Peace Movement Aotearoa

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NGO information for the 54th Session of the Committee Against Torture: New Zealand

Sixth Periodic Report of New Zealand under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Overview

1. This report provides a brief outline of some issues of concern with regard to the state party's compliance with the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) to assist the Committee Against Torture (the Committee) in its consideration of New Zealand's Sixth Periodic Report (the Report).

2. There are three main sections below:

A. Information on Peace Movement Aotearoa;

B. Specific issues related to the Convention:

i) Treatment of prisoners in situations of armed conflict;

ii) Structural discrimination in the criminal justice system;

iii) National Preventive Mechanisms; and

C. General issues around the constitutional and legal framework, and lack of protection for Convention rights.

3. We appreciate the opportunity to provide information to the Committee, thank you.

A. Information on Peace Movement Aotearoa

4. Peace Movement Aotearoa is the national networking peace organisation, registered as an incorporated society in 1982. Our purpose is networking and providing information and resources on peace, social justice and human rights issues. Our membership and networks mainly comprise Pakeha (non-indigenous) organisations and individuals; and our national mailing lists currently include representatives of more than one hundred national or local peace, human rights, social justice, faith-based and community organisations.

5. Promoting the realisation of human rights is an essential aspect of our work because of the crucial role this has in creating and maintaining peaceful societies. In the context of Aotearoa

New Zealand, the Treaty of Waitangi, domestic human rights legislation, and the international human rights treaties to which New Zealand is a state party, and the linkages among these, are a key focus of our work; and any breach or violation of them is of particular concern to us.

6. We have previously provided information to treaty monitoring bodies and Special Procedures as follows: to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in 2005[1]; to the Committee on the Elimination of Racial Discrimination in 2007[2] and 2013[3]; to the Human Rights Committee in 2009[4], 2010[5], and 2014[6]; to the Committee on the Rights of the Child in 2010[7] and 2011[8]; to the Committee on Economic, Social and Cultural Rights in 2011[9] and 2012[10]; and jointly with the Aotearoa Indigenous Rights Trust and others, to the Human Rights Council for the Universal Periodic Review of New Zealand in 2008[11], 2009[12] and 2014[13].

7. We are not in a position to send a representative to the 54th Session, but are happy to provide clarification of any points in this report or further information if that would be helpful to Committee members.

B. Specific issues related to the Convention

i) Treatment of prisoners in situations of armed conflict

8. There have been persistent allegations, since 2002 in particular, that New Zealand combat troops deployed overseas have handed over prisoners to military or other state authorities without due regard to their right to freedom from torture as specified in the Convention and in the Geneva Conventions.

9. In 2009, it was revealed that since 2002 the New Zealand Special Air Service (SAS) had transferred at least 55 prisoners to the United States-run Kandahar detention centre in southern Afghanistan where prisoners are known to have been tortured; 50 were subsequently released and of the five that were not, SAS sources were “pretty sure” at least three were subsequently transferred to the United Sates detention facility at Guantanamo Bay.[14] It was reported that the only information recorded by the SAS for each prisoner was “height, eye colour and place of detention”, neither the prisoner's name nor date of birth were recorded. [15]

10. In response to these allegations, when announcing another SAS deployment to Afghanistan in 2009, the Prime Minister said that the SAS would most likely in future to hand any detainees over to Afghan authorities.

> *"Like New Zealand, Afghanistan is a party to the Geneva Convention," he said. "New Zealand has already received an assurance from the Afghan government that all transferred detainees will be treated humanely according to these conventions and international law."*[16]

11. The 2009 SAS deployment provided training and mentoring to the Afghan Crisis Response Unit (CRU) in Kabul, and in 2011 there were allegations that the SAS was involved in handing captured prisoners over to the Afghan National Directorate of Security[17], at the time the subject of a damning report by the United Nations Assistance Mission in Afghanistan[18] documenting cases of torture and ill-treatment. The state party would neither confirm nor deny these allegations, although the Minister of Defence did say that the *"CRU captured 58 suspects with the help of the SAS since its rotation started in September 2009"*, and *"I've been advised by the [New Zealand] Defence Force that they have no reports of anyone who's been arrested by the*

CRU having been tortured", but he added that the Defence Force did not track each person to ensure that was the case.[19]

12. While the state party attempted to downplay the involvement of the SAS in the capture of prisoners by using phrases such as they were "in the vicinity of" or that arrests had taken place "when New Zealand has been in support", and to deny any responsibility for captured prisoners - "The Afghan authorities, of course, are the detaining or arresting authorities under those circumstances"[20] - it should be noted that it paid $10,000 to the families of two Afghan civilians who were killed in a raid on the logistics supply company Tiger International in Kabul[21], one of the occasions when captured prisoners were handed over to the National Directorate of Security. This surely indicates some SAS culpability even if it has been publicly denied. According to the investigative journalist who has provided much of the information on the SAS involvement in capturing prisoners, it was the SAS, not the CRU, who were "in the lead" during that raid.[22]

13. The state party is currently preparing to deploy combat troops to Iraq to provide training for Iraqi security forces, which are also known to engage in torture and other ill-treatment of prisoners. Given the apparent involvement of the SAS in the capture of prisoners during training and mentoring in Afghanistan, there is no guarantee that New Zealand soldiers will not be involved in similar activities in Iraq.

14. It should be noted that when the Office of the High Commissioner of Human Rights report was released last month which referred to members of the Iraqi Security Forces and affiliated militia having carried out extrajudicial killings, torture, abductions, the forcible displacement of a large number of people, often with impunity, and may have committed war crimes[23], the Prime Minister said that the deployment would go ahead regardless.[24]

15. The state party has apparently secured an agreement with the Iraqi government for legal protection for New Zealand troops to fight in Iraq, including immunity "if they broke the law, as long as it was within the military mission"[25]; but will not release any details of the agreement[26] so we do not know if it has any reference to respect for and protection of Convention rights. In addition, due to the secrecy around the deployment, it is not clear if the troops will be travelling on diplomatic passports as has been suggested in some media reports[27], and as some other states have apparently done in the absence of a formal Status of Forces Agreement[28], or what implications that has for impunity for any human rights violations by New Zealand troops or the Iraqi forces they will be training.

16. If New Zealand combat forces deployed overseas cannot ensure that any prisoners captured during combat or training operations are treated in a manner fully compliant with the provisions of the Convention and the Geneva Conventions, and are not in a position to operate their own detention facilities, then they should not be deployed.

ii) Structural discrimination in the criminal justice system

17. In the List of Issues Prior to Reporting[29], the Committee asked for information about safeguards put in place to protect the rights of minorities from discrimination and marginalization, including bias in the criminal justice system.

18. We note that the Robson Hanan Trust has provided the Committee with detailed information about this[30], and would like to make these additional brief points.

19. The state party has persistently denied that structural discrimination is a factor in the disproportionate numbers of Maori who are arrested, prosecuted, convicted, and imprisoned - for example, in its response to recommendations in its first Universal Periodic Review, the state party explicitly said it: *"does not agree that the disproportionate representation of certain ethnic groups in the criminal justice system, such as Maori, is due to institutional bias. Other factors are responsible for this outcome."*[31]

20. This view can be seen again in the current Report: *"although an over-representation relating solely to ethnicity is associated with prosecutions, convictions, sentencing and reconviction in New Zealand, most of this is accounted for by other known risk factors"*.[32] Those risk factors (detailed in the Report[33]) make no reference in to the historical and ongoing processes of colonisation, including the imposition of an alien legal system on Maori.[34]

21. By way of contrast with the state party's position, in its initial statement at the conclusion of its country visit last year, the Working Group on Arbitrary Detention:

> *"found indications of bias at all levels of the criminal justice process, starting at the investigative stage, through searches and apprehension; police or court bail; extended custody in remand; all aspects of prosecution and the court process, including sentencing; disciplinary decisions while in prison, and the parole process including the sanctions for breach of parole conditions.*
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> *... The Working Group considers that special attention should be given to the disproportionate negative impacts on Maori of criminal justice legislation extending sentences or reducing probation or parole. The Working Group recommends that a review be undertaken of the degree of inconsistencies and systemic bias against Maori at all the different levels of the criminal justice system, including the possible impact of recent legislative reforms."*[35]

22. The Working Group additionally pointed out: *"Incarceration that is the outcome of such bias constitutes arbitrary detention in violation of international law."*[36]

iii) National Preventive Mechanisms

23. There are three issues outlined in this section in relation to the state party's National Preventive Mechanisms (NPM) established under the Optional Protocol to the Convention: the first to do with resourcing; the second with the scope of the NPMs mandate; and the third to do with the functional independence of the Central National Preventive Mechanism.

24. With regard to resourcing, the Sub-Committee on the Prevention of Torture's Report on its country visit in 2013 stated:

> *" ... the situation regarding the NPM within the State party has reached a critical point. Most of the components of the NPM have not received extra resources since their designation to carry out their OPCAT mandate which, together with general staff shortages, have severely impeded their ability to do so. Moreover, the Children's Commissioner and IPCA reported that their funding was earmarked for statutory functions, which excluded NPM-related work. In this regard, the SPT was concerned to learn that the OPCAT mandate - an international obligation - was not considered by the State party to be a 'core function' of the bodies designated as the NPM. The SPT is also concerned that inadequate funding might be used – or might be perceived by the bodies*

themselves as being used - to pressurize components of the NPM to sacrifice their OPCAT related work in favour of other functions. Should the current lack of human and financial resources available to the NPM not be remedied without delay, the State party will inevitably find itself in the breach of its OPCAT obligations."[37]

25. In the 2014 'Monitoring Places of Detention: Annual Report of Activities under the Optional Protocol to the Convention Against Torture', the Office of the Children's Commissioner (the NPM tasked with monitoring youth justice residences, care and protection residences, and Mother and Baby Units in prisons), stated:

"To date the Office has not been funded to undertake its NPM function and has absorbed the costs by combining the activity with the Office's general monitoring work in residences. ... However, the Office's resources limit its ability to participate as part of multi-disciplinary team to review mental health facilities and adult prisons where people up to the age of 18 are detained. This is a gap and without funding cannot be managed within existing staffing and resourcing levels." [38]

26. With regard to the scope of the NPMs mandate, the 'Monitoring Places of Detention' report, includes:

"A substantial number of areas where people are deprived of their liberty are not currently monitored by NPMs. This includes facilities where people reside subject to a legal substitute decision-making process, such as locked aged care facilities [there are an estimated 138 aged care providers with locked facilities], dementia units, compulsory care facilities, community-based homes and residences for disabled persons, boarding schools and other situations where children and young people are placed under temporary state care or supervision. People detained in these facilities potentially are vulnerable to ill-treatment that can remain largely invisible."[39]

27. The final point in this section relates to the functional independence of the Central National Preventive Mechanism, the Human Rights Commission (the Commission). In October 2011, the state party introduced the Human Rights Amendment Bill[40] to make changes to the role and structure of the Commission. The legislation had its first reading in November 2013 and was referred to the Justice and Electoral Select Committee, which reported back to parliament in April 2014. The second reading of the Human Rights Amendment Bill is underway at present.

28. While there are several areas of concern about the legislation, the most critical relates to the functional independence of the Commission, because two sections extend the involvement of the Minister of Justice (the Minister) in setting the work priorities and the activities undertaken by the Commission. The relevant sections are:

"6. Membership of Commission: Section 8 is amended by repealing subsection (1) and substituting the following subsections: ... "(1B) A Commissioner must lead the work of the Commission in any other priority area that is designated by the Chief Commissioner, and the Chief Commissioner may designate an area of work as a priority area ***only after consultation with the Minister*** *and the other Commissioners."* [our emphasis] and

"11. 15. Functions of Chief Commissioner: The Chief Commissioner has the following functions: ... (e) to allocate spheres of responsibility among the Commissioners, and to determine the extent to which Commissioners engage in activities undertaken in the performance of the Commission's functions (except for those stated in section 76), but ***in each case only after consultation with the Minister****,"* [our emphasis][41]

29. Extending the involvement of the Minister in the setting of work priorities and the activities undertaken by the Commission comprises undue state interference, and if enacted, will not meet the minimum requirements of real and perceived independence for an National Human Rights Institution (NHRI) as defined by the Paris Principles[42] and by the General Observations of the International Coordinating Committee of National Human Rights Institutions' Sub-Committee on Accreditation[43] - both repeatedly stress that the essential minimum standards for an NHRI include independence and autonomy for its activities, and the ability to exercise its mandate in an unfettered manner.

C. General issues around the constitutional and legal framework, and lack of protection for Convention rights.

30. Since the Committee last considered the state party, there has been no progress towards better protection of Convention rights in the constitutional and legal framework. The fundamental problem with the constitutional arrangements is perhaps best illustrated in this sentence from the state party's Twentieth Periodic Report under the Convention on the Elimination of All Forms of Racial Discrimination:

> *"As Parliament is supreme, the Bill of Rights Act, other human rights instruments and the Courts cannot directly limit Parliament's legislative powers."*[44]

31. This means in practice that parliament can, and does, enact legislation by a simple majority to set in place one or multiple breaches of domestic human rights legislation and of the international instruments which New Zealand is a state party to.

32. While this has been a long-standing failure in the state party's constitutional arrangements, in some respects however, the situation appears to be worsening because the state party has been implementing its particular political agenda by proposing and then enacting legislation in short time frames under urgency, with little or no time for public consideration or submissions; has introduced major changes with human rights implications to legislation at the final reading stage by way of Supplementary Order Papers; the minimal protection provided by the New Zealand Bill of Rights Act 1990 has been eroded; and the state party has enacted legislation that removes the possibility of scrutiny or judicial review by the Courts for those affected by discriminatory policy and practice.

33. **Use of urgency**: The state party has made increasing use of urgency to pass legislation; for example, during the 49th parliament (December 2008 to October 2011), parliament was under urgency for 25% of the sitting time[45]; 300 Bills were enacted during 266 sitting days, and: *"More disquieting, 30 urgency motions allowed the Government to fast-track new laws and deny the public an effective say on their content."*[46]

34. While we do not have access to figures for the use of urgency in the most recent session of parliament (2011 - 2014), our impression is that it may have increased further - for example, in just one sitting under urgency on 19 November 2013, 13 Bills were progressed through various stages: the first reading of three Bills (including two with major human rights implications, the Parole Amendment Bill 2012 and Immigration Amendment Bill (No 2) 2013); the second reading of two Bills; and the final reading of eight Bills, including the Social Housing Reform (Housing Restructuring and Tenancy Matters Amendment) Bill 2013 which, among other things, made fundamental changes to eligibility for social housing.

35. In November 2014, the state party introduced omnibus legislation - the Countering Terrorist Fighters Legislation Bill - under urgency "to introduce measures to monitor "foreign terrorist fighters" and to place restrictions on their travel."[47]

36. Among other things, the Bill:

- *"allows the NZ Security Intelligence Service (SIS) to conduct surveillance activities without a warrant in situations of emergency or urgency;*
- *allows the NZSIS, under warrant, to undertake visual surveillance in a private setting or that would involve trespass onto private property (both with or without a visual surveillance device);*
- *allows the Director of Security (or person acting as the Director) to authorise surveillance activities to be undertaken in situations of emergency or urgency;*
- *amends the Customs and Excise Act 1996 to clarify that direct access to Customs databases can be provided to the NZSIS and Police for counter-terrorism purposes;*
- *amends the Passports Act 1992 in relation to the power of the Minister of Internal Affairs to cancel or refuse to issue a New Zealand passport or other travel document if the Minister believes on reasonable grounds that a person is a danger to the security of New Zealand;*
- *allows the Minister to set a passport cancellation period of up to three years if the Minister is satisfied that the person would continue to pose a danger to New Zealand or any other country;*
- *allows the Minister to suspend a person's passport or other travel document for no more than 10 working days if the Minister is satisfied that a briefing recommending cancellation is being prepared and the person is likely to travel within the period of temporary suspension;*
- *amends the Passports Act so that the special provisions that apply to proceedings where national security is involved also apply to judicial reviews and any other litigation to challenge the Minister's decisions that involve national security;*
- *exempts the Crown from liability for loss and damages caused through the cancellation of travel except where those actions are grossly negligent or shown to be in bad faith;*
- *provides that cancellation or refusal to issue a travel document can be on the grounds that a person is a danger to any other country, in addition to New Zealand, because the person intends to engage in or facilitate a terrorist act or the proliferation of weapons of mass destruction; and*
- *provides that a person's travel document may be cancelled when they are outside New Zealand."*[48]

37. The Countering Terrorist Fighters Legislation Bill was introduced to parliament and had its first reading on 25 November 2014, when it was referred to the Foreign Affairs, Defence and Trade Select Committee with a reporting back deadline of 2 December. On 26 November, public submissions were invited on the Bill with a deadline of the following day, 27 November. The Select Committee reported back to parliament on 2 December, and the legislation was enacted as the Passports Amendment Act 2014, Customs and Excise Amendment Act 2014, and New Zealand Security Intelligence Service Amendment Act 2014 on 9 December 2014 - 11 working days after it was first introduced to parliament.

38. **Supplementary Order Papers (SOPs)**: The state party has introduced substantive amendments with human rights implications to legislation via SOPs thus bypassing any Select Committee consideration of, or public input into, proposed legislation.

39. One example of the use of SOPs relates to the smoking ban in prisons, which began as a policy announcement by the Department of Corrections in 2010.[49] In June 2011, the Department of Corrections Chief Executive directed prison managers to introduce a rule under Section 33 of the Corrections Act 2004, which resulted in a blanket on smoking by all prisoners, whether convicted or on remand, by way of forbidding smoking in prisons and possession of tobacco or any tobacco-related item.

40. A prisoner at Auckland Prison, Mr Taylor, challenged the validity of the ban by way of judicial review which was heard at the Auckland High Court in June 2012. In its decision issued in December 2012, the High Court made an order declaring the rule to be unlawful, invalid and of no effect.

41. In October 2012 (between the High Court hearing and release of its judgment), the state party amended the Corrections Regulations 2005 to keep the smoking ban in place. In February 2013, the state party introduced an amendment to the Corrections Amendment Bill then before parliament by way of SOP 171 to retrospectively validate the rules made before 12 February 2013 by prison managers under the Corrections Act; to amend both the Corrections Act and Smoke-free Environments Act 1990 to remove any reference that might suggest prisoners have a right to smoke; and to prohibit proceedings which would question the validity of those rules and the amending regulations (except for a proceeding commenced before 12 February 2013 that related only to the period before then).

42. Mr Taylor sought a second judicial review in the High Court challenging the validity of the October 2012 amendment to the Regulations, pointing out that if the amendments were unlawful, then any prisoner who had been punished for smoking during that period - and punishment could have significant repercussions, for example on parole decisions - should be able to seek correction of their disciplinary record or compensation.

43. In its judgment released on 3 July 2013, the Court declared that the October 2012 amendment to the Regulations was unlawful, invalid and of no effect, and commented on both the importance of this issue and the lack of an effective remedy as follows: *"there is a public interest in the Court addressing allegations that prisoners have been subjected to unlawful regulation, even if the only remedy might be a declaration that this happened."*[50]

44. This highlights another inadequacy of the current constitutional arrangements - even where the state party has been found to have breached provisions of the domestic human rights legislation, the only remedy from the Courts is a declaration of inconsistency, there is no requirement for the state party to act on the Court's recommendations or to amend the offending regulations or legislation.

45. **New Zealand Bill of Rights Act 1990 (NZBoRA) consistency**: The increasing speed with which legislation is introduced and enacted has contributed to the erosion of the minimal protection provided by way of advice on the consistency of proposed legislation with the NZBoRA. Consistency with the NZBoRA is determined by the Attorney-General, a government politician, and frequently states that proposed legislation is consistent with the

NZBoRA when it clearly is not consistent with either the provisions of domestic human rights legislation or of the international human rights instruments that New Zealand is a state party to.

46. One example of this relates to the Countering Terrorist Fighters Legislation Bill (as outlined above), which clearly has major human rights implications and yet was considered to be consistent with the NZBoRA as follows:

> *"We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 18 (freedom of movement), s 21 (unreasonable search and seizure) and s 27 (right to justice)."*[51]

47. Another example relates to the Immigration (Mass Arrivals) Amendment Bill 2012 (subsequently known as the Immigration Amendment Bill 2012), which was introduced to parliament on 30 April 2012. The first reading of the Bill was on 3 May 2012, and it was subsequently referred to the Transport and Industrial Relations Select Committee. The Select Committee reported back to parliament in August 2012, and the Bill was enacted as the Immigration Amendment Act 2013[52] in June 2013.

48. The purpose of the legislation is to deter "people-smuggling operations" and to legislate for a most unlikely possibility - the mass arrival of "illegal immigrants" on a craft.[53] It should be noted that no craft carrying a group of asylum seekers, undocumented refugees or indeed "illegal immigrants" has arrived on New Zealand's shores since the establishment of the colonial government in the late 1800s. In any event, people smuggling and trafficking in people are already crimes under Sections 98C and 98D of the Crimes Act 1961.

49. Among other things, the legislation:

- *"establishes a definition of mass arrival group (a group of more than 30 people, initially ten in the Bill);*
- *allows for the mandatory detention, under a group warrant, for an initial period of up to six months, of "illegal migrants" (other than unaccompanied minors) arriving as part of a mass arrival group;*
- *provides for further periods of detention for up to 28 days with court approval, or release on binding conditions; and*
- *empowers the suspending of the processing of refugee and protection claims by regulation."*[54]

50. In relation to the review processes for refugee and protection claims, the legislation:

- *"provides that the Immigration and Protection Tribunal is not required to provide an oral hearing in cases where a second or further claim has been lodged and declined "on the papers" by a refugee and protection officer;*
- *provides that there is no obligation to consider a third or subsequent claim from the same person (while providing discretion to consider such a claim if warranted);*
- *provides that second and further claims can be rejected where there has been no material change of circumstances, or where the claim is manifestly unfounded, clearly abusive, or repeats an earlier claim;*

- *provides that review proceedings cannot generally be taken on matters being dealt with by the Immigration and Protection Tribunal until it has made a final decision on all relevant matters; and*
- *provides that judicial review proceedings can only be filed by leave of the High Court."*[55]

51. The Office of the United Nations High Commissioner for Refugees (UNHCR), in the introduction to its submission to the Select Committee considering the Bill, outlined concerns about its provisions as follows:

> *"3. The Immigration Amendment Bill 2012 introduces a number of measures that will have a direct impact on the manner in which a new category of asylum-seeker and refugee is received and processed on arrival in New Zealand. Those falling within the proposed statutory definition of a 'mass arrival group' will be treated in a manner differently from those arriving and claiming asylum by other means of transport.*
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> *4. For this new category of asylum-seeker and refugee, the proposed changes anticipate (both through legislative changes and policy flowing from it): procedures involving mandatory detention; the suspension of refugee status procedures; restrictions on family reunion; and a requirement to re-establish refugee status after a period of three years. The proposed changes will also affect the rights and treatment of children who form part of family groups arriving as part of a "mass arrival group".*
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> *5. In UNHCR's view the combined effect of these proposed measures represents a significant change of direction from New Zealand's traditional, and very positive, approach to asylum-seekers and refugees. The proposed legislative amendments and the policy changes that will flow from them raise important questions about their compatibility with New Zealand's obligations under the 1951 Convention and other related human rights treaties to which it is party."*[56]

52. The Immigration Amendment Act 2013 is clearly not compatible with the state party's obligations under the Convention, one of the human rights treaties referred to in the UNHCR's submission. Yet the NZBoRA analysis provided on the Immigration (Mass Arrivals) Amendment Bill 2012 (which was enacted as the Immigration Amendment Act 2013) stated:

> *"We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with the right to be free from arbitrary detention and the right to judicial review affirmed in ss 22 and 27(2) of the Bill of Rights Act respectively."*[57]

53. **Removal of access to the courts:** The state party has enacted legislation that removes the possibility of scrutiny or judicial review by the courts, and, in some cases, also removes the possibility of complaints relating to discrimination being made to the Human Rights Commission.

54. One example of this unfortunate practice is the state party's legislative changes to enforce the ban on smoking in prisons (referred to above).

55. Another example, not related to the Convention but included here to illustrate this point, is the New Zealand Public Health and Disability Amendment Act 2013[58] - the state party's response to the 'Family Carers' case (Atkinson & Others v Ministry of Health) regarding the discriminatory policy and practice of the Ministry of Health funded home and community

support services. Parents and resident family members who provide these services to their adult disabled family members are not paid - solely on the basis that they are related to the person requiring support - whereas the same support provided by a non-family carer is paid. The complaint of discrimination was laid with the Human Rights Commission in 2001; and in January 2010, the Human Rights Review Tribunal determined that the policy was unjustified discrimination on the ground of family status under the NZBoRA[59] - a determination subsequently upheld by the High Court in December 2010[60] and by the Court of Appeal in May 2012[61].

56. The New Zealand Public Health and Disability Amendment Bill (no 2) 2013 was introduced to parliament, read and enacted as the New Zealand Public Health and Disability Amendment Act 2013 in a single day - 16 May 2013 - with no possibility of Select Committee or public scrutiny, and no reason given for such extreme urgency.

57. The legislation not only sets in law discrimination against family members providing full or part time care for relatives[62], but also takes away the possibility of any remedy for complaints and civil proceedings alleging unlawful discrimination in respect of policies on payment for providing health and disability support services to family members other than a declaration that the policy is inconsistent with NZBoRA[63]. Furthermore, the legislation states, "*no proceedings based in whole or in part on a specified allegation may be commenced or continued in any court or tribunal*"[64] in relation to breaches of the right to freedom from discrimination under the Human Rights Act and NZBoRA.

58. Incidentally, the Attorney-General's Report on the consistency of the New Zealand Public Health and Disability Amendment Bill (no 2) with the NZBoRA[65] (presented on the same day the legislation was introduced then enacted) provides an excellent illustration of the hazards of having a government politician, rather than an independent body, responsible for assessing the human rights implications of proposed legislation. While the Report does conclude that the limitation on the right to judicial review is an unjustified limitation because the legislation prevents any challenge on the lawfulness of a decision under the NZBoRA, the Attorney-General then voted in favour of enacting the Bill.[66]

59. Thank you for your consideration of our report.

6 April 2015

References

[1] 'Submission to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People', 23 November 2005, at http://www.converge.org.nz/pma/CERD71-PMA1.pdf

[2] 'NGO Report to the Committee on the Elimination of Racial Discrimination', Peace Movement Aotearoa, 21 May 2007: Report at http://www.converge.org.nz/pma/CERD71-PMA.pdf - Annex 1 at http://www.converge.org.nz/pma/CERD71-PMA1.pdf - Annex 2 at http://www.converge.org.nz/pma/CERD71-PMA2.pdf and - Annex 3 at http://www.converge.org.nz/pma/CERD71-PMA3.pdf

[3] 'NGO information for the 82nd session of the Committee on the Elimination of Racial Discrimination', Peace Movement Aotearoa, February 2013, at http://www.converge.org.nz/pma/cerd82-pma.pdf

[4] 'NGO information to the Human Rights Committee: For consideration when compiling the List of Issues on the Fifth Periodic Report of New Zealand under the International Covenant on Civil and Political Rights', 8 June 2009, at http://www.converge.org.nz/pma/ccpr-pma09.pdf
[5] 'Additional NGO information to the Human Rights Committee', 5 March 2010, at http://www.converge.org.nz/pma/ccpr-pma10.pdf
[6] 'NGO information for the Human Rights Committee, 110th session: List of Issues Prior to Reporting, New Zealand', Peace Movement Aotearoa, January 2014, at http://www.converge.org.nz/pma/ccpr-pma14.pdf
[7] 'NGO information to the Committee on the Rights of the Child: Third and Fourth Periodic Reports of New Zealand under the Convention on the Rights of the Child and the Optional Protocol on the Involvement of Children in Armed Conflict', August 2010, at http://www.converge.org.nz/pma/pma-crc0810.pdf and 'NGO briefing to the Committee on the Rights of the Child', October 2010, at http://www.converge.org.nz/pma/pma-crc1010.pdf
[8] 'NGO update to the Committee on the Rights of the Child', January 2011, at http://www.converge.org.nz/pma/pma-crc0111.pdf
[9] 'NGO information for the Pre-Sessional Working Group of the Committee on Economic, Social and Cultural Rights: For consideration when compiling the List of Issues on the Third Periodic Report of New Zealand under the ICESCR', Peace Movement Aotearoa, 26 April 2011, at http://www2.ohchr.org/english/bodies/cescr/docs/ngos/PeaceMovementAotearoa_NewZealand46.pdf
[10] 'NGO information for the 48th session of the Committee on Economic, Social and Cultural Rights: Third Periodic Report of New Zealand under the International Covenant on Economic, Social and Cultural Rights', Peace Movement Aotearoa, 5 April 2012, at http://www.converge.org.nz/pma/CESCR48-PMA.pdf
[11] 'Joint submission to the Universal Periodic Review of New Zealand: Indigenous Peoples' Rights and the Treaty of Waitangi', coordinated by Aotearoa Indigenous Rights Trust and Peace Movement Aotearoa, November 2008, at http://www.converge.org.nz/pma/towupr09.pdf Annex A at http://www.converge.org.nz/pma/towupr09a.pdf
[12] Oral interventions and written statements made during 2009 are available at http://www.converge.org.nz/pma/nzupr09r.htm
[13] 'Joint submission to the Universal Periodic Review of New Zealand: Indigenous Peoples' Rights and the Treaty of Waitangi', coordinated by Aotearoa Indigenous Rights Trust and Peace Movement Aotearoa, January 2014, at http://www.converge.org.nz/pma/nzupr2-ipr.pdf
[14] 'Eyes Wide Shut: The Government's Guilty Secrets in Afghanistan', Jon Stephenson, May 2011, at http://www.metromag.co.nz/metro-archive/eyes-wide-shut
[15] See, for example, 'Kiwi troops in 'war crimes' row', Jon Stephenson, 2 August 2008, at http://www.stuff.co.nz/national/2712026/Kiwi-troops-in-war-crimes-row
[16] See, for example, 'SAS to be deployed in Afghanistan', NZPA, 10 August 2009 at http://www.stuff.co.nz/timaru-herald/news/national/2737700/New-Zealand-SAS-to-be-deployed-in-Afghanistan
[17] See, for example, 'Eyes Wide Shut: The Government's Guilty Secrets in Afghanistan' as above, and 'No guarantee SAS captives not tortured', Otago Daily Times, 13 October 2011, at http://www.odt.co.nz/news/national/181988/no-guarantee-sas-captives-not-tortured
[18] 'Treatment of Conflict-Related Detainees in Afghan Custody', United Nations Assistance Mission in Afghanistan and United Nations Office of the High Commissioner for Human Rights, October 2011, at http://unama.unmissions.org/Portals/UNAMA/Documents/October10_%202011_UNAMA_Detention_Full-Report_ENG.pdf
[19] 'No guarantee SAS captives not tortured', Otago Daily Times, 13 October 2011, at http://www.odt.co.nz/news/national/181988/no-guarantee-sas-captives-not-tortured
[20] See, for example, Parliamentary Debates: Questions for Oral Answer, 5. SAS, Afghanistan—Prisoners, Hansard, 3 May 2011, at http://www.parliament.nz/en-nz/pb/business/qoa/49HansQ_20110503_00000005/5-sas-afghanistan%E2%80%94prisoners
[21] 'Afghan families paid after men shot', Neil Reid, 23 February 2014, at http://www.stuff.co.nz/national/politics/9753645/Afghan-families-paid-after-men-shot
[22] 'Response Critiques NZ Defence and Government's Reaction to NZ SAS / Afghanistan Issue', Jon Stephenson, 11 May 2011, at http://www.scoop.co.nz/stories/HL1105/S00110/stephenson-responds-to-govt-reaction-on-nzsastorture-issue.htm

[23] 'Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups', 13 March 2015, A/HRC/28/18, at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_18_AUV.doc

[24] See, for example, 'PM defends deployment amid war crime allegations', Radio New Zealand, 17 March 2015, at http://www.radionz.co.nz/news/political/268864/pm-defends-deployment-amid-war-crime-allegations

[25] See, for example, 'NZ troops in Australia, awaiting deployment', Isaac Davison, 31 March 2015, at http://www.radionz.co.nz/news/political/268864/pm-defends-deployment-amid-war-crime-allegations

[26] As at note above, and, for example, 'Defence Minister will not release Iraq mission details', Audrey Young, 1 April 2015, at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11426343

[27] See, for example, No 'D-Day' for Iraq deployment, Radio New Zealand, 12 March 2015, at http://www.radionz.co.nz/news/political/268490/no-'d-day'-for-iraq-deployment

[28] For example, Australia ('Australian special forces enter Iraq with diplomatic passports', 15 November 2014, at http://www.news.com.au/national/australian-special-forces-enter-iraq-with-diplomatic-passports/story-fncynjr2-1227122337721) and Spain ('Spanish troops will have diplomatic passport in Iraq', The Diplomat, 8 January 2015, at http://thediplomatinspain.com/en/spanish-troops-will-have-diplomatic-passport-in-iraq)

[29] 'List of issues prepared by the Committee prior to the submission of the sixth periodic report of New Zealand (CAT/C/NZL/6)', Committee Against Torture, 7 May–1 June 2012, CAT/C/NZL/Q/6, para 3

[30] 'Report to the Committee Against Torture on New Zealand's 6th periodic report', Robson Hanan Trust, 9 February 2015

[31] 'Report of the Working Group on the Universal Periodic Review: New Zealand, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review', 7 July 2009, A/HRC/12/8/Add.1, p 5

[32] 'Sixth periodic reports submitted by States parties under article 19 of the Convention: New Zealand', 4 March 2014, CAT/C/NZL/6, para 146

[33] As above, para 143

[34] For a full analysis of structural discrimination in the criminal justice system, please refer to 'Maori Over-representation in the Criminal Justice system - does Systemic Discrimination have anything to do with it?' Kim Workman, Executive Director, Rethinking Crime and Punishment, November 2011, at http://www.rethinking.org.nz/assets/Maori%20and%20the%20CJS/02_Structural_Discrimination_in_the_CJS.pdf

[35] 'Statement at the conclusion of its visit to New Zealand (24 March -7 April 2014)', United Nations Working Group on Arbitrary Detention, 7 April 2014

[36] As at note above

[37] 'Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand', 25 August 2014, CAT/OP/NZL/1

[38] 'Monitoring Places of Detention: Annual Report of Activities under the Optional Protocol to the Convention Against Torture', Human Rights Commission, December 2014, p 14 at http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/916/original/2014_opcat_annual_report.pdf?1418084591

[39] As at note above, p 29

[40] Human Rights Amendment Bill 2011, at http://www.legislation.govt.nz/bill/government/2011/0346/latest/096be8ed80e0674f.pdf

[41] Human Rights Amendment Bill 2011

[42] General Assembly Resolution 48/134, adopted at the 85th plenary meeting, 20 December 1993 - http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/116/24/PDF/N9411624.pdf?OpenElement

[43] 'General Observations of the International Coordinating Committee of National Human Rights Institutions Sub-Committee on Accreditation', adopted May 2013 - http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf

[44] 'Twentieth Periodic Report submitted by states parties under Article 9 of the Convention: New Zealand (submitted February 2012)', CERD/C/NZL/20, at para 20

[45] 'Adjournment speech', Lockwood Smith, Speaker of the House, 6 October 2011 at http://www.parliament.nz/en-NZ/PB/Debates/Debates/Speeches/5/a/f/49HansS_20111006_00001097-Smith-Lockwood-Adjournment.htm
[46] 'Risk in hasty legislation', Waikato Times, 10 October 2011, at http://www.stuff.co.nz/waikato-times/news/5759026/Risk-in-hasty-legislation
[47] 'Bill Digest: Countering Terrorist Fighters Legislation Bill 2014', Parliamentary Library, November 2014, at http://www.parliament.nz/resource/en-nz/51PLLaw21811/786808d3c8497c5895c1a14a1f3abd531334be5f
[48] As at note above
[49] For more detail, please see to 'Prison smoking ban prompts judicial intervention and raises constitutional concerns', Wilson Harle Barristers and Solicitors, July 2013 at http://www.wilsonharle.co.nz/assets/Prison-Smoking-ban-prompts-judicial-intervention-and-raises-constitutional-concerns.pdf which also refers to other instances of significant legislative changes which have been introduced by way of SOPs.
[50] *Taylor v Attorney-General & Ors* [2013] NZHC 1659, at [13]
[51] 'Consistency with the New Zealand Bill of Rights Act 1990: Countering Terrorist Fighters Legislation Bill', 12 November 2014, at http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/countering-foreign-fighters-and-other-violent-extremists-bill
[52] Immigration Amendment Act 2013, at http://www.legislation.govt.nz/act/public/2013/0039/latest/096be8ed80b340a7.pdf
[53] 'Consistency with the New Zealand Bill of Rights Act 1990: Immigration (Mass Arrivals) Amendment Bill', 3 April 2012, at http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/immigration-mass-arrivals-amendment-bill
[54] 'Bills Digest: Immigration Amendment Bill 2012', 2 May 2012, at http://www.parliament.nz/en-NZ/PB/Legislation/Bills/BillsDigests/4/e/3/50PLLaw19731-Immigration-Amendment-Bill-2012-Bills-Digest-No-1973.htm The legislation is available at http://www.legislation.govt.nz/bill/government/2012/0016/25.0/096be8ed8085f0b2.pdf
[55] 'Bills Digest: Immigration Amendment Bill 2012', as at note above
[56] 'Immigration Amendment Bill 2012', Submission by the Office of the United Nations High Commissioner for Refugees, 8 June 2012, at http://unhcr.org.au/unhcr/images/2012-06-08_UNHCR%20Submission%20to%20the%20NZL%20Immigration%20Ammendment%20Bill.pdf
[57] 'Immigration (Mass Arrivals) Amendment Bill: Consistency with the New Zealand Bill of Rights Act 1990', 3 April 2012, http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/immigration-mass-arrivals-amendment-bill
[58] New Zealand Public Health and Disability Amendment Act 2013, at http://www.legislation.govt.nz/bill/government/2013/0118/latest/096be8ed80aee7df.pdf
[59] Atkinson and others v Ministry of Health [2010] NZHRRT 1 (8 January 2010), at http://www.nzlii.org/nz/cases/NZHRRT/2010/1.html
[60] Ministry of Health v Atkinson HC Auckland CIV-2010-404-000287 [2010] NZHC 2401; (2010) 9 HRNZ 47 (17 December 2010), at http://www.nzlii.org/nz/cases/NZHC/2010/2401.html
[61] Ministry of Health v Atkinson [2012] NZCA 184; [2012] 3 NZLR 456 (14 May 2012), at http://www.nzlii.org/nz/cases/NZCA/2012/184.html
[62] Overview, New Zealand Public Health and Disability Amendment Act 2013, p 2
[63] Overview, New Zealand Public Health and Disability Amendment Act 2013, p 2
[64] New Zealand Public Health and Disability Amendment Act 2013, Section 70E, parts 1 and 2
[65]' Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the New Zealand Public Health and Disability Amendment Bill (No 2) presented to the House of Representatives pursuant to section 7 of the New Zealand Bill of Rights Act 1990', 16 May 2013, at http://www.parliament.nz/resource/0001614287
[66] More detailed information on the New Zealand Public Health and Disability Amendment Act is available in 'NGO information for the Human Rights Committee, 110th session: List of Issues Prior to Reporting, New Zealand', Peace Movement Aotearoa, January 2014, paras 18 - 25, at http://www.converge.org.nz/pma/ccpr-pma14.pdf