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

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

IN THE MATTER OF NEW ZEALAND'S 6TH PERIODIC REPORT

ALTERNATIVE SHADOW REPORT - FILED BY DR TONY ELLIS BARRISTER OF THE HIGH COURT OF NEW ZEALAND

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INDEX

Information Note

Who is this report written for?

1. This Shadow Report is primarily written for the independent members of the United Nations Committee Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment **("the Committee")** for their formal consideration of New Zealand's fourth[1] periodic report under the Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment[2] **("the Convention" or "CAT"),** which is scheduled for an unknown date in April or May 2015 in Geneva.

Who is the author?

2. This Shadow Report, the author's fourth to the Committee is submitted by a New Zealand practicing human rights lawyer—Dr Tony Ellis,[3] It was prepared on a pro-bono basis.

What is a 'Shadow Report'?

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

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

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

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

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

5. Following which the Committee released a report with recommendations **("concluding observations").** The Committee's concluding observations (along with its 'views' on individual communications submitted under the Article 22 communications procedure) while not formally binding as a matter of law, constitute authoritative interpretations of international human rights law.

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

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

8. One of the most useful national sources for the UN's human rights treaty bodies is the independent 'alternative reports' also known as 'Shadow Reports'. Like third-party 'amicus curie briefs' in national courts or expert submissions to Parliamentary Committees, Shadow Reports are now commonly submitted to the UN human rights treaty body committees by interested national parties. Examples of such parties include independent national human rights institutions, non-governmental organisations **("NGOs")** working in the field of human rights, or lawyers who act on behalf of victims of human rights abuses.[9] While this 'Shadow Reporting process' is regularly utilized in commonwealth and western countries, it is rarely used by organisations in New Zealand. While this can be attributed to a lack of

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

staffing/funding, unawareness that such a possibility exists is also a major barrier. The authors hope that, as a secondary goal, this report raises awareness in New Zealand of the Shadow Reporting process.

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

9. 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.'

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

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

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

13. Thus, in addition to this brief written submission, the author of this Shadow Report may also attend the Committee's examination, depending on the actual date not yet posted on the Committee's website.

Article 2 Incorporation of the Convention in national legislation

14. The Committee's 2009 Concluding Observations included:

> 4. While appreciating the steps the State party has taken to bring its domestic laws into compliance with its obligations under the Convention, the Committee is concerned that the Convention has not been fully incorporated into domestic law. The Committee notes with provisions of the Convention, including article 2, has no higher status than ordinary legislation in the domestic legal order, which may result

in the enactment of laws that are incompatible with the Convention. The Committee further notes that judicial decisions make little reference to international human rights instruments, including the Convention. (art.2)

The State party should:

(a) Enact comprehensive legislation to incorporate into domestic law all the provisions of the Convention;

(b) Establish a mechanism to consistently ensure the compatibility of domestic law with the Convention; and

(c) Organize training programmes for the judiciary on the provisions of the Convention and the jurisprudence of the Committee.

15. Not only has this recommendation not progressed, but New Zealand has moved backwards.

16. The first individual communication from New Zealand, *Vogel v New Zealand* was lodged last year on behalf of Mr Vogel, claiming a violation of Articles 14 and 16 of the Conventiuon.

17. The author of this shadow report is counsel for Mr Vogel. Despite having twice sent the communication, no registration has been notified to counsel of its receipt, or registration.

18. The Communication concerns the Prisoners' and Victims' Compensation Act, where compensation awarded to prisoners for abuse by state officials can be removed, (unlike Lotto winnings or inheritances) and the failure to provide comensation to Mr Vogel for an unlawfully long detention in Solitary Confinement, and a fundamental failure to uphold a compensatory right thereby effectively rendering the Convention rights illusory, and in breach of General Comment 2.

Optional Protocol to CAT

(a) National Preventative Mechanisms

19. Your sub-committee following a visit to New Zealand[22] reported on the inadequate financing of the NPT's.

20. With respect New Zealand not providing adequate funding for the

[22] CAT/OP/NZL/1. 25 August 2014

NPT's effectively prevents any meaningful implementation of the Convention.

21. The Committee should endorse the Sub-Committee's findings:

> 14. The SPT reminds the State party that the provision of adequate financial and human resources constitutes an on-going legal obligation of the State party under article 18.3 of the OPCAT. It recommends that the
>
> State party:
>
> (**a) Ensure that the NPMs enjoy complete financial and operational autonomy when carrying out their functions and that they are able to freely determine how to use the resources available to them;**
>
> **(b) As a matter of priority, increase the funding available in order to allow the NPMs to effectively implement their OPCAT mandate throughout the country;**
>
> **(c) Ensure that the NPM is staffed with a sufficient number of personnel so as to ensure that its capacity reflects the number of places of detention within its mandate, as well as being sufficient to fulfil its other essential functions under the Optional Protocol;**
>
> **(d) Provide the NPMs with the means to ensure that they have access to the full range of relevant professional expertise, as required by OPCAT.**

Solitary Confinement

22. As the Committee will be aware solitary confinement comes in a number of guises. Mr Vogel's was "cellular confinement", other prision terminology is "segregation" and in Mental Health faciliites it is termed seculsion.

23. In respect of segregation facilities, the Ombudsman's Office (a NPM) reported in the 7th Annual Report on Monitoring Places of Detention[23] that:

> **Segregation facilities**
>
> For the third consecutive year, segregation facilities remain a cause for significant concern
>
> While it was pleasing to see progress being made on the development of a new Management Unit at Auckland Prison during the reporting year prisoners were still being housed in the two

[23] http://www.hrc.co.nz/wp-content/uploads/2014/12/2014-OPCAT-Annual-Report.pdf

> stainless steel cells highlighted in the 2012/13 annual report. Corrections has assured inspectors that these cells are not currently in use and will only be used as a last resort (upon the completion^ of the Management Unit). Corrections also advised that the cells were developed in response to a range of security breaches and have been effective from a security point of view. However the Ombudsman's office still considers these **cells are a cruel and inhuman way to detain individuals has asked that they be decommissioned [Bold added]**

24. It would be appreciated if the Committee sought full details of how many times these cells were used in 2014 and 2015, and what for.

25. An article in the DominionPost[24] shows the misues of selusion in the Mental Health sector where a person with Mental Health problems coupled with intellectual disability and Autism was detained in seculsion for 3 years.

> Ashley Peacock is in the care of Capital & Coast District Health Board as a compulsory treatment patient, with autism, post-traumatic stress disorder, a mild intellectual disability and mental health problems.
>
> His father does not dispute that he needs care, but believes seclusion should not be a long-term solution.
>
> Details released by the Office of the Ombudsman would appear to show that it agrees.
>
> Peacock's treatment has now been under investigation by the office for more than two years. In September 2011, Ombudsman Dame Beverley Wakem recommended that Capital & Coast District Health Board move Peacock out of seclusion into a more appropriate facility.
>
> Nine months later, she checked and found nothing had changed, so she again urged the DHB to move him out of seclusion.
>
> But still he remained in the seclusion room, and she launched a wider investigation into the overall handling of his care.
>
> This has since been shelved after the DHB secured funding to move Peacock in August. But, as of Friday, he remained in seclusion.

26. That it took 3 years to discover, illustrates the inadequences of NPM fundings, and the problem as I understand it not yet resolved, and a variety of seclusion appears to be continuing.

27. Needless to say the authorities have paid no compensation for this ill treatment.

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[24] http://www.stuff.co.nz/national/health/9384414/Sons-seclusion-no-solution-says-father 11 November 2013.

Article 3

28. New Zealand claims to obtain diplomatic assurances in relation to extraditons where the death penalty is involved.

29. In the case of *Kyung Yup Kim* who is sought by China for extradition for murder, he has been detained for over 3 ½ years whilst the extradition process continues, the Committee should inquire of the timing of the Extradition assurances, and whether the Government and/or the Ministry of Justice is immune from any political pressures to extradite.

30. The Committee should also enquire as to whehter any assurance against Torture which as the Committee is aware is endemic in China have been sought.

31. The Committee should also inquire what montitoring and enforcement provisons (if any) are in force or planned in respect of the Death Penalty, and Torture if Mr Kim is extradited.

Articles 10 & 11 –Training on NZBORA and International Law

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

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

32. The training on the Istanbul Protocol reported by the Government whilst welcome, is insufficent.

33. In Mr Vogel's case it was plain the prison doctor was unaware and had received no Convention, or Protocol training.

34. All prison doctors should receive this training.

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

35. A Conclusion along similiar lines to the 2014 Swedish Concluding Obervations would be most welcome:[40]

The State party should intensify its efforts to provide (a) training programmes on the prohibition of torture and the obligations of the State party under the Convention, for all officials; and (b) systematic and practical training on the Istanbul Protocol to medical personnel who are in direct contact with persons deprived of their liberty. The State party is encouraged to sensitize the media to its obligations under the Convention, in particular the absolute prevention of torture.

Article 14

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

(a) Lack of Effective Remedy

See discussion on *Vogel v New Zealand* above.

(b) 2007 Concluding Observations Recommendation 6(g) – Inquiry into *Taunoa et al*

36. The Committee at paragraph 6 of its 2007 Concluding Observations[45] recommended that the State Party:

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

37. The State party at page 75, paragraph 6 of its Fifth Periodic Report said:

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

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

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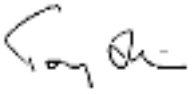
40 Concluding Observations and Comments of the Committee Against Torture Sweden:CAT/C/SWE/CO/6-7, 12 December 2104 para 18.

45 Concluding Observations and Comments of the Committee Against Torture: New Zealand:CAT/C/NZL/CO/5 4 June 2009

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



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8 februari 2015