow Reporting process.

Compliance with Human Rights bodies findings

Experience has shown that most Governments are highly unlikely to give equal weight, as they should, to 'the not so good' as well as 'the good.'

By highlighting some of these 'not so good' areas, this Shadow Report aims to fill some of the gaps in the sixth periodic report.

In the 6th periodic report the State party claims to be strongly committed to the protection and promtion of human rights, yet it has

[8] 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

still failed to implement the views of the Committee in *E.B v New Zealand*, 1368/2005 (Issues para 7, 6th report para 68), and when asked by the author who was his counsel to correct the misinformation provided to the Committee that E.B. did not want compensation, the State party declined.

As Justice Louise Arbour, a previous United Nations High Commissioner for Human Rights from 2004-2008, recently noted:[9]

> A State's compliance with its obligations under the Covenant and other human rights treaties 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.

Not only does New Zealand not promote and protect international human rights, by failing to comply with obligagtions under the Covenant it also imperils the very rule of law.

Additionally, the State Party has now refused to implement the recommendation of the UN Working Group on Arbitrary Detention in July 2015 in *A v New Zealand* 21/2015:

> 28. The Working Group concludes that the continuation of **Mr. A's incarceration after 2004 for the protection of the public, is an arbitrary deprivation of liberty falling into category I** of the categories applicable to the consideration of the cases submitted to the Working Group. The detention also constitutes a violation of international law for reasons of discrimination and falls into category V.
>
> Disposition
>
> 29. In the light of the preceding, the Working Group on Arbitrary Detention renders the following opinion:
>
> > **The deprivation of liberty of Mr. A is arbitrary and in contravention of articles 9** of the Universal Declaration of Human Rights and **the International Covenant on Civil and Political Rights**. It falls into categories I and V of the categories applicable to the consideration of the cases submitted to the Working Group.
>
> 30. Consequent upon the opinion rendered, the Working Group requests the Government of New Zealand to take the necessary steps to remedy the situation of Mr. A and bring it into conformity with

[9] Cite with website

> the standards and principles in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
>
> 31. The Working Group considers that, taking into account all the circumstances of the case, **the adequate remedy would be to release Mr. A from prison and accord him an enforceable right to compensation in accordance with article 9(5) of the International Covenant on Civil and Political Rights.**
>
> **[Bold added]**

With respect, the author simply cannot agree that New Zealand is strongly committed to protection and promotion of international human rights, on the last two occassions of an international finding against New Zealand, it has refused to implement the views of the deciding bodies.

More information

This Shadow Report is dated January 2016. If there are substantive changes before the Committee's scheduled examination in Geneva, the author may also submit a brief update closer to March 2016.

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 the 'Country Rapporteur' (the Committee member designated to lead that particular State Party examination).

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

In addition to this written submission, the author of this Shadow Report will attend the Committee's examination.

B. COMMON THEMES AND RECOMMENDATIONS

Reservations to ICCPR

New Zealand currently has four 'reservations' to the ICCPR.[10] The

[10] There are four current reservations, source: http://www2.ohchr.org/english/bodies/ratification/4_1.htm

reservation to Article 14(6) is of particular concern. Article 14(6) states that:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered facts show conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partially attributable to him.

New Zealand's reservation states:

> The Government of New Zealand reserves the right not to apply article 14(6) to the extent that it is not satisfied by the existing system for ***ex gratia*** payments to persons who suffer as a result of a miscarriage of justice.

For 30 years this reservation has remained in place. 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.

The Human Rights Committee's General Comment 31/14 clearly noted, at paragraph 14 that:[11]

> 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.

In the case of David Bain convicted of murdering his father and four other family members, the Privy Council ordered a retrial, and he was

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"The Government of New Zealand reserves the right not to apply article 10(2)(b) or article 10(3) in circumstances where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable; and further reserves the right not to apply article 10(3) where the interests of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned...." The Government of New Zealand reserves the right not to apply article 14(6) to the extent that it is not satisfied by the existing system for ***ex gratia*** payments to persons who suffer as a result of a miscarriage of justice…."The Government of New Zealand having legislated in the areas of the advocacy of national and racial hatred and the exciting of hostility or ill will against any group of persons, and having regard to the right of freedom of speech, reserves the right not to introduce further legislation with regard to article 20. …."The Government of New Zealand reserves the right not to apply article 22 as it relates to trade unions to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that article."

[11] 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)

acquitted at the retrial. David Bain became a household name due to the massive media interest. A report for the then Minister of Justice on a compensation claim by David Bain, was commissioned from retired Supreme Court of Canada Judge the Hon Ian Binnie QC, he reported in August 2012, the report cost $400,000. The Minister rejected the independent report. A second report was commissioned from former Justice of the Australian High Court Ian Callinan who will lead a fresh inquiry, which will re-examine Bain's claim for compensation arising from his wrongful conviction and imprisonment for murder.

In the concluding obervations to the 5th periodic report your Committee said:

> 5. The Committee welcomes the State party's indication that it is currently amending its regulations on detention so as to permit the withdrawal of its reservation to article 10, paragraphs 2(b) and 3 of the Covenant. The Committee further notes the State party's intention to maintain its other reservations.
>
> The State party should proceed to withdraw its reservations to article 10, paragraphs 2(b) and 3, and consider withdrawing all its other reservations to the Covenant.

No progress has been noted.

The Author urges the Committee to again recommend in stronger language that New Zealand withdraw its reservations to the ICCPR.

C. IN PRACTICE, THE COVENANT IS NOT RECOGNISED AS LAW IN NEW ZEALAND

The Covenant is not directly enforceable in New Zealand courts. In a November 2015 response to the Committee in respect of *Miller and Carroll v New Zealand* 2502/2014 the State party say:

> 28. The Court of Appeal was not required to make a determination on this issue because the nature of New Zealand law is that the Covenant is not directly incorporated into the law of New Zealand.

Additionally, the situation of even obtaining a domestic human rights remedy is becoming worse. See the 2013 submission of the Human Rights Commission to yourselves on the list of issues on NZ's 6th periodic report, to be presented in March 2016:

Effective Remedy (Article 2)

The rule of law lies at the foundation of a free and democratic society and is essential for the protection of human rights. However, legislation is increasingly being used to oust judicial and other review mechanisms, which significantly impacts on the right to justice (and to an effective remedy). Recent examples include:

- Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010;
- Canterbury Earthquake Response and Recovery Act 2010
- Taxation (Tax Administration and Remedial Matters) Act 2011; and
- Immigration Amendment Act 2013;

In 2012 the Court of Appeal affirmed that the policy of not paying family carers to provide disability support services to disabled family members constituted unjustifiable discrimination on the basis of family status. In direct response to this decision the Government passed the New Zealand Public Health and Disability Amendment Act under urgency[12] on 17 May 2013. The Act effectively ousts the Commission's jurisdiction and removes any potential domestic remedy for unlawful discrimination relating to family care policy.[13] The passage of the Act from introduction to enactment in 24 hours with no opportunity for Select Committee Review, a heavily redacted Regulatory Impact Statement and a report from the Attorney General that the Bill breached BORA was greeted with despondency and despair by disabled people.

This hardly accords with the State party's trumpet blowing under key judgments on the Covenant, at paragraph 10.

The right of prisoners to vote got the first New Zealand Declaration of Inconsistency, but nevertheless the right to vote for prisoners has not been actioned. (6th report, para 23)

Paragraph 23 prasies *Ye v Minister of Immigration* for interpreting the Immigration Act consistently with the Convention on the Rights of the child. Yet the Minister of Justice agreeing to the extradition of Mr Kyung Yup Kim for homicide, did not even consider Mr Kim's two New Zealand citizen children.

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12 Meaning that despite there being significant human rights implications, neither the Commission nor the public were able to make submissions on the Bill.

13 It stops people from bringing unlawful discrimination complaints about a family care policy to the Commission. Nor will any proceedings be able to be commenced or continued in any court in relation to discrimination.

In *Kim v Prison Manager of Mt Eden Prison*,[14] a habeas corpus appeal, the Supreme Court found that where the appellant was in danger of extradition to China, it was "premature"[15] to rely on *Israil v Kazakhstan*[16] as to the possibility of the death penalty or torture, hardly consistent with being able to use Covenant points at any stage of the prosecution.[17]

In addition Mr Kim has been detained in prison for over 4 ½ years, whilst challenges to his extradition were made.

No one pending extraditon should be imprisoned. This is inconsistent with your Concluding Observation to the 5th periodic report:

> 16…
>
> **The State party should:**
>
> **a) bring its legislation fully in line with the principle of non-refoulement;**
>
> **b) ensure that no asylum-seeker or refugee is detained in correctional facilities and other places of detention together with convicted prisoners, and amend the Immigration Act accordingly; and**
>
> **c) consider extending the mandate of the New Zealand Human Rights Commission so that it can receive complaints of human rights violations related to immigration laws, policies and practices and report on them.**

The Committee should extend its observation to include extradition detainees, in line with that Concluding Observation, and General Comment 35/60:

> Article 9 addresses such uses of detention in the implementation of expulsion, deportation or extradition.

The Committee should also find a breach stronger than its 2010 concluding observations at para 7:

> The State party should enact legislation giving full effect to all

14 [2012] NZSC 121.
15 Ibid, paragraph 31.
16 *Israil v Kazakhstan* CCPR/C/103/D/2024/2011.
17 The habeas appeal was a criminal case as extradition is treated as criminal, even if it were a civil case e.g. judicial review, Covenant jurisdiction should still be able to be relied upon.

> Covenant rights and provide victims with access to effective remedies within the domestic legal system. It should also strengthen the current mechanisms to ensure compatibility of domestic law with the Covenant

D. LIMITED APPLICATION AND INTERPRETATION OF NEW ZEALAND BILL OF RIGHTS ACT

In 2002, the Human Rights Committee noted its "regret" that the New Zealand Bill of Rights had "no higher status than ordinary legislation". The State Party noted in response (in the fifth report under the ICCPR,[18] and with reference to information provided in earlier reports) that:

> 7. 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.

In other words, the State Party agrees with the Committee that the application and interpretation of the Bill of Rights Act is limited. However, the State Party (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 (See the State Party's legal submissions in *Baigent's case*[19]).

Nothing has changed.

Impact of section 4

Section 4 of NZBORA constitutes a major fetter on the NZBORA and

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

19 *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.

the Covenant:

> 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.

It has a one line mention at para 65 of the 6th periodic report.

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.

Section 4 constitutes a major fetter on the rights contained in the ICCPR.

The Human Rights Committee in paragraph 8 of its Concluding Observations[20] 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 Author encourages the Committee to urge the State Party to avoid further breaching the Covenant by repealing section 4 of the

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

Bill of Rights Act 1990, and by giving the Bill of Rights Act 1990 supreme law status.

E. ARTICLE 14 (RESERVATIONS)

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.

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

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

The State Party at para 230 of its 5th periodic report was rather misleading as it suggested 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.

There have been no prosecutions under the Crimes Against Torture Act.

The Author encourages the Committee to again ask the State Party to withdraw the reservation.

F. PRISONERS' AND VICTIMS' CLAIMS ACT 2005

This legisalation was the subject of oral questioning in New York in 2010, The Minister of Justice advised the Committee that the Cabinet

would shortly consider it. The Cabinet did, and matters from a rights perspective got worse.

If the prisoner receives a legacy, lottery win, or private litigation win, his or her windfall is not subject to this legislation. Only compensation awarded against State Authorities for rights breaches, or torts is engaged.

Once a claim by a prisoner has been settled, or a Court orders compensation, the funds are held on trust for six months pending any claims from prior victims. The deposit of the funds ar eplaced in public notice columns of newspapers

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 entitled to Legal Aid.

A communication to the Committee Against Torture *Vogel v New Zealand* 672/2015 is currently due for the author's response to the State party's reply. In thatt communication is alleged that such not apying compensation to prisoners is antithecial to the purposes and intention of the Convention.

Whilst *Taunoa v Attorney-General*[21] the leading case on prisoner compensation was before the Court of Appeal, the legislature passed the Prisoners' and Victims' Claims Act 2005, under urgency. This effectively curtailed any effective remedy, adequate or otherwise, for prisoners, who are subjected to torture or other ill-treatment by state officials.

The original legislation had a three year term, and was renewed in 2008, and 2011, it is now permanent.

The State Party in it's 5th periodic Report at paragraph 273 provides:

> 273. In addition to the case law noted above, claims of cruel,

[21] *Taunoa v Attorney-General* [2006] 2 NZLR 457 (CA), Para 284.

> 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.

The State Party's 5th Periodic Report at paragraph 138 says:

> The Act has two 'sunset clauses'. These clauses provide that the guidelines restricting compensation payments and the special claims procedure will expire in 2010. The Act contains these sunset clauses because work is currently being done on an independent prison inspectorate.

The State Party do not report on the topic in its 6th report, albiet the legislation is effectively"new".

The Author encourages:

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

G. PRIVATE PRISONS—PARA 19 OF ISSUES

The 6th periodic report deals with this issue at Para 196, and the list of issues deals with it at Para 19.

The NZ Herald reported in July 2015:[22]

> A prisoner in the Serco-run Mt Eden prison was so badly beaten he was left with serious brain injuries and had to learn to walk again.
>
> The man is now taking Serco to court in a private prosecution-the first of its kind in New Zealand. It is a new revelation after a week of complaints about Serco that resulted in the Government taking back control of the prison.
>
> Fresh allegations yesterday that prisoners had been also raped and extorted have been referred to police.

A second private prison has just opened. The Corrections website states:

> Auckland South Corrections Facility (ASCF), located in Wiri, is the newest men's prison and the second privately run prison in New Zealand.

[22] http://www.nzherald.co.nz/news/print.cfm?objectid=11486965.

> The Department of Corrections has contracted SecureFuture (the Public Private Partner) to design, build, finance, operate and maintain the new prison.
>
> SecureFuture has subcontracted Serco to operate the prison. The prison will form part of Corrections' prison estate, but will be privately operated by Serco for a period of 25 years.

This is disturbing given Serco failures at Mt Eden Corrections Facility.

Mr Kim referred to above in respect of extradition, has currently been detained for 4 ½ years pending extradition, and is subject of a current judicial review.

He was subject of a psychological report by Dr Armon Tamatea of Waikato University, and a psychiatric report from Dr Vesna Rosic, Mr Kim on the basis of these reports has a severe major depression, with anxiety distress, and was a the time of the reports late 2015 suicidal. Dr Rosic opined at 59:

> Therefore, it is more likely than not that Mr Kim's detention in Mt Eden prison for over four years substantially contributed in the development of his Major depressive disorder (severe) with anxious distress and suicidal risk

He also claims to be locked in his cell for at least 19 hours a day.

Plainly, the private prison environment leaves much to be desired.

The Committee's 2010 Concluding Observations included this statement:

> It remains concerned as to whether such privatization in an area where the State party is responsible for the protection of human rights of persons deprived of their liberty effectively meets the obligations of the State party under the Covenant and its accountability for any violations, irrespective of the safeguards in place. (arts. 2 and 10

74. The Committee should express greater concern considering its prior concluding observation fell on deaf ears.

H. DETENTION AND LIBERTY OF THE SUBJECT— SOLITARY CONFINEMENT ARTICLES 7. 9, AND 10

The Standard Minimum Rules 1955 for the Treatment of Prisoners[23] ("SMR") (recently updated to the Mandela Rules which provide greater protections)[24] are unlike most international human rights instruments which the NZ Government has failed to enact in domestic law. These rules have higher status, and are in any event customary international law. The Corrections Act 2004 says:

> **5 Purpose of corrections system**
>
> (1) The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by—
>
> …
>
> (b) providing for corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act that are based, amongst other matters, on the United Nations Standard Minimum Rules for the Treatment of Prisoners; and

The Mandela Rules prohibit prolonged solitary confinement (over 15 days), and place restraints or shorter terms:

> Rule 43
>
> 1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:
>
> (a) Indefinite solitary confinement;
>
> (b) Prolonged solitary confinement;
>
> Rule 44
>
> For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.
>
> Rule 45

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23 Adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

24 A.C.3/70/L.3, 29 September 2015 .

> 1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.

The Human Rights Commission in its role as the primary National Preventive Mechanism ("NPM") under the Optional Protocol to the Convention Against Torture (OPCAT) issued a 2015 report on Monitoring Places of Detention[25]. The Ombudsman also an NPM, reported at p 28 on Prisons. Under the heading Segregation facilities it said:

> Because of the differences between prisons in the physical environment of segregation units and cells, segregation remains a cause for significant concern. Evidence is ongoing of variances in the way directed segregation is being applied to prisoners pursuant to sections 58. 59 and 60 (1)(a) of the Corrections Act 2004 (the Act) across the prison estate.
>
> Although the new management cells at Auckland Prison are bigger, brighter, and less oppressive than the old ones; their design is intended to increase surveillance, enable prolonged solitary confinement, and minimise contact between prisoners and staff. Cells are self-contained with a toilet and shower. Other measures, such as a small barren exercise yard feeding-slots built into cell doors, serve to reduce prisoner movement in and out of the unit.
>
> Tongariro/Rangipo Prison has no management unit therefore, prisoners on directed segregation are located in the separates units (in a punishment cell). As previously reported, separates facilities designed for prisoners undertaking a period of cell confinement and do not have some of the design features legally required for prisoners subject to a segregation directive under the Act. Furthermore, cells are monitored on camera, including the toilet and shower facilities.

New Zealand law does not permit habeas corpus (article 9(4) applications) for those in Solitary, see the 5 Court of Appeal Judge bench in *Bennett v Superintendent, Rimutaka Prison*:[26]

> [Held]:
>
> 1 The writ of habeas corpus was to be used only where it was sought to release someone entirely from unlawful custody. A change of conditions on which an inmate sentenced to imprisonment was being detained whether by segregation, reclassification or transfer to another institution did not create a new detention under an

[25] Annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT), 1 July 2014-2015.

[26] [2002] 1 NZLR 616(CA)

> enactment for the purposes of s 23(1) of the New Zealand Bill of Rights Act 1990. Nor did unlawful treatment during detention render the detention itself unlawful (see paras [61], [62]).
>
> *R v Miller* (1985) 23 CCC (3d) 97 not followed.

This is inconsistent with General Comment 35/5;

> Examples of deprivations of liberty include police custody, "arraigo,"[27] remand detention, imprisonment after conviction, house arrest,[28] administrative detention, involuntary hospitalization,[29] institutional custody of children, and confinement to a restricted area of an airport,[30] and also include being involuntarily transported.[31] They also include certain further restrictions on a person who is already detained, for example, **solitary confinement** or physical restraining devices.
>
> [**Bold** added]

The Committee should recommend:

A. New Zealand law be extended so that Habeas Corpus is available to those detained in solitary confinement;

B. The Committee should recommend prolonged solitary confinement should immediately cease, and the use of solitary should be confined to exceptional cases, and only used as a last resort;

C. It should also recommend the management cells at Auckland prison should no longer be used, and that cells at Tongariro, should not be used for prisoners detained in solitary.

I. PROTECTION OF THE RIGHTS OF CHILDREN ARTICLES 7 AND 24 (ISSUES PARA'S 22 AND 23)

The Confidential Listening and Assistance Service made its final report in July 2015, under the headline 'Horrifying' and 'deeply shocking' report into child abuse the NZ Herald of 25 August 2015 reported:

A panel tasked with examining historical abuse in New Zealand's state

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27 See Concluding observations Mexico 2010, para. 15.

28 1134/2002, *Gorji-Dinka v. Cameroon*, para. 5.4; see also Concluding observations, United Kingdom 2008, para. 17 (control orders including curfews of up to 16 hours).

29 754/1997, *A. v. New Zealand*, para. 7.2 (mental health); see Concluding observations Moldova 2009, para. 13 (contagious disease).

30 See Concluding observations Belgium 2004, para. 17 (detention of migrants pending expulsion).

31 R.12/52, *Saldías de López v. Uruguay*, para. 13.

institutions has heard a litany of physical, emotional and sexual abuse, describing it as "horrifying" and "deeply shocking".

> However, the Confidential Listening and Assistance Service said the "most shocking thing was that much of this was preventable".
>
> "If people had been doing their jobs properly and if proper systems had been in place, much of this abuse could have been avoided with better oversight," the panel said.
>
> In its final report, released to Fairfax under the Official Information Act, chairwoman Judge Carolyn Henwood said the panel members were "profoundly affected" by what they heard.
>
> "As the numbers grew and more voices were heard, a picture was painted for us of a careless, neglectful system which allowed cruelty, sexual abuse, bullying and violence to start and continue.
>
> "Through their words and tears, we could see the invisible welts and bruises, as well as the deeper hurt and emotional damage."
>
> More than 1100 people came forward to speak to the panel between 2008 and June this year, covering child welfare care, psychiatric care and health camps, and residential education.
>
> "**Our panel meetings revealed an alarming amount of abuse and neglect, with extreme levels of violence," Judge Henwood said**.
>
> "**I was deeply shocked by their stories and by the overall level of violence and abuse that New Zealanders were willing to inflict on children**.
>
> "Serious physical and sexual abuse came from a wide range of people and from both genders. Foster caregivers and extended families, social workers and staff, teachers, the clergy, cooks, gardeners, night watchmen; even other children and patients all took part in abuse.
>
> "We heard of people using their fists and their feet, as well as weapons and other implements on occasion, to attack children. Many very severe beatings for no apparent reason were reported to us."
>
> **As many boys as girls were sexually abused - about 57 per cent of both genders, the report said**.
>
> **[Bold** added]

Child abuse is no doubt aggravated by child poverty, UNICEF reported on 11 December 2015:[32]

> Child poverty is a reality in New Zealand
>
> As many as 28 per cent of New Zealand children – about 305,000 –

[32] https://www.unicef.org.nz/learn/our-work-in-new-zealand/Child-Poverty-in-New-Zealand

currently live in poverty.

When a child grows up in poverty they miss out on things most New Zealanders take for granted. They are living in cold, damp, over-crowded houses, they do not have warm or rain-proof clothing, their shoes are worn, and many days they go hungry. Poverty can also cause lasting damage. It can mean doing badly at school, not getting a good job, having poor health and falling into a life of crime.

UNICEF's job is to stand up for children everywhere. That includes kids in New Zealand. When children's rights are neglected or under threat, UNICEF is there to advocate on their behalf. Pushing government to keep children first in their policies, working with local councils to make more child friendly cities and spreading the word about issues in schools is all part of a powerful mix of actions UNICEF takes for New Zealand children.

The 2015 budget giving an extra $25 per week from next April 2016, was of little help:

A $790 million package to lift children out of poverty will see benefits rise beyond inflation for the first time in 30 years, but it won't come for free.

The Government also imposing stricter work obligations.

The package, announced in the Governnment's Budget on Thursday, will give families on benefits with children a $25-a-week boost to their incomes, while-low income working families will get at least $12.50 a week extra.

The increase to benefits is the first, beyond inflation, since 1977.[33]

The technical report of Child Poverty Monitor says:[34]

Key points

Poverty and living conditions

In 2014, 305,000 (29%) of dependent 0–17 year olds were living in income poverty defined using a relative threshold measure of below 60% of the median income after housing costs were taken into consideration. In 2013, the percentage was 24%.

In 2014, 245,000 (23%) of dependent 0–17 year olds were living in income poverty defined using a fixed-line threshold measure of below 60% of the 2007 median income after housing costs were taken into consideration. In 1982, the percentage was 14%.

The non-income measure (NIM) indices reported by the Ministry of Social Development have been revised in recent years and the Material Wellbeing Index (MWI) and the DEP-17 Index have been developed. This makes a comparison over the last three years more

33 http://www.stuff.co.nz/business/68742199/Budget-2015-Benefits-rise-in-bid-to-tackle-child-poverty

34 http://www.nzchildren.co.nz/

> complex; however, the changes will improve the ability to assess change over time in the future.
>
> Approximately 148,000 (14%) of dependent 0–17 year olds are living in material hardship using the threshold of MWI≤9 or DEP-17 =7+.
>
> Defining more severe poverty for children and young people using a combination of a poverty threshold of below 60% median income after housing costs AND being in material hardship, 9% of dependent 0–17 year olds were living in households in severe poverty compared to less than 5% of the total population in 2014. An alternative measure, using a relative threshold of below 50% median income after housing costs has 21% of dependent 0–17 year olds living in severe poverty.
>
> Three out of five children living in current poverty live in persistent poverty. This is based on their average income over 7 years being below the average low income poverty over the same period (from Statistics NZ's Survey of Family Income and Employment (SoFIE) updated 2012)…
>
> Between 2010 and 2014 there were 205,661 hospitalisations for medical conditions with a social gradient and 45,160 hospitalisations for injury with a social gradient.
>
> Since 2000 there has been little change in the rate of death for children aged 0–14 years as a result of assault, abuse of neglect in recent years, and a small but *significant* fall in the hospitalisation rate for such injuries. The highest rates of assault, neglect or maltreatment are seen in the first year of life.

The Committee should update its 2010 concluding observation:

> **18. The State party should further strengthen its efforts to combat child abuse by improving mechanisms for its early detection, encouraging reporting of suspected and actual abuse, and by ensuring that the relevant authorities take legal action against those involved in child abuse**.

So ensuring that the issue of child poverty is addressed and focus is placed on detecting and preventing deaths and injury in the first year of a child's life.

DR TONY ELLIS
Barrister of the High Court of New Zealand
14 March 2016