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Committee against Torture
Human Rights Treaties Branch
Human Rights Council and Treaty Mechanisms Division
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Distinguished Members

Review of New Zealand seventh periodic report: **Updating shadow report concerning state party change in position towards the Committee and other treaty bodies**

1. Counsel are independent New Zealand legal practitioners who undertake substantial work in national and international human rights law, including before the Committee; before other treaty bodies and procedures; and before all levels of the New Zealand courts.[1]

2. This short shadow report, submitted in advance of the Committee's examination of the seventh periodic report of New Zealand in July 2023, raises recent adverse changes in the State Party's engagement with individual communications and support for the Committee and other treaty bodies, as reflected in recent practice.

3. The State Party's previous position, on the part both of its executive government and of its courts, was concerned to uphold the work of the treaty bodies and the standing of treaty body decisions. Notably, the State Party advised the Human Rights Council at its 37th Session in March 2018 that:[2]

> "We greatly value the work of the human rights treaty bodies, as we strive for the highest standards of implementation of all the conventions to which we are a State party."

and its appellate courts had emphasised the standing of treaty bodies, including by virtue of individual communication procedures:[3]

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1 See https://www.tonyelis.co.nz and https://www.woodwardstreet.co.nz/ben. Dr Ellis was counsel in *Vogel v New Zealand* 672/2015 and has also conducted numerous other treaty body proceedings, presented shadow reports and attended hearings of the Committee at least 4 times since 2004. Mr Keith has appeared before the Committee as a state party delegate and has contributed to reports and proceedings before treaty bodies and other fora.

2 New Zealand statement to the 37th session of the United Nations Human Rights Council, March 2018, accessible https://www.beehive.govt.nz:

3 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (NZCA), 266; *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (Privy Council in respect of New Zealand), 21; *Attorney-General v Taylor* [2017] 3 NZLR 24 (NZCA), 48-49.

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> "... since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it."
>
> "The views of the Human Rights Committee acquire authority from the standing of its members and their judicial qualities of impartiality, objectivity and restraint. Moreover, there is much force in the provisional view ... that its functions are adjudicative. As ... pointed out, when it reaches a final view that a state party is in breach of its obligations under the covenant, it makes a definitive and final ruling which is determinative of an issue that has been referred to it."
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> "By adopting the first optional protocol to the ICCPR on 26 August 1989, New Zealand also accepted individual access by its citizens to the Human Rights Committee for violation of rights under the ICCPR, when they have been unable to obtain a domestic remedy. ..."

4. In four recent developments, however, the State Party has departed from that approach.

(i) Committee's 2004 recommendation concerning highly restrictive prison regime

5. In its *Concluding Observations* on the third periodic report of the State Party, the Committee expressed concern over:[4]

> "... prolonged non-voluntary segregation in detention (solitary confinement), the strict conditions of which may amount, in certain circumstances, to acts prohibited by article 16 of the Convention ..."

following findings in *Taunoa v Attorney-General*, proceedings before the New Zealand courts that found a highly restrictive segregated prison programme to amount to cruel treatment and breach of the right to dignity in imprisonment, contrary to art 16 of the Convention and art 10(1) ICCPR. The Committee recommended an inquiry into the events that had led to those proceedings.

6. However:

    (a) The State Party has not conducted such an inquiry, almost twenty years later; and

    (b) In particular, the State Party has now reinstituted such a programme, the Persons of Extreme Risk Unit (**"PERU"**), in which prisoners are detained alone and held in their cells for 23 hours each day. At least two prisoners have been held in the unit for approximately three years and, until last week, the "PERU" held both sentenced and unsentenced prisoners. Dr Ellis has received, and passed on, credible allegations of ill-treatment and/or torture within the "PERU".

(2) State Party's responses to findings of breach by the Committee

7. The Committee will recall that it had successive findings of breach of the Convention by the State Party, in particular in respect of the longstanding failure to investigate and appropriately remedy the torture of patients, including vulnerable children, within the New Zealand public mental health system.

8. The State Party has provided certain written responses to those findings of breach. Notably, in its recent response to communication No 934/2019, the government referred to:[5]

    (a) The pending prosecution of one staff member, together with explanations of why others were not prosecuted, including that the author of that communication could not identify individuals responsible and so that the New Zealand Police "were not,

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[4] CAT/C/CR/32/4, [5](d) & [6](g).

[5] State party response, pp 4 & 5-10.

and are not, able to investigate" further what the government described as "claims" made by that author.

(b) The work of the Royal Commission into Abuse into Care, both as to:

(i) Investigation of these and other instances of torture and ill-treatment; and

(ii) Redress for survivors of these appalling acts:

9. However, it will be seen that these measures are not accurately described and, in any case, fall well short of meeting Convention obligations as found by the Committee:

(a) As above, the State Party's reliance on a Police investigation has yielded only limited findings, including that because the author of the communication – a vulnerable young person at the time – could not provide identifying details of some of those responsible for his torture, the investigation could go no further. Nonetheless, the response states that:[6]

> "the New Zealand Government submits that Mr Richards' claims have been thoroughly investigated by Police. The New Zealand Government has acknowledged the suffering experienced by [the author] and others at the Child and Adolescent Unit. However, absent any additional information about the offending that took place, the matter cannot be taken any further."

(b) While the Royal Commission is described as undertaking a "a full, independent and impartial investigation",[7] the reality – as reflected in the report of the Commission and in comments by survivors – is that the Commission procedure permitted only broad findings that torture and ill-treatment occurred: for example, with the exception of one now deceased psychiatrist and redacted references to the staff member above, the Royal Commission report makes no specific findings concerning the individuals responsible;[8] and

(c) While the Royal Commission has set out broad principles of redress, it has not itself attempted to provide remedies and, as in fact stated in the government response, the provision of remedies is the subject of further government policy work towards "an independent survivor-focussed redress system": that is, the terms of redress will depend not on the Royal Commission but on further executive government-directed policy decisions.[9] Further, that work, though described in the government response as reflecting an "urgent need" in December 2021 (p 9 at para 24), has progressed only to the appointment of two chairpersons for that further policy work in April of this year, more than 16 months later.[10] Survivors are, appropriately, deeply skeptical of any progress.[11]

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6 State party response p 4, [10].

7 Above n 6, p 5, [16.2].

8 https://www.abuseincare.org.nz/assets/Document-Library/Redacted-Lake-Alice-Report.pdf .

9 Above n 6, p 9, at fn 9.

10 "Next steps in redress system for survivors of abuse in care" https://www.beehive.govt.nz/release/next-steps-redress-system-survivors-abuse-care 14 April 2023.

11 See, for example, one survivor's account of the inquiry's shortcomings Steve Goodlass "While the inquiry drags on, there's no justice for abuse in care survivors", Spinoff May 9, 2023 https://thespinoff.co.nz/society/09-05-2023/while-the-inquiry-drags-on-theres-no-justice-for-abuse-in-care-survivors , setting out various failings and the conclusion:

> "The chance of survivors seeing any redress any time soon is extremely slim and begs the question, what hope is there?"

(3) State Party's response to treaty body interim measures to protect author at risk of torture

10. Counsel[12] currently act for Mr Kyung Yup Kim, a citizen of South Korea long resident in New Zealand, whom the State Party has sought to extradite to the People's Republic of China (**PRC**) since 2011, notwithstanding findings by the Committee and others of endemic torture in that State Party. The State Party has not conducted any effective investigation into the evidenced risk to Mr Kim, instead relying upon non-binding, vague and limited assurances given by the PRC. That extradition has been upheld by a bare majority of judges in the New Zealand Supreme Court, the final appellate court in the State Party.

11. Mr Kim's case is currently before the Committee's counterpart, the Human Rights Committee, under the (First) Optional Protocol to the ICCPR: see *Kim v New Zealand* CCPR 4170/2022. While counsel should be happy to assist the Committee further on any aspect of the case, counsel's focus in this shadow report is upon the distinct issue of the apparent change in position by the State Party towards the right of individual communication and obligations in respect of treaty body decisions, both under that Protocol and, before the Committee, under art 22.

12. The State Party has, however, taken two regrettable steps in that case:

    (a) The State Party response is general; does not address significant aspects of the communication; and, in parts, is simply factually inaccurate;

    (b) Most concerning, and although that Committee has issued interim measures, the State Party has taken the position that it will "consider itself free" to extradite the author to the PRC unless the Committee gives the case "full and immediate priority" and "fast-tracks" a decision by the end of the current year; and

    (c) That statement is made notwithstanding that there is no "fast-track" and:

        (i) As above, the State Party has pursued the case since 2011, with repeated delays before its own courts;

        (ii) The State Party has not disputed the grounds for interim measures; and

        (iii) The State Party is in any case bound to comply with interim measures.[13]

(4) State Party's response to arbitrary detention findings of Human Rights Committee

13. The same concern is evident in the State Party's response to the 2021 decision of the Human Rights Committee in *Thompson v New Zealand* 3162/2018 that the author had been arbitrarily detained by an unlawful judicial order and was thereby entitled to compensation:

    (a) The State Party response was that:[14]

    > "… the breach of art 9(5) found by the Committee results from Supreme Court judicial precedent.
    >
    > The New Zealand Government has requested advice about whether it should take any steps to overturn this precedent. As with compensation, this consideration also raises

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12 Together with third counsel Graeme Edgeler.

13 See, for example, the Committee's decision in Abbahah v Morocco CAT/C/72/D/871/2018 (2021), [11.13]; also Human Rights Committee *General Comment No. 33: Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights* CCPR/C/GC/33 (2009).

14 State party response at p 2, heading [4].

> fundamental questions about the separation of powers and the independence of the judiciary. Given the constitutional significance of changing the law in this area, officials will consult civil society, academics and practitioners about the legal and constitutional implications of different options."

but:

(i) The State Party cannot, of course, rely on its domestic law as a reason for non-compliance with a treaty obligation;[15]

(ii) The response is again not accurate: while it is said that the remedy required by the treaty body decision "raises fundamental questions", the Supreme Court precedent allegedly relied upon, *Chapman v Attorney-General*, states only that a court does not have jurisdiction to entertain a claim for compensation for judicial breaches of fair procedure. It does not address compensation for arbitrary detention or preclude the executive government from itself affording compensation;[16] and

(iii) Counsel for the author in that case advises that the consultation promised in that response – given in early 2022 - has not occurred and that the advice sought has not been provided because of other priorities.[17]

(b) Further, the State Party has also departed from its earlier principled position before its appellate courts. Notably, the New Zealand Supreme Court recently declined an application to reopen one of its own decisions in order to give effect to the finding of breach. The executive government opposed reopening of the decision notwithstanding that breach and the Court, accepting that position, simply ignored the high standing of that adverse finding:[18]

> "**The Views is not the decision of a judicial body**, and it is a decision in [the author's] own case. … The important value of finality would be compromised if the Court allowed the reopening of a judgment so long after its delivery on the basis that **an international body has formed the view that aspects of the Court's reasoning is incorrect**."

Conclusions and recommendations to the COmmittee

14. The consistent position is that:

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15 Vienna Convention on the Law of Treaties, art 27.

16 *Attorney-General v Chapman* [2011] NZSC 110; [2012] 1 NZLR 462 accessible http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZSC/2011/110.html.

17 See, similarly, the decision of the Human Rights Committee in *Miller & Carroll v New Zealand* 2502/2014, which in 2017 found the sentence of "preventive detention" to constitute arbitrary detention. The New Zealand Law Commission, an independent statutory law reform body, released an issues paper canvassing possible reform of that law two weeks ago – that is, almost six years since the finding of breach – and, even if reforms are proposed, these are then dependent upon the executive government for implementation: as one illustration, a similar paper raising issues over extradition law was released by the Commission in December 2014; a final report, recommending significant reforms, was released in February 2016; but the State Party has taken no step.

18 *Thompson v Attorney-General* [2023] NZSC 27, [7]-[8] (emphases added), accessible http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZSC/2023/27.html and contrast, for instance, the observation of the International Court of Justice in *Republic of Guinea v Democratic Republic of Congo* 2010 ICJ Rep 639, [66]:

> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States parties obliged to comply with treaty obligations are entitled."

(a) Despite clear determinations in each of these cases that the State Party is obliged to take particular steps, the State Party has either not done so; has done so only in part; and/or has given factually inaccurate assurances concerning steps; and

(b) Whatever the reason for these repeated failings, the State Party appears either to dispute or simply to fail to respect its obligations under the individual communication procedures and, with it, to uphold the standing of the Committee and its fellow treaty bodies. In particular, the State Party does not now appear to accept that its courts are no less subject to those obligations.

15. Counsel therefore ask that:

(a) The Committee inquire into this concerning change in position in the forthcoming periodic review;

(b) The Committee also recommend an urgent, independent and otherwise Convention-compliant inquiry into the "PERU";

(c) The Committee emphasise the significant obligations upon the State Party in respect of individual communications in its forthcoming concluding observations, including:

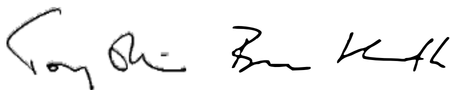
(i) The provision of factually accurate information;

(ii) The prompt implementation of remedies;

(iii) Respect for interim measures decisions; and

(d) The Committee seek early confirmation from the State Party of its acceptance, and – given the inadequate and delayed responses set out above – its substantive implementation, of those observations.

Yours sincerely



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