



New Zealand's 6th periodic review under the International Covenant on Civil and Political Rights

Submission of the New Zealand Human Rights Commission to the Human Rights Committee

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SECTION 1 - INTRODUCTION

- 1 The New Zealand Human Rights Commission (“Commission”) is New Zealand’s National Human Rights Institution (“NHRI”). It is accredited as an “A” status NHRI. It is an independent Crown Entity pursuant to the Crown Entities Act 2004 and derives its statutory mandate from the Human Rights Act 1993 (“HRA”). The long title to the HRA states it is intended to provide better protection of human rights in New Zealand in general accordance with United Nations human rights Covenants and Conventions.
- 2 The Commission welcomes the opportunity to make this submission to the Human Rights Committee (“Committee”) in relation to New Zealand’s 6th periodic review under the International Covenant on Civil and Political Rights (“ICCPR”)
- 3 The major political and civil human rights issues in New Zealand relate to violence or the threat of violence, particularly family violence, sexual violence and the threat of violence from terrorists; and discrimination that sees more Māori and more disabled people in our prisons. Significant research and work is being led by the Government to reduce family and sexual violence, balance the political and civil rights in counter-terrorism activities and eliminating the bias that the Government has accepted is present in the criminal justice system. The Government’s delegation should be in a position to update the Committee at the review of New Zealand on the steps the Government is taking. These include major work on family and sexual violence under the leadership of the Ministers of Justice and Social Development; the report of the surveillance and intelligence due in early March; and the expansion of the Police strategy – The Turning of the Tide - to include the whole Justice Sector. These issues are addressed in sections 4, 6 and 8 of this submission.
- 4 The other major ICCPR human rights issue in New Zealand is discrimination (Article 2). Apart from the discrimination in the criminal justice system mentioned above, the effect of this discrimination is seen in unequal realisation of economic and social rights – particularly adequate standard of living (income and housing), education and health. These issues are addressed in section 5 of this submission.
- 5 The submission has been presented according to thematic issues identified in the Committee’s LOIPR. For each thematic area, the Commission has identified the relevant articles of the Convention and paragraphs of the LOIPR, as well as providing a summary of the key issues and proposed recommended actions.
- 6 A full list of proposed recommendations is attached as Appendix 1.

SECTION 2 - BACKGROUND AND GENERAL MATTERS OF IMPLEMENTATION

7 New Zealand generally has high levels of human rights realisation. New Zealanders are generally free to say what they think, read and view what they like, worship where and how they choose, move freely around the country and feel confident in the laws that protect them from discrimination and the arbitrary abuse of power. Most New Zealanders also experience the benefits of the economic, social and cultural rights – education, decent work, good health and affordable, healthy housing. New Zealand is one of the States ranked with Very High Human Development by the UNDP's Human Development Index. However, in the last thirty years, as in many other developed countries, there are a significant minority of New Zealanders who are being left behind in realisation of social and economic rights and opportunities.

8 Since 2012 there have been some significant achievements, including:

- greater recognition of the equality of same-sex couples with the recent passage of the Marriage (Definition of Marriage) Amendment Act 2013;
- significant progress in settling historic breaches of the Treaty of Waitangi. Between January 2011 and September 2015, 39 Bills have been passed by Parliament giving effect to Treaty settlements.¹ As Māori and the Crown continue to make progress with Treaty settlements, innovative forms of redress have emerged. These have related to things such as recognition of mana and recognition of cultural taonga;
- initiatives which aim to close gaps in the realisation of human rights and give better effect to cultural expertise and the principle of self determination. Examples of this approach are *Ka Hikitia – Accelerating Success 2013 -2017*,² the *Pasifika Education Plan 2013 – 2017*,³ the introduction of ten marae⁴-based courts and two Pasifika courts for Māori and Pacific young people involved in the youth justice system, and the introduction of *The Turning the Tide Strategy*⁵;
- the release of the Constitutional Advisory Panel's report on the Constitutional Conversation;
- Formation of a Bullying Prevention Advisory Group under the leadership of the Secretary of Education which is leading the implementation of the Bullying Prevention Action Plan. If this plan is fully implemented the Government will have fully met the recommendations made in the last four years by UN Treaty Bodies and by States in the Universal Periodic Review;

¹ <https://www.govt.nz/assets/Documents/OTS/Quarterly-report-to-30-September-2015.pdf>

² <http://www.education.govt.nz/ministry-of-education/overall-strategies-and-policies/the-maori-education-strategy-ka-hikitia-accelerating-success-20132017/>

³ <http://www.education.govt.nz/ministry-of-education/overall-strategies-and-policies/pasifika-education-plan-2013-2017/>

⁴ The marae is the focal point of Maori communities throughout New Zealand. Marae are used for meetings, celebrations, funerals, and other important events. Maori people see their Marae as turungawaewae – their place to stand and belong.

⁵ <http://www.police.govt.nz/about-us/maori-police/turning-tide>

- The co-creation and co-governance of the Disability Action Plan 2014-18 which has the Safety, Autonomy and Representation of disabled people as three of its Outcomes;
- The ongoing development under the leadership of the Minister of Justice and the Minister of Social Development of a new strategy to address the issues of family and sexual violence in New Zealand;
- The review of the surveillance and intelligence that the Commission requested in its 2013 report to the Prime Minister is underway and due to report in early March; and
- The expansion across the Justice Sector of the New Zealand Police of The Turning of The Tide strategy as advocated by the Commission and Iwi leaders.

9 Challenges remain, however, to fully realising human rights for everyone in New Zealand. Violence and abuse and the discrimination and inequalities experienced by some New Zealanders remain the most significant human rights issues for New Zealand:

- Violence, abuse and harassment continue to occur at unacceptably high levels in New Zealand, despite wide recognition of the problem and wide-ranging efforts to address it. Māori and disabled people are more likely to be victims of physical and sexual violence, and have less access to physical and psychological and judicial interventions. While there has been some good progress, the level of family and sexual violence in New Zealand is unacceptably high. New Zealand has the fifth worst child abuse record of 31 OECD countries. Most serious violence against children is family violence.
- Despite the many efforts of communities and successive Governments, discrimination, social and economic exclusion and entrenched inequalities remain a reality for certain groups of people living in New Zealand. Those affected include women, children, disabled people, Māori, Pacific people, migrants and refugees, older people, and other minority groups. Poor people most notably poor Māori, Pacific people, and disabled people are the most seriously affected. This is evident in material deprivation and incarceration rates, education achievement levels, low levels of participation in work, low incomes, poor health and inadequate housing.

10 The OECD Economic Survey on New Zealand notes:⁶

New Zealand has generally done well in enabling economic and social participation of its people. Yet, as in many other countries, income inequality and poverty have increased, rising housing costs have hit the poor hardest, and the

⁶ OECD, *Economic Surveys New Zealand: Overview* (June 2015)

rate of improvement in many health outcomes has been slower for disadvantaged groups than for others. Gaps in education achievement have narrowed, but the influence of socio-economic background on education achievement has increased. Of particular concern are those New Zealanders who face persistently low incomes, material hardship and poor long term outcomes across a range of dimensions. While Māori and Pasifika are less than a quarter of the population, they are significantly overrepresented in these groups.

New Zealand Governments have made improving outcomes in key areas that affect well-being (income, housing, health and education) for low socio-economic households, including many Māori and Pasifika people, a top priority. Because the same individuals tend to have poor outcomes across various dimensions of well-being, a co-ordinated multi-pronged approach is needed. In particular, there is a need to better use data and evidence to target and tailor interventions across the public sector to more effectively improve the long-term outcomes of the most disadvantaged New Zealanders....

- 11 Since New Zealand's last review two major earthquakes and numerous aftershocks struck the Canterbury region. The earthquakes resulted in significant loss of life and destruction of homes, businesses, community⁷ and city infrastructure. The Government has invested a large amount of resources and efforts in the Canterbury earthquake recovery process. However, significant issues have emerged relating to rights to property, health, housing and participation by affected people in decision making. The Canterbury earthquake recovery process has brought renewed attention to a number of enduring human rights challenges for New Zealand and highlighted the fragility of some human rights protections.

- 12 On 10 December 2013 the Commission released a report which outlines the human rights challenges raised by the Canterbury earthquakes. The aim of the report was to encourage key influencers and decision-makers to apply a human rights approach, by putting human rights principles at the centre of decision-making in civil emergencies, and more broadly when developing policies.⁸ The approach recommended in the report is consistent with the human rights aspects of the Guiding Principles of the *Sendai Declaration on Disaster Risk Recovery* which New Zealand has ratified.

⁷ Community infrastructure includes churches, church halls and community centres. The loss of these facilities has been particularly challenging, increasing social isolation for some groups, especially older people and disabled people.

⁸ A copy of the report is available here: <http://www.hrc.co.nz/key-projects/canterbury-earthquake-recovery/monitoring-human-rights-in-the-canterbury-earthquake-recovery>

13 In 2014 New Zealand underwent its second Universal Periodic Review (“UPR”) before the United Nations Human Rights Council. Over 200 civil society organizations and individuals were involved in making 53 submissions to the UPR. One hundred and fifty five recommendations were made to New Zealand. The Government accepted 121 of these. By accepting these recommendations the Government has committed to take action to improve the realization of rights. These actions are set out in New Zealand’s National Plan of Action for the protection and promotion of Human Rights 2015 – 2019 (“NPA”).⁹ Forty nine of the 101 actions in the NPA relate directly to ICCPR obligations.

A. Implementation of the Sustainable Development Agenda

14 New Zealand’s commitment to realising the United Nations Sustainable Development Agenda (“SDG Agenda”) will have a significant bearing on its progress in implementing ICCPR. Many of the Goals in the SDG Agenda have a direct correlation with ICCPR rights, such as the right to life, the right to participate in the conduct of public affairs, the right to access to legal remedy, the right to be free from torture or cruel, inhuman or degrading treatment, and the right to be free from discrimination.¹⁰ SDG Goal 16 is particularly relevant.

15 The incorporation of the SDG Agenda into the New Zealand public policy framework is currently at a very early stage. New Zealand is considering how it will report to the United Nations on the SDG Agenda particularly in relation to its sustainable development indicators.¹¹ These indicators, which are being developed by the UN with the assistance of national statistics commissions, including Statistics New Zealand, will provide an international benchmark that will assist with the assessment of measures taken to implement ICESCR and to a lesser extent ICCPR. The Commission is encouraging Government to consider streamlined and harmonised reporting to the United Nations on the SDG Agenda to the High Level Political Forum and on human rights to the UN Human Rights Council under the Universal Periodic Review. While there would be different reports they would complement each other. Such an approach would make consultation with and the involvement of civil society more effective.

⁹ <http://npa.hrc.co.nz/#/page/about>

¹⁰ See Danish Institution of Human Rights, *A human rights review of the proposed SDG Priority Indicators*, http://www.humanrights.dk/files/media/dokumenter/human_rights_and_development/human_rights_guide_to_sdgs/SDG-HR-Indicators%20full%20guide.pdf

¹¹ [https://sustainabledevelopment.un.org/content/documents/1684SF - SDG Universality Report - May 2015.pdf](https://sustainabledevelopment.un.org/content/documents/1684SF_-_SDG_Universality_Report_-_May_2015.pdf)

- 16 The Government is currently undertaking a significant amount of work to upgrade and improve its data usage and capabilities and the access to data for others. The Data Futures Partnership (“DFP”) currently being developed by Statistics New Zealand, will be at the centre of this work. The DFP consists of a cross-sector Working Group of “influential individuals” drawn from the Government and non-Government sectors, supported by a Secretariat based at Statistics New Zealand to support the DFP work programme. The DFPs mandate includes the development of data use projects that allow progress on system-wide public sector issues.
- 17 **The Commission recommends that the Committee urges New Zealand to commit to establish a process – based on the collection of robust disaggregated data - to monitor and review its progress in meeting its ICCPR related commitments under the SDGs.**

B. Business and Human Rights

- 18 The *United Nations Guiding Principles on Business and Human Rights* (“UNGPs”) were unanimously endorsed by the UN in late 2011. Application of the UNGPs would support ICCPR rights compliance. For example, mass data collection and surveillance by private sector agencies engages rights to privacy, freedom of association and expression. Although many human rights principles are embedded in New Zealand law and Policy, the Government is yet to take concrete steps towards ensuring the UNGPs are fully incorporated within its policy and regulatory frameworks. Furthermore the Government has not made any commitment to develop a National Action Plan on Business and Human Rights.
- 19 Through the Canterbury Earthquake Recovery the role of business in protecting economic, social and cultural rights has come to the fore. This has been particularly evident in relation to insurance related matters and disputes in relation to reconstruction and repair of homes in the Canterbury region.
- 20 The insurance model has not been without its problems and 7 claims have been filed with New Zealand’s National Contact Point under the OECD Guidelines on Multinational Enterprises.
- 21 In 2015 the Ministry for Business, Employment and Innovation revised the Government Rules of Sourcing. While the Rules mention international obligations they are not specific about what international obligations are relevant. The Government has indicated that it will involve the Commission more proactively in the next review of procurement policies and guidelines.
- 22 **The Commission recommends that the Committee urges the Government to ensure that:**
- **The Government undertakes UNGP training of officials in the public sector who work with business and trade and Boards and managers in State Owned**

Enterprises so they are aware of the State's UNGP obligations and the UNGP obligations of businesses owned by the State and that they meet those obligations ;

- **Government Procurement policies and guidelines specifically reference the UNGPs;**
- **State Owned Enterprises have a human rights policy; a human rights due diligence process; a remediation process if human rights are breached; and a human rights reporting process;**
- **Businesses operating in New Zealand are aware of their responsibilities under the UNGPs and comply with these; and**
- **The Government develops a national action plan for Business and Human Rights.**

SECTION 3 - CONSTITUTIONAL AND LEGAL FRAMEWORK (Article 2)

A. *Legislation*

LOIPR

Please state the measures taken to revise the laws that have been enacted but are inconsistent with the Bill of Rights Act and to ensure that new legislation is consistent with the obligations of the State party under the Covenant.

(Para 6)

23 Overall policy and legislation is well developed and generally consistent with international standards. However, a significant amount of legislation has been passed notwithstanding negative reports by the Attorney-General under section 7 of the Bill of Rights Act 1990 (“BORA”) indicating that it is inconsistent with the rights contained therein and the corresponding protections in the ICCPR. The Commission refers in particular to:

- The Criminal Investigations (Bodily Samples) Amendment Act 2009 – Article 17;
- The Parole (Extended Supervision Orders) Amendment Act 2009 – Articles 14, 9;
- The Parole (Extended Supervision Orders) Amendment Act 2014 – Articles 14, 9;
- The Sentencing and Parole Reform Act 2010 – Article 7;
- The Corrections Amendment Act 2013 – Article 7;
- The Public Safety (Public Protection Orders) Act 2014 – articles 14(7), 9(1);
- The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 – Article 25;
- The New Zealand Public Health and Disability Amendment Act 2014 – Article 2; and
- The Prisoners’ and Victims’ Claims (Continuation and Reform) Amendment Act 2013 – Article 2.

24 The Subcommittee on the Prevention of Torture (“SPT”) has voiced particular concern about the Bail Amendment Act which removes the presumption of bail for 17 – 20 years old who have previously served a sentence of imprisonment. “The SPT [was] concerned that these amendments will have a negative impact on the number of youth held on remand and the length of time spent on remand, which is already a matter of grave concern. Furthermore, the SPT [was] deeply concerned that the Bail Amendment Bill could exacerbate the disproportionately high number of Māori in prison, given the high rate of Māori recidivism, and the number of Māori

currently on remand.”¹²

- 25 **The Commission recommends that the Committee urges the Government to commit to reviewing all legislation – with a particular focus on the abovementioned Acts – within the next reporting period to ensure that it fully complies with New Zealand’s international obligations.**

B. Constitutional arrangements – New Zealand Bill of Rights Act 1990 and the Treaty of Waitangi

LOIPR

In the light of the previous concluding observations of the Committee (CCPR/C/NZL/CO/5, para. 7 and CCPR/CO/75/NZL, para. 8), please indicate the measures taken to strengthen the Bill of Rights Act of 1990, which reportedly does not encompass all Covenant rights and does not take precedence over ordinary domestic law.

(Para 6)

In light of the concluding observations of the Committee (CCPR/C/NZL/CO/5. PARA. 20), please provide information on measures taken to ensure that the Treaty of Waitangi forms part of domestic law and, therefore can be invoked in domestic courts

(Para25).

- 26 Despite New Zealand’s commitment to its international obligations, in practice not all of the rights contained in the various international treaties to which New Zealand is a party are given explicit domestic legal expression or protection. For example:

- the rights and freedoms protected by the BORA are set out in Part 2 of the BORA and reflect some, but not all, of those incorporated in the ICCPR such as the right to privacy. While the Privacy Act 1993 regulates the collection and use of personal information, it is not underpinned (or empowered) by a presumptive statutory right to privacy; ¹³In its submission to the Intelligence Services Review the Commission has proposed that the ICCPR right of privacy be enshrined in the BORA.

¹² SPT, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand*, at 21.

¹³ In particular, there is no equivalent of Art. 17 of the ICCPR which guarantees “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation.” The right to found a family, a general right of equality before the law, and additional rights protecting children are other rights which are not included in the BORA.

- the Canterbury earthquake recovery has highlighted the importance of the right to be free of arbitrary interference with home and property. The right to property links to the realisation of many economic, social and cultural rights and to the guarantee of rangatiratanga under Article 2 of the Treaty of Waitangi¹⁴. It can be traced back to the Magna Carta which became part of New Zealand’s law in 1840.¹⁵ Property rights are protected to some extent by the common law and legislation,¹⁶ but are not among the rights and freedoms in BORA.
- 27 The Relationship and Confidence and Supply Agreement between the National Party and the Māori Party (16 November 2008) agreed to establish a group to consider constitutional issues, including Māori representation. In 2012 a Constitutional Advisory Panel (“Panel”) was appointed to “listen, facilitate and record New Zealanders’ vies on constitutional issues.”¹⁷
- 28 On 31 July 2013 the Commission made a submission to the Panel. In its submission the Commission recommended:
- incorporation of all civil and political rights in to the BORA;
 - explicit statutory recognition of economic, social and cultural rights, including the availability of judicial remedies and alternative dispute resolution;
 - adding an equality provision to BORA;
 - specific legislative protection of property rights;
 - stronger protections to ensure better human rights compliance via a range of mechanisms;
 - entrenchment of the BORA; and
 - enhancing political participation via a range of specified mechanisms.¹⁸
- 29 In December 2013 the Panel released its report. It made a series of strong recommendations to improve New Zealand’s constitutional arrangements. In particular the Panel has recommended in relation to BORA that the Government:
- sets up a process, with public consultation and participation, to explore in more detail the options for amending the Act to improve its effectiveness such as:
 - adding economic, social and cultural rights, property rights and

¹⁴ Article 2 of the Treaty guaranteed to Maori the right to exercise authority over their own affairs and to maintain ownership of their land for as long as they wished to do so.

¹⁵ Chapter 29 of the Magna Carta provides “No freeman shall be...disseised of his freehold...but ...by the law of the land.” This aspect of the Magna Carta has been recognised by the Courts over the years (for example, *Cooper v Attorney-General* [1996] 3 NZLR 480) and is implicit in Article 2 of the Treaty of Waitangi.

¹⁶ Such as the Public Works Act 1981 and the Resource Management Act 1991.

¹⁷ <http://www.cap.govt.nz/Our-Role>

¹⁸ A copy of the Commission’s submission to the Constitutional Review is available here:

<http://www.hrc.co.nz/2013/commissions-review-of-new-zealands-constitutional-arrangements-to-the-constitutional-advisory-panel-released>

- environmental rights;
 - improving compliance by the Executive and Parliament with the standards in the Act;
 - giving the Judiciary powers to assess legislation for consistency with the Act; and
 - entrenching all or part of the Act.
- 30 The Treaty of Waitangi (1840) is New Zealand’s founding document and has major significance for human rights and harmonious race relations in New Zealand. The four articles of the Treaty reflect fundamental human rights principles.¹⁹ The place of the Treaty of Waitangi in New Zealand’s constitutional arrangements was considered through the Constitutional Review process. The Panel recommended the Government:
- continue to affirm the importance of the Treaty as a foundational document;
 - ensure a Treaty education strategy is developed that includes the current role and status of the Treaty and the Treaty settlement process so people can inform themselves about the rights and obligations under the Treaty;
 - support the continued development of the role and status of the Treaty under the current arrangements as has occurred over the past decades;
 - set up a process to develop a range of options for the future role of Treaty, including options within existing constitutional arrangements and arrangements in which the Treaty is the foundation; and
 - invite and support the people of Aotearoa New Zealand to continue the conversation about the place of the Treaty in our constitution.
- 31 New Zealand’s sixth report to the Committee notes – in relation to the Constitutional Review - that “[g]overnment has not yet formally responded as the response was released at the beginning of an election year.”²⁰ It has now been over 16 months since the election. In its twenty first to twenty-second periodic reports under the International Convention on the Elimination of All Forms of Racial Discrimination the Government stated that “[t]he Government welcomed the Panel’s report, reflecting the views of over 5,000 New Zealanders and organisations. It will prove a valuable resource for New Zealanders now and in the future.”²¹

¹⁹ Article 1 reflects the right to self-determination for incoming settlers, democratic rights such as citizenship rights and legal rights protected by the rule of law. Article 2 reflects the right to self-determination for tangata whenua, indigenous rights and property rights. Article 3 reflects the rights to equality and non-discrimination in the realisation of civil, political, economic and social rights. Article 4 reflects the right to freedom of religion and beliefs.

²⁰ Sixth Periodic report of States parties due in 2015, New Zealand (8 May 2015) at 35 : <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/165/37/PDF/G1516537.pdf?OpenElement>

²¹ New Zealand’s twenty first to twenty-second periodic reports under the International Convention on the Elimination of All Forms of Racial Discrimination (Submitted December 2015) at [45].

32 The Commission recommends that the Committee urge New Zealand to commit to concrete timeframes to respond to the recommendations of the Constitutional Advisory Panel and to establish without delay processes – with public consultation and participation - to:

- *explore in more detail the options for amending the BORA with a particular focus on adding property rights, the right to privacy and incorporating other ICCPR obligations; and*
- *develop a range of options for the future role of the Treaty of Waitangi within New Zealand's constitutional arrangements.*

C. Reservations to the Convention

LOIPR

Does the State party envisage withdrawing its reservations entered upon its ratification of the Covenant? If not, please provide detailed reasons explaining why it does not intend to do so and how those reservations are compatible with the object and purpose of the Covenant (CCPR/C/NZL/CO/5, para. 5).

(Para 4)

33 Article 20 (2) of the ICCPR provides:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination or violence shall be prohibited by law.

34 On ratifying the ICCPR in 1978 New Zealand entered the following reservation in relation to Article 20: The Government of New Zealand having legislated in the areas of advocacy of national and racial hatred and the exciting of hostility or ill will against any group or persons, and having regard to the right to freedom of speech, reserves the right not to introduce further legislation with regard to Article 20.

35 The Government's Report to the Committee notes that the reservations remain because "New Zealand considers current legislation is sufficient in this area and in particular has duly balanced the right to freedom of expression. New Zealand has legislation against the advocacy of national and racial hatred, and the inciting of hostility or ill will against any group of persons."

36 Recently a case was brought before the Human Rights Review Tribunal to test the application of s61 of the HRA, which prohibits publishing material (or using words in certain circumstances) which is likely to incite racial hatred. The plaintiffs, in this case, alleged that certain cartoons published in the Marlborough Express and Christchurch Press were insulting and likely to have the effect of bringing Māori and Pacific people into contempt by reason of their race, colour and/or ethnic or national origin. As a result they said the cartoons breached s.61 of the HRA.

- 37 This case raises significant issues relating to the right to freedom of expression and the need to balance the right to express opinions that may be unpopular or controversial against material that is likely to expose persons to hatred or contempt.
- 38 The Commission intervened in this case. In its submission the Commission took into account the high value placed on freedom of expression in international human rights law and domestically in the BORA. The Commission noted that “international law mandates a high threshold for intervention to ensure the right to freedom of expression is infringed as little as possible.” At the time of writing the Tribunal had not released its decision.
- 39 It remains unclear, however, whether s61 of the HRA (and s131 – inciting racial disharmony) applies to all religious groups. This is because both sections refer specifically to the actions being likely to excite hostility, or bring into contempt any group “on the ground of the colour, race, or ethnic or national origins of that group of persons.”²² Although this has not been tested in the New Zealand Courts, International jurisprudence suggests that the definition in ss61 and 131 of the HRA may not extend to groups such as those of the Islamic faith where religious belief may not be directly related to ethnicity, race or national origins.
- 40 Removing the reservation would, in the Commission’s view, provide clarity that it is the Government’s intent that ss61 and 131 of the HRA extend to protect all groups against national, racial or religious hatred as envisaged by Article 20(2) of the ICCPR.
- 41 **The Commission recommends that Committee urges the Government to take the necessary steps to remove its reservation to Article 20(2) without delay.**

D. Pre Legislative Scrutiny – The New Zealand Bill of Rights Act 1990

- 42 Section 7 of the New Zealand Bill of Rights Act 1990 (“BORA”) requires the Attorney-General to inform Parliament about any provision in a Bill that appears to be inconsistent with any of the rights and freedoms affirmed therein. The Ministry of Justice and the Crown Law Office examine all draft legislation and advise the Attorney-General on any BORA implications.
- 43 The effectiveness of the section 7 process hinges on the extent to which Parliament is systematically informed and involved in the scrutiny process.

²² Human Rights Act 1993, ss61 and 131:
http://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html?search=ts_act%40bill%40regulation%40deemedreg_human+rights+act_resel_25_a&p=1

- 44 In 2014 Parliament’s Standing Orders were amended to require all section 7 reports to be referred to select committee²³ for consideration.²⁴ The Commission welcomes this amendment and believes that it will result in more systematic review and debate of the BORA implications of legislation.
- 45 Parliament may form a different view about whether a particular right or freedom is limited or whether the limitation is justified. However, that decision is informed by the opinion of the Attorney-General.
- 46 This means that despite the intent of the reporting mechanism to ensure that legislation complies with BORA a number of significant Bills pass which limit fundamental rights and freedoms. For example, Professor Janet McLean has noted that “in respect of all 27 negative reports that had been tabled as at May 2011, the Government proceeded with the Bill, which “it openly acknowledged as limiting protected rights unreasonably in a way that could not be justified.”²⁵ As at May 2015 there had been 59 negative section 7 reports.²⁶
- 47 The New Zealand Law Society has suggested that legislation enacted despite a negative section 7 report should be subject to a “sunset clause” to enable it to be periodically reconsidered. The Commission supports this recommendation.
- 48 A further complication is that a section 7 report is not tabled where a provision may be inconsistent with BORA. Rather it is tabled where it is considered that it is in fact inconsistent. This entails consideration not only of prima facie inconsistency but also justification under section 5 of BORA. Section 5 of BORA provides:²⁷
- Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*
- 49 What is justifiable in a free and democratic society is a question for Parliament and will potentially change over time depending on the political, social and economic environment.

²³Select committees are regarded as an important check and balance on the Executive, particularly in a Parliament that lacks an upper house or revising chamber, as is the case in New Zealand. Examination of bills for consideration after the first reading – except for those to which urgency is accorded – is a primary function of select committees.

²⁴ SO 265(5). The recommended amendments to Standing Orders were debated and adopted by the House on 30 July, and came into effect on 15 August 2014: <http://www.parliament.nz/resource/en-nz/00HOHPBReferenceStOrders4/eb7c8b9e4a6c7aa88a47d14dc4100513b2557e60>

²⁵ Professor Janet McLean “Bills of Rights and Constitutional Conventions” (lecture, Victoria University of Wellington, 30 August 2011).

²⁶ McGregor, Bell and Wilson, *Faultlines: Human Rights in New Zealand* (2015); http://www.waikato.ac.nz/_data/assets/pdf_file/0004/248782/NO-watermark-Fault-lines-Human-rights-in-New-Zealand.pdf

²⁷ New Zealand Bill of Rights Act 1990, section 5. <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

50 The Commission believes that the current approach is inconsistent with the purpose and wording of section 7, which states:²⁸

Where any Bill is introduced into the House of Representatives, the Attorney-General shall.....

Bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights.

(emphasis added)

51 **The Commission recommends that the Committee urges the Government to commit to amending its BORA vetting process to better protect human rights in legislative development by:**

- **ensuring that section 7 reports are prepared, tabled in Parliament and referred to select committee where a Bill appears to be inconsistent with any of the rights and freedoms contained in the BORA. In other words where there is a *prima facie* inconsistency;**
- **establishing a mechanism for Parliament to periodically review the continued validity of any justified limitation.**

52 Supplementary Order Papers (“SOPs”) propose amendments to bills after their introduction into Parliament. SOPs are not routinely subject to BORA review and reporting. The Commission considers that this is a gap in New Zealand’s pre legislative scrutiny processes.

53 In 2012, for example, an SOP proposing greater mandatory use of invasive strip-searching of prisoners was not considered for consistency with the Bill of Rights despite raising questions of compliance with both domestic and international human rights standards. Where proposed amendments engage domestic and international human rights obligations, the usual reporting mechanism ought to apply.

54 The Standing Orders Committee of the House of Representatives has recommended that Bill of Rights reporting be required on substantive SOPs.²⁹ **The Commission agrees with the Standing Orders Committee and recommends that the Committee encourages the Government commit to amending its BORA reporting process to require section 7 reports - in the modified form referred to above at paragraph 51 – on substantive SOPs.**

²⁸ Ibid, s7.

²⁹ *Review of Standing Orders* (Report of the Standing Orders Committee, September 2011) at 37.
http://www.parliament.nz/en-nz/pb/sc/documents/reports/50DBSCH_SCR56780_1/review-of-standing-orders-2014-i18a

E. Wider human rights scrutiny measures

- 55 Although New Zealand has a longstanding commitment to the development of international human rights standards, it is less consistent in fully incorporating those standards in the development of legislation and policy. Human rights considerations are generally not at the heart of public policy decision making. New Zealand has no overarching cross Government strategy to ensure that human rights are known and understood by all duty bearers and rights holders, and that a human rights approach to legislative and policy development is routinely applied by all Government departments.
- 56 The New Zealand Cabinet Manual expressly requires Ministers to advise the Cabinet of any “international obligations” affected by proposed legislation.³⁰ However, the Commission’s engagement in the legislative process has revealed that this requirement is often overlooked and there is seldom any transparent assessment of New Zealand’s international human rights obligations in the development of legislation.
- 57 Many NGOs and civil society organisations have stated that they want to see a dedicated Human Rights Select Committee established that would scrutinise legislation and section 7 reports, and conduct thematic inquiries. This has been raised by some submitters in relation to this review.
- 58 In 2014 the Standing Orders Committee considered whether it was appropriate in the New Zealand context to establish a Human Rights Select Committee. It concluded that it was not, stating:³¹

It could be difficult to maintain the membership of such a committee, and in principle, this proposal could potentially marginalize important matters that already seem to be too confined to legal and academic circles.

...However, there is another part to the equation: as well as drawing the attention of members to Bill of Rights matters, there should be an increased emphasis on expressing these issues in ways that are comprehensible, not only for members, but for the public in general. The answer is not to shut NZBORA matters away in a specialist committee, as that could in fact be counter-productive.

New Zealand has a well-regarded system of subject select committees that have multiple functions and exercise general oversight of policy, legislative, and administrative matters within their subject areas. Bill of Rights scrutiny should be part of a mainstream discussion about legislative quality that takes place in all subject select committees and is applied in all policy contexts...

³⁰ Section 7.60 of the *Cabinet Manual*, Cabinet Office, 2008.

³¹ *Supra* note 32 at 15.

- 59 As a result of this work the Commission is considering its own position. It has to date advocated for a Human Rights Select Committee. It has however, already participated in human rights training of Select Committee Clerks at the request of the Clerk of the House. As a result the Commission has seen firsthand the seriousness with which the Parliamentary Officers are taking the issue. If human rights can be mainstreamed in all Select Committees that, in the Commission's view, is likely to be a better result than a separate Human Rights Select Committee. The challenge is to make mainstreaming a reality.
- 60 In June 2015 Parliamentarians launched a cross-party network to raise the profile of human rights at Parliament. The network seeks to ensure that Parliament is better informed about human rights and that they are at the centre of the decision-making process. The Commission understands that this group has, however, only met once since being established. Other cross Parliament groups have been formed in regard to Women's rights and the rights of GLBTI people.
- 61 **The Commission urges the Committee to encourage New Zealand to continue to mainstream human rights by:**
- a) **making the requirement set out in section 7.60 of the Cabinet Manual more explicit in requiring identification of implications in relation to international human rights commitments and extend it to apply to all policy and legislation (both primary and secondary);**
 - b) **taking steps to ensure that the requirements are strictly adhered to; and**
 - c) **developing and implementing capacity-building programmes for parliamentarians and civil servants across the public sector.**

F. Family Court Reforms

- 62 In March 2014 the Family Court reforms were introduced and included the requirement that parties attend the free Parenting through Separation (PTS) course and new family dispute resolution (FDR) service before they can apply to the family court. However, FDR is not mandatory if there is affidavit evidence that one of the parties, or a child of one of the parties, has been subjected to domestic violence by one of the other parties to the dispute. There are anecdotal reports from the Bar that the reforms are not working, particularly for those experiencing family violence.

- 63 The Commission was advised by the Ministry for Women in 2015 that while two aspects of the reforms have been evaluated through a small scale qualitative study (Family Dispute Resolution and mandatory self-representation); there has been no comprehensive evaluation of the family justice system reforms introduced in 2014. The Commission understands that an analysis of administrative data related to the family justice reforms will take place in mid-2017, but is concerned that victims of family violence may suffer in the meantime if there are problems that are not being identified or addressed.
- 64 **The Commission recommends that the Committee urge the Government to undertake an urgent qualitative evaluation of women and girl's experience in the family court, with a focus on those who are experiencing family violence.**

SECTION 4 - COUNTER-TERRORISM MEASURES (Articles 2, 6, 14, 17 and 26)

A. *Security Surveillance Legislation*

LOIPR

Please provide information on the steps taken to redraft the Government Communications Security Bureau and Related Legislation Amendment Bill, taking into account the conclusions of the Human Rights Commission, published in a report to the Prime Minister in July 2013, that the bill would breach the right to privacy in an unbalanced and unjustified manner.

Please clarify whether the comments of the Human Rights Commission in the above-mentioned report to the Prime Minister were taken into account in the Telecommunications (Interception Capability and Security) Act (Act No. 91 of 11 November 2013). In particular, please clarify the following points in the Act: (a) the definition of “national security”; (b) the extent to which information on users, including their personal data, may be provided to relevant authorities by a service or network operator; (c) the extent to which intercepted information and information on the receivers may be provided by a service or network operator to relevant authorities; (d) the conditions under which information may be classified; and (e) the conditions under which classified security information may be used by law enforcement authorities and the judiciary.

(Para 9 and 10)

- 65 The Government’s report to the Committee responds in detail to the Committee’s specific questions relating to the Telecommunications (Interception Capability and Security) Act 2013. This section does not repeat that information but rather provides an overview of the broader security and surveillance framework in New Zealand.
- 66 Globally, issues around mass surveillance, privacy, business and human rights, and media freedom have arisen in the wake of disclosures by Edward Snowden in 2013. In New Zealand, the focal point for these issues was the Government Communications Security Bureau and Related Legislation Amendment Act 2013 and the Telecommunications (Interception Capability and Security) Act.
- 67 The Commission remains concerned that the legislation is wide-reaching without sufficient safeguards against abuse of power. There is inadequate oversight and inadequate provision for ensuring transparency and accountability. In its report to the Prime Minister on the legislation and broader human rights matters regarding surveillance the Commission recommended:
- A full and independent inquiry into New Zealand’s intelligence services be undertaken as soon as possible with terms of reference agreed on a cross-political party basis, to consider the role and function of our intelligence

services, their governance and oversight mechanisms and to consider the balance between human rights and national security; and

- Stronger accountability and oversight mechanisms, including Parliamentary oversight from a cross-party select committee, in addition to the Inspector-General of Intelligence and Security.³²

- 68 In June 2014 the Commission provided a written update to the Committee on surveillance and human rights in New Zealand.
- 69 The Intelligence and Security Committee Act 1996 provides that a Review of the intelligence and security agencies, the legislation governing them, and their oversight legislation must, in accordance with the terms of reference specified pursuant to the Act be commenced before 30 June 2015 and afterwards, held at intervals not shorter than 5 years and not longer than 7 years.³³
- 70 The Government appointed Sir Michael Cullen and Dame Patsy Reddy as the reviewers and in May 2015 the Review commenced. The Review's terms of reference include consideration of how well the legislative framework protects both national security and the rights of New Zealanders; and whether current oversight mechanisms are sufficient to guard against unlawful practices and maintain public confidence.³⁴
- 71 In its submission to the Review, the Human Rights Commission proposed a number of recommendations aimed at advancing a human rights consistent approach. In doing so, the Commission was informed by recent UK reports³⁵ which emphasise, among other things, the importance that clarity, transparency, limitations upon powers and human rights compliance have in establishing and maintaining public trust and confidence in the role and functions of intelligence and security services.

³² A copy of the Commission's report is available here: <http://www.hrc.co.nz/wp-content/uploads/2013/07/09072013-Human-Rights-Commission-Report-to-the-Prime-Minister-re-GCSB-and-TICS-Bills-FINAL.pdf>

³³ ss 21 -27 (as amended by the Intelligence and Security Amendment Act 2013)
http://www.legislation.govt.nz/act/public/1996/0046/latest/DLM392242.html?search=ts_act%40bill%40regulation%40deemedreg_intelligence_resele_25_a&p=1

³⁴ The full terms of reference for the review are available here: <http://www.justice.govt.nz/publications/global-publications/i/intelligence-and-security-agencies-review>

³⁵ David Anderson QC, *A Question of Trust, Report of the Investigatory Powers Review*, June 2015, Independent Surveillance Review, *A Democratic License to Operate, Report of the Independent Surveillance Review*, Royal United Services Institute for Defence and Security Studies, July 2015

- 72 Furthermore, the Commission considered that the challenges brought about by contemporary and future electronic surveillance and data interception technology requires consideration of whether the BORA should be updated to include a free-standing right to privacy, consistent with New Zealand's obligations under the ICCPR. A copy of the Commission's submission is attached at Appendix 2.
- 73 The Commission's submissions argue the clear and consistent laws relating to surveillance. The Review's Terms of Reference are limited to intelligence services.
- 74 The Commission has been advised that the reviewers will release their final report to the Minister on 29 February 2016. It will be up to the Minister to decide when that report is made public. The Commission will update the Committee further on these matters once the report has been released.
- 75 In November 2015 Justice Minister Amy Adams asked the Law Commission to begin a statutory review of the operation of the Search and Surveillance Act 2012.

B. Foreign Terrorist fighters/Pillar One UN Counter Terrorism Strategy

- 76 The Countering Terrorist Fighters Legislation Act was passed by Parliament in December 2014. The Act is designed to ensure that New Zealand is able to address the evolving threat posed by foreign terrorist fighters. The Act forms part of the measures the Government has chosen to fulfil its obligations under Article 6 of the ICCPR - to adopt measures to counter terrorism and its impacts.
- 77 The Commission recognises the importance of the Act and the contribution that New Zealand can make to the fight against terrorism. However, any long term solution must start with the communities themselves – designing and implementing solutions to minimise extremism and radicalisation in their communities. This is recognised in Pillar One of the UN Counter Terrorism Strategy.
- 78 The Commission has also voiced concerns about the unintended consequences of measures such as the Countering Terrorist Fighters Legislation Act including stigmatisation and harassment of particular groups and individuals.
- 79 The Commission remains concerned that the Government's focus on Pillar One of the UN Counter Terrorism Strategy is less extensive than the other pillar of that strategy. New Zealand civil society organisations and the New Zealand Police have a long history of peacemaking and constructive community engagement that needs to be nurtured and strengthened in counter terrorism activities.
- 80 **The Commission recommends that the Committee urge the Government to develop in consultation with communities a dedicated programme of work to minimize extremism and radicalisation.**

C Children

- 81 Since 2011, the introduction of enhanced information sharing capabilities amongst government agencies has given rise to issues pertaining to the rights of children to privacy under Article 16.
- 82 Amendments made to the Privacy Act 1993 in 2012 have introduced Approved Information Sharing Agreements (AISAs), a regulatory instrument that enables government agencies to share personal information in circumstances that would otherwise breach the Information Privacy Principles contained in the Privacy Act. AISAs are developed via a robust statutory process that is overseen by the Privacy Commissioner.
- 83 A Vulnerable Children's AISA was developed and passed into regulation in 2015. The AISA enables personal information on vulnerable children to be collected, stored and shared between specified Government agencies through a Vulnerable Children's database and triage hub. The information is then used to inform the delivery of services and interventions, including those of multi-disciplinary Children's Teams and improve inter-agency co-ordination.
- 84 The review of CYF also contemplates the introduction of predictive risk modelling to identify children who may be at heightened risk of harm.³⁶ Predictive risk modelling assigns risk through an assessment of information regarding the child's family background and circumstances, such as the existence of previous child protection interventions, drug or substance abuse and benefit history. It therefore requires personal information about the child and their family history from relevant agencies to be collected. The Commission has raised concerns with the Government's Advisory Expert Group on Information Security on the potentially discriminatory impact of predictive risk modelling, particularly if it used to target children of beneficiaries.
- 85 In addition, the rights of children under Article 16 have been more indirectly engaged by a recent raft of interim legislation that has established extraordinary mechanisms for countering foreign terrorist fighters and increasing governmental powers of surveillance.³⁷ An Independent Review of Security and Intelligence services is currently ongoing and will be releasing its findings in February 2016. The review is expected to result in a major overhaul of New Zealand's intelligence and security legislation and oversight mechanisms. To date, the potential impact of these reforms of children, particularly the children of ethnic groups who may be unduly targeted by surveillance powers, has not been accorded specific consideration.

³⁶ Terms of Reference for the Modernising Child, Youth and Family Expert Panel, page 2 and 4

³⁷ See for example Countering Foreign Terrorist Fighters Bill 2014.

86 **The Commission recommends that the Committee urges the Government to ensure that the rights of children are upheld and protected in circumstances where they, or their family members, are subject to surveillance or other forms of intelligence or security activity.**

SECTION 5 - EQUALITY AND NON DISCRIMINATION (Articles 2, 20 and 26)

A *Equality in employment*

LOIPR

Please provide information on the measures taken to ensure equality in employment by closing the existing pay gaps between men and women. Furthermore, please provide information on the concrete measures taken, since the last periodic report, to improve the low representation of women in high-level and managerial positions and on boards of private entities. Please provide information on the measures taken to identify and address the underlying causes of the wider pay gap in the public service.

(Para 11)

- 87 The female labour force participation rate (for women aged 15 and over) rose slightly from 63.1% during the March 2012 quarter to 63.2 % in the year to December 2015.³⁸ However, despite an increase in qualifications, women remain over-represented in minimum wage jobs. In 2014, 66.6 % of minimum wage earners over 25 were women.³⁹
- 88 New Zealand women have made significant progress in participation in many areas of the labour market. However, the levels of participation are not always matched by levels of representation in corporate governance and in senior management in the public and private sectors. Women represent 33 % of elected officials in local Government, the judiciary increased slightly over the reporting period to 29 per cent, and representation in national politics remained static at 32 %. Although women comprise 60 per cent of all public servants, only 24.1% are chief executives of public service departments and 44.2% of senior management are female.⁴⁰ While the Government made a commitment in 2011 to 45 % participation on state sector boards,⁴¹ this figure has remained stagnant over the last 10 years and as at December 2014 women made up 41.7% of Ministerial appointees.⁴²

³⁸ Household Labour Force Survey: December 2015 quarter, Ministry of Business, Innovation and Employment: http://www.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/LabourMarketStatistics_HOTPDec15qtr.aspx

³⁹ Minimum Wage Reviews 2014, Ministry of Business, Innovation and Employment: <http://employment.govt.nz/er/pay/backgroundpapers/2014/Minimum-Wage-Review-MBIE-Report-2014.pdf>

⁴⁰ Ministry of Women's Affairs, Draft CEDAW report 2016.

⁴¹ Ministry of Women's Affairs, "2014 -2018 Strategic Intentions" Presented to the House of Representatives pursuant to section 39 of the Public Finance Act 1989 in 2014.

⁴² Supra note 39.

- 89 At the Forty-Third Pacific Islands Forum, New Zealand endorsed the Gender Equality Declaration which outlined a commitment to “Adopt measures, including temporary special measures (such as legislation to establish reserved seats for women and political party reforms), to accelerate women’s full and equal participation in governance reform at all levels and women’s leadership in all decision making.”⁴³
- 90 Statistics released by the New Zealand Stock Exchange (“NZX”) show that the number of female directors has increased by only 5 % since 2013 – from 12.4 % to 17% in 2015. While NZX Main Board listed companies are required to provide a breakdown of the gender composition of their Directors and Officers, there is no mandatory requirement to establish and disclose gender/diversity policies. Businesses can play a key role in advancing human rights within their organisations and the wider community through accelerating gender equality in their companies by setting targets or adopting special measures.
- 91 The NZX is currently undertaking a review of its code of practice for listed companies. The Commission will be making a submission to this review and encouraging the establishment and disclosure of gender/diversity policies to be a mandatory requirement.

Gender pay gap

- 92 The gender pay gap has increased slightly over the reporting period. In 2015 women’s median hourly earnings were \$21.23 compared with \$24.07 for men, a pay gap of 11.8 % - compared to 9.6 % in 2012. The Commission’s Tracking Equality at Work tool found that when demographic characteristics are combined, the degree of inequality in employment for women is amplified.⁴⁴ For example, Pacific and Māori women are paid a lower rate than European women. Disabled women have lower incomes than disabled men. Pacifica women are particularly over-represented in minimum wage jobs.⁴⁵
- 93 The State Services Commission Human Resources Capability Survey of the public sector showed that the pay gap between men and women in key leadership roles has not improved since 2010. Moreover, the pay gap for women at lower levels of the public service is 14%, the equivalent of \$11,000.⁴⁶
- 94 In 2016 all but one Government department had gender pay gaps. Nine had pay gaps of 20% or more. The highest was 39% and the average 14%.⁴⁷

⁴³ Pacific Islands Forum, “43rd Pacific Islands Forum Communique”, (1 September 2012),

<http://www.scoop.co.nz/stories/WO1209/S00002/43rd-pacific-islands-forum-communique.htm>

⁴⁴ NZ Human Rights Commission, “Tracking Equality at Work” (webtool), <http://tracking-equality.hrc.co.nz/#/>

⁴⁵ NZ Human Rights Commission, “Tracking Equality at Work - pay” (webtool <http://tracking-equality.hrc.co.nz/#/issue/pay>)

⁴⁶ State Services Commission, “Human Resource Capability in the New Zealand State Sector” (December 2015)

http://www.ssc.govt.nz/sites/all/files/hrc-survey-2015_0.pdf

⁴⁷ State Services Commission, Gender Pay Gap by Department 2008 - 2015

- 95 In New Zealand's recent UPR, 36 recommendations were made in relation to women, a number of which related to the gender pay gap. Although the Government accepted these recommendations, the actions recorded in the NPA only commit to monitoring the gender pay gap, not any measurable outcomes.
- 96 Both the HRA and the BORA recognise that to overcome discrimination, positive actions may be needed to enable particular groups to achieve equal outcomes with other groups in our society. 'Special measures' or 'affirmative action' are not discriminatory if they assist people in certain groups to achieve equality where information shows that the present position is unequal. The State Services Commission support affirmative action with regard to achieving equal employment opportunities.
- 97 In 2012 the Commission released its report *Caring Counts Tautiaki tika* which inquired into equal employment issues in the aged care workforce.⁴⁸ The report found significant and enduring pay inequalities for aged care workers and made a series of recommendations across a number of areas, including leadership, pay, qualifications, transparency and fair travel policies.
- 98 In October 2014, the Court of Appeal issued a decision in *TerraNova v Service and Food Workers Union (SFWU)* on the interpretation of the Equal Pay Act 1972 ("EPA"). The Court of Appeal confirmed an earlier Employment Court decision that:
- the EPA provides for equal pay for work of equal value (pay equity) meaning women should receive the same pay as men for jobs that require similar skill, effort and responsibility;
 - the Employment Court may look beyond the immediate employer or industry for comparators if an appropriate comparator does not exist in the immediate employer or industry; and
 - the Employment Court must take into account evidence of systemic undervaluation of the work in question derived from current or historic or structural gender discrimination.
- 99 In response to this case the Government has established two new processes:
- the *Government Joint working party on equal pay principles across the whole workforce* to develop a set of principles for implementation of equal pay in female dominant work forces; and
 - a process to negotiate a settlement for care and support workers to try and resolve the *TerraNova* case before it is due to return to court in March 2016.

⁴⁸ <http://old.hrc.co.nz/2012/05/27/caring-counts-report-says-sorting-caregivers%e2%80%99-wages-affordable-and-necessary/>

100 In October 2015 the Government introduced the Home and Community Support (Payment for Travel between Clients) Settlement Bill. The Bill responds to an issue raised in the Commission’s Caring Counts report and resolves a claim filed in the Employment Relations Authority that the time a home and community support worker spends travelling between clients is work for the purposes of the Minimum Wage Act 1983.

101 **The Commission recommends that the Committee urge the Government to:**

- **set targets to increase the representation of women in corporate governance and senior management in the public sector and to eliminate the gender pay gap in the public and private sector over the next reporting period, and provide an update to the CEDAW Committee when it reviews New Zealand in 2016/17.**
- **take steps – regulatory or otherwise - to require listed companies to establish and disclose gender polices including measurable objectives and implementation in their annual reports in line with the United Nations Guiding Principles on Business and Human Rights; and**
- **establish a cross agency programme of work to implement and monitor the implementation of SDG Goal 5 – achieving gender equality and empower all women and girls.**

B Inequalities in the education system and labour market

LOIPR

Please provide information on measures taken to address the continuing inequalities faced by Maori and particularly Pacific peoples in the education system and in the labour market.

(Para 12)

Employment

102 Although, the unemployment rate for Māori fell 1.6 percentage points to 10.6% in the year ended December 2015, it remained almost double the national rate of 5.5%. Labour force participation also fell, meaning that the number of Māori in the labour force has not kept up with growth of the working-age population. Labour force participation for Māori was 65.2%, compared to the national rate of 68.4%.⁴⁹

⁴⁹ Statistics NZ, (February 2016), Labour Market Statistics: December 2015 quarter. Available at: http://www.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/LabourMarketStatistics_HOTPDDec15qtr/Commentary.aspx

- 103 The rate of Māori young people not engaged in employment, education or training (“NEET”), while lessening slightly in recent years, is also higher than that of other ethnic groups. As at September 2015, the NEET rate for Māori was around double that of Europeans and the national average (20.8% for Māori; 9.4% for Europeans; 11.4% for other ethnic groups).⁵⁰
- 104 The unemployment rate for Pacific peoples dropped over 2015 to 9.7 %. This is the lowest rate since December 2008. The labour force participation rate for Pacific peoples in 2015 was 65.2 % (up 1.5% from 2013).⁵¹ Fewer Pacific people were NEET, 16.5% (down from 18% the previous year).⁵²
- 105 Data from the Disability Survey 2013⁵³ showed that only 50% of disabled adults participated in the labour force, compared to 75% of non-disabled adults. The rate of participation ranges from around 30% to 50% depending on the type of disability. Disabled people in the labour force are also considerably more likely to be unemployed. In 2013 disabled people had an unemployment rate of 9%, compared with 5 %for non-disabled people.⁵⁴ The rate of unemployment for disabled people was also recorded as 9% in the 2001 Disability Survey, showing the situation has not improved in recent years.
- 106 A recent online survey showed that LGBTI workers were twice as likely to experience bias in the workplace and 27% experienced discrimination at work due to their sexual identity.⁵⁵
- 107 **The Commission recommends that the Committee urge the Government to:**
- **set targets to increase the representation of Māori, Pacific People and disabled people in corporate governance and senior management in the public sector over the next reporting period;**
 - **strengthen its efforts to increase the participation of Māori, Pacific People and disabled people in the labour market; and**
 - **report back to the Committee within 18 months on what steps the Government has taken to reduce bias and discrimination at work.**

⁵⁰ Statistics NZ, (November, 2015), *Māori in the Labour Market – September 2015*. Available at: <http://www.mbie.govt.nz/info-services/employment-skills/labour-market-reports/Māori-labour-market/Māori-sep-2015>.

⁵¹ Ibid.

⁵² <http://www.mbie.govt.nz/info-services/employment-skills/labour-market-reports/pacific-peoples-labour-market-trends/september-2015>

⁵³ http://www.stats.govt.nz/browse_for_stats/health/disabilities/disability-and-labour-market.aspx

⁵⁴ Ibid.

⁵⁵ Westpac survey: Kiwi workplace acceptance of Rainbow Community surface deep. <http://www.westpac.co.nz/rednews/business/westpac-survey-kiwis-only-surface-deep-acceptance-of-rainbow-community/>

- 108 The percentage of children who have attended Early Childhood Education before starting school has steadily increased each year since 2000, and was 96.1% as at March 2015. This was an increase of 0.2 percentage points since March 2014. The Ministry of Education is intensifying engagement with priority communities in order to reach the 98% target in 2016.⁵⁶
- 109 New Zealand's National Certificates of Educational Achievement ("NCEA") are national qualifications for senior secondary school students. NCEA is recognised by employers and used as the benchmark for selection by universities and polytechnics. Education achievement of Level 2 NCEA is a significant indicator of positive outcomes in later life. The Government has set a Better Public Service Target that 85% of 18 year-olds will have achieved NCEA Level 2 or an equivalent qualification in 2017. The 2014 NCEA Level 2 result for 18 year-olds is 81.2%, compared with 78.6% in 2013 and 77.2% in 2012. Māori and Pasifika achievement improved at a faster rate than overall. The rate of improvement from 2011 to 2014 for all students has been 74.3% to 81.2% or a 6.9% change. For Māori there has been a 10.6% change and Pasifika students a change of 9.5%. 2015 figures were not available at the time of writing.⁵⁷
- 110 *Ka Hikitia – Accelerating Success 2013-2017* outlines five focus areas to raise Māori achievement in education, namely improving Māori language, increasing early-childhood education ("ECE"), improving achievement in primary and secondary education, increasing success in tertiary education, and for education sector agencies to create conditions for Māori students to achieve. Since *Ka Hikitia* was introduced, more Māori children are attending ECE and Māori students' performance in National Standards (reading, writing and mathematics) and by the end of 2014 attainment of NCEA Level 2 has increased by approximately 2%.⁵⁸
- 111 Māori participation and achievement in tertiary education has also increased in recent years. Twenty eight percent of Māori students were studying at Bachelors level and above in 2014, up from 21 % in 2007. The rate at which Māori complete qualifications has also increased: of Māori who started full-time study at Level 4 or above in 2007, 62 % had completed a qualification within five years, compared with a rate of 53 % for those who started in 2004.⁵⁹
- 112 However, as acknowledged in *Ka Hikitia*, more needs to be done. Accordingly the Government has set the following Better Public Service targets:
- 98% of children starting school will have participated in early childhood

⁵⁶ <https://www.ssc.govt.nz/bps-supporting-vulnerable-children#result2>

⁵⁷ <https://www.ssc.govt.nz/bps-boosting-skills-employment#result5>

⁵⁸ <http://www.education.govt.nz/assets/Documents/Ministry/Strategies-and-policies/Ka-Hikitia/KH-DataSnapshot2014.pdf>

⁵⁹ New Zealand's twenty first to twenty-second periodic reports under the International Convention on the Elimination of All Forms of Racial Discrimination

education in 2016;

- 85% of all 18 year olds will have achieved NCEA level 2 or an equivalent qualification in 2017; and
- 60% of 25 to 34 year olds will have a qualification at Level 4 or above on the New Zealand Qualifications Framework by 2018.

113 Pacific students' performance in NCEA level 2 has also progressively improved. Seventy five percent of Pacific students achieved NCEA level 2 in 2014 compared with 65% in 2011. Pacific participation and achievement in tertiary education has also increased in recent years.⁶⁰

114 However, despite these improvements the gap between Pacific and other ethnicities remains. In 2014, 75% of Pacific 18-year-olds had at least NCEA Level 2, compared with 85.1% of 18-year-olds of European descent, and the overall national rate of 81.2%.⁶¹

115 The *Pasifika Education Plan: 2013 -2017* is aimed at raising participation, engagement, and achievement from early learning through to tertiary education. It sets the following targets which are also Better Public Service targets:

- 85% of children starting school will have participated in early childhood education by 2017; and
- 85% of all 18 year olds will have achieved NCEA level 2 or an equivalent qualification in 2017.

116 In 2010, the Ministry of Education introduced its *Success for All – Every School, Every Child 2010-2014* policy programme, which sought to achieve a fully inclusive school environment by 2014. The final 2015 evaluative report on *Success for All* produced by the Education Review Office (“ERO”) indicates that, while the policy’s objective of a fully inclusive educational environment was not reached, some progress has been made. ERO’s 2014 evaluation of a sample of 152 schools found that 78% were “mostly inclusive”, compared to 50% in 2010.

⁶⁰ http://www.educationcounts.govt.nz/statistics/pasifika-education/progress_against_pasifika_education_plan_targets

⁶¹ Ministry of Education (August, 2015): http://www.stats.govt.nz/browse_for_stats/snapshots-of-nz/nz-social-indicators/Home/Education/18-year-olds-with-higher-qualif.aspx

- 117 However, ERO also reported that only half of the schools in the sample were effective in promoting achievements and outcomes of students.⁶² ERO went on to issue broad recommendations for schools and the Ministry of Education focused at improving the use of achievement data, increasing teacher capability, and improving the information available to school boards.⁶³
- 118 *Success for All 2010 – 2014* has now concluded. It has not yet been succeeded by a similar overarching strategy. While the Ministry of Education has affirmed the application of the inclusive education principles of Article 24 of the Convention on the Rights of Persons with Disabilities to primary and secondary schools⁶⁴, the Education Act 1989 is yet to be updated to explicitly include or reflect those principles.
- 119 Parliament’s Education and Science Select Committee is undertaking an Inquiry into the identification of and support for students with dyslexia, dyspraxia, and autism spectrum disorders. The Inquiry may have significant implications for the education sector. A considerable number of students in New Zealand schools are affected by dyslexia (approximately 10% of the school population) and dyspraxia (6%). Students with autistic spectrum disorders are estimated to constitute around 1%.
- 120 Recently the Ministry of Education released its *Special Education Update Action Plan*. Under the Plan the Ministry of Education will lead a programme of work that will significantly redesign the system of education for students with additional learning needs. Locally led projects in communities around the country will be rolled out in 2016 to improve service delivery.⁶⁵ Lessons learned from these projects will inform the redesign of the national service delivery model. The Government will be able to provide the Committee with an up to date report on the status of inclusive education.

⁶² Education Review Office, *Inclusive practices for students with special needs in schools*, March 2015, page 2, page 28 accessed

<http://ero.govt.nz/National-Reports/Inclusive-practices-for-students-with-special-needs-in-schools-March-2015/National-report-summary>

⁶³ Education Review Office, *ibid* p3-4

⁶⁴ Ministry of Education, *Supports and Services for Learners with Special Education Needs/Disabilities* April 2012

⁶⁵ <http://www.education.govt.nz/ministry-of-education/specific-initiatives/special-education-update/>

- 121 In May 2014 the Taskforce on Regulations Affecting School Performance reported to the Minister on how improved legislation and regulation could contribute to the goal of raising the achievement of all students. The Taskforce considered that the Education Act 1989 was out of date, did not reflect current practice and is no longer fit for purpose. The Ministry of Education is now reviewing the Education Act and in late 2015 undertook public consultation on the future of the Act. Participants were specifically asked to comment on what the goals for education should be; how resources can be better focused to achieve whole-of community education outcomes; how local arrangements can support choice and diversity; and how school boards can respond more effectively to lift student performance.
- 122 The Review of the Education Act presents an opportunity to clearly embed the right to education for all New Zealanders in the regulatory framework.
- 123 **The Commission recommends that the Committee urges the Government to:**
- **report back to the Committee within 18 months on progress made against the targets in *Ka Hikitea and the Pasifika Education Plan*;**
 - **ensure that the Special Education Update Action Plan is based on the principle of inclusive education;**
 - **ensure all aspects of the right to education are adequately protected in any new Education Act and corresponding regulations;**
 - **codify an enforceable right to an inclusive education; and**
 - **provide data - disaggregated by gender, disability ethnicity and family status – on educational outcomes for children who are materially deprived, and report back to the Committee on this within 18 months.**

SECTION 6 - RIGHT TO LIFE, PROHIBITION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, AND RIGHTS OF NON CITIZENS (Articles 3, 6, 7 and 13)

A Violence against women

LOIPR

Please provide an update on the legislative, administrative and other measures taken to eliminate all forms of violence against women, including spousal rape, by ensuring, inter alia, prompt investigations, prosecutions of perpetrators and the provision of effective remedies to victims. Please provide statistical data on violence against women, including on: (a) the number of complaints received; (b) the number of cases prosecuted; (c) the number of convictions secured and acquittals; and (d) the reparation provided to victims. Please provide an update on the status of investigation of the cases filed against the “Roast Busters”, who reportedly have violated several young, including underage, women.

(Para 13)

124 Violence against women and children in New Zealand is pervasive. The Commission believes this is New Zealand’s most widespread human rights issue. As Kofi Annan has noted, perhaps the most shameful human rights violation.⁶⁶ Studies quoted by the Ministry of Women’s Affairs (now Ministry of Women) show the gender of victims of sexual violence as being between 92 and 95 percent female.⁶⁷ The groups most at risk of sexual violence are young women, Māori women, women who have been victimised before and people with disabilities.⁶⁸ Young women between the ages of 16 and 30 comprise 66-70 percent of victims of sexual violence. Just under half of all victims are New Zealand European, just under one third is Māori, and just over one tenth is Pacific. Urgent and ongoing attention is required to address violence in the home and the wider community.

125 In 2014, there were 7163 recorded male assaults female offences and 6103 recorded offences for breaching a protection order.⁶⁹ There were 1,927 reported sexual offences against an adult over 16 years. While these statistics are compelling, they do not reflect the full picture – only 1 in 10 sexual assaults are actually reported to

⁶⁶ Kofi Annan (1999)\0, quoted in “Violence against Women in Aotearoa New Zealand 2009”, Herbert, Hill, A and Dickson S. Published online at <http://.roundtablevaw.org.nz/Integrated.pdf>

⁶⁷ Restoring Soul (2009), Ministry of Women.(Wellington New Zealand) p84

⁶⁸ V Kingi and J Jordan 2009 and S Triggs et al 2009 quoted in Restoring Soul (2009) Ministry of Women’s Affairs (Wellington New Zealand) p12

<http://www.mwa.govt.nz/news-and-pubs/publications/restoring-soul-pdf>

⁶⁹ <https://nzfvc.org.nz/news/increasing-family-violence-calls-fewer-resolutions-nzfvc-data-summaries-2015>

Police⁷⁰ and only 3 of them are prosecuted.

- 126 Twenty four percent of New Zealand women report having experienced sexual assault in their lifetime.⁷¹ Seventy three percent of these assaults were perpetrated by a partner, ex-partner or other family member. One in three (35.4%) ever-partnered New Zealand women report having experienced physical and/or sexual Intimate Partner Violence (“IPV”) in their lifetime. When psychological/emotional abuse is included, 55% report having experienced IPV in their lifetime.
- 127 In 2014, Women’s Refuges received 78,161 crisis calls. 5,198 women accessed advocacy services in the community and 2,794 women and children stayed in safe houses.
- 128 The Commission notes that women with disabilities are much more likely to suffer from domestic violence than other women in New Zealand.^{72,73}
- 129 The continuing high level of violence against women and girls remains one of New Zealand’s greatest contemporary challenges. The absence of an agreed common understanding and definition of family and sexual violence and a lack of appropriate data and indicators invariably limit the ability to monitor and evaluate the effectiveness of various programmes and services.⁷⁴
- 130 The Commission met with key civil society groups in the development of the New Zealand’s second National Plan of Action on Human Rights (“NPA”). The lack of adequate and sustainable funding for some programmes, and the absence of joined up programmes and services that are monitored and evaluated were highlighted as key concerns.
- 131 The Government is committed to addressing the unacceptably high level of family and sexual violence in New Zealand. In July 2015 the Government launched a comprehensive work programme that was client-focused to address duplication, fragmentation, and gaps, with a whole of Government approach.⁷⁵ In the

⁷⁰ <http://www.justice.govt.nz/publications/global-publications/n/new-zealand-crime-and-safety-survey-2014/publications/global-publications/n/new-zealand-crime-and-safety-survey-2014/documents/nzcass-main-findings-report>

⁷¹ <http://www.justice.govt.nz/publications/global-publications/n/new-zealand-crime-and-safety-survey-2014/publications/global-publications/n/new-zealand-crime-and-safety-survey-2014/documents/nzcass-main-findings-report>

⁷² Statement by the Minister of Women’s Affairs at the launch of the publication “Domestic Violence and Disabled People” in 2011.

⁷³ Also confirmed in Carolyn Frohmader and Therese Sands, “Fact Sheet: Violence against People with Disabilities in Institutions and Residential Settings, November 2014. <http://www.pwd.org.au/documents/orgdocs/FS-Violence-PWD2014.doc> (accessed 14 January 2016).

⁷⁴ Reported sexual assaults only account for 1% of actual assaults.

⁷⁵ <https://www.national.org.nz/news/news/media-releases/detail/2015/07/29/Launch-of-new-family-violence-work-programme>

Ministerial Group on Family Violence and Sexual Violence Cabinet Paper,⁷⁶ there is also acknowledgement, among other things, of developing shared definitions for sexual and family violence. The Ministerial Group's proposed work programme will work across Government to look at each aspect of the response to sexual and family violence; prevention; identification and initial response; incident response and safety; and long term recovery.

- 132 There are a number of other promising new initiatives underway including a proposed population survey to ascertain the full extent of family and sexual violence in New Zealand, a more efficient and 'mobile' way that Police are collecting family violence data, an innovative new model of how victims of sexual violence are managed, and the pilot of healthy relationship training in nine secondary colleges.
- 133 The Minister of Justice has also asked the Law Commission to resume work on proposals to better support victims of sexual violence through the Criminal Justice system. The Law Commission report is due out before the end of 2016.
- 134 Business has an important role to play in addressing domestic violence. The Impacts of Domestic Violence on Workers and the Workplace 2014 Survey commissioned by the Public Service Association (PSA) revealed that half of respondents had some experience of family violence and over 25% had direct experience in New Zealand.⁷⁷
- 135 Recent research has found that domestic violence is a workplace issue and estimated to cost employers in New Zealand on average \$368 million a year or \$3.7 billion dollars when combined over the next ten years. The report concluded by stating that workplace protections could reduce cost and increase productivity.⁷⁸
- 136 **The Commission recommends that the Committee urges the Government to:**
- **report back to the Committee within 18 months on the work of the Ministerial Group on Family Violence and Sexual Violence;**
 - **report back to the Committee within 18 months on the Law Commission's report and the actions that the Government will take in response to that report;**
 - **develop in consultation with civil society an agreed definition of sexual and family violence and an appropriate minimum data set of indicators;**
 - **ensure that one of the outcomes of work of the Ministerial Group on Family and Violence and Sexual Violence is a process to co-ordinate and monitor all**

⁷⁶ https://beehive.govt.nz/webfm_send/68

⁷⁷ Margaret Michelle Rayner-Thomas, "The impacts of domestic violence on Workers in the Workplace", A thesis submitted in partial fulfilment of the requirements for the degree of Master of Public Health (MPH), The University of Auckland, 2013. <https://www.psa.org.nz/media/>

⁷⁸ PSA, "Productivity Gains from Workplace Protection of Victims of Domestic Violence" (21 March 2014).

interventions to reduce violence and to ensure that they are adjusted and extended as required on the basis of robust empirical evidence; and

- **take legislative and regulatory measures as appropriate to ensure that workplace policies support employees who are experiencing family violence**
- **consider inclusion of strategies for business to support employees who are exposed to family or sexual violence.**

Roastbusters

137 In early November 2013 stories about the sexual activities of a group of young men in Auckland who referred to themselves as *Roastbusters* gained worldwide media attention. The young men allegedly intoxicated young women (under the age of 16) and engaged in sexual conduct with them.

138 The New Zealand Police had received reports of concern about four separate incidents involving the *Roastbusters* between 2011 and early 2013. None of these resulted in criminal charges being laid.

139 The alleged behaviour and the lack of Police action garnered public outrage. On 16 November 2013 numerous protests were held across New Zealand's major cities to speak out against rape culture, the police mishandling of the case, victim blaming and inadequate funding for rape crisis centres and educational programmes set up focusing on consent, and rape prevention and awareness.

140 The IPCA was asked by the Minister of Police to conduct an inquiry into Police actions in this case. In March 2015 the IPCA released its report.⁷⁹ The IPCA found that "while existing Police child protection policy and investigation is sound," the Police failed in several significant areas to meet the requirements of a good criminal investigation.⁸⁰

141 In particular the IPCA concluded that there was a lack of emphasis on prevention in the investigations. The IPCA stated in its report that:⁸¹

...all of the Police officers involved in these matters treated the young women and their families with courtesy and compassion, and ensured that they were afforded both dignity and privacy. Officers were clearly victim-focused and motivated to act in accordance with the victims' wishes, and in their best interests. The Authority does not question the appropriateness and importance of this focus, and recognizes the substantial improvements in policing practice that have effected in the last decade. However, it is concerned that in several of these cases, because officers concluded

⁷⁹ IPCA, *Report on Police's Handling of the alleged offending by 'Roastbusters'*, Wellington (March 2015).

⁸⁰ *Ibid* at 33.

⁸¹ *Ibid* at 14.

that there was insufficient evidence to proceed without the cooperation of the young women, they decided that no further action was required. They therefore overlooked the importance of holding the young men accountable for their behavior and preventing its recurrence.

(Emphasis added)

- 142 The Police, themselves, have acknowledged that this is an area requiring further policy development to guide Police practice.⁸²
- 143 The young men were alleged to have committed such offences as sexual violation by rape and unlawful sexual connection, attempted rape, and assault with intent to commit sexual violation. These offences are set out in the Crimes Act 1961 (“Crimes Act”).
- 144 Section 128 of the Crimes Act states that the offence of sexual violation is committed if it can be proven that the alleged victim does not consent to the connection, and that the alleged perpetrator does not have a reasonably held belief that he or she is consenting.
- 145 There is no statutory definition of consent. The courts have held that it must be full, voluntary, free and informed⁸³ and that a person must understand their situation and be capable of making up their mind when they agreed to the sexual acts.⁸⁴ In addition section 128 A states:⁸⁵
- *A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.*
 - *A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.*
 - *A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.*
- 146 Under section 134 of the Crimes Act, everyone who has a sexual connection with, or does an indecent act on, a young person (under the age of 16 years) has committed an offence and is liable to a term of imprisonment. There is no consent requirement under section 134.

⁸² Ibid.

⁸³ *R v Isherwood* CA182/04, 14 March 2005.

⁸⁴ *R v Adams* CA70/05, 5 September 2005

⁸⁵ Crimes Act 1962, s128A.

- 147 While acknowledging that it is uncommon for Police to prosecute a young person under section 134 as it is not considered to be in the public interest to do so, the IPCA found that there were a number of aggravating factors in these cases that should have prompted prosecution. In particular, the young women were between two and three years younger than the men; they were vulnerable; the extent to which they were willing parties was at best equivocal; and they were subject to sexual acts by more than one man. Furthermore the behaviour of the young men was considered serious and required a response.
- 148 The IPCA concluded that the Police Child Protection Team did not properly evaluate all available offences due to a misunderstanding of the interplay between sections 128 and 134 of the Crimes Act.
- 149 The Commission notes that the *Roastbusters* case is not an isolated incident and believes that more needs to be done to protect young people from the kind of abuse highlighted in the *Roastbusters* case.
- 150 **Drawing on the IPCA report the Commission recommends that the Committee urges the Government to commit to:**
- **reviewing Police practice and policy to ensure that appropriate emphasis is placed on prevention;**
 - **ensuring that adequate instruction and guidance about the application of section 128 and 134 of the Crimes Act 1961 is provided to the Police Child Protection Team; and**
 - **addressing the 34 IPCA recommendations within a specific timeframe and report back to the Committee within 18 months on progress.**

B Disabled people

- 151 A recent study⁸⁶ focusing on violence against disabled people highlighted the hidden nature of much abuse directed against disabled people living in care situations akin to a family relationship within the community. In addition to the physical, emotional and sexual violence experienced by non-disabled people, “locked in” and “silencing” violence is often specifically directed at disabled people.
- 152 The report noted that it was reasonable to interpret the Domestic Violence Act 1995 as generally excluding people in employer/employee relationships, such as care workers, from the definition of a domestic relationship. The author continued:⁸⁷

⁸⁶Roguski, M, *The Hidden Abuse of Disabled People Residing in the Community: An Exploratory Study*, (18 June 2013) <http://www.communityresearch.org.nz/wp-content/uploads/formidable/Final-Tairawhiti-Voice-report-18-June-2013.pdf>.

⁸⁷ *Ibid.*

As such, it is not clear whether the Act adequately protects disabled people experiencing abuse in home-care/live-in support situations. There appears to be an uncertainty about the legal protection available to disabled people experiencing such abuse, and particularly emotional and psychological abuse.

153 **The Commission recommends that the Committee urges the Government to**

- **consider whether the Domestic Violence Act 1995 and other legislations provides sufficient protection for disabled people in community care situations and if it doesn't commit to amending it so as to apply; and**
- **commit to tracking violence/domestic violence against people with disabilities and educate the public as to the disability/violence nexus.**

C *Intersex People*

154 A surgical approach to deal with those presenting as 'intersex' (a label to describe biological variety of anatomical conditions that do not fall within standard male and female categories) became standard practice in the 1970s. Genital-normalising treatment, involving both surgery and hormone therapy, is however often medically unnecessary, not always consistent with the person's gender identity, poses severe risks for sexual and reproductive health and is often performed without free and fully informed consent.

155 Section 240A of the Crimes Act 1961 criminalises surgery on the female genitalia of any person, in certain situations. Despite international developments regarding the prohibition of surgical genital normalising interventions until children are able to make their own full and informed decisions, this issue has not been directly addressed by the New Zealand Government.

156 **The Commission recommends that the Committee urge the Government to commit to a programme of work over the next reporting period to:**

- **improve the understanding around informed consent and the rights of children and their parent(s), and ensuring that parents and competent young people are made aware of the differing views about medical or surgical interventions before making any decisions;**
- **encourage the compulsory provision of training in relevant undergraduate and postgraduate courses on appropriate medical responses to intersex conditions; and**
- **legislate against non-consensual surgical procedures on children aimed solely at correcting genital ambiguity.**

D Suicide

157 New Zealand ranks 13th highest in the OECD for suicide rates. In 2014/2015 564 people took their own life. This number has remained relatively static over the past 8 years. Males are more likely than females to take their lives and Māori men are most at risk with 93 deaths last year.

158 The Government has taken steps to address youth suicide but adult men remain a significant issue. Further, the Police have reported a 100% increase in the number of callouts in Canterbury relating to suicide behaviour.

159 **The Commission recommends that the Committee urge the Government to:**

- **take similar steps for adult males to those taken in regard to youth in New Zealand; and**
- **to ensure mental health services are adequately funded, particularly in Canterbury.**

E Operation 8

LOIPR

Please provide an update on the prosecution of the four cases arising from Operation Eight, which was carried out on 15 October 2007. Please provide information on the investigations by the Independent Police Conduct Authority into police conduct during the Operation Eight anti-terrorism raids. Have those investigations been concluded? If yes, please outline the recommendations that were made and the measures taken to implement them.

(Para 15)

160 On 15 October 2007, 17 people were arrested in an exercise that became known as Operation 8. The exercise was the result of months of visual surveillance and interception of private communications by the police that had been authorized in the belief that the surveillance was necessary to prevent terrorist activity⁸⁸. The Solicitor General later found the use of the Terrorism Suppression Act to obtain the interception warrants was justified but that there was insufficient evidence to authorise prosecution under that Act.

161 The implications of the use of the Terrorism Suppression Act was the subject of much public discussion and led to renewed concern about the effectiveness of the criminal

⁸⁸ As defined in the Terrorism Suppression Act 2002

law in preventing organized threats to public safety and security. The treatment of Māori and Pakeha was also raised and it was suggested that the police would not have employed the same tactics if predominantly Pakeha communities had been involved.

- 162 Within days the Commission received over 50 enquiries, complaints and expressions of concern. In considering how best to respond the Commission took into account that those arrested would be able to challenge any evidence through the formal court processes and that a complaint mechanism with extensive powers to examine Police files and require evidence, namely the Independent Police Conduct Authority (“IPCA”), was available⁸⁹. The Commission therefore chose not to investigate the complaints but rather analyse the human rights considerations that arose in the exercise. During this time the Commission maintained contact with Tuhoe and New Zealand Police leadership to ensure that the matter was being resolved in the way we had been advised it would.
- 163 On 22 May 2013 the IPCA published its report *Operation Eight: The Report of the Independent Police Conduct Authority* (“the IPCA Report”). The IPCA found that Police had acted unlawfully in establishing road blocks in Taneatua and Ruatoki and in detaining and searching people around New Zealand. The IPCA made a number of recommendations to Police following its investigation, including changes to policy and practice relating to the use of road blocks, the introduction of more general community impact assessments before searches are undertaken in major operations and better planning where children and vulnerable people are involved. The IPCA also recommended that Police re-engage with Tuhoe and take appropriate steps to build bridges with the Ruatoki community.
- 164 On 27 July 2014 Police Commissioner Mike Bush undertook a series of visits with Tuhoe whanau to deliver a personal apology. In August 2014 the Police Commissioner, accompanied by Māori Leaders, representatives of tribal groups from throughout the country, 90 police officers from the Bay of Plenty District, Iwi liaison officers and the Police Executive, was welcomed onto Te Rewarewa Marae, Ruatoki.
- 165 The Commission’s human rights analysis concludes that no comprehensive assessment of the impact on innocent people was carried out; and insufficient support was provided to innocent people. The Commission made several recommendations to help ensure negative impacts are minimised in the future:⁹⁰
- an independent agency, possibly the Commission could have usefully been tasked with monitoring the human rights of innocent affected people in the

⁸⁹ The criminal matters were still before the Courts and the IPCA had not reported at the time this comment was being prepared.

⁹⁰ A copy of the Commission’s report is available here: <http://www.hrc.co.nz/2013/commission-releases-human-rights-analysis-of-operation-eight>

immediate aftermath of Operation 8, to record and measure the impact on human rights and to identify social recovery and support needs;

- a joined-up, early intervention wraparound support response by social sector Government and non-Government agencies, in association with the independent agency monitoring human rights impacts, should have been established to rapidly respond to the immediate and on-going social recovery and support needs of innocent affected people;
- relevant Government agencies should develop contingency plans to ensure rapid response capability for undertaking impact assessments and delivering early intervention wraparound support response, to guard against similar situations in the future.

166 **The Commission recommends that the Committee encourages the Government to report to the Committee on what actions it has taken to respond to the recommendations from the IPCA.**

F Detention of asylum seekers

LOIPR

Please describe the circumstances that warrant the detention of undocumented migrants, and report on the conditions of such detention. Please also provide information on the measures taken to ensure that asylum seekers and undocumented migrants are not detained in correctional facilities together with convicted prisoners.

(Para 16)

167 Detention of asylum seekers in New Zealand can occur under two circumstances. Those arriving at the border are initially held in police custody pending a risk assessment and court hearing. After the hearing, claimants are either detained at a prison if identity or security concerns are raised, conditionally released to an approved address in their community, or held at the Mangere Accommodation Centre.

168 Statistics from the Ministry of Business, Innovation and Employment for the last 3 financial years are reproduced below:

2012/2013 Financial Year				
Month	Visa	Penal	MRRC	Totals
Jul	0	0	0	0
Aug	0	2	0	2
Sep	8	0	1	9
Oct	12	0	1	13
Nov	0	0	3	3
Dec	0	1	0	1
Jan	0	1	1	2
Feb	0	0	1	1
Mar	5	0	0	5
Apr	6	0	0	6
May	0	0	0	0
Jun	0	1	0	1
Total	31	5	7	43

2013/2014 Financial Year				
Month	Visa	Penal	MRRC	Totals
Jul	5	0	0	5
Aug	1	0	0	1
Sep	0	0	0	0
Oct	2	0	0	2
Nov	0	0	1	1
Dec	0	0	1	1
Jan	1	0	1	2
Feb	0	0	1	1
Mar	5	3	3	11
Apr	1	1	1	3
May	1	0	0	1
Jun	1	0	1	2
Total	17	4	9	30

2014/2015 Financial Year				
Month	Visa	Penal	MRRC	Totals
Jul	1	1	1	3
Aug	0	1	1	2
Sep	1	1	0	2
Oct	0	1	1	2
Nov	1	1	1	3
Dec	0	1	2	3
Jan	0	0	0	0
Feb	0	0	1	1
Mar				0
Apr				0
May				0
Jun				0
Total	3	6	7	16

- 169 Foreign nationals already detained in a prison under section 310 of the Immigration Act 2009 (“Immigration Act”) can claim asylum, but must do so within two days of being taken into custody. In these cases, refugee and protection officers have access to the prison to interview them and are encouraged to make a decision as quickly as possible, ideally within 20 weeks. Claimants remain detained in prison until a decision is made, at which point they are released if granted refugee status.
- 170 Asylum seekers can appeal to the Immigration and Protection Tribunal if their claims are rejected. For those detained in a prison, the appeal must be made within five working days of the decision, while in all other instances the deadline is 10 working days. Legal aid is also available to those wanting to challenge their detention, a significant change provided for through the 2009 amendments to the Immigration Act.

Police cells

- 171 Under the 2009 Act any police station in New Zealand can be used to detain a person without a warrant of commitment for up to 96 hours including both undocumented migrants and asylum seekers whose identity is uncertain. Under the previous immigration act detention could only last up to 72 hours. Individuals reportedly are generally detained at police stations for no longer than 24-48 hours.

172 The appropriateness of using police stations for immigration purposes has been criticised by human rights groups. For instance, the Papakura police station in Auckland has been criticised for not providing separate facilities for migrants and asylum seekers, as well as overcrowding and poor hygiene. Detainees also claimed being denied access to their belongings and being forced to sleep in cells without a mattress.

The Mangere Accommodation Centre

173 The Mangere Accommodation Centre (also known as the Mangere Refugee Resettlement Centre) is the sole facility in New Zealand dedicated entirely to housing refugees and asylum seekers. The centre's population is predominantly made up of incoming UN Quota Refugees being resettled in the country (of which New Zealand accepts 750 annually), as well as asylum seekers whose identity is uncertain and who do not pose either a risk of absconding or to national security. Both are housed together, which has reportedly caused resentment and tension between the two groups, and has led to criticism of differences in treatment, including a lack of parity in accessing housing and employment support services. On average, asylum seekers spend six weeks at the centre, which can hold up to 28 at any given time. While at the centre, the Immigration Act officially classifies these asylum seekers as 'detainees'.

174 New Zealand authorities characterise the facility as "open detention". There are, however, limitations on asylum seekers' movements, and the centre's management has the right to refuse permission to leave during the day.

175 As part of Budget 2013, the New Zealand Government committed \$5.5 million of operating expenditure over the next four years towards the cost of the rebuild of the Mangere Centre. The rebuild process is now underway and is due to be completed in 2016.

Correctional Institutions

176 Asylum seekers and irregular migrants who are considered to potentially pose risk of absconding and/or a risk to national security are detained in correctional institutions. At the time of the WGAD visit to New Zealand they are generally held in Waikeria Prison, Arohata Prison for Women and Mt Eden Corrections Facility. These prisons are not providing separate facilities for immigrants in an irregular situation and asylum seekers.

- 177 Asylum seekers detained in these prisons are criminalised and are subject to general prison standards such as wearing prisoner uniforms and lockdowns. The UNHCR has made it clear that the imposition of such standards on asylum seekers is inappropriate.⁹¹
- 178 There are well known negative, and at times serious, physical and psychological, consequences for asylum seekers in prison detention. However, prison staff are often not trained in relation to asylum, the identification of the symptoms of trauma and standards related to detention of asylum seekers.
- 179 Furthermore corrections staff are often unaware which detainees are asylum seekers. The absence of this basic knowledge can prove problematic in monitoring the standards and conditions being applied to asylum seekers.
- 180 **The Commission recommends that the Committee urge the Government to commit to ensuring that:**
- **asylum seekers detained in correctional facilities are separated from other prisoners;**
 - **asylum seekers are not subject to criminal standards of detention; and**
 - **prison staff are appropriately trained in relation to standards of detention for asylum seekers, the identification of the symptoms of trauma and human rights.**

Alternatives to Detention

- 181 Historically, New Zealand has been viewed as both a regional and global leader with regard to Alternative to Detention (“ATD”) development and implementation. Section 315 of New Zealand’s Immigration Act 2009 introduced a tiered detention and monitoring system that includes a greater ability to use reporting and residence requirements instead of secure detention. Section 315 reads:

[A]n immigration officer and the person liable for arrest and detention may agree that the person will do all or any of the following things:

- (a) reside at a specified place;*
- (b) report to a specified place at specific periods or times in a specified manner;*
- (c) provide a guarantor who is responsible for:*
 - (i) ensuring the person complies with any requirements agreed under*

⁹¹ UNHCR, *Detention guidelines*, p 31 available at <http://www.unhcr.org/505b10ee9.html>.

this section; and

- (ii) reporting any failure by the person to comply with those requirements;*
- (d) if the person is a claimant, attend any required interview with a refugee and protection officer or hearing with the Tribunal;*
- (e) undertake any other action for the purpose of facilitating the person's deportation or departure from New Zealand.*

The person is subject to arrest and detention if they fail to comply with the conditions of their release or in order to execute a deportation order. The application of these conditions is at the discretion of the immigration officer.

Immigration Amendment Act 2013

- 182 International law clearly sets out the permissible purposes and conditions of immigration detention. It is a fundamental human right that no one shall be subject to arbitrary or unlawful detention. This means that detention must not only be lawful but must be necessary, reasonable and proportionate. It can only be justified when other less invasive and restrictive measures have been considered and found insufficient to safeguard the lawful objective. Criminalising illegal entry or irregular stay would exceed the legitimate interest of States.⁹²
- 183 In relation to asylum seekers the *UN Guidelines on Detention of Asylum Seekers* state that detention of asylum seekers is only a legitimate purpose where it relates to verification of identity or the protection of national security or public order. Even then it must only be used as a matter of last resort and on exceptional grounds - after all possible alternatives to detention have been exhausted and for the shortest time possible.
- 184 However, in 2013 the Immigration Amendment Act⁹³ was passed. The Act introduces new provisions which enable detention of asylum-seekers who arrive in New Zealand by boat as part of a 'mass group' containing 30 or more persons. An Immigration officer can now apply to the District Court for a group warrant of commitment authorising the detention for a period of not more than 6 months. The Act also removes the right of an individual to apply to the District Court to vary a warrant of commitment or to be released on conditions.
- 185 While it is highly unlikely that the detention provisions of this Act will ever be used, the Commission remains concerned that in the absence of accessible and robust review mechanisms its application may result in arbitrary and unlawful detention. **The Commission recommends that Committee encourage the Government to review the Immigration Amendment Act to ensure that:**

⁹² Working Group on Arbitrary Detention, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4, 10 January, 2008, para. 53.

⁹³ <http://www.legislation.govt.nz/act/public/2013/0039/latest/whole.html>

- where detention is deemed to be a necessity, a maximum 30 day time limit should be adhered to, so that all asylum seekers are moved into the community once health, character and identity checks are complete; and
- adequate review mechanisms are available to those detained as part of a 'mass group' which consider individual circumstances to avoid delay, discrimination and unnecessary detention.

G *The Asylum process*

186 Recently concerns have been raised by the Refugee Bar and the Auckland District Law Society regarding the disclosure of information provided to the Refugee Status Branch ("RSB") to third parties. The Commission understands that the RSB verifies information provided by refugee claimants with third parties - including verifications in home countries - and in some circumstances reserves the right to do so without seeking consent from the claimant.

187 Section 151 of the Immigration Act 2009 sets the parameters for the disclosure of information in respect of asylum seekers, refugees and protected persons. The Commission acknowledges that there are differing views on the interpretation of this provision and the extent to which information may be disclosed to third parties – including to countries of origin.

188 The Commission acknowledges that the RSB may need to make inquiries with third parties in certain circumstances. However, doing so without appropriate operational level safeguards, risks impacting on claimant's rights to privacy, safety and security, and is arguably at odds with the principles of the Refugee Convention.

189 Failure to address this issue may result in claimants being reluctant to disclose information to the RSB, ultimately impacting on the quality and timeliness of decision making. The Commission believes that a pragmatic solution can easily be found through international human rights law, based on the principles of transparency and proportionality. Such an approach would balance the rights of claimants with the need – in certain (exceptional) circumstances – for RSB to make inquiries without consent.

190 **The Commission recommends that the Committee urges the Government commit to developing – in consultation with the UNHCR, the Human Rights Commission and the Refugee Bar – confidentiality guidelines for the processing of claims for refugee status and/or protected status. These guidelines should be based on international human rights law and the principles of the Refugee Convention.**

SECTION 7 - TREATMENT OF PERSONS DEPRIVED OF THEIR LIBERTY, INDEPENDENCE OF THE JUDICIARY AND FAIR TRIAL (Articles 2, 10, 14)

A Reverse onus of proof

LOIPR

Please provide updated information on the measures taken to revise the legislation related to drug possession which was found to infringe the right to presumption of innocence by the Supreme Court. Has the State party made any amendments to such legislation? If so, what is the nature of those amendments and how do they address the concern about the presumption of innocence?

(Para 18)

- 191 Under section 25(c) of the BORA, everyone charged with an offence has “the right to be presumed innocent until proved guilty according to law”. While the right can be limited in some situations the Supreme Court in *R v Hansen*⁹⁴ (“*Hansen*”) held that such situations will not be a common occurrence⁹⁵. In *Hansen* the majority held that although the control of illegal drugs was a significant objective, the fact that the reverse onus was triggered by possession of an arbitrary amount, it was not rationally connected with the objective and could not be justified in a free and democratic society.
- 192 In the wake of *Hansen*, the Attorney-General has twice found that the reverse onus of proof in proposed legislation could not be justified under section 5 of BORA⁹⁶ but the legislation has been passed despite the inconsistency. These laws remain on the statute book.
- 193 More recently amendments to the Bail Act were passed in 2012 that include a reverse onus of proof which requires defendants charged with murder and serious Class A drug offences to show why they should be released on bail rather than the prosecution showing they should not be released (as is the case at present).
- 194 **The Commission recommends that the Committee encourage the Government to commit to reviewing the use of reverse onus of proof to ensure that the right to be presumed innocent is fully protected.**

⁹⁴ [2007] 3 NZLR 1.

⁹⁵ The Chief Justice considered whether justification of the presumption of innocence could ever be limited as it denies the right entirely.

⁹⁶ Misuse of Drugs (Classification of BZP) Amendment Act 2008 and the Misuse of Drugs Amendment Bill 2010.

B Disproportionate representation of Māori in the Criminal Justice System

LOIPR

In the light of the concluding observations of the Committee (CCPR/C/NZL/CO/5, para. 12) and the follow-up responses of the State party (CCPR/C/NZL/CO/5/Add.1, paras. 2–45 and CCPR/C/NZL/CO/5/Add.2, paras. 3–6), please provide an update on the achievements made following the various initiatives taken aimed at reducing the disproportionately high incarceration rate of Māori, in particular women. Please provide information on improvements made to address the underlying social causes and concerns regarding discrimination in the administration of justice that are responsible for the high proportion of Māori among accused persons as well as among victims of crimes.

(Para 21)

- 195 In 2015, 15 percent of New Zealand's population identified with the Māori ethnic group.⁹⁷ Among children (under 15 years), the share is higher, at 26 percent. Among people aged 65+ years, the share is lower, at 6 percent. Projections indicate that the Māori ethnic group is likely to increase its share of the total population at all ages, reflecting higher growth rates on average, driven by high Māori birth rates and the younger Māori age structure. Depending on future trends in birth rates, the Māori population could account for nearly 20 percent of New Zealand's population in 2038, and nearly one-third of New Zealand's children.⁹⁸
- 196 While Māori make up only 15% of New Zealand's population, they account for a disproportionate amount of those coming into contact with the criminal justice system - both as victims and offenders. Rates of victimisation across most offence types - particularly violent offences - are significantly higher for Māori. Māori are also over-represented at the other end of the criminal justice spectrum; in New Zealand's arrests, prosecutions, convictions, imprisonments and re-imprisonments.⁹⁹
- 197 At every stage in the criminal justice process, the outcomes for Māori are generally more severe than they non Māori. Māori are less likely to receive diversion or cautions and are more likely to be sentenced to prison. Although New Zealand's imprisonment rate is 199 people per 100,000, the rate for Māori is closer to 700 per 100,000. Māori make up over 50% of New Zealand's prison population and over 60% of its female prison population.¹⁰⁰

⁹⁷ <http://www.stats.govt.nz/maori>

⁹⁸ Ibid.

⁹⁹ <http://www.rethinking.org.nz/Default.aspx?page=3629>

¹⁰⁰ Ibid.

- 198 A recent report from the New Zealand Police, *A review of Police and Iwi/Māori relationships: working together to reduce offending and victimisation among Māori* (“Review”), confirmed that “Māori comprise 45% of arrests, 38% of convictions and over 50% of prison inmates.”¹⁰¹ Māori are significantly more likely than non-Māori to be reconvicted and re-imprisoned.
- 199 Twenty three percent of the 14 – 16 year old population is Māori.¹⁰² The number of young Māori aged 14-16 who appear in the Youth Court is 5% of the total population of 14-16 year old Māori.¹⁰³ However, Māori make up 52% of apprehensions of 14 – 16 year olds,¹⁰⁴ and 55% of Youth Court appearances.¹⁰⁵ Māori youth offenders are given 65% of Supervision with Residence orders (the highest Youth Court order before conviction and transfer to the District Court).^{106 107}
- 200 The Review identified Māori women as disproportionately represented in the criminal justice system, noting that “the age-adjusted imprisonment rate for Māori men is about seven times that of New Zealand European men, and for Māori women, nine times the rate”¹⁰⁸
- 201 The Review further acknowledged that “on average, Māori experience more factors which contribute to offending and victimisation: low education, low skills, unemployment, drug and alcohol abuse, and living in deprived neighbourhoods. These are often linked and mutually reinforcing so that they can create a vicious cycle in people’s lives.”¹⁰⁹ The factors which increase the likelihood of exposure to the criminal justice system (“CJS”) can then be compounded by bias within the CJS. This can take the form of direct discrimination and/or indirect discrimination.¹¹⁰

¹⁰¹ <http://www.police.govt.nz/sites/default/files/publications/review-of-police-and-iwi-Māori-relationships.pdf> at i.

¹⁰² Calculated using statistics for 14-16 year olds in the mean year ended 31 December 2012 from Statistics New Zealand (www.stats.govt.nz) “Māori Population Estimates: Mean Year Ended 31 Dec 1991-2012 and “Infoshare” “National Population Estimates” “Population” “Population Estimates DPE” “Estimated Resident Population by Age and Sex (1991+) (Annual-Dec).”

¹⁰³ Calculated using statistics for 14-16 year olds in the mean year ended 31 December 2012 from Statistics New Zealand (www.stats.govt.nz) “Māori Population Estimates: Mean Year Ended 31 Dec 1991-2012 and Statistics New Zealand “Child and Youth Prosecution Tables” “Multiple-Offence Type Prosecution”.

¹⁰⁴ Calculated using statistics for the mean year ended 31 December 2012 from Statistics New Zealand (www.stats.govt.nz) “New Zealand Police Recorded Crime and Apprehensions Tables” “Annual Apprehensions for the Latest Calendar Years”.

¹⁰⁵ Calculated using statistics for the mean year ended 31 December 2012 Statistics New Zealand (www.stats.govt.nz) “Child and Youth Prosecution Tables” “Multiple-Offence Type Youth Court Order”.

¹⁰⁶ Calculated using statistics for the mean year ended 31 December 2012 Statistics New Zealand (www.stats.govt.nz) “Child and Youth Prosecution Tables” “Multiple-Offence Type Youth Court Order”.

¹⁰⁷ See also: Judge Andrew Becroft, “From Little Things, Big Things Grow” *Emerging Youth Justice Themes in the South Pacific*, Australasian Youth Justice Conference: Changing Trajectories of Offending and Reoffending (2013); http://www.aic.gov.au/media_library/conferences/2013-youthjustice/presentations/becroft-paper.pdf

¹⁰⁸ Ibid. at 25.

¹⁰⁹ Ibid at i.

¹¹⁰ Ibid.

202 As the Working Group on Arbitrary Detention (“WGAD”) acknowledged, it is important to address those underlying risk factors which increase the likelihood of exposure to the criminal justice system. The WGAD stated:¹¹¹

the search needs to continue for creative and integrated solutions to the root causes which lead to disproportionate incarceration rates of the Māori population.

203 Over the last three years, as a result of the *Drivers of Crime* initiative – a whole of Government approach to reduce offending and victimisation – the number of young Māori appearing in court has reduced by 30%.¹¹² Building on the *Drivers of Crime* initiative, the Government launched the Youth Crime Action Plan (“YCAP”) in October 2013. This plan aims to reduce youth crime and recidivism. An updated work programme for the YCAP is currently being developed by the Ministry of Justice.

204 In addition, a recent crime and crash prevention strategy, *The Turning of the Tide*,¹¹³ sets targets for reduced Māori offending, repeat offending and apprehensions. The *Turning of the Tide* approach is based on collecting detailed data showing where bias is occurring; developing relationships and partnerships with iwi; and a shared understanding of the data and co-development of solutions.

205 It has proved successful with Phase 1 of *Turning of the Tide* resulting in the following outcomes:

Target - end of Phase I, June 2015	Actual - end of Phase I, June 2015
A 5% decrease in the proportion of first-time offenders who are Māori	No change for youth or adults - 28% of first-time youth offenders - 44% of first-time adult offenders are Māori.
A 10% decrease in the proportion of repeat youth and adult offenders who are Māori	7.3% increase in the proportion of repeat youth and adult offenders who are Māori. - 59% of repeat youth offenders - 44% of repeat adult offenders are Māori.
A 10% decrease in the proportion of repeat victims who are Māori	4.8% decrease in the proportion of repeat youth victims who are Māori 3.8% increase in the proportion of repeat adult victims who are Māori.
A 15% reduction in Police (non-traffic) apprehensions of Māori resolved by prosecution	41% reduction in Police (non-traffic) apprehensions of Māori youth

¹¹¹ Working Group on Arbitrary Detention, *Mission to New Zealand*, A/HRC/30/36/Add.2 (6 July 2015).

¹¹² Minister of Justice, *Opening remarks to the UN Human Rights Council*, January 2014.

¹¹³ <http://www.police.govt.nz/sites/default/files/resources/the-turning-of-the-tide-strategy.pdf>

	13% reduction in Police (non-traffic) apprehensions of Māori adults resolved by prosecution.
A 10% decrease in the proportion of casualties in fatal and serious crashes who are Māori	16% decrease in the proportion of casualties in serious crashes who are Māori 22% decrease in the proportion of casualties in fatal crashes who are Māori.
Māori satisfaction with Police services, and Māori trust and confidence in Police, will be higher than they've ever been	Māori Trust and Confidence in Police grew initially but has been declining since mid- to late-2013. Te Kupenga 2013 shows police and health are the top-rated institutions by Māori.

NB: The baseline year is 2011/12

206 Phase 2 (July 2015 – June 2018) sets the following targets:

- A 10% decrease in the proportion of first time offenders who are Māori;
- A 20% decrease in the proportion of repeat offenders who are Māori;
- A 20% decrease in the proportion of repeat victims who are Māori;
- A 25% reduction in Police (non traffic) apprehensions of Māori resolved by prosecution;
- A 20% decrease in the proportion of casualties in fatal and serious crashes who are Māori; and
- Increased trust and confidence in Police

207 The Working Group on Arbitrary Detention recommended that “a review be undertaken of the degree of inconsistencies and systemic bias against Māori at all the different levels of the criminal justice system... [and] extend the Turning of the Tide to other areas of the criminal justice system.”¹¹⁴ The CAT Committee recommended the extension of the Turning of the Tide to other sections of the Justice sector. As a result, in October 2015 a team – reporting to the Justice Sector Leadership Board and the Police Commissioner’s Māori Focus Forum – was established to develop a Justice Sector-wide Māori strategy.

208 **It is recommended that the Committee urge the Government to commit to addressing the disproportionate representation of Māori in the criminal justice system by:**

- **ensuring that partnership with Iwi is central to the Justice Sector-wide Māori strategy currently being developed;**
- **stepping up its efforts to address the root causes which lead to disproportionate incarceration rates of Māori through including specific**

¹¹⁴ Working Group on Arbitrary Detention, *Mission to New Zealand*, A/HRC/30/36/Add.2 (6 July 2015).

actions in the Youth Crime Action Plan; and

- ensuring that justice, social sector and care and protection initiatives for Māori are linked up and are based on partnerships with Iwi.

C Mental Health in Detention

209 The high prevalence of mental health issues amongst people in detention, and their access to care and treatment in detention are longstanding issues. Sixty to seventy percent of people in prison have either a learning disability or mental illness.

210 In 2012 the Ombudsman completed an investigation into prison healthcare,¹¹⁵ identifying deficiencies in the management of mentally unwell prisoners, and finding that aspects of the management of prisoners at risk of self-harm could be detrimental to their long term mental health. In general, it was found that services were insufficiently responsive to the diverse needs of prisoners requiring mental health care.

211 Also in 2012, the IPCA carried out a review of deaths in police custody,¹¹⁶ highlighting the effect of alcohol, drugs and mental health issues on people in Police custody as areas requiring attention. The 20 recommendations made by the IPCA included “to work towards establishing detoxification centres to provide appropriate care for heavily intoxicated people, and expansion of the watch-house nurse programme to help identify and manage detainees with mental health, alcohol or other drug issues.”¹¹⁷

212 Despite some very positive developments, such as increased adolescent mental health services, improved screening for mental health issues in prisons, efforts to reduce seclusion, and a successful pilot initiative placing mental health nurses in Police watch houses, overall, mental health issues in detention remain a concern. An ongoing concern is that detainees experiencing mental illness should be professionally treated in a therapeutic environment, rather than managed in a custodial setting.

213 According to the New Zealand Police Mental Health Team, Police dealt with around 5,000 mental health related jobs in 1995/96. By contrast in 2103/14 Police responded to over 25,500 mental health related calls for assistance.¹¹⁸

¹¹⁵http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/456/original/own_motion_prisoner_health.pdf?1349735789

¹¹⁶ <http://ipca.govt.nz/Site/media/2012/2012-June-30-Deaths-in-Custody.aspx>

¹¹⁷ Ibid.

¹¹⁸ New Zealand Police, *Mental Health Team Newsletter*, November 2014, p2.

- 214 In March 2015 the IPCA released a review of Police custodial management¹¹⁹ that identified systemic and organizational deficits that contributed to recurring problems in Police detention. Specifically, the IPCA noted that discussions with Police and Area Mental Health Services staff have clearly shown that the problems with the way Police respond to vulnerable and mentally impaired persons are commonplace. The report highlighted the absence of appropriate alternatives to Police detention for dealing with vulnerable people, including those who have not committed an offence, and the lack of a timely response by Mental Health Services to mentally impaired persons in Police custody. The IPCA considers that, unless they are violent or pose an obvious and immediate threat to the safety of others, all practicable steps should be taken to avoid having mentally impaired people detained in Police cells solely for the purpose of receiving a mental health assessment.¹²⁰
- 215 Police have developed new training packages for both recruit and frontline officers based on feedback from Mental Health Service User (“MHSU”) groups, and acknowledged the importance of having MHSU involved in future thinking around mental health crisis response. Police watch houses with on-site mental health nurses have also resulted in better monitoring and continuity of care during police custody. The SPT recommended this practice be applied nationally.
- 216 **The Commission recommends that the Committee urge the Government to take steps to develop a national strategy and agree a set of actions to ensure the provision of mental health care in places of detention which includes mechanisms to ensure the timely and appropriate sharing of individuals’ health information across Government agencies.**

D Disproportionate representation of people with intellectual or learning disabilities

- 217 The WGAD heard testimonies when it visited New Zealand that people with intellectual or learning disabilities are at a particular disadvantage in the criminal justice system. Police officers, lawyers and officials are inadequately trained in relation to intellectual and learning disabilities. This has meant that in some cases, an individual may be questioned by the police without the presence of a lawyer, and is subsequently convicted and sentenced without or with inadequate legal representation.
- 218 It is estimated that 60-70% of people in New Zealand prisons are disabled people. The disabilities include intellectual or learning disabilities, foetal alcohol syndrome and poor mental health.

¹¹⁹ IPCA, *Review of Police Custodial Management*, Wellington (March 2015).

¹²⁰ *Ibid.*

219 **The Commission urges the Committee to remind the Government of its obligation to afford access to justice on an equal basis and to develop a set of actions designed to ensure there is equal access to justice for persons with Disabilities in New Zealand.**

E Detention under the Mental Health (Compulsory Assessment and Treatment) Act 1992

220 The number of people subject to both community and inpatient compulsory treatment is growing both absolutely and as a proportion of the population. Of particular concern is that New Zealand's use of community treatment orders is amongst the highest in the world.¹²¹ In 2013 Māori were 2.9 times more likely to be under a community treatment order than non-Māori.¹²²

221 The WGAD noted with concern that the legislative framework governing the detention of persons with mental disabilities under the Mental Health (Compulsory Assessment and Treatment) Act 1992 ("MHCAT Act") is not effectively implemented to ensure that arbitrary deprivation of liberty does not occur. In practice, compulsory treatment orders are largely clinical decisions, and it is difficult to effectively challenge such orders as the right to legal advice of patients undergoing compulsory treatment may be limited.¹²³

222 Concerns also remain over the issue of capacity and the tension between compulsory treatment and the right to refuse mental health treatment, to make an informed choice and to give informed consent. The MHCAT Act arguably does not differentiate between people who have capacity and those who do not.¹²⁴ As such, people with a mental disorder may be treated against their will despite retaining decision-making capacity.¹²⁵

223 A gap in monitoring under the Optional Protocol to the Convention against Torture ("OPCAT") that has been identified by New Zealand's National Preventive Mechanisms ("NPMs") concerns facilities where people reside subject to a legal substitute decision-making process, such as locked aged care facilities, dementia units, compulsory care facilities, community-based homes and residences for disabled persons. People detained in these facilities are potentially vulnerable to ill-treatment and this can remain largely invisible because of the nature of the residences.

¹²¹ O'Brien AJ. *Community treatment orders in New Zealand: regional variability and international comparisons*, Australas Psychiatry (2014).

¹²² Supra note 90.

¹²³ United Nations Working Group on Arbitrary Detention, *Statement at the conclusion of its visit to New Zealand (24 March -7 April 2014)*, p.5.

¹²⁴ [Mental Health \(Compulsory Assessment and Treatment\) Act 1992](#).

¹²⁵ The right to refuse consent, s(57), and not accept treatment, s(59), is limited as the Act effectively deprives a person of any power to refuse treatment within the first month of compulsory treatment, at the discretion of the responsible clinician, s(59)(4).

224 NPMs strongly argue that persons in such facilities or situations can effectively be in a state of detention, which means these places should be subject to preventive monitoring under OPCAT.¹²⁶ **The Commission would welcome the Committee's guidance on these issues.**

F Transgender people in detention

225 The Commission has previously raised concerns that transgender prison inmates are particularly vulnerable to abuse and/or sexual assault. Partly this was because they were housed according to their biological sex unless they had completed gender reassignment surgery.

226 In late 2014 the Department of Corrections broadened the criteria used to determine the gender identity of a prisoner and to ensure appropriate assignment to a prison that matches that gender. In October 2015 Corrections reported that there were up to 20 transgender people in NZ prisons.¹²⁷ The majority of these were, and continue to be, trans women.¹²⁸

227 However, despite these policy changes issues still remain. These include abuse of wrongly placed (predominately female) prisoners; using solitary confinement as a way of protective segregation; lack of or slow response to, applications for transfer after/during transition; lack of access to health and rehabilitation services and abuse under search and detention policies that do not recognise their gender identity.

228 The Commission has been informed that there remains a lack of understanding of the new policy/procedures (by Corrections personnel and trans people), and few suitably trained Corrections staff to ensure effective implementation.

229 **The Commission recommends that the Committee urges the Government to commit to:**

- **reviewing – in collaboration with the trans community – the current policy and practices; and**
- **ensuring all Corrections staff are appropriately trained and supported in the implementation of these policies.**

¹²⁶ See also CRPD General comment No.1, p.10.

¹²⁷ This does not include transgender people that are in immigration detention centers

¹²⁸ Corrections' deputy national commissioner Rachel Leota in a statement to Radio New Zealand (October 7)

SECTION 8 - PROTECTION OF THE RIGHTS OF CHILDREN (Articles 7 and 24)

A Violence, Child abuse and neglect

LOIPR

In the light of the concluding observations of the Committee (CCPR/C/NZL/CO/5, para. 18), please provide information on the concrete measures taken to combat child abuse. What specific measures have been taken to establish mechanisms for the early detection of child abuse and to encourage reporting of suspected and actual abuse? Please provide updated information on measures taken (a) to prosecute and punish such acts and (b) to assist and protect victims of child abuse. Please also provide relevant statistical data, disaggregated on the basis of sex and age, on this phenomenon.

(Para 22)

- 230 The Government has set a target for the public service to halt the ten year rise in children experiencing physical abuse and reduce the total number to 3,000 by 2017. While there has been some good progress, the level of family violence in New Zealand is unacceptably high. New Zealand has the fifth worst child abuse record of 31 OECD countries.
- 231 In 2014, there were 3178 reported cases of children being physically abused, 1294 of being sexually abused and 9,499 who suffered emotional abuse and neglect.¹²⁹ This is a decrease of 12 % from 2013 where 3,181 children were reported as being physically abused, 1,423 were sexually abused and 11,386 suffered emotional abuse and neglect.¹³⁰
- 232 The Commission is pleased to see that the number of children recorded as suffering abuse and neglect in New Zealand has gone down for the first time in 10 years. However more needs to be done to ensure the physical and emotional safety and wellbeing of all children in New Zealand.
- 233 The Vulnerable Children Act 2014 provides the basis for the introduction of a Vulnerable Children's Plan, to be implemented by specified Government agencies. The Vulnerable Children Act enables the Vulnerable Children's Plan to include measures to improve the economic and social well-being of vulnerable children. This provides the basis for a systemic approach to be implemented, albeit across a relatively narrow cohort of children, with the current policy definition of a

¹²⁹ <http://www.scoop.co.nz/stories/PA1501/S00097/child-abuse-down-by-12-%-but-still-way-too-high.htm>

¹³⁰ Ibid.

“vulnerable child” limiting its application to approximately 30,000 children who are deemed to be in significant risk of harm. However, the Vulnerable Children Act does not contain a specific definition of a “vulnerable child”, which means it is possible that its scope could be expanded in the future to include a greater range of vulnerable children, including those living in poverty. The Vulnerable Children’s Plan is yet to be introduced by the Government.

234 In 2015, the Government initiated a major review of Child, Youth and Family (“CYF”), the Government agency that delivers child protection and youth justice services. The Expert Panel appointed to conduct the review is charged with recommending steps to modernise CYF and improve its performance. The Expert Panel has recently released its interim report which has identified a number of critical shortcomings in CYFs performance, including a finding that children are not placed at the centre of its practice.

235 Violence and bullying is endemic in New Zealand schools. Effects on victims can include living with anxiety and fear, lowered self-esteem, engagement in risk-taking behaviours such as substance abuse, self-harming, truanting and dropping-out from school, with associated long term adverse impacts. Victims may also suffer mental health issues including suicidal ideation, relationship difficulties and impeded emotional, behavioural and cognitive development.¹³¹ Disabled children and young people, and same-sex attracted, both sex-attracted, Trans and intersex children and young people are disproportionately affected by violence in schools.

236 In 2013, the Government established a Bullying Prevention Advisory Group (“BPAG”) whose members included the Secretary for Education, the Children’s Commissioner, the Human Rights Commission and education sector professionals, to address the problem. The BPAG produced non-regulatory guidelines to assist schools develop and administer bullying prevention practices and programmes.¹³² The guidelines contain reference to obligations upon schools to prevent bullying.

237 However, the principal legislation governing the school sector, the Education Act 1989, does not contain any provisions that establish explicit obligations upon schools to prevent bullying, nor are any contained in the National Administrative Guidelines for schools, issued under that Act.

238 The BPAG 2016 strategic plan includes the following key activities:

- develop an interagency bullying prevention centralised website;

¹³¹ Office of the Children’s Commissioner (2009) *School Safety: An Inquiry into the safety of students at school*

¹³² <http://www.wellbeingatschool.org.nz/sites/default/files/Bullying-prevention-and-response-A-guide-for-schools.pdf>

- establish a Bullying Prevention Week and profile bullying prevention best practice through the media;
- heighten awareness of the importance of addressing bullying systematically and proactively by supporting school communities in the development of best practice by providing the knowledge and resources they need to facilitate and sustain their bullying prevention and response efforts; and
- encourage building the evidence-base for effective practice:
 - enhancing the capacity to collect data;
 - encouraging research and evaluation to identify what works;
 - collecting and sharing best / informed practice; and
 - supporting new developments / innovations in line with the evidence

239 In October 2016 BPAG confirmed its intention to start collecting data.

240 School boards of trustees have the overall responsibility for the health and safety of staff, students and others in their schools under the Health and Safety at Work Act 2015. Although there is no binding obligation to prevent bullying in the Act, the Commission believes that the health and safety responsibilities in the Act require boards of trustees to take all necessary steps to ensure the physical and mental health of students including by preventing bullying and abuse.

241 **The Commission recommends that the Committee urge the Government to:**

- **systematically collect data on violence and bullying in schools; monitor the impact of the student mental health and well-being initiatives recently introduced in schools on the reduction of the incidence of violence and bullying; and assess the effectiveness of measures, legislative or otherwise, in countering violence and bullying; and**
- **ensure that there is a binding obligation on schools to prevent violence and bullying.**

SECTION 9 - ADOPTION (Articles 2, 17, 18 &26)

- 242 The Adoption Act 1955 is one of the oldest statutes in New Zealand with ongoing application. It was enacted at a time when societal structures and mores were very different from today. The Act relies on a number of grounds of prohibited discrimination to regulate the adoption process.
- 243 Over the years the courts have made attempts to construe the Act in such a way as to align it with contemporary civil life. Executive Government and Crown Entities such as the Law Commission have also reviewed the Act. The theme that consistently emerges from these court decisions and reviews is that at least some of the discrimination contained in the Act is unjustified and a barrier to ensuring justice in individual cases.
- 244 In 2013 *Adoption Action*¹³³ applied to the Human Rights Review Tribunal for a declaration that the Adoption Act 1955 and the Adult Adoption Information Act 1985 are inconsistent with the anti-discrimination provisions in the BORA and therefore contravene Part 1A of the HRA. The Commission intervened in these proceedings. At the time of writing the decision of the Tribunal had not been released.
- 245 **The Commission recommends that the Committee urge the Government to commit to reviewing the Adoption Act 1955.**

¹³³ *Adoption Action* is an incorporated society whose members include persons who have had personal experience of adoption whether as relinquishing parents, adopted persons or actual or potential adoptive parents.

SECTION 10 - PARTICIPATION (Article 25)

- 246 Despite having a strong commitment to democratic principles, the Canterbury earthquake recovery has highlighted the fragility of some human rights protections. People affected by the earthquakes are limited in their opportunities to participate in problem identification, solution design and decision-making in issues which affect their lives. Difficulties are faced in the provision of full and timely information relevant to decision-making, and clear timeframes and transparency from decision-making authorities. Limitations on meaningful participation and the uncertainty faced by many Cantabrians are factors contributing towards deteriorating standards of mental health and wellbeing. The Canterbury experience is symptomatic of a wider trend to move towards centralised governance, progressively removing the voice of those affected from the decision making process.
- 247 In 2013 New Zealand accepted an invitation to join the *Open Government Partnership ("OGP")*, an initiative to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance and support the implementation of multilateral commitments.
- 248 The Government has developed an OGP Action Plan 2014 -2016.¹³⁴ Under this Action Plan it has committed to responded to the *2013 Transparency International New Zealand's National Integrity System Assessment Report* which includes a recommendation to:¹³⁵
- strengthen transparency and integrity in a range of priority areas specifically with respect to Parliament, the political executive, and local Government.
- 249 On 4 February 2016 New Zealand signed the Trans Pacific Partnership ("TPP"), a free trade agreement between 12 Pacific Rim countries. The TPP contains safeguards that ensure that New Zealand can meet its obligations to Māori, including under the Treaty of Waitangi. However, the Iwi Chairs Forum¹³⁶ has voiced concern that notwithstanding the Treaty clause in the TPP, the Government has failed to engage with Māori and is in breach of its obligations as a Treaty Partner.
- 250 **The Commission recommends that the Committee urge the Government to commit to implementing the recommendation from the 2013 Transparency International Report – with particular focus on increasing participation in central and local Government.**

¹³⁴ <https://www.ssc.govt.nz/node/9658>

¹³⁵ <https://www.ssc.govt.nz/node/9673>

¹³⁶ A national forum representative of over 40 iwi and hapu across the country.

SECTION 11 - EQUALITY AND NON-DISCRIMINATION, RIGHT TO PARTICIPATE IN PUBLIC LIFE AND THE PROTECTION OF THE RIGHTS OF PERSONS BELONGING TO ETHNIC MINORITIES (Articles 25, 26 and 27)

LOIPR

Please provide information on steps taken as well as a timetable to implement Waitangi Tribunal's Wai 262 decision of 2011.

(Para 25)

251 The Waitangi Tribunal's WAI 262 report provides a framework for the better realisation of indigenous rights to cultural heritage in Aotearoa New Zealand. Given the comparatively small size of Aotearoa New Zealand, and the extent of the inquiry undertaken by the Tribunal, arguably this should be achievable. Moreover, as the Tribunal noted, despite some fears about the Treaty and indigenous rights, there is:

an underlying good will and mutual respect between New Zealand's founding cultures. This has made the process of settling historical grievances possible, and is reflected in the increasing acknowledgement that 'Māori identity and culture is now a vital aspect of New Zealand identity and culture.

252 There have been some significant developments since the release of the report in 2011. However, a full Government response to WAI 262 has not yet been issued.

253 However, the National Impact Analysis of the TPP makes clear that there are implications relating to matters considered in WAI 262 if New Zealand is to be able to perform its obligations under the TPP, should it be ratified. The particular TPP matter relates to plant variety rights.

254 **The Commission recommends that the Committee urge the Government to set a concrete timetable for responding to the recommendations from the Waitangi Tribunal's Wai 262 decision.**

SECTION 12 - ARBITRARY INTERFERENCE WITH FAMILY OR HOME (Article 17)

- 255 Following the Canterbury earthquakes the Government designated certain areas used for residential purposes as the “red zone”. The Crown made an offer to purchase the property of people in the red zone for the full 2007 rateable valuation if their properties were insured. Owners of properties which were uninsured or consisted of vacant land were offered only half the 2007 rateable value of the land, and nothing for any improvements, including homes. Owners of commercial properties were offered half the 2007 rateable value of the land and half of the rateable value for any improvements (if the improvements had been insured).
- 256 At the same time the Council indicated that it was unlikely to install any new services in the red zone and utilities may be discontinued. It would also be difficult to insure properties if people elected to remain. The effect was that it would no longer be viable for people to continue living in the red zone and they would find it difficult – if not impossible - to sell their property to a purchaser other than the Crown.
- 257 The decision to red zone properties has had the effect of undermining the market value of those properties. As a result, owners of property within the red zone, particularly those who were uninsured or owned vacant land, find themselves at a considerable disadvantage economically, with severe social impacts, and under pressure to sell to the Crown on the Crown’s terms.
- 258 In 2013 these decisions were challenged in the High Court and ultimately appealed to the Supreme Court of New Zealand. The Commission intervened in these proceedings.¹³⁷ The High Court found that the Government’s creation of the Red Zone was made “outside of, and without regard for, the statutory regime and was not made according to law.”¹³⁸ In addition the Court cited the Universal Declaration of Human Rights, the International Covenant on Economic Social and Cultural Rights and quoted Article 17 of the ICCPR. It said that:¹³⁹

The use and enjoyment of one’s home is a fundamental human right. In my view the creation of the red zone comprised an interference with that right.

- 259 The Supreme Court found that the decision to establish the residential red zone in Christchurch was unlawfully made – in that it was made outside the ambit of the Canterbury Earthquake Recovery Act 2011. The Court stated:¹⁴⁰

The whole scheme of the Canterbury Earthquake Recovery Act, its purposes and its legislative history support the view that decisions of the magnitude of those made in June 2011 on recovery measures should have been made under the Act and in particular through the Recovery Plan processes. They were not. That the June 2011

¹³⁷ A copy of the Commission’s submissions to the High Court are available here: http://www.hrc.co.nz/wp-content/uploads/2013/09/Quake-outcasts_Submission-of-the-Human-Rights-Commission-as-Intervener.pdf

¹³⁸ *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2013] NZHC 2173 at [90].

¹³⁹ At [65].

¹⁴⁰ [2016] 1 NZLR 1.

decisions were made outside of the Act undermined the safeguards, community participation and reviews mandated by the Act.

260 The Court went on to conclude that:¹⁴¹

While we have held that the June 2011 red zone measure should have been introduced under a Recovery Plan, it is obviously now too late for this to occur. In practical terms, a declaration as the unlawfulness of the June 2011 decisions would not serve any useful purpose and none is made.

261 The Government was directed to reconsider the offers it made. Following the development of a *Residential Red Zone Offer Recovery Plan* under the CER Act, new offers were made on the following terms:

- 100% of the 2007 RV for vacant section owners; and
- 100% of the 2007 RV of the land alone and nothing for improvements for uninsured residential property owners.

262 Sixteen of the original claimants have recommenced judicial review proceedings to challenge the validity of these new offers. The Commission is still considering whether it will intervene in this case.

263 The Waimakariri District Council has just released its Preliminary Draft Residential Red Zone Recovery Plan. In that Plan the Council confirmed that property owners in the red zone, who declined the Crown's buyout offer would continue to have essential services to their properties maintained. The Council also anticipates that some former red zone property owners might be able to buy back or lease their sections and is investigating this option further.

264 By contrast the Christchurch District Council is currently proposing district plan changes based on the red zone designation. This is being done through the establishment of a temporary special purpose zone pending the full development of the Red Zone Recovery Programme. The Commission considers that this is the proper mechanism to determine the appropriate use of the red zone land. In a similar vein to the circumstances around the offers, imposing a greater level of restriction on building and development than the Operative Plan provisions at this stage can be seen as a signal to the very small number of property owners in the red zone that remaining is not a priority. The continued delays and uncertainty for those who remain in the red zone have severely impacted on their health and wellbeing. Any ongoing uncertainty - by imposing a special zone with inferences about the future land use - can be expected to exacerbate the negative impact of the Crown's

¹⁴¹ Ibid at [205].

actions in relation to the red zone.

265 **The Commission recommends that the Committee urge the Government to:**

- **reconsider the offers that were made in 2016 and commit to working with property owners in the red zone on an individual basis to find a solution;**
- **ensure that all Red Zone Recovery Plans and Programmes expressly require Councils to maintain services and infrastructure for those property owners who wish to remain;**
- **consider the possibility of buy back provisions for former property owners accepted the Crown offers; and**
- **encourage the Christchurch City Council to ensure that any planning decisions temporary or otherwise are not based on the arbitrary red zone designations, but rather on an individualised assessment of properties and in close consultation with property owners.**

Appendix 1: List of Proposed Recommendations

- 1 The Commission recommends that the Committee urges New Zealand to commit to establish a process – based on the collection of robust disaggregated data - to monitor and review its progress in meeting its ICCPR related commitments under the SDGs.
- 2 The Commission recommends that the Committee urges the Government to ensure that:
 - it undertakes UNGP training of officials in the public sector who work with business and trade and Boards and managers in State Owned Enterprises so they are aware of the State’s UNGP obligations and the UNGP obligations of businesses owned by the State and that they meet those obligations ;
 - Government Procurement policies and guidelines specifically reference the UNGPs;
 - State Owned Enterprises have a human rights policy; a human rights due diligence process; a remediation process if human rights are breached; and a human rights reporting process;
 - Businesses operating in New Zealand are aware of their responsibilities under the UNGPs and comply with these; and
 - The Government develops a national action plan for Business and Human Rights.
- 3 The Commission recommends that the Committee urges the Government to commit to reviewing all legislation – with a particular focus on the abovementioned Acts – within the next reporting period to ensure that it fully complies with New Zealand’s international obligations.
- 4 The Commission recommends that the Committee urge New Zealand to commit to concrete timeframes to respond to the recommendations of the Constitutional Advisory Panel and to establish without delay processes – with public consultation and participation - to:
 - explore in more detail the options for amending the BORA with a particular focus on adding property rights, the right to privacy and incorporating other ICCPR obligations; and
 - develop a range of options for the future role of the Treaty of Waitangi within New Zealand’s constitutional arrangements.

- 5 The Commission recommends that Committee urges the Government to take the necessary steps to remove its reservation to Article 20(2) without delay.
- 6 The Commission recommends that the Committee urges the Government to commit to amending its BORA vetting process to better protect human rights in legislative development by:
- ensuring that section 7 reports are prepared, tabled in Parliament and referred to select committee where a Bill appears to be inconsistent with any of the rights and freedoms contained in the BORA. In other words where there is a *prima facie* inconsistency;
 - establishing a mechanism for Parliament to periodically review the continued validity of any justified limitation.
- 7 The Commission urges the Committee to encourage New Zealand to continue to mainstream human rights by:
- d) making the requirement set out in section 7.60 of the Cabinet Manual more explicit in requiring identification of implications in relation to international human rights commitments and extend it to apply to all policy and legislation (both primary and secondary);
 - e) taking steps to ensure that the requirements are strictly adhered to; and
 - f) developing and implementing capacity-building programmes for parliamentarians and civil servants across the public sector.
- 8 The Commission recommends that the Committee urge the Government to undertake an urgent qualitative evaluation of women and girl's experience in the family court, with a focus on those who are experiencing family violence.
- 9 The Commission recommends that the Committee urge the Government to develop in consultation with communities a dedicated programme of work to minimize extremism and radicalisation.
- 10 The Commission recommends that the Committee urges the Government to ensure that the rights of children are upheld and protected in circumstances where they, or their family members, are subject to surveillance or other forms of intelligence or security activity.
- 11 The Commission recommends that the Committee urge the Government to:
- set targets to increase the representation of women in corporate governance

and senior management in the public sector and to eliminate the gender pay gap in the public and private sector over the next reporting period, and provide an update to the CEDAW Committee when it reviews New Zealand in 2016/17.

- take steps – regulatory or otherwise - to require listed companies to establish and disclose gender polices including measurable objectives and implementation in their annual reports in line with the United Nations Guiding Principles on Business and Human Rights; and
- establish a cross agency programme of work to implement and monitor the implementation of SDG Goal 5 – achieving gender equality and empower all women and girls.

12 The Commission recommends that the Committee urge the Government to:

- set targets to increase the representation of Māori, Pacific People and disabled people in corporate governance and senior management in the public sector over the next reporting period;
- strengthen its efforts to increase the participation of Māori, Pacific People and disabled people in the labour market; and
- report back to the Committee within 18 months on what steps the Government has taken to reduce bias and discrimination at work.

13 The Commission recommends that the Committee urges the Government to:

- report back to the Committee within 18 months on progress made against the targets in *Ka Hikitea and the Pasifika Education Plan*;
- ensure that the Special Education Update Action Plan is based on the principle of inclusive education;
- ensure all aspects of the right to education are adequately protected in any new Education Act and corresponding regulations;
- codify an enforceable right to an inclusive education; and
- provide data - disaggregated by gender, disability ethnicity and family status – on educational outcomes for children who are materially deprived, and report back to the Committee on this within 18 months.

14 The Commission recommends that the Committee urges the Government to:

- report back to the Committee within 18 months on the work of the Ministerial Group on Family Violence and Sexual Violence;
- report back to the Committee within 18 months on the Law Commission's report

- and the actions that the Government will take in response to that report;
- develop in consultation with civil society an agreed definition of sexual and family violence and an appropriate minimum data set of indicators;
 - ensure that one of the outcomes of work of the Ministerial Group on Family and Violence and Sexual Violence is a process to co-ordinate and monitor all interventions to reduce violence and to ensure that they are adjusted and extended as required on the basis of robust empirical evidence; and
 - take legislative and regulatory measures as appropriate to ensure that workplace policies support employees who are experiencing family violence
 - consider inclusion of strategies for business to support employees who are exposed to family or sexual violence.
- 15 Drawing on the IPCA report the Commission recommends that the Committee urges the Government to commit to:
- reviewing Police practice and policy to ensure that appropriate emphasis is placed on prevention;
 - ensuring that adequate instruction and guidance about the application of section 128 and 134 of the Crimes Act 1961 is provided to the Police Child Protection Team; and
 - addressing the 34 IPCA recommendations within a specific timeframe and report back to the Committee within 18 months on progress.
- 16 The Commission recommends that the Committee urges the Government to
- consider whether the Domestic Violence Act 1995 and other legislations provides sufficient protection for disabled people in community care situations and if it doesn't commit to amending it so as to apply; and
 - commit to tracking violence/domestic violence against people with disabilities and educate the public as to the disability/violence nexus.
- 17 The Commission recommends that the Committee urge the Government to commit to a programme of work over the next reporting period to:
- improve the understanding around informed consent and the rights of children and their parent(s), and ensuring that parents and competent young people are made aware of the differing views about medical or surgical interventions before making any decisions;

- encourage the compulsory provision of training in relevant undergraduate and postgraduate courses on appropriate medical responses to intersex conditions; and
 - legislate against non-consensual surgical procedures on children aimed solely at correcting genital ambiguity.
- 18 The Commission recommends that the Committee - in order to address the high rate of suicide in New Zealand - urge the Government to:
- take similar steps for adult males to those taken in regard to youth in New Zealand; and
 - to ensure mental health services are adequately funded, particularly in Canterbury.
- 19 The Commission recommends that the Committee encourages the Government to report to the Committee on what actions it has taken to respond to the recommendations from the IPCA in relation to Operation 8.
- 20 The Commission recommends that the Committee urge the Government to commit to ensuring that:
- asylum seekers detained in correctional facilities are separated from other prisoners;
 - asylum seekers are not subject to criminal standards of detention; and
 - prison staff are appropriately trained in relation to standards of detention for asylum seekers, the identification of the symptoms of trauma and human rights.
- 21 The Commission recommends that Committee encourage the Government to review the Immigration Amendment Act to ensure that:
- where detention is deemed to be a necessity, a maximum 30 day time limit should be adhered to, so that all asylum seekers are moved into the community once health, character and identity checks are complete; and
 - adequate review mechanisms are available to those detained as part of a 'mass group' which consider individual circumstances to avoid delay, discrimination and unnecessary detention.

- 22 The Commission recommends that the Committee urges the Government commit to developing – in consultation with the UNHCR, the Human Rights Commission and the Refugee Bar – confidentiality guidelines for the processing of claims for refugee status and/or protected status. These guidelines should be based on international human rights law and the principles of the Refugee Convention.
- 23 The Commission recommends that the Committee encourage the Government to commit to reviewing the use of reverse onus of proof to ensure that the right to be presumed innocent is fully protected.
- 24 It is recommended that the Committee urge the Government to commit to addressing the disproportionate representation of Māori in the criminal justice system by:
- ensuring that partnership with Iwi is central to the Justice Sector-wide Māori strategy currently being developed;
 - stepping up its efforts to address the root causes which lead to disproportionate incarceration rates of Māori through including specific actions in the Youth Crime Action Plan; and
 - ensuring that justice, social sector and care and protection initiatives for Māori are linked up and are based on partnerships with Iwi.
- 25 The Commission recommends that the Committee urge the Government to take steps to develop a national strategy and agree a set of actions to ensure the provision of mental health care in places of detention which includes mechanisms to ensure the timely and appropriate sharing of individuals’ health information across Government agencies.
- 26 The Commission urges the Committee to remind the Government of its obligation to afford access to justice on an equal basis and to develop a set of actions designed to ensure there is equal access to justice for persons with Disabilities in New Zealand.
- 27 The Commission recommends that the Committee urges the Government to commit to:
- reviewing – in collaboration with the trans community – the current policy and practices relating to trans prisoners; and
 - ensuring all Corrections staff are appropriately trained and supported in the implementation of these policies.
- 28 The Commission recommends that the Committee urge the Government to:
- systematically collect data on violence and bullying in schools; monitor the

impact of the student mental health and well-being initiatives recently introduced in schools on the reduction of the incidence of violence and bullying; and assess the effectiveness of measures, legislative or otherwise, in countering violence and bullying; and

- ensure that there is a binding obligation on schools to prevent violence and bullying.

29 The Commission recommends that the Committee urge the Government to commit to reviewing the Adoption Act 1955.

30 The Commission recommends that the Committee urge the Government to commit to implementing the recommendation from the 2013 Transparency International Report – with particular focus on increasing participation in central and local Government.

31 The Commission recommends that the Committee urge the Government to set a concrete timetable for responding to the recommendations from the Waitangi Tribunal's Wai 262 decision.

32 The Commission recommends that the Committee urge the Government to:

- reconsider the offers that were made in 2016 to residential red zone property owners and commit to working with property owners in the red zone on an individual basis to find a solution;
- ensure that all Red Zone Recovery Plans and Programmes expressly require Councils to maintain services and infrastructure for those property owners who wish to remain;
- consider the possibility of buy back provisions for former property owners accepted the Crown offers; and
- encourage the Christchurch City Council to ensure that any planning decisions temporary or otherwise are not based on the arbitrary red zone designations, but rather on an individualised assessment of properties and in close consultation with property owners.

Appendix 2: Copy of Submission to the Independent Review of Intelligence and Security Services

Submission of Human Rights Commission

Independent Review of Intelligence and Security Services

14 August 2015

Introduction

1. The Human Rights Commission welcomes the opportunity to provide this submission to the Independent Review of Intelligence and Security Services ('the Review'). The Commission's position can be summarised as follows:
 - 1.1 The Commission considers that there is a strong case for substantial reform of New Zealand's intelligence and security regime. Such reform should be guided by a principled yet pragmatic methodology that maximises public trust and confidence in the operations of our intelligence and securities agencies. The Commission endorses the principles designed by David Anderson QC¹ and the Independent Surveillance Review Panel² in their recent reviews of UK intelligence and security system as being instructive for this purpose.
 - 1.2 Accordingly, the Commission considers that the societal challenges brought about by contemporary (and future) electronic surveillance and data interception technology requires that consideration be given to incorporating the right to privacy into New Zealand law through inclusion in the rights and freedoms protected under the New Zealand Bill of Rights Act 1990.
2. The Commission's specific recommendations for the Reviewers to consider can be found at paragraph 19 below.
3. Human rights are of central importance when considering intelligence and security policy, practice and legislation. The Commission appreciates the interest the

¹ David Anderson QC, *A Question of Trust, Report of the Investigatory Powers Review*, June 2015,

<https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf>

² Independent Surveillance Review, *A Democratic License to Operate, Report of the Independent Surveillance Review*, Royal United Services Institute for Defence and Security Studies, July 2015, <https://www.rusi.org/downloads/assets/ISR-Report-press.pdf>

Reviewers have taken in this matter to date and welcomes any opportunity for ongoing dialogue.

Initial Observations

4. Over the last two years, the role and functions of New Zealand's intelligence and security services have been subject to an unprecedented degree of public interest, judicial scrutiny and legislative reform. This occurred against a backdrop of domestic and international events that shone a public spotlight on intelligence services, in particular their extensive mass surveillance and data interception capabilities. The Commission has taken a close interest in these developments and their implications for human rights in New Zealand.³
5. The legal and operational functions of these essential services give rise to human rights considerations that are fundamental to the functions of a modern democratic state. With this in mind, the Commission recommended in its 2013 report to the Prime Minister that an independent review of New Zealand's intelligence and security regime take place⁴. The Government has referred to the Commission's recommendation, and the subsequent legislative action it took to establish the periodic review process, in its sixth periodic report to the UN Human Rights Committee under the International Covenant on Civil and Political Rights.⁵
6. The activities of intelligence and security agencies can be described as having a two-fold effect on human rights. Firstly, these activities may limit the human rights of people in New Zealand, an obvious example being the impact of surveillance operations on the privacy rights of affected persons. Conversely, the role and functions of intelligence and security services enhance the Government's capability of meeting its human rights related duty to protect its people from harm.
7. This has led to a complex, polarised public debate, both in New Zealand and internationally. In his review of the UK's intelligence and security legislation, David Anderson QC described this debate as "double-jointed", dominated by the arguments of law enforcement officials and "securocrats" for more operational capability and fewer restraints on the one hand; and arguments by civil liberties advocates for more safeguards and less capabilities on the other. Anderson comments that "the silent majority" (the general public) sit in between these

³ For further detail, please refer to the bundle of Commission reports and related international materials dated 27 July 2015 provided to the Reviewers

⁴ Human Rights Commission, *Report to the Prime Minister: Government Communications Security Bureau and Related Legislation Amendment Bill; Telecommunications (Interception Capability and Security) Bill, and associated wider issues relating to surveillance and the human rights of people in New Zealand*, 9 July 2013, para 49, p 12

⁵ New Zealand Government, *New Zealand's sixth periodic report under the International Covenant on Civil and Political Rights*, 2015, p 13, paras 83-88

positions “in a state of some confusion.”⁶

8. At heart of this debate lies a perception that a trade-off is required between privacy rights and rights related to personal security⁷ in order to enable the operations of the intelligence and security services. The Commission submits that such a characterisation is too narrow. Instead, a balanced position can be found within the human rights concepts and principles that underpin the modern democratic state.⁸
9. This balance has been explored in detail in the recent reports issued by David Anderson QC and the Independent Surveillance Review Panel (the ISR Panel).⁹ The approaches taken in those reports are instructive and of invaluable application to the New Zealand context.
10. Anderson’s approach in balancing the complex and competing sets of interests is to place the notion of trust at the heart of the matter, noting that *“if one thing is for certain it is that the road to a better system must be paved with trust.”* The Commission considers that, in order to earn the trust of the public, the “trustworthiness” of laws, institutions and practices is a matter of paramount importance in this respect.
11. In order to achieve a more balanced, accessible system that more effectively reflects and responds to the public interest, Anderson recommends that the design and operation of intelligence and security legislation, policy and practices reflect the following five inter-related principles¹⁰:
 - Minimise no-go areas
 - Limited powers
 - Rights compliance
 - Clarity and transparency
 - A unified approach
12. The ISR Panel frames the relationship between the public and the Government security and intelligence services within concept of the eponymous “democratic

⁶ *A Question of Trust*, p 245, 13.1. 13.2

⁷ Such as the right to life and the right to personal security (Article 3 of the Universal Declaration on Human Rights and Articles 6 and 9.1 of the ICCPR)

⁸ For the historical context informing the Commission’s position, refer to speech by David Rutherford, Chief Commissioner, *Protecting the balance: trust, confidence, privacy and intelligence*, NZIP Annual Conference, 15 July 2015, <https://www.hrc.co.nz/news/protecting-balance-trust-confidence-privacy-and-intelligence/>

⁹ The ISR Panel consisted of senior stakeholder representatives from across Government, industry, civil society and Parliament – see *A Democratic License to Operate*, para 0.3

¹⁰ *A Question of Trust* pp 246-255

license to operate”, whereby the mandate of the intelligence and security services is derived from the consent of the people through the democratic process.

13. The ISR Panel based the notion of a “democratic license to operate” upon three distinct “deals”.¹¹ The first deal exists between citizen and state and must be reflected in a clear, transparent legal framework and a coherent, visible and effective oversight regime. The second deal regards an improved “shared understanding” between the Government and private sector as to the role internet and telecommunications companies have to play in sustaining the essential principles that govern an open society. The third deal concerns the importance of international harmonisation. This concept is particularly important when considering New Zealand’s role in the Five Eyes Alliance and its obligations under international human rights treaties.

14. This approach provided the foundation for the ISR Panel’s development of the following ten ‘tests’ with which to measure the potential intrusive impact of new legislation or regulations governing intelligence and security powers. These tests are:
 - Rule of law
 - Proportionality
 - Necessity
 - Restraint
 - Effective oversight
 - Recognition of necessary secrecy
 - Minimal secrecy
 - Transparency
 - Legislative clarity
 - Multilateral collaboration

15. The Commission also wishes to emphasise the value of the recent work of UN entities in defining the role of intelligence and security services within the terms of the international human rights framework. In particular, the reports of UN Special Rapporteur Martin Sheinin to UN Human Rights Council that set out best practice guidelines¹² are particularly useful points of reference against which intelligence and security policy and legislation can be assessed.

¹¹ *A Democratic License to Operate*, para 5.30-5.34

¹² Human Rights Council, Reports of Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – *Ten areas of best practice in countering terrorism* A/HRC/16/51, 22 December 2010; *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight*, A/HRC/14/46, 17 May 2010

Related issues outside the scope of the Review

16. The Commission notes that the 2013 and 2014 legislative reforms to intelligence and security law have avoided the issue of countering radicalism, nor has the use of ethnic or racial profiling in surveillance operations been directly addressed. The Commission considers that both civic education initiatives and community development approaches that avoid stigmatisation of particular communities are essential components of any security framework. These activities should have the ongoing resource and support required for them to flourish¹³. These measures are also an important component of Pillar 1 of the UN Global Counter-Terrorism Strategy, which calls upon States to¹⁴:

“promote a culture of peace, justice and human development, ethnic, national and religious tolerance and respect for all religions, religious values, beliefs or cultures by establishing and encouraging, as appropriate, education and public awareness programmes involving all sectors of society.”

17. The Commission also notes the ongoing challenge posed by the exponential growth in the collection and use of personal data by private sector entities. The ISR Panel has noted that the public is as equally, if not more, concerned about the use of personal data by private companies as they are in respect of Government agencies¹⁵. The ISR Panel goes on to express its concern that mass data collection and surveillance by private sector organisations are “largely overlooked in discussions of transparency”¹⁶. While this concern falls outside the scope of this Review, the Commission considers that the Review’s findings may have the potential to model best practice approaches that are of application across the public and private sectors.

Summary of the Commission’s recommendations

18. The Commission has focused its submission at high-level issues arising from the Review rather than statutory detail. A summary of the Commission’s positions on the various amendments to intelligence and security legislation that have taken place since 2013 can be found in the annexure to this submission.
19. The Commission has accordingly formulated the following recommendations for the Reviewers to consider:

¹³ Speech by David Rutherford, Chief Commissioner, *Protecting the balance: trust, confidence, privacy and intelligence*, NZIP Annual Conference, 15 July 2015, <https://www.hrc.co.nz/news/protecting-balance-trust-confidence-privacy-and-intelligence/>

¹⁴ United Nations Global Counter-Terrorism Strategy, A/RES/60/288, 2006, Pillar 1, para 3

¹⁵ *A Democratic License to Operate* p 35, para 2.24

¹⁶ *ibid* p 44, para 2.53

- a. That the Reviewers undertake a comprehensive review of New Zealand's intelligence and security legislation for consistency with international human rights law and norms.
 - b. That the Reviewers consider ways in which the clarity, accessibility and structure of New Zealand's intelligence and security legislation can be improved.
 - c. The Commission recommends that the Reviewers consider the implications that inclusion of the right to privacy in the New Zealand Bill of Rights Act would have for intelligence and security law, policy and operations.
 - d. That the Reviewers investigate the implications of consolidating the NZ legislative framework into a unified structure.
 - e. That the Reviewers investigate the implications of developing a statutory Code of Practice for ensuring human rights compliance by intelligence and security agencies.
 - f. The Commission recommends that the Reviewers consider statutory mechanisms (such as a statutory Code of Practice) for requiring human rights training for intelligence and security officials.
 - g. That that the Reviewers investigate current and potential measures which enable oversight mechanisms to assess intelligence and security practices against New Zealand's domestic and international human rights obligations.
 - h. That the Reviewers investigate the implications of consolidating current oversight roles and functions into an independent centralised judicial entity such as an Intelligence and Security Commission.
20. The Commission's position is set out in more detail below under the following sections, based on the terms of reference of the Review:
- Part A: Concerning the adequacy of the current legislative framework to protect NZ's current and future national security, while protecting individual rights.
 - Part B: Concerning the current oversight arrangements and whether these provide sufficient safeguards at an operational, judicial and political level to ensure that NZSIS and GCSB act lawfully and maintain public confidence.

21. As regards the Review’s matters of particular focus, the Commission has previously stated its position on the Countering Foreign Terrorist Fighters legislation sunset clause and the definition of “private communications” under the GCSB Act in its submissions on those pieces of legislation. These positions are referenced in the annexure to the submission. The Commission does not intend to expand on those positions further in this submission.

PART A: The legislative framework

22. The legislative framework governing New Zealand’s intelligence and security sector is complex and spread over a number of relatively obscure legislative instruments. The statutory structures and terminology used are, for the most part, highly technical and lack unifying guidelines or a code of practice. As a result, the legislative framework is relatively impenetrable and inaccessible to members of the public.
23. This is perhaps reflective of the ad hoc way in which the legislature has responded to the intelligence and security sector’s evolving policy and operational objectives over the years. While this is not unique to New Zealand, this is not a desirable situation. In his analysis of the UK legislative framework, Anderson notes:
- “Obscure laws – and there are few more impenetrable than RIPA and its satellites [the UK equivalents] corrode democracy because neither the public...nor the legislators...truly understand what they mean.”¹⁷*
24. The Commission considers Anderson’s five inter-related principles – minimising no-go areas, limiting powers, rights compliance, clarity and transparency and a unified approach - provide invaluable guidance when approaching the complex and competing sets of interests that must be taken into account when contemplating the design and utility of intelligence and security legislation.

Minimising no-go areas and limiting powers

25. Anderson characterises the above two principles as follows:
- In order for a system to be trusted, it must be fair and effective. No-go areas should be minimised as much as possible, whether in the physical or digital world.
 - That intelligence and security powers are limited in the interests of privacy.

¹⁷ *A Question of Trust* p 253

26. The operation of intelligence and security legislation has inherent implications for the privacy of individuals. This, in turn, gives rise to democratic concerns. As the ISR has noted, the individual's right to privacy, while not an absolute right, is a pre-requisite in a functioning modern democracy and provides the basis for freedom, personal autonomy and personal expression¹⁸.
27. While a free-standing right to privacy is not expressly contained in the New Zealand Bill of Rights Act 1990, the right is guaranteed under international human rights law by way of Article 17 of the ICCPR, which provides that:
- No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- Everyone has the right to the protection of the law against such interference or attacks*
28. Rapid advancements in electronic mass surveillance and data interception are highlighting the difficulties New Zealand's domestic human rights law has in responding to emerging challenges brought about by 21st century information technology. The absence in the New Zealand Bill of Rights Act of a right to privacy, analogous to that guaranteed under Article 17 of the ICCPR, inhibits the current statutory compliance and oversight provisions from taking into account the impact of intelligence and security powers on a person's right to privacy (see paragraph 49 below). While the Privacy Act 1993 regulates the collection and use of personal information, it is not underpinned (or empowered) by a presumptive statutory right to privacy.
29. Accordingly, the Commission would encourage the Reviewers to give some consideration to this issue. The Commission considers that the inclusion of a right to privacy in the NZBORA is entirely appropriate in the contemporary context and would render it more consistent with the objectives stated in its long title, which are:
- (a) *to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and*
- (b) *to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights*
30. In its 2014 report to the UN General Assembly, *The Right to Privacy in the Digital Age*¹⁹, the Office of the UN High Commissioner (OHCHR) has noted that any legal

¹⁸ *A Democratic License to Operate*, p 31, para 2.10

¹⁹ Office of the High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, June 2014, A/HRC/27/37

limitations to the right to privacy under Article 17 of the ICCPR must be:

*...sufficiently accessible, clear and precise so that an individual may look to the law and ascertain who is authorized to conduct data surveillance and under what circumstances. The limitation must be necessary for reaching a legitimate aim, as well as in proportion to the aim and the least intrusive option available.*²⁰

31. The principles of necessity and proportionality are therefore crucial human rights concepts²¹ when considering the powers and jurisdictional scope of our intelligence and securities agencies.
32. The OHCHR suggests that the onus is upon Governments to demonstrate that powers that interfere with individual privacy are both necessary and proportionate to address the specific risk. Without these precepts, the activities of Government intelligence agencies, such as mass surveillance programmes risk arbitrariness, even if they serve a legitimate aim and are vested under an accessible legal regime.²²
33. Further to this point, both the ISR Panel and Anderson reinforce “the articulation of enduring principles” as a key component of any intelligence and security regime. The ISR Panel goes on to recommend the development of statutory Codes of Practice, written in plain accessible language, that include details of the technical implementation and application of governing legislation.²³
34. The Commission endorses this approach. New Zealand’s disparate legislative framework lacks a coherent set of principles that guide consistent practices or set appropriate parameters of implementation.
35. Rebecca Kitteridge indirectly identified this concern in her March 2013 report *Review of Compliance of the Government Communications Security Bureau*. Ms Kitteridge recommended the development of a “comprehensive compliance framework” for the GCSB. In coming to this recommendation, Ms Kitteridge observed:

“I would argue that GCSB [is at the] high-risk end of the compliance spectrum. Its powerful capabilities and intrusive statutory powers may only be utilised for certain purposes. The necessarily secret nature of its capabilities and activities prevents the

²⁰ *ibid* para 23, p 8

²¹ And are not only limited to the right to privacy under Article 17. For example, Article 12.3 of the ICCPR provides for a restriction on the right to freedom of movement on the grounds of national security; an issue of direct relevance to the amendments to the Passport Act 1992 made under the Countering Foreign Terrorist Fighters legislation. In its General Comment No 27 on the right to freedom of movement under Article 12, the UN Human Rights Committee has found that in order to comply with Art 12.3 any such restrictions must be necessary to protect their aim and adhere to the principle of proportionality. See CCPR/C/21/Rev 1/Add 9 paras 11-18

²² A/HRC/27/37 para 25, p 9

²³ *A Democratic License to Operate*, Recommendation 2

sort of transparency that would usually apply to a public sector organisation. It is therefore imperative that the public be able to trust that those exercising the powers are doing so only in the way authorised by Parliament. A robust compliance regime, including visibly demanding external reporting and oversight, should provide considerable assurance to the public.”²⁴

36. A statutory Code of Practice that applies across the intelligence and security sector has the potential to provide a stronger protective mechanism against intrusive practices or “jurisdiction creep” than a policy-level compliance framework.
37. In addition, the Commission agrees with Anderson’s position that arbitrary distinctions should not be drawn between content data and communications data (meta-data). Instead, what is important is that such data may only be accessed pursuant to properly authorised requests, based on clear laws that are subject to independent judicial oversight.²⁵

Rights compliance

38. In recent submissions, the Commission has identified a number of concerns about the potential impact on human rights of the recent tranche of reforms to New Zealand’s intelligence and security laws.²⁶
39. The Commission has accordingly proposed that intelligence and security legislation includes both explicit reference to human rights principles and places an onus on officials to respect human rights in the course of implementing their statutory duties.²⁷
40. This approach reflects international human rights standards articulated in a number of recent UN reports and General Assembly resolutions²⁸. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, for example, has proposed a number of practice standards that include:
 - That all intelligence services are constituted through publicly available laws that comply with international human rights law²⁹.
 - That intelligence services are prohibited from undertaking any action that

²⁴ Rebecca Kitteridge, *Review of Compliance of the Government Communications Security Bureau* para 38, p 20, <http://www.gcsb.govt.nz/assets/GCSB-Compliance-Review/Review-of-Compliance.pdf>

²⁵ *A Question of Trust* para 13.12-13.14

²⁶ See Human Rights Commission, Reports and related materials on intelligence and security policy, 27 July 2015

²⁷ Human Rights Commission, Briefing to DPMC, para 2.4

²⁸ Such as General Assembly Resolution 68/178 on the Protection of human rights and fundamental freedoms while countering terrorism and Resolution 67/167 concerning the right to privacy in the digital age

²⁹ A/HRC/14/46, Practice 4, p 7

- contravenes international human rights law³⁰.
- That intelligence services and their oversight institutions take steps to foster an institutional culture based on respect for human rights, including training members on the relevant provisions of international human rights law.³¹
41. Furthermore, the OHCHR has observed a disconnect between the “clear and universal” framework for the promotion and protection of privacy under international human rights law and the inadequacy of the legislative frameworks of many States in providing safeguards and accountability for privacy violations³².
42. The OHCHR has also identified a “clear and pressing need for vigilance” in ensuring that surveillance policies and practices comply with international human rights law. Accordingly, the OHCHR has recommended that States review their national laws, policies and practices to ensure full conformity with international human rights law, and address any shortcomings through the adoption of a clear, precise, accessible, comprehensive and non-discriminatory legislative framework.³³
43. This Review provides an important opportunity for this type of human rights stock-take to take place. This should also include consideration of whether a specific statutory mechanism is required to ensure human rights compliant policy and practice. With this in mind, the Commission considers that a statutory Code of Practice could provide a basis for incorporating into legislation a set of human rights-complaint principles and related values that underpin national security policy and practice.
44. Further to this point, the UN Special Rapporteur Scheinin has observed that:
- “...it is good practice for national security and its constituent values to be clearly defined in legislation adopted by parliament. This is important for ensuring that intelligence services confine their activities to helping safeguard values that are enshrined in a public definition of national security...In many areas, safeguarding national security necessarily includes the protection of the population and its human rights; indeed a number of States explicitly include the protection of human rights as one of the core functions of their intelligence services.”³⁴*

Clarity and transparency

³⁰ *ibid*, Practice 5

³¹ A/HRC/14/46, *ibid*, Practice 19, p 17

³² A/HRC/27/37, para 47

³³ *ibid* para 50

³⁴ A/HRC/14/46 p 5, 6 (such as Switzerland, Croatia and Brazil)

45. The recent reviews of the UK's intelligence and security apparatus have emphasised the importance of having a clear, consistent legislative framework that is coherent, transparent and accessible. As Anderson notes:

*"The fact that the subject matter is technical is no excuse for obscurity. It should be possible to set out a series of limited powers, safeguards and review mechanisms with a high degree of clarity and... without technical jargon".*³⁵

46. Similarly, the ISR Panel lists "legislative clarity" as one of its ten tenets for testing legislation for intrusions against privacy, noting that while such legislation is not likely to be simple, it must be:

*"clearly explained in Codes of Practice that have Parliamentary approval, are kept up-to-date and are accessible to citizens, the private sector, foreign Governments and practitioners alike".*³⁶

47. UN reports also emphasise the importance of clear, accessible legislative language. UN Special Rapporteur Frank La Rue has recommended that legal frameworks governing communications surveillance measures meet *"a standard of clarity and precision that is sufficient to ensure that individuals have advance notice of and can foresee their application."*³⁷

48. The Commission is of the view that the statutory language in New Zealand's intelligence and security legislation is often less than clear or precise. In particular, the Commission has noted its concern that important terminology, such as the definition of "private communications" under s 4 of the GCSB Act, is vague and risks undermining reasonable expectations of privacy.³⁸

49. Another related example is the requirement under s 8D(1)(a) of the GCSB Act that the GCSB deliver its functions in a "human rights standards recognized by New Zealand law", which is ambiguous as to whether this includes ratified international human rights treaties. This is a crucial issue when considering the obligations that the GCSB has with regards to the right to privacy, a right that is guaranteed in international human rights law under Article 17 of the ICCPR, but conspicuously absent from the NZBORA.

A unified approach

³⁵ *A Question of Trust*, para 13.33

³⁶ *A Democratic License to Operate*, p xiv

³⁷ Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression Frank La Rue*, A/HRC/23/40, 17 April 2013, para 83, p 21

³⁸ Human Rights Commission, *Report to Prime Minister*, paras 27-28

50. Consideration could also be given to consolidation of the disparate collection of statutes that currently make up New Zealand's intelligence and security framework.
51. Anderson has notably recommended the consolidation of the UK's similarly disparate legislative framework into a single body of law with a single system of oversight that applies across the investigatory and intelligence agencies.³⁹
52. This approach has been largely endorsed by the other contemporaneous UK reviews. The ISR Panel, for example, has endorsed Anderson's conclusions and recommended the development of a comprehensive new law that consolidates existing statutes. The Intelligence and Security Committee of the UK Parliament also proposed, at an earlier stage, a similar unified approach.
53. The Commission also endorses the consideration of a similar unified approach for New Zealand's legislative framework. An exhaustive, transparent, rights-compliant unified statutory regime of the kind envisaged by Anderson⁴⁰ would constitute a significant improvement on the structure and accessibility of the current regime and would adhere more closely to international human rights practice standards.⁴¹

PART A - RECOMMENDATIONS: The legislative framework

- a. The Commission recommends that the Reviewers undertake a comprehensive review of New Zealand's intelligence and security legislation for consistency with international human rights law and norms.
- b. The Commission recommends that the Reviewers consider ways in which the clarity, accessibility and structure of New Zealand's intelligence and security legislation can be improved.
- c. The Commission recommends that the Reviewers consider the implications that inclusion of the right to privacy in the New Zealand Bill of Rights Act would have for intelligence and security law, policy and operations.
- d. The Commission recommends that the Reviewers investigate the implications of consolidating the NZ legislative framework into a unified structure.
- e. The Commission recommends that the Reviewers investigate the implications of developing a statutory Code of Practice for ensuring human rights compliance by intelligence and security agencies.

³⁹ *A Question of Trust*, para 13.44

⁴⁰ *A Question of Trust*, para 12.45

⁴¹ A/HRC/14/46, p 6, Practice 2

- f. The Commission recommends that the Reviewers consider statutory mechanisms (such as a statutory Code of Practice) for requiring human rights training for intelligence and security officials.

Part B: Oversight mechanisms

54. Oversight mechanisms are crucial components of a human rights compliant intelligence and security system. They have a critical safeguarding role in ensuring that powers are applied lawfully and in conformity with the State's human rights obligations.
55. In most jurisdictions, oversight of the intelligence and security services is carried out in a multi-lateral way by a combination of institutions located within the executive, judicial and legislative branches of Government. While there is no single model for intelligence oversight, effective systems will include the following features⁴²:
- Specialised oversight institutions with mandates and powers based on publicly available law.
 - At least one civilian institution that is independent of both the intelligence services and the executive.
 - A combined remit of oversight that covers all aspects of the work of intelligence agencies, including compliance with the law, including human rights, as well as administrative, financial and operative performance.
 - Power, resources and expertise to initiate and conduct investigations
 - Measures necessary to protect classified information and data accessed as a result of oversight work.
56. Among these functions, the independent scrutiny of compliance with laws and human rights obligations is a particularly important aspect of the intelligence and security system's public mandate. As UN Special Rapporteur Sheinin has noted⁴³:
- Intelligence oversight institutions serve to foster public trust and confidence in the work of intelligence services by ensuring they perform their statutory functions in accordance with respect for the rule of law and human rights.*
57. In New Zealand, these oversight institutions and their functions are spread over a

⁴² A/HRC/14/46 , Practices 6-8 p 8-10

⁴³ *ibid* p 9

number of statutes and are relatively disjointed, in reflection of the current nature of the legislative framework. The Inspector-General of Intelligence and Security primarily has the role of providing independent review of the compliance of intelligence and security agencies with their legal functions, and can receive complaints regarding individual cases. The Commissioner of Security Warrants, a retired High Court judge, is charged with authorising applications for warrants⁴⁴ under the New Zealand Security Intelligence Service Act 1969 and interception warrants (in conjunction with the Minister) under the GCSB Act⁴⁵. Parliamentary oversight is provided by the Intelligence and Security Committee⁴⁶.

58. It is notable that none of these institutions are expressly required to have any consideration of New Zealand's international human rights obligations, which serves to highlight the absence of the ICCPR Article 17 right to privacy from the NZBORA. The Inspector-General, the oversight mechanism responsible for compliance, is not explicitly required to regularly review operational policy and practice against human rights obligations or consider human rights impact⁴⁷, although they may consult with a Human Rights Commissioner when carrying out any of their inquiry, complaint and review functions⁴⁸. The Inspector-General is also required to review the 'legal compliance' of intelligence and securities agencies, however the statutory language indicates that this review function is limited to domestic law.⁴⁹
59. Furthermore, the Inspector-General's complaints inquiry functions are reasonably limited. The Inspector-General does not appear to have any authority to inquire into complaints regarding groups of people or systemic practices (such as racial or ethnic profiling for example), nor do they have jurisdiction to issue remedies to individual complainants. Redress is limited to the issue of a report that is furnished to the Minister and the agency chief executive.⁵⁰ Complainants have no right of access to that report. Instead, the Inspector-General is merely obliged to notify the complainant of their conclusions in limited terms⁵¹.
60. New Zealand's oversight mechanisms therefore have limitations when it comes to monitoring human rights compliance. The Commission has previously raised

⁴⁴ And providing authorisation for warrantless surveillance under s 41E(2)

⁴⁵ Section 15B

⁴⁶ The Commission supports the establishment of a Parliamentary Select Committee with cross-party political membership, see Human Rights Commission, Report to Prime Minister, p 13, para 55(a)

⁴⁷ Section 11(1) Inspector-General of Intelligence and Security Act

⁴⁸ Section 12 Inspector-General of Intelligence and Security Act

⁴⁹ Section 11(1) Inspector-General of Intelligence and Security Act

⁵⁰ *ibid* s 25

⁵¹ *ibid*

concern that the 2013 amendments did not establish an oversight regime sufficient to assure the public that appropriate scrutiny and supervision will occur.⁵²

61. In the UK, the Anderson report has recommended the consolidation of three independent oversight entities into one centralized Commission, entitled the Independent Surveillance and Intelligence Commission (ISIC). The ISIC model proposed by Anderson merges a number of judicial and bureaucratic functions together under the same roof, including:
 - Warrant oversight and authorisation (to be undertaken by Judicial Commissioners)
 - Capacity to carry out own-motion inquiries
 - Review and monitoring
 - Audit and inspection of intelligence and security services
62. Anderson proposes that the strong, centralized ISIC model brings a number of advantages due to its greater size and unified nature. This includes having much broader monitoring and investigation capabilities and a greater public profile.⁵³
63. The IRS Panel has similarly recommended that a consolidated approach is taken through the creation of a National Intelligence and Surveillance Office (NISO). However, unlike Anderson's proposal, the Judicial Commissioners who authorise and oversee that warrant process remain independent from the NISO⁵⁴.
64. The ISR Panel notes that a clear oversight regime is an essential aspect of maintaining public trust and confidence in intelligence and security services. Complex, obscure legal frameworks and institutions do not tend to serve the public well as they are difficult for the public to identify and access.⁵⁵
65. The Commission considers that the strong, centralised institutional models envisaged in the ISIC and NISO models ought to be considered for adaptation in New Zealand. The Commission considers that the current "sole office-holder" approach taken in New Zealand risks having insufficient capacity to undertake a suitably broad range of oversight functions⁵⁶.

⁵² Human Rights Commission, *Report to Prime Minister*, para 42, p 11

⁵³ *A Question of Trust*, para 14.97

⁵⁴ *A Democratic License to Operate*, Recommendations 17-19, p xviii

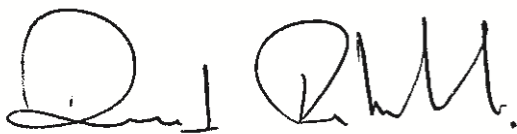
⁵⁵ *ibid* para 4.42-4.43

⁵⁶ see also Human Rights Commission, *Report to Prime Minister*, p 7, para 29

66. New Zealand is a small country and lacks the necessary level of resources, infrastructure and service demand to justify an entity on the scale of Anderson’s ISIC model. Our current oversight regime is far more minimal in terms of personnel and institutional scope than the UK’s incumbent model. Notwithstanding these inherent limitations, the notion of an independent Intelligence and Security Commission consisting of judicial commissioners that places the current Inspector-General and Commissioner for Security Warrants functions under one roof has some merit.
67. Such an approach may work to improve the institutional strength, scope and independence of New Zealand’s oversight regime. This approach would also complement a more integrated or unified legislative framework and the development of a statutory Code of Practice.

Part B: RECOMMENDATIONS – Oversight mechanisms

- g. The Commission recommends that the Reviewers investigate current and potential measures which enable oversight mechanisms to assess intelligence and security practices against New Zealand’s domestic and international rights obligations.
- h. The Reviewers investigate the implications of consolidating current oversight roles and functions into an independent centralised judicial entity such as an Intelligence and Security Commission

A handwritten signature in black ink, appearing to read 'D. Rutherford'.

David Rutherford
Chief Commissioner