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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Fifth periodic reports of States parties

NEW ZEALAND∗

[24 December 2007]

∗ In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not edited before being sent to the United Nations translation services.

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Introduction

1. This is the Fifth Report of the New Zealand Government, submitted under Article 40, paragraph 1 (b) of the International Covenant on Civil and Political Rights ("the Covenant"). The report supplements New Zealand's Initial Report submitted in January 1982 (CCPR/C/10/Add.6), the Second Report submitted in June 1988 (CCPR/C/37/Add.8), the Third Report submitted in December 1993 (CCPR/C/64/Add.10) and the Fourth Report submitted in March 2001 (CCPR/C/NZL/2001/4).

2. This report covers the period from January 1997 to December 2007 and has been prepared in accordance with the guidelines regarding the form and content of periodic reports from States Parties (CCPR/C/20/Rev.2). Reference should also be made to the core document on New Zealand (HRI/CORE/1/Add.33).

3. To keep the present report to a reasonable length, much supporting information has been incorporated in Annexes. It also should be noted that information about Parliament, the courts, legislation, and Government activity is readily available www.govt.nz. Legislation referred to in this report can be found at www.legislation.govt.nz.

4. A draft of this report was circulated for public comment in late October 2007, resulting in the receipt of 14 submissions that were considered in the preparation of the final report.

I. GENERAL

Overview

5. The Covenant rights remain central to New Zealand law, policy and society. In *Human Rights in New Zealand Today: Nga Tika Tangata O Te Mōtū*, released in 2004 (attached as Annex A), the Human Rights Commission noted that:

> New Zealand meets international human rights standards in many respects, and often surpasses them. Although New Zealand is not flawless, the report [Human Rights in New Zealand Today] shows that we have most of the elements essential for the effective protection, promotion and fulfilment of human rights: democracy, the rule of law and an independent judiciary free of corruption; effective structures of governance; specific processes for human rights and other forms of accountability; recognition of the vulnerability of particular groups and individuals; and active, involved, diversely organised citizens .... New Zealanders are generally free to say what we think, read what we like, worship where and when we choose, move freely around the country and feel confident in laws that protect us from discrimination and the arbitrary abuse of power.

6. The period under review has seen some significant developments in the way in which New Zealand gives effect to the rights recognised in the Covenant.

7. The Supreme Court of New Zealand was established by the Supreme Court Act 2003 and has delivered key judgements on Covenant rights:

- *R v. Hansen* [2007] 3 NZLR 1 (attached as Annex B and discussed at paragraphs 14-15 and 19), in which a majority of the Court clarified that it is necessary to ascertain

whether a particular limit on a right is demonstrably justifiable under section 5 of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act") before applying alternative meanings under section 6 of that Act

- *Taunoa & others v. Attorney General* [2007] 2 NZLR 457 (attached as Annex C and discussed at paragraphs 205 to 209), in which the Court upheld judgments that treatment of five current or former prisoners had been in breach of section 23(5) of the Bill of Rights Act but could not be characterised as cruel, degrading or disproportionately severe

- *Brooker v. Police* [2007] 3 NZLR 91(attached as Annex D and discussed at paragraph 293) , in which the Court affirmed that protest constituted expressive behaviour that is protected by section 14 of the Bill of Rights Act and did not constitute "disorderly behaviour" in that instance and

- *Rogers v. Television New Zealand* [2007] NZSC 91(attached as Annex E and discussed at paragraphs 276-280), in which the Court affirmed the existence of a tort of invasion of privacy, as described by the Court of Appeal in *Hosking v. Runting* [2005] 1 NZLR 1, and further defined the scope of that tort

8. Significant enactments during the reporting period include the:

- Human Rights Amendment Act 2001 which, among other things: (a) removed the exemption from the Human Rights Act 1993 for certain government activities and made most government activity subject to the single discrimination standard under the Bill of Rights Act; and (b) reformed the Human Rights Commission and conferred on the Human Rights Review Tribunal the ability to make declarations of inconsistency in respect of discriminatory legislation

- Civil Union Act 2004, which allowed two people to formalise their relationship by entering into a civil union, whether they are of different sex or the same sex

- Relationship (Statutory References) Act 2005, which gave statutory recognition in a wide range of Acts to civil union and de facto couples where it was previously restricted to married couples

- Care of Children Act 2004, which repealed and replaced the Guardianship Act 1968 with an updated Act to promote children's welfare

- Armed Forces Law Reform Bill 2007 (enacted as four separate Acts), which improved the compliance of the military justice system with the New Zealand Bill of Rights Act 1990 and the Covenant

9. Other significant developments are:

- *New Zealand Action Plan for Human Rights*, (attached as Annex F) developed by the Human Rights Commission, setting human rights outcomes to which New Zealand should aspire and approximately 180 "priorities for action" to achieve the outcomes

- *Action Plan for New Zealand Women* (attached as Annex G), a five-year plan, starting in 2004, sets out an integrated approach to improving the circumstances of women in New Zealand

- Withdrawal of New Zealand's remaining reservations to the Convention on the Elimination of all forms of Discrimination Against Women (related to paid parental leave and service in the Armed Forces) as well as initiating steps to remove two reservations to the United Nations (UN) Convention on the Rights of the Child (related to age-mixing in detention and immigration status in accessing publicly-funded services) and one to the Covenant (also related to age-mixing)

- Ratification of Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) which provides for National Preventive Mechanisms to access places of detention

- *Statement on Religious Diversity* (attached as Annex H)developed as a community based initiative through the New Zealand Diversity Action Programme and

- Creation of the Families Commission in July 2004 to actively speak out for better policies, services and support for all New Zealand families and whānau

New Zealand Bill of Rights Act 1990

10. In its concluding comments on New Zealand's Fourth Periodic Report, the Committee noted that it is possible, under the terms of the Bill of Rights Act, to enact legislation that is incompatible with the provisions of the Covenant. The Committee recommended that New Zealand take appropriate measures to implement all the Covenant rights in domestic law and to ensure that every victim of a violation of Covenant rights has a remedy in accordance with Article 2 of the Covenant.

11. New Zealand's Third Periodic Report sets out a short history of the course of events that led to the enactment of the Bill of Rights Act (see paragraph 6 of that report). Further information was provided in New Zealand's Fourth Periodic Report (see paragraph 9 of that report). The principal reason that Parliament decided against according the Bill of Rights Act a higher status than ordinary legislation was that to do so would involve a significant shift in the constitutional balance of power from Parliament to the judiciary. It was also considered that such a fundamental shift might lead subsequently to some intrusion of political factors into the appointment of members of the judiciary.

12. Although the courts cannot strike down legislation, they do wield considerable power in protecting rights and freedoms. This has been achieved in a number of ways, including the judicial creation of new remedies to give effect to the rights guaranteed by the Bill of Rights Act and the use of the direction in section 6 of the Bill of Rights Act that legislation be interpreted consistently with rights and freedoms where possible.

Judicial Opinion on Incompatibility

13. The previous periodic report noted (at paragraph 18) that the Court of Appeal in *Moonen v. Film and Literature Board of Review* [2000] 2 NZLR 9, 17 (*Moonen*) (attached as Annex I) observed:

> [that it had] the power, and on occasion the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the United Nations Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum.

14. It is still unclear whether the courts have jurisdiction to issue a formal declaration of incompatibility. However, in the recent decision of the Supreme Court in *R v. Hansen* [2007] 3 NZLR 1 (*Hansen*), a majority of the Court indicated that section 6(6) of the Misuse of Drugs Act 1975, which establishes a presumption that a person in possession of specified quantities of illegal drugs has the intention of selling or supplying those drugs, was inconsistent with the presumption of innocence affirmed in section 25(c) of the Bill of Rights Act.

15. Soon after the decision of the Supreme Court was delivered, the Attorney-General cited it in support of his advice to Parliament under section 7 of the Bill of Rights Act. The Attorney-General concluded that the Misuse of Drugs (Classification of BZP) Amendment Bill, in extending the scope of the Act to a new drug, was inconsistent with section 25(c) for the reasons outlined by the Supreme Court in *Hansen*. The Bill is still before Parliament.

16. The Health Select Committee (a Committee of Parliament) considered the Bill and, in reporting back to the House, paid close attention to the report of the Attorney-General.[1] The Committee concluded that no change to the Bill was required because the Act as a whole is currently under review. The review was commenced for reasons unrelated to the possible inconsistency with the Bill of Rights Act, but will now include that matter in its terms of reference.

Section 6 of the Bill of Rights Act

17. Section 6 of the Bill of Rights Act requires that, wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in that Act, that meaning will be preferred to any other meaning.

18. The previous periodic report noted, at paragraph 22 that in *Moonen* the Court of Appeal stated that "where an enactment can be given a meaning that is consistent with the rights and

[1] A copy of the report is available http://www.parliament.nz/NR/rdonlyres/4F36FA79-8AD6-4845-B3EC-179DAD6AAAB0/69552/DBSCH_SCR_3903_55991.pdf. See page 6 for a discussion of the Bill of Rights Act.

freedoms contained in the Bill of Rights, that meaning shall be preferred to any other. Thus if there are two tenable meanings, the one which is most in harmony with the Bill of Rights must be adopted". The Court had set out a five-stage approach:[2]

- Identify the different interpretations of a provision that are properly open
- If more than one meaning is available, identify the meaning which constitutes the least possible limitation on the relevant right or freedom
- Having adopted that meaning, determine the extent to which it limits the relevant right or freedom
- Consider whether the limitation can be demonstrably justified in a free and democratic society, taking into account the objective and
- Indicate whether the limitation is or is not justified and, if not, may declare it to be inconsistent

19. In *Hansen*, a majority of the Supreme Court clarified that it is necessary to ascertain whether a particular limit on a right is demonstrably justifiable before applying the interpretative rule in section 6 of the Bill of Rights Act.

Section 7 of the Bill of Rights Act

20. Section 7 of the Bill of Rights Act requires the Attorney-General to bring to the attention of the House of Representatives any provision in a Bill that appears to be inconsistent with the rights and freedoms contained in that Act:

(a) On introduction in the case of a Government Bill; or

(b) As soon as practicable after introduction for any other Bill.

21. Since the enactment of the Bill of Rights Act, the Attorney-General has tabled reports in respect of 42 Bills introduced into the House of Representatives.[3]

22. Section 4 of the Bill of Rights Act, which provides that no provision in any enactment can be held impliedly repealed or in any way invalid or ineffective merely because the provision is inconsistent with the Bill of Rights Act, does not form any part of the Attorney-General's consideration of a Bill under section 7. It does not limit the ability of the Attorney-General to bring a Bill to the attention of the House.

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[2] *Moonen v. Film and Literature Board of Review* [2000] 2 NZLR 9, 16.

[3] This figure includes 19 Government Bills and 23 Non-Government Bills (as at December 2007).

23. If the Attorney-General presents a report to the House under section 7, it does not prevent the Bill from proceeding or being enacted into law. The purpose of the report is to provide information to members in their deliberations but the opinion of the Attorney-General is merely an opinion. In some circumstances legal commentators have questioned whether a Bill subject to a report does infringe upon the Bill of Rights Act while, on other occasions, it has been suggested that a report ought to have been made when one was not. The New Zealand Government regards differences of opinion on the exercise of the power in particular cases as inevitable and a sign of healthy debate.

24. The responsibilities of the Attorney-General under section 7 of the Bill of Rights Act are supported by internal government processes designed to promote the consideration of human rights at the early stages of policy development. All submissions to Government on policy proposals and Government Bills must include a statement on the consistency of the proposal or legislation with both the Bill of Rights Act and the Human Rights Act.

25. Each government department has to make its own assessment; however, departments will frequently consult either the Ministry of Justice or the Crown Law Office. The Ministry of Justice provides the Attorney-General with advice on the consistency of all Bills (other than Bills developed by the Ministry of Justice) with the Bill of Rights Act. Advice on Justice Bills is provided by the Crown Law Office. In most cases, the Ministry will work closely with the sponsoring agency to ensure that successive versions of the Bill comply with the Bill of Rights Act. This process enables most human rights concerns to be addressed before the Bill is introduced into Parliament.

26. Since 2003, Bill of Rights advice on Bills has been made available on the Ministry of Justice website. The advice often discusses possible limitations on rights that do not amount to an inconsistency with the Bill of Rights Act. The purpose of publication is to make Parliament and members of the public aware of the human rights issues associated with a Bill and assist them to consider whether changes need to be made to the Bill. From time to time select committees have also asked the Attorney-General to make officials available to provide Bill of Rights advice on the provisions of a Bill as introduced or any proposed changes. Legal assistance is also available from the Office of the Clerk (an Officer of Parliament).

Supreme Court of New Zealand

27. A significant development during the reporting period was the establishment of the Supreme Court as the final court of appeal in New Zealand.

28. Prior to the establishment of the Supreme Court, New Zealand's highest court of appeal was the Judicial Committee of the Privy Council ("the Privy Council"). Sitting in London, the Privy Council dealt with a small number of appeals each year (usually fewer than ten). Criminal appeal cases could be appealed only with the leave of the Privy Council, which was usually granted only if a substantial point of law needed to be resolved. The Privy Council was traditionally the final court of appeal for many Commonwealth countries. Over time, as the various colonies established their independence, many replaced the Privy Council with their own court of final appeal.

29. In December 2000 the Government approved the release of a discussion paper entitled *Reshaping New Zealand's Appeal Structure*. It invited public comment on three options to replace the Privy Council. Submissions were evenly divided on whether appeals to the Privy Council should be abolished or retained; however, there was a clear consensus that, if appeals to the Privy Council ended, a replacement stand-alone court sitting above the Court of Appeal should be established.

30. Further public consultation culminated in the report of a Ministerial Advisory Group which formed the basis of a Supreme Court Bill. The Bill was introduced in 2002, and enacted on 17 October 2003. The Act came into force on 1 January 2004, establishing the Supreme Court and ending appeals to the Privy Council in relation to all decisions of New Zealand courts made after 31 December 2003. The right to appeal to the Privy Council remains for decisions made before that date. The Supreme Court was formally established when the Act came into force, and was empowered to hear appeals from 1 July 2004.

Terrorism Suppression Act 2002

31. In its concluding comments on the previous periodic report, the Committee noted that New Zealand is under an obligation to ensure that measures taken to implement Security Council resolution 1373 are in full conformity with the Covenant, including that the definition of terrorism does not lead to abuse (and is in conformity with the Covenant).

32. The Terrorism Suppression Act 2002 ("TSA") was enacted in order to meet New Zealand's obligations under Security Council resolution 1373. At the time of the terrorist attacks of 11 September 2001, the Terrorism (Bombing and Financing) Bill ("the Bill") was already before Parliament. The purpose of that Bill was to implement in New Zealand law the International Convention for the Suppression of Terrorist Bombings, and the International Convention for the Suppression of the Financing of Terrorism.

33. Following the adoption of resolution 1373, the New Zealand Government decided that the Bill should be used as the vehicle for implementing New Zealand's obligations under the resolution. The Bill was seen as a better vehicle for implementing the serious measures called for in the resolution than regulations made under the United Nations Act 1946, which is the usual method for giving effect to UN sanctions.

34. The TSA creates offences that effectively prohibit dealings with the property of designated terrorists, or providing services to them. It includes the offences of recruitment to, and participation in, terrorist groups. The official assignee may take control of frozen property so that it can be preserved during the designation period. Financing of terrorist acts is a criminal offence where the donor or collector of funds intends or knows the funds are to be used for a terrorist act. An amendment in 2007 added a general offence of committing a terrorist act.

35. The 2007 amendment also implemented the International Convention for the Suppression of Acts of Nuclear Terrorism, and amendments to the Convention on the Physical Protection of Nuclear Material. The two treaties oblige New Zealand to create new offences concerning the use of radioactive material and radioactive devices.

36. To be convicted of an offence associated with terrorism, a person has to be tried in the usual way, with evidence establishing guilt beyond reasonable doubt.

Definition of Terrorism

37. The Government was conscious of the fact that, in implementing resolution 1373, effective anti-terrorism measures needed to be put in place without infringing on individual rights and freedoms. Careful consideration was given to the definition of a terrorist act in order to avoid including legitimate activities or criminal activity that is better dealt with by other parts of the criminal law.

38. Section 5 of the TSA defines a terrorist act as an act carried out for the purpose of advancing an ideological, political, or religious cause; and with the intention to induce terror in a civilian population or to unduly compel or force a government or an international organisation to do or abstain from doing any act. In order to be a terrorist act, the act must also be intended to cause:

(a) Death or serious bodily injury;

(b) Serious risk to the health or safety of a population;

(c) Serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life;

(d) Destruction of, or serious damage to, property of great value or importance; major economic loss; or major environmental damage, if likely to result in one or more of the outcomes specified above; or

(e) Introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.

39. The definition in the TSA clearly differentiates terrorism from protest or industrial action. Section 5(5) states that any act of protest, advocacy, dissent, strike, or lockout is not a sufficient basis for inferring the necessary intention or outcome required to be considered a terrorist act.

Designation Procedure

40. The TSA includes two mechanisms to identify the individuals and groups to which the anti-terrorism provisions apply. First, the Prime Minister may designate an entity as a terrorist entity if the Prime Minister believes on reasonable grounds that the entity has knowingly carried out, or has knowingly participated in the carrying out of, one or more terrorist acts. Before designating an entity as a terrorist entity, the Prime Minister must consult with the Attorney-General about the proposed designation.

41. Secondly, persons and entities on the UN terrorist list, established under Security Council resolution 1267 and its successor resolutions which form the Security Council's Al Qaeda and Taliban sanctions regime, are automatically designated under the TSA.

42. As originally enacted, designations under the TSA expired unless renewed by the High Court. This process was changed by the 2007 amendment. Under the new procedure, designations made by the Prime Minister continue to expire after three years but then can be renewed by the Prime Minister. The Prime Minister may only renew designations if satisfied, on reasonable grounds, that the entity continues to be engaged in terrorist activity. This amendment makes the TSA consistent with anti-terrorism legislation in other comparable jurisdictions where decisions at the renewal stage are made by the same person who made the original designation and the same test is applied. Any decision by the Prime Minister to designate an entity, or a decision not to revoke a designation, is still susceptible to normal judicial review proceedings.

43. Following the 2007 amendment, the Prime Minister must now report the renewal of terrorist designations to the New Zealand Intelligence and Security Committee. The Committee comprises the Prime Minister; the Leader of the Opposition; two Members of Parliament nominated by the Prime Minister following consultation with the leader of each party in Government; one Member of Parliament nominated by the Leader of the Opposition, with the agreement of the Prime Minister, following consultation with the leader of each party not in the Government or in coalition with a Government party.

44. In respect of designations made under resolution 1267, it became apparent that the automatic expiry of the designations after three years was inconsistent with the obligation that the entities are designated for as long as they are on the UN terrorist list. Following the 2007 Amendment, entities designated under resolution 1267 will remain designated in New Zealand for as long as they remain designated by the UN, without needing to be renewed by the High Court.

Operation of the TSA

45. Section 67 of the TSA requires the consent of the Attorney-General before any prosecution can be commenced under the Act. The Attorney-General has delegated that power to the Solicitor-General. The Solicitor-General acts entirely independently of the Government of the day.

46. One case has been referred to the Solicitor-General under section 67 of the TSA; however, the Solicitor-General did not consent to charges being laid under the Act. The Solicitor-General noted some procedural difficulties connected with the TSA and recommended that it be referred to the New Zealand Law Commission for review. This recommendation was adopted by the Government. The Law Commission is an independent organisation which reviews areas of the law that need updating, reforming or developing. It makes recommendations to Parliament which are also published in its reports series.

II. INFORMATION RELATING TO SPECIFIC ARTICLES

Overview

47. In this Part, reference is made to significant changes to legislation, policies and practices relating to human rights as well as important judicial decisions made during the reporting period. Issues raised by the Human Rights Committee during consideration of New Zealand's Fourth Periodic Report are discussed and in some cases elaborated upon, and inquiries on progress at

the end of the last reporting period are updated. Only those articles of the Covenant in respect of which there have been relevant changes or developments are addressed. Comments made by the Committee are dealt with as follows in this report:

Status of the Bill of Rights Act as an Ordinary Statute

48. The reasons why Parliament decided against according the Bill of Rights Act a higher status than ordinary legislation and the operation of the Bill of Rights Act in New Zealand law, is described in paragraphs 10 to 26 above.

Consistency of Anti-Terrorism Measures with Covenant Rights

49. Paragraphs 31 to 46 above explain the provisions of the Terrorism Suppression Act 2002, including the definition of terrorism. Paragraphs 245 to 258 explain the process for removing immigration risks offshore as well as the case of Ahmed Zaoui. Mr. Zaoui was the subject of a security risk certificate issued by the Director of Security but has been allowed to stay in New Zealand. Paragraph 138 describes the proposed codification of New Zealand's non-refoulement obligations with reference to Articles 6 and 7 of the Covenant.

Sentence of Preventive Detention

50. Paragraphs 152 to 163 of this report explain the principles underlying the sentence of preventive detention and provide information on its use. Paragraphs 261 to 264 deal with the Committee's specific concerns with retrospectivity. A sentence of preventive detention cannot be imposed retrospectively. The Sentencing Act 2002 provides that an offender is liable for preventive detention for an offence committed before the Act came into force only if the offending qualified for preventive detention in terms of section 75(4) of the Criminal Justice Act 1985, and if the Court would have imposed such a sentence under that Act.

Treatment of Persons Deprived of their Liberty

51. Paragraphs 196 to 200 of this report outline the mechanisms in the Corrections Act 2004 and regulations for the monitoring of treatment of prisoners. Paragraph 219 explains the new oversight role of the Ombudsmen. Paragraphs 231 to 233 of this report describe the positive steps New Zealand has taken towards lifting its reservation to Article 37(c) of the UN Convention on the Rights of the Child and Article 10 of the Covenant in respect of age-mixing. Paragraphs 221 to 230 describe the operation of prisoner transport services including the findings of an Ombudsmen's inquiry prompted, in part, by the death of 17-year-old remand prisoner Liam Ashley who died as a result of injuries sustained while being transported in a van with other prisoners. Finally, paragraphs 234 to 235 update the Committee on the contract for the management of Auckland Central Remand Prison. Management of the prison was transferred back to the Public Prisons Service on 13 July 2005.

Returning Residents Visas for Permanent Residents and Some Citizens

52. The circumstances under which a permanent resident or New Zealand citizen requires a returning resident visa are described in paragraphs 236 to 237 of this report. The Immigration Bill currently before Parliament includes changes to facilitate the entry into New Zealand of permanent residents and citizens travelling on foreign passports.

Prohibited Grounds of Discrimination in the Human Rights Act 1993

53. As explained in the Fourth Periodic Report, the Government considers New Zealand law to ensure that the grounds of discrimination are effectively proscribed (see paragraphs 241-244 of that report). In particular, language has been dealt with under complaints on the ground of race (paragraphs 398 to 399).

Māori Disadvantage in Health, Education and Employment and Low Proportion of Māori in Parliament, Public Office, etc.

54. As noted in the fourth periodic report (at paragraph 53), there have been some improvements in eliminating disparities between Māori and non-Māori but much remains to be done (paragraphs 412 to 442).

Article 1

Tokelau

55. Under a programme of constitutional devolution developed in discussions with Tokelau leaders in 1992, Tokelau (with New Zealand's support) has developed institutions and patterns of self-government to enable its people to make a valid choice, under an act of self-determination, concerning their future political status. As a first step, that part of Government which deals with the interests of all of Tokelau was returned to Tokelau in 1994. In 2003 the Administrator's powers were formally delegated to the three Village Councils and the General Fono.

56. Since 2003 work has been carried out in Tokelau and in New Zealand on a draft Constitution and draft Treaty of Free Association with New Zealand. These documents would form the basis of a new status for Tokelau - to be self governing in free association with New Zealand - if this was chosen by Tokelau under an act of self-determination. Two referenda on this change in status have since taken place in Tokelau under UN supervision; one in February 2006, and again in October 2007. On both occasions, the requisite two-thirds majority for a change in status was not reached. Tokelau therefore remains a non-self governing territory under the administration of New Zealand. New Zealand and Tokelau will continue to work together in the interests of Tokelau and its people, taking into account the principle of the right to self-determination.

Article 2

Remedies Under the New Zealand Bill of Rights Act 1990

57. The previous periodic report described remedies available under the Bill of Rights Act, including the ability to award damages (see paragraphs 12-19 of that report).

58. The Court of Appeal decision in *Drew v. Attorney-General* [2002] 1 NZLR 58 (attached as Annex J) confirmed that it is possible for the courts to strike down or invalidate regulations as ultra vires if:

(a) The regulations contain unjustified inconsistency with a right or freedom affirmed in the Bill of Rights Act; and

(b) That unjustified inconsistency was not clearly authorised or required by the regulation-making provision of the statute.

Human Rights Amendment Act 2001

59. The Human Rights Act prohibits discrimination on the grounds set out in section 21 of that Act. The Human Rights Commission (HRC) is an independent statutory body set up to protect human rights in New Zealand. The Commissioners are appointed to operate collectively to undertake strategic leadership, advocacy and education in human rights and to provide leadership and direction to the work of the Commission as a whole. They are supported by the General Manager and staff of the Commission.

Consistency 2000 and Compliance 2001

60. Prior to the enactment of the Human Rights Amendment Act 2001, the Human Rights Act contained a broad exemption for all legislation and for non-legislative government activities that discriminate on the grounds of disability, age, political opinion, employment status, family status or sexual orientation.

61. The Consistency 2000 project required the HRC to identify all legislative provisions and Government policies and practices which conflicted with the Human Rights Act, or infringed the spirit and intention of the Act, and report to the Minister of Justice before 31 December 1998. The Compliance 2001 process required all government departments to provide reports to their Ministers and the Ministry of Justice by 2 March 2001 on the consistency of legislation with the Human Rights Act. Following that audit process, the Human Rights Amendment Act was enacted and came into force on 1 January 2002.

62. The Human Rights Amendment Act made significant changes to the Act:

- Government activity (except in relation to employment, sexual or racial harassment and victimisation, which are subject to the general provisions of Part 2 of the Act) is now subject to the single discrimination standard under section 19(1) of the Bill of Rights Act
- The broad exemption from the Human Rights Act for certain government activities was removed
- Institutional reform of the HRC including:
    - Disestablishment of the Race Relations office and establishment of a Race Relations Commissioner
    - Disestablishment of the complaints division and a new focus on resolution and mediation of complaints and

- Establishment of an independent Office of Human Rights Proceedings to undertake discrimination cases with public funding and

- Ability of the Human Rights Review Tribunal to make declarations of inconsistency in respect of discriminatory legislation

Anti-Discrimination Standard

63. The Bill of Rights Act and the Human Rights Act apply different approaches in determining whether a particular activity leads to unlawful discrimination. The Human Rights Act makes discrimination unlawful in certain specified areas of activity such as the provision of goods and services or employment. Part 2 of the Human Rights Act includes numerous exceptions for activities that would otherwise be unlawful discrimination. Section 19 of the Bill of Rights Act affirms a general right to be free from discrimination by Government or any person performing a public function, power or duty. The Bill of Rights Act uses the same grounds of discrimination as the Human Rights Act, but, in recognition of the wide and diverse range of activities undertaken by Government, it is not limited to defined areas of activity. Instead of specific exemptions the right is subject to reasonable limits that can be demonstrably justified in a free and democratic society. This standard is applied to the full range of government activity (except employment) and requires the Government to provide robust justifications for any discriminatory activities.

64. The Human Rights Amendment Act incorporated the Bill of Rights Act anti-discrimination standard into the Human Rights Act in relation to government activity. This means that the Bill of Rights Act standard is now the sole discrimination standard all government activities must comply with, except employment policies and practices and the related areas of racial and sexual harassment. Government employment practices are still subject to the Human Rights Act standard because there is no material difference in law between private and public sector employment.

Government Exemption

65. The removal of the previous exemption for certain government activities now requires the government to justify any continuing discrimination under the Bill of Rights Act. In so doing it provided a further incentive to the public sector to focus, as had already occurred as part of the policy process, on the human rights implications of policy at an early stage in the policy-making process. This process, referred to as mainstreaming of human rights, involves early consideration of human rights and leads to good public policy. Good governance, fairness and equality are key principles underpinning social cohesion and long-term economic development.

66. The Act made a range of statutory amendments to address a large number of discriminatory provisions that were identified during the Consistency 2000/Compliance 2001 audits to remove unjustifiable discrimination. For example, a number of Acts were amended to extend “next-of-kin” status to include de facto relationships. A large number of Acts were amended by replacing “disability” as a ground for removal from statutory appointments with “inability to perform the functions of the office”. The litigation processes in the Human Rights Act cannot be used to disrupt immigration decisions, and the Human Rights Review Tribunal cannot issue declarations of inconsistency in relation to immigration legislation. However, the

Human Rights Amendment Act narrowed the specific exemption concerning immigration decision-making and ensured the HRC is able to exercise its other inquiry, public statement and reporting functions with regard to immigration matters generally.

Institutional Change in the Human Rights Amendment Act

67. In May 2000, the New Zealand Government commissioned an independent panel of experts to report on New Zealand's human rights protections. The panel investigated the roles, operation, and structures of the HRC, Race Relations Conciliator, Privacy Commissioner and Complaints Review Tribunal. The panel also considered how best to enhance the effective promotion and enforcement of New Zealand's domestic human rights laws.

68. Following the panel's report, the Human Rights Amendment Act amalgamated the HRC and the Office of the Race Relations Conciliator. The combined office retains the name of the Human Rights Commission. It has a full-time Chief Human Rights Commissioner, Race Relations Commissioner, and Equal Employment Opportunities Commissioner as well as up to five part-time Commissioners.

69. The new HRC has a focus on:

- Increasing public understanding of the importance of civil, political, economic, social and cultural rights in underpinning a free, democratic and cohesive society that respects and values difference

- Leading constructive discussion within the community on the various dimensions of human rights issues and

- Encouraging positive interaction between different individuals, groups, communities and cultures within society

70. The new HRC not only deals with complaints and the resolution of disputes concerning discrimination, but is also focused strategically on all human rights and on community leadership and education work about those rights. The Race Relations Commissioner continues to take a lead role in matters related to race but merging the two offices is also designed to stimulate wider debate and dialogue on the Treaty of Waitangi, indigenous peoples' rights and human rights. Race relations are a primary focus for the HRC.

71. The HRC is able to effectively perform the dual functions of promoting and educating New Zealanders about all human rights. It provides a publicly-funded complaints process for allegedly discriminatory activities. With the introduction of a more accessible and robust dispute resolution process, New Zealanders have greater protection from Governments exercising potentially discriminatory power as well as discrimination in the private sector.

72. The Human Rights Amendment Act allowed the HRC and the Human Rights Review Tribunal to deal with all discrimination complaints, including those about legislation, the Government and the public sector. The purposes of the Human Rights Amendment Act were: to

provide greater public sector accountability for, and compliance with, human rights obligations; strengthen New Zealand's human rights institutional framework and enhance the processes for resolving disputes about discrimination.

73. An autonomous Office of Human Rights Proceedings headed by the Director of Human Rights Proceedings has replaced the Proceedings Commissioner. The Office and the Director provide publicly-funded representation to complainants in proceedings under the Human Rights Act, with decisions on representation guided by criteria in the Act.

74. The procedures for complaints and proceedings under the Human Rights Act apply to both government and non-government action. The distinction is that government action (other than employment, harassment and victimisation) is dealt with under Part 1A of the Act and private activity (and claims concerning employment, harassment or victimisation) under Part 2. The complaints process contains the following key elements:

- Single entry point for complaints through the HRC
- If the complaint is about a private sector activity, the complaint is considered under part 2; if it is a governmental activity, the complaint is considered under part 1A
- The HRC attempts to resolve the complaint informally, including by mediation
- Where mediation has been unsuccessful, a complainant may elect to bring proceedings before the Tribunal and may seek representation from the Office of Human Rights Proceedings
- The Tribunal determines the proceedings arising from the complaint and may order a range of remedies and
- Parties to proceedings may appeal to the courts

Dispute resolution

75. All problems or complaints relating to government, as well as non-government, discrimination, are dealt with through a publicly funded dispute resolution process under the Act. The initial dispute resolution process is faster and more informal, and the complaints process as a whole is more within the control of the parties themselves. The HRC's role is to assist the parties to resolve the dispute by providing dispute resolution services, including information gathering, expert advice, and mediation.

76. The Human Rights Amendment Act enhanced the processes for resolving disputes about discrimination. Instead of the HRC making determinations and controlling how the complaint progresses, the HRC now focuses on empowering the parties by providing them with relevant information and assisting them to reach a mutually acceptable resolution.

Human Rights Review Tribunal

77. If mediation fails or is inappropriate, the complainant (or person aggrieved or the Commission) may take the case to the Human Rights Review Tribunal for adjudication. The

Director of Human Rights Proceedings is able to decide whether to provide complainants with representation and publicly funded litigation assistance. The Director's functional independence from the HRC is important because it helps to keep this litigation role separate from the broader advocacy, education and mediation roles of the HRC.

78. Where Government policies or practices are found by the Tribunal or the Courts to contain unjustified discrimination, the full range of remedies in the Human Rights Act are available. These include financial damages, orders to perform actions to redress the loss suffered by the complainant, orders to refrain from repeating the discriminatory activity, or declarations that the Government has breached the Act.

79. When statutes or regulations are found to contain unjustified discrimination, the Human Rights Amendment Act empowers the Human Rights Review Tribunal to make declarations that a statute or regulation is inconsistent with the Bill of Rights Act because it contains unjustified discrimination. The Tribunal does not have jurisdiction to invalidate regulations but has a power of referral in such cases to the High Court, which has jurisdiction to do so.

80. A declaration of inconsistency in respect of any enactment made by the Tribunal requires the responsible Minister to bring the declaration to the attention of the House, along with the Government response to that declaration. The objective of declarations is to draw to the attention of Parliament legislation or regulations that, in the view of the Tribunal, contain an unjustified inconsistency with section 19 of the Bill of Rights Act. To date, the Tribunal has not exercised its ability to make a declaration of inconsistency.

Child Poverty Action Group Incorporated v Attorney-General [2005] NZHRRT 28

81. This is one of the first proceedings under Part 1A of the Human Rights Act. The claimant, a non-governmental organisation, is represented by the Office of Human Rights Proceedings. The claimant alleges that the provision for an in-work tax credit to low-to-middle income families discriminates on the grounds of "employment status", as recipients of income-tested benefits are ineligible for the credit. On a jurisdictional point, the Tribunal and, on appeal, the High Court has held that the claimant group could bring the proceedings itself, without any affected party directly involved. The proceedings are to be heard in 2008.

New Zealand Action Plan for Human Rights

82. The Ministerial Report on the Re-evaluation of Human Rights Protections in New Zealand 2000 recommended that New Zealand develop a national plan of action that would outline goals, objectives and actions in the human rights field. Following that report, the Human Rights Amendment Act charged the HRC with developing a national plan of action for human rights. The purpose of the New Zealand Action Plan for Human Rights (NZAPHR) was to encourage a broader and more complex understanding of human rights and support for them, both in public policy-making and in society at large.

83. The development of the NZAPHR relied on an assessment by the HRC of the current status of human rights, based on analysis of law, policy, research, and consultation with the public, non-governmental organisations and government departments and agencies. This was published in September 2004 as *Human Rights in New Zealand Today*.

84. The NZAPHR also built on the pressing issues identified in *Human Rights in New Zealand Today* and included further public engagement and consultation with government departments and agencies. The HRC presented the NZAPHR to the Government on 31 March 2005.

85. The NZAPHR sets out a substantial number of "outcomes" for New Zealand to aspire to, grouped under six headings:

- Getting it right for children and young people
- Getting it right for disabled people
- Getting it right in race relations
- Civil and political rights
- Economic, social and cultural rights and
- Getting the framework right: protecting and promoting human rights in New Zealand

86. The HRC developed approximately 180 "priorities for action" for achieving each of its respective "outcomes".

Government Response to the NZAPHR

87. Given the wide range of recommendations, in July 2007, the Government directed government agencies to consider the priorities for action contained in the NZAPHR as part of their normal business. In order to facilitate the HRC's on-going monitoring role, departments are expected both to respond to requests from the HRC for relevant information in a timely manner and to identify work meeting the NZAPHR priorities in their Statements of Intent, Annual Reports, and other organisational documents. This approach will allow agencies to give those priorities for action the careful analysis they deserve and allow for flexibility. The approach will allow for a range of responses tailored to the different operating environments and policy priorities of departments. The aim is to encourage continuing dialogue between the HRC and government departments.

88. In its Statement of Intent 2007-2008 the HRC has signalled a proposal to undertake (for completion by 30 June 2008) a mid-term review of progress in achieving the priorities identified in 2005. The scope and method of the review are still being developed. The HRC notes that this will provide an updated basis from which to assess the effectiveness of the Commission's leadership on, and advocacy for, the Action Plan. It will also enable an evidence-based reassessment of the NZAPHR priorities through to 2010.

Article 3

89. New Zealand's Sixth Report to the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), submitted in March 2006 (CEDAW/C/NZL/6), comprehensively covers developments relating to the equal rights of men and women to enjoyment of all civil and political rights during the last report period.

90. The international comparative *Global Gender Gap Report*, published by the World Economic Forum, measures economic participation and opportunity, educational attainment, health and survival and political empowerment. The report is an authoritative benchmark of New Zealand's progress in ensuring equal rights for men and women. In 2007, New Zealand's ranking moved from 7th place to 5th place. One of the key findings of the report was that "New Zealand improves further in the two areas where it already has particular strengths; its rank in political empowerment increased by two places to 9th position among the 128 countries, while its rank on economic participation rose by six places to 8th position this year."

Action Plan for New Zealand Women

91. In February 2004, the Government launched its five-year *Action Plan for New Zealand Women*. In recent years, significant progress has been made in improving the circumstances of women in New Zealand. Economic indicators show that the percentage of women in the paid workforce has increased; women's unemployment has decreased; and more women are employed in professional and managerial occupations. Increasing numbers of women are moving into self-employment.

92. Generally, women achieve better outcomes than men in education, including university undergraduate qualifications. Paid parental leave and improved access to early childhood education and care help women and their partners to balance participation in the paid workforce with family commitments. Indicators also show a steady improvement in women's life expectancy. However, gender and ethnic analysis shows that inequalities still exist between men and women, and between different groups of women, across a wide range of indicators.

93. The Action Plan is an integrated government approach to improving the circumstances of women in New Zealand. Actions combine to improve outcomes for women and their families/whānau in the workplace, the home, the community, and as members of New Zealand society. The Action Plan is inclusive, recognising the importance of the connections and relationships women have with men, children, other women, families/whānau, communities and society as a whole. The Action Plan recognises the differing priorities, choices and needs of groups of women, women in the context of families and whānau, and women as individuals. With these considerations in mind, the Action Plan has been formulated to reduce inequalities and improve outcomes for women.

94. Through an extended process of analysis and consultation, three key themes emerged to provide a conceptual framework for the Plan. The New Zealand Government has prioritised actions to improve outcomes for women in these three inter-related areas:

(a) *Economic Sustainability*, to improve women's economic independence and ability to contribute to New Zealand's economy (ensure access to a good level of income, and the skills and knowledge to help women maximise their financial resources);

(b) *Work-Life Balance*, to help women achieve an improved balance between paid work and life outside work; and

(c) *Well-being*, to improve health and social outcomes for women.

Women in Leadership Roles

95. The Government continues to work towards increasing the numbers of women in leadership and decision-making roles, with the objective of achieving 50% representation for women on Statutory Boards by 2010. In December 2006, the number of women on the existing 412 Statutory Boards stood at 1131 (42%) out of a total of 2675.

96. While women are increasing their participation in the public sector through government-appointed decision-making roles, New Zealand is making slow progress in terms of women taking up governance positions in the private corporate sector. The *New Zealand Census of Women's Participation* (attached as Annex K) is published every two years by the New Zealand HRC and examines women's progress in governance, the professions and in public life. The Census shows that in 2006, women held only 7.13% of board directorships in the top 100 companies listed on the New Zealand Stock Exchange. Two other security markets showed even lower female representation in board rooms.

97. Government measures undertaken include:

- Promoting the benefits of increasing women's participation in the private sector and to 50/50 representation on state boards
- Promoting the benefits of diversity and
- Continuing to widen and deepen the pool of women in leadership roles by:
  - Identifying suitably qualified women including board members and employees of council controlled organisations, entities within the voluntary sector and women within the private sector and
  - Continuing to address occupational segregation, which affects women's ability to gain the experience required for leadership roles

98. The Census provides a benchmarking tool for monitoring and future reporting to the committee, so that New Zealand will be better able to report on the progress of women in leadership. It encourages board chairs and other directors to reflect on the diversity and current composition of their boards and assists shareholders and institutional investors to consider board succession planning. It allows national women's organisations to focus attention on gender participation in governance and decision-making and to pursue activities and policies aimed at closing the gender gaps.

99. Information from interviews with key private sector male and female directors and recruiting agencies indicates that increasingly, chairs and boards actively seek women candidates. Reasons for doing so include pragmatic business considerations, fairness and equity issues, and a belief in the benefits that diversity brings to board decision-making.

Equal Employment Opportunities for Women

100. A description of New Zealand's Equal Employment Opportunity (EEO) provisions and their effect on women's entitlements to equal pay and equal employment opportunities was included in the fourth periodic report (see paragraphs 73-88 of that report).

101. The Human Rights Act, Employment Relations Act 2000 ("ERA") and Equal Pay Act 1972 provide protection against discrimination on the basis of gender in employment. The Parental Leave and Employment Protection Act 1987 is also an important part of New Zealand's employment law framework.

102. Employees who believe that they have been discriminated against by reason of their gender can take their grievance against their employer to court under the ERA; they can make a complaint to the Labour Inspectorate of the Department of Labour under the Equal Pay Act; or they can make a complaint to the HRC under the Human Rights Act. A variety of information materials explaining the procedures and remedies provided under these Acts is widely available.

103. The ERA requires all contracts of employment to include effective personal grievance procedures. Gender-based discrimination and sexual harassment are two of the grounds on which a grievance claim can be made.

104. Section 17 of the Human Rights Act sets out the functions of the EEO Commissioner and includes providing advice and leadership on EEO matters, evaluating legislation, leading development of guidelines and voluntary codes of practice, and monitoring and analysing progress on improving equal employment opportunities in New Zealand and reporting to the Minister on that advice.

105. While the protection provided by the current legislative framework is significant, there are, unfortunately, still some groups of women who have limited scope for improving their pay and working conditions. The Government seeks to minimise this disadvantage through legislation (for example, annual increases to the minimum wage and an increase in annual leave). In 2004, the minimum wage was reviewed, resulting in an increase of the adult minimum wage (for people 18 years and over) from $10.25 per hour to $11.25 per hour. The youth rate (for 16 and 17 year olds) rose from $8.20 to $9.00 per hour, and was increased from 60% to 80% of the adult minimum wage. The Government also increased the minimum entitlement of annual leave from three weeks to four. Both these initiatives came into force on 1 April 2007.

106. From 1 April 2008, the adult minimum wage will increase to $12.00 an hour. The youth minimum rate will be replaced by a new entrants minimum hourly rate of $9.60. The new entrants rate can be paid to 16 and 17 year olds for the first 200 hours or three months of employment, after which they must be paid the adult minimum wage.

Parental Leave and Employment Protection Act 1987

107. The Parental Leave and Employment Protection Act provides job-protected leave and parental leave payment for eligible parents. The Act has a strong focus on gender equity, both in the labour market and within families. Paid parental leave is funded from general taxation, and is intended to provide some income stability for women and their families as they adjust to the

birth or adoption of a child. The employment-protected leave taken under the Act ensures that women have the right to return to the same job under the same terms and conditions they had before they took parental leave.

108. To be eligible for parental leave and payment, an employee must have worked an average of 10 hours per week for the same employer over six or 12 months (including one hour in every week or 40 hours in every month). Self-employed persons are required to work in self-employment for an average of 10 hours per week over six or 12 months. Employees who meet the six month eligibility criteria are entitled to job-protected leave of 10 days special leave for women during pregnancy, 14 weeks maternity leave and paid parental leave, and 1 week partners/paternity leave as appropriate. Employees who are eligible under the 12 month criteria are also entitled to up to 52 weeks unpaid extended leave, which can be shared between partners, and a further week of partners/paternity leave (2 weeks total). Eligible self-employed parents are entitled to 14 weeks of parental leave payment.

109. Primary entitlement to the 14 weeks of paid parental leave rests with mothers, who can transfer part or all of the entitlement to their partner if they are also eligible. The payment replaces the individual's income up to a cap of currently $391.28 (before tax) per week.

110. Over 2005 and 2006, the Department of Labour conducted an extensive evaluation of the parental leave scheme. The purpose of the evaluation was to better understand the extent to which the Act is meeting its overall objectives. The evaluation focused on the experiences of three groups: women who have babies or adopt them; fathers or other partners of these women; and employers.

111. The evaluation found that the parental leave scheme enjoys considerable support from mothers, fathers and employers alike. Key findings include:

- Approximately 80% of mothers were eligible for paid parental leave and of those, approximately 80% took some parental leave
- Mothers are not using the full entitlement of leave available to them - on average, most mothers return to work when their baby is six months old, but would ideally return when baby is 1 year old
- Financial pressure is the biggest barrier to taking the full 12 months leave available
- Two-thirds of mothers who took paid parental leave returned to work for the same employer, most to the same terms and conditions and
- Most mothers change their working arrangements on return to work; reduced hours being the most common adjustment:
  - Two-thirds of those who returned to work do so part-time, in comparison with one-third who worked part-time prior to taking parental leave; and
  - Of those who decreased their hours, two-thirds considered it a permanent change.

112. A number of agencies (including the HRC, the National Advisory Council on the Employment of Women, and the Families Commission) are pressing for widened eligibility of paid parental leave. Recent gender-based discrimination complaints to the HRC relate to the eligibility of seasonal workers, and the rights of fathers/partners as primary entitlement holders. The 2005/06 parental leave evaluation found that mothers in casual work were more likely to be ineligible for paid parental leave as their working patterns make it more difficult for them to meet the eligibility criteria relating to tenure and hours worked.

113. The Government will consider further amendments to the Parental Leave and Employment Protection Act at a later date, including consideration of those women in paid work who remain ineligible for paid parental leave, including seasonal and casual workers.

Equal Pay Act 1972

114. The Equal Pay Act makes it unlawful for employers to refuse or omit to offer or afford employees the same terms of employment, conditions of work, fringe benefits and opportunities for training, promotion and transfer as are made available to other employees with the same or similar qualifications employed in the same or similar work, by reason of the gender of the employees.

115. An employee can make a complaint regarding equal pay to the Labour Inspectorate. Using the Department of Labour's mediation services, the Inspectorate may be able to resolve the situation informally through direct contact with the employer. Alternatively the Inspectorate may act through the Employment Relations Authority. Under the Act, the Employment Relations Authority may, of its own motion or on the application of a Labour Inspector, examine the provisions of an instrument or proposed instrument of remuneration, and amend it to the extent necessary to meet the requirements of the Act. If the result is not satisfactory, the issue can be heard in the Employment Court. No equal pay complaints were received by the Labour Inspectorate in the period covered by this report.

Other Legislative Initiatives

116. The State Sector Act 1988 requires every government department to develop and publish an annual EEO plan. Government departments are required to summarise the EEO programmes for the year and include an account of the extent to which they were able to meet the plan, in their Annual Reports. The EEO team at the State Services Commission evaluates the programmes and their development. The Local Government Act 2002 requires local authorities to have an EEO policy and programme; the State-Owned Enterprises Act 1986 requires the same for State-Owned Enterprises.

117. To achieve Government's aim of producing EEO across the whole state sector, the Crown Entities Act 2004 extended the "good employer" provisions of the State Sector Act to Crown entities. The EEO Commissioner was given responsibility for monitoring departments, and providing guidance to the additional 97 agencies in consultation with the State Services Commission. Crown entities reported on EEO for the first time in their 2007 annual reports, which are audited by the HRC.

Non-Legislative Initiatives

118. While the Government recognises the need for strong legislative prohibitions on discrimination in employment, it also encourages the voluntary adoption of EEO principles and practices. The dual approach is likely to result in a greater uptake of the legislative requirements. For example, the Government funds the EEO Trust, an organisation which promotes the benefits of EEO practices to employers, acknowledges and recognizes good EEO employers, develops educational material that seeks to change attitudes towards EEO, coordinates existing EEO resources, commissions research, reviews and monitors existing and proposed research, and disseminates research results. Through the EEO Trust, the Government works with employers directly to promote equal remuneration requirements and raise awareness of messages about fairness and equality.

119. The EEO Contestable Fund was established in 1991, at the same time as the EEO Trust. The Fund's objective is to assist in improving employer practices at the workplace level. Funding is available for projects which encourage employers and employees to work together to make positive and practical changes to behaviour and attitudes in relation to EEO in the workplace, promote interest and commitment to EEO by private sector employers, and create a resource which is capable of being used by others. So far, 38 projects have received funding. The projects include work and family strategies, opportunities for women in non-traditional occupations, and the establishment of an anti-sexual harassment network.

120. The New Zealand Employment Service ran a large number of programmes and seminars providing assistance to people seeking work. Women were eligible for a variety of specially targeted initiatives, for example programmes providing support for women who wish to return to the workforce after having children, or who wish to stop receiving the Domestic Purposes Benefit and return to the workforce. More information on these initiatives is provided in New Zealand's reports on the ILO Convention on Equal Remuneration (No. 100) and in the ILO Convention on Employment Policy (No. 122).

The Gender Pay Gap

121. As mentioned above, it is illegal to pay differential wages on the basis of gender. Data from New Zealand's Quarterly Employment Survey show that between 1989 and 2007 there has been a relatively constant gap between the average hourly earnings for males, compared with the average hourly earnings for females. Female average hourly earnings are 82.4% of male earnings (September 2007).

122. Pay disparity is caused by a complex array of interrelated factors, only one of which may be deliberate discrimination. Other factors include women's lower level of participation in the workforce, and their higher concentration in specific industries and occupations. Further research into the interrelationships between worker characteristics and earnings is ongoing.

The Pay and Employment Equity Plan of Action

123. The Government's five-year *Pay and Employment Equity Plan of Action* (attached as Annex L) commenced in 2004, following the report of a tripartite Taskforce. The Plan of Action's objective is to ensure that remuneration, job choice and job opportunities are not

affected by gender. It is based on existing legislation, and on unions and employers working together, with a focus on workplace-based partnerships to achieve change. The Plan of Action aims to integrate pay and employment equity into existing public sector management, legislation, resources, fiscal management, employment relations and activity across the whole of government.

124. The Plan of Action has a three-phased approach. Phase one covers the Public Service, public health and public education sectors (2004-08). Phase two, based on a government-led, encouragement-based approach, involves a staged extension of the Plan of Action from 2007/08 to Crown entities, state-owned enterprises and local government. The third Phase would extend the measures to the private sector and will be subject to Government decisions in 2010.

125. In phase one of the Plan of Action, 15 Public Service organisations have completed pay and employment equity reviews and response plans and the rest of the 38 organisations are on track for completion in 2008. The process in the public health sector is being finalised and a national response plan for that sector is to go to Government early in 2008. The process is underway in the public schools sector and is due for completion in 2008. The tertiary education sector and the kindergarten sector will begin the process in 2008. Phase two is in the early stages of implementation.

126. The Department of Labour's Pay and Employment Equity Unit was established in 2004 to support implementation of the Plan of Action; to provide advisory services and develop tools and associated processes; to monitor and report progress to Government; to generally promote and support the achievement of pay and employment equity; and to provide education and training. Tools developed by the Unit include the Equitable Job Evaluation system, a Gender Inclusive Job Evaluation Standard, the Pay and Employment Equity Workbook, pay investigation guidelines, fact sheets and other resources.

Active Labour Market Programmes

127. The Government has a range of active labour market programmes designed to help people enter sustainable employment. These range from low-intensity programmes broadly available to those seeking work, to more intensive and expensive assistance targeted at individuals who are disadvantaged in the labour market. For example, specific programmes are aimed at people with health and disability needs. Programmes may also have a principal objective. For example, the Training Incentive Allowance aims to assist sole parents to acquire the skills and capability that they need to obtain employment. Women particularly benefit from Active Labour Market Programmes due to the high proportion of sole parents who are female.

Representation of Women in Parliament

128. Since the Mixed Member Proportional representation (MMP) voting system was introduced in 1996, the proportion of women in Parliament has remained stable. Following the 2005 general election, women make up 32% of the current Parliament (compared with 28% following the 2002 election). Eight out of 28 Ministers are women, including New Zealand's first Pacific woman Minister. This compares with 8 women Ministers out of 26 at the time of the last report. Women ministers have also been appointed to non-traditional portfolios.

Women in the Judiciary

129. There are 32 High Court Judges of whom seven (22%) are women. There are seven Associate Judges of whom one (14%) is a woman. There are 134 District Court Judges of whom 37 (28%) are women. These figures include Environment Court, Family Court and Youth Court Judges, and the Chief Coroner. There are 45 District Court Judges who hold Family Court warrants, of whom 17 (38%) are female, and 21 Judges who sit in Family Court, of whom 9 (43%) are female.

Reservations to CEDAW

130. The New Zealand Defence Force formally rescinded the policy against women serving in active combat in 2000. The Human Rights (Women in Armed Forces) Amendment Bill was enacted in May 2007 and repealed section 33 of the Human Rights Act, which had permitted the New Zealand Defence Force to discriminate on the basis of gender in active combat roles. In July 2007 New Zealand withdrew its remaining reservation to CEDAW (relating to the service of women in the New Zealand Police and the Armed Forces). New Zealand previously removed another reservation in relation to paid-parental leave in September 2003.

Article 4

Law Reform (Epidemic Preparedness) Act 2006

131. Following the identification of the H5-N1 avian influenza virus in 2003, the World Health Organisation encouraged the development of national preparedness plans to stop, contain and treat the influenza, reduce opportunities for the influenza to emerge, improve the early warning system, delay initial international spread, and accelerate vaccine development. The New Zealand Government identified gaps in the legislative framework which constrain its ability to respond to an outbreak of avian influenza or a similar infectious disease capable of becoming an epidemic. The Law Reform (Epidemic Preparedness) Act 2006 amended several legislative provisions in order to ensure that the New Zealand Government is able to respond to an epidemic emergency if necessary.

132. The Director-General of Health is able to set priorities for the dispensing of medicines during an epidemic. The Director-General must, of course, act consistently with the right to life affirmed in section 8 of the Bill of Rights Act (and Article 6 of the Covenant). Other amendments enable persons to be quarantined in certain circumstances.

Article 6

The Right to Life

133. Based on the mortality experiences of New Zealanders in the period 2004-2006, life expectancy at birth was 77.9 years for males and 81.9 years for females. The infant mortality rate has declined from 11.2 deaths per 1,000 live births in 1986 to 5.1 per 1,000 in 2006. For Māori, life expectancy at birth was 69.0 years for males and 73.2 for females.

International Crimes and International Criminal Court Act 2000

134. The fourth periodic report foreshadowed that this report would provide a detailed description of the International Crimes and International Criminal Court Act 2000 (see paragraph 93 of that report). The International Crimes and International Criminal Court Act came into force on 1 October 2000. This Act implements many of the obligations that New Zealand has as a State Party to the Rome Statute.

135. The majority of the provisions in the Act relate to the Articles of co-operation contained in Part 9 of the Rome Statute - that is those provisions dealing with the surrender of persons to the International Criminal Court (ICC) and the provision of assistance during the investigation and trial. Other provisions relate to the creation of specific new offences relating to the administration of justice. These obligations are found in Parts 2, 3, and 4 of the Act.

136. The Act also includes a number of provisions implementing other Articles that New Zealand was not required to provide for under domestic legislation. These include provisions that would allow for the enforcement of sentences and orders domestically imposed by the ICC, including the possibility that ICC prisoners may serve their sentences in New Zealand prisons, and allow for the ICC to sit in New Zealand (see Parts 6 and 9 of the Act respectively).

137. The Act also extends New Zealand's criminal law by creating new offences of genocide and crimes against humanity and by restating the categories of war crimes. At the time the legislation was introduced New Zealand did not have discrete offences relating to genocide or crimes against humanity. The Act confers universal jurisdiction for the offences of genocide, crimes against humanity, and war crimes. The principles contained in Part 3 of the Rome Statute are also incorporated within New Zealand's domestic law so that they will be as relevant in a domestic prosecution for these offences as in proceedings before the ICC itself.

Immigration Bill

138. The Immigration Bill, introduced to Parliament in August 2007, proposes codifying New Zealand's non-refoulement obligations derived from the provisions of Articles 6 and 7 of the Covenant (and Article 3 of the Convention against Torture) into domestic legislation, thereby clarifying the process enabling people to claim protection in New Zealand. Protection status will prevent a person being deported if there are substantial grounds for believing that the person would be in danger of being subjected to arbitrary deprivation of life or to torture or cruel treatment. The Bill is currently proceeding through the domestic legislative process and is expected to be enacted in 2008. In recognition of the fact that the Bill is still before Parliament, a detailed description of the legislation, if enacted, will be provided in New Zealand's next periodic report to the Human Rights Committee.

Article 7

Fifth periodic report under the Convention against Torture

139. New Zealand submitted its fifth periodic report under the Convention against Torture in January 2007 (CAT/C/NZL/5). This provides an outline of New Zealand's compliance with the obligation to ensure that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

140. A significant development since the submission of New Zealand's fifth periodic report under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is that New Zealand has ratified the Optional Protocol to the Convention.

141. The Optional Protocol entered into force in New Zealand on 13 April 2007. The ratification of the Optional Protocol followed the enactment of the Crimes of Torture Amendment Act in December 2006. The Act provides a regime that enables New Zealand to comply with the Optional Protocol and includes provisions:

(a) Enabling the Subcommittee of the UN Committee against Torture to visit places where people are deprived of their liberty;

(b) Allowing the designation of one or more domestic persons, bodies or agencies as "National Preventive Mechanisms" to also visit places of detention; and

(c) Providing for a "Central National Preventive Mechanism" to coordinate the activities of the domestic bodies charged with monitoring places of detention in New Zealand, and to maintain effective liaison with the Subcommittee.

142. As required by the Optional Protocol, New Zealand has designated several independent "National Preventive Mechanisms". The following agencies were designated as the National Preventive Mechanisms by notice in the New Zealand Gazette on 21 June 2007:

(a) An Ombudsman holding office under the Ombudsmen Act 1975 (for the purpose of examining and monitoring the treatment of persons detained in prisons, premises approved or agreed under the Immigration Act 1987, health and disability places of detention, and youth justice residences established under section 364 of the Children, Young Persons and Their Families Act 1989);

(b) The Independent Police Conduct Authority (for the purpose of examining and monitoring the treatment of persons detained in police cells or otherwise in the custody of the police);

(c) The Children's Commissioner (for the purpose of examining and monitoring the treatment of children in youth justice residences established under section 364 of the Children, Young Persons and Their Families Act 1989); and

(d) Visiting Officers appointed in accordance with relevant Defence Force Orders issued pursuant to sections 175 and 206 of the Armed Forces Discipline Act 1971(for the purpose of examining and monitoring the treatment of persons detained in New Zealand Defence Force detention quarters).

143. Under sections 80 and 87 of the Court Martial Act 2007, which was recently enacted, the national preventive mechanism role in respect of New Zealand Defence Force detention quarters will be transferred to the Inspector of Service Penal Establishments. This is an appointment held by the Registrar of the Court Martial of New Zealand, a statutory officer independent of the Defence Force. This reform will take effect when the necessary work to bring into force all the recent reforms to the military justice system has been completed.

144. The functions of the national preventive mechanisms are to:

(a) Examine conditions of detention and treatment of detainees;

(b) Make recommendations to the person in charge of a place of detention; and

(c) Prepare at least one written report each year on the exercise of its functions to the central National Preventive Mechanism and present that report to the:

(i) House of Representatives if the National Preventive Mechanism is an Officer of Parliament; or

(ii) Minister if the National Preventive Mechanism is not an Officer of Parliament.

145. The HRC was designated as the Central National Preventive Mechanism on 21 June 2007 and will coordinate the activities of the national monitoring bodies and liaise with the Subcommittee of the UN Committee against Torture.

Taser trial

146. As outlined in the fifth periodic report to the Committee against Torture under the Convention against Torture, the New Zealand Police undertook a 12 month trial of the Taser in 4 districts. The Police Commissioner approved the trial of the Taser on the basis that the introduction of the tactical option would enhance the safety of the public, offenders and police.

147. The New Zealand Police are due to report to the Police Commissioner by 14 December 2007, and the Commissioner will make the final decision on the future use of the Taser in New Zealand policing.

Taunoa & Others v. Attorney-General

148. Discussion of this case was included in the fifth periodic report under the Convention against Torture (see paragraphs 188-194 of that report). This case has now been considered by the Supreme Court and is discussed at paragraphs 205 to 209 of this report.

Article 8

149. New Zealand is party to the three key specific anti-slavery instruments: the International Convention for the Abolition of Slavery and the Slave Trade (1926); the Protocol amending the Slavery Convention signed at Geneva on 25 September 1926, with Annex (1953); and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).

150. New Zealand ratified the International Labour Organisation Conventions on Forced Labour, 1930 (No. 29) in 1938 and Abolition of Forced Labour, 1957 (No. 105) in 1968. In light of these ratifications, New Zealand has undertaken to suppress forced or compulsory labour and not to make use of it.

151. The New Zealand Government is committed to maintaining its record as a country with no reported incidences of human trafficking. The Department of Labour leads an Interagency Working Group (IWG) that enables a co-ordinated approach to the issue of human trafficking. This group is developing a New Zealand National Plan of Action to Prevent Trafficking in Persons (NPA) to incorporate processes to raise awareness of human trafficking, establish relationships with key non-governmental stakeholders (NGOs), coordinate offshore prevention activities, ensure victim protection response if needed and align law enforcement/judicial investigation and prosecution. New Zealand has not identified any cases of human trafficking in the course of immigration operations or fraud investigations.

Article 9

Preventive Detention

152. The sentence of preventive detention is one of two indeterminate sentences available in New Zealand, the other being imprisonment for life. Preventive detention is imposed in order to protect the community from people assessed as being at high risk of further offending.[4]

153. A sentence similar to preventive detention has been available in New Zealand since 1906 under habitual-offenders legislation, initially restricted to repetitive sexual offenders over 25-years old. In 1987 the sentence was extended to include offenders convicted of serious violent offences and the age threshold was lowered to 21 years. In 1993 the sentence was extended to offenders convicted of sexual violation for the first time.

154. The Sentencing Act 2002 made further modifications to the sentence. The number of qualifying sexual and violent offences increased, and the requirement for offenders to have a previous conviction prior to their qualifying offence was removed. The minimum applicable age was lowered to 18 (but the courts have been reluctant to impose a sentence of preventive

[4] *R v. Johnson* [2004] 3 NZLR 29; (2003) 21 CRNZ 196.

detention on offenders just over the age threshold[5]). The minimum term of imprisonment that must be served under preventive detention was lowered from 10 to 5 years. However, the courts do not consider this to widen the eligibility of the sentence to less serious offenders.[6]

155. If the offence is not particularly grave, the courts have held that the sentence of preventive detention will usually turn on persistent, knowing behaviour, prior warnings from the courts that the offender is at risk of preventive detention in the event of re-offending, and harm from present and past offending that is cumulatively serious.[7]

156. A sentence of preventive detention may only be imposed in the High Court after a person has been tried and convicted. All trial rights of an accused apply, including the right to be presumed innocent. A sentence of preventive detention can be appealed to the Court of Appeal, in the same way as any other sentence.

157. If the court decides to consider a sentence of preventive detention, the offender must be notified and given sufficient time to prepare submissions. The court must consider reports from at least 2 health assessors of the likelihood of the offender committing a further qualifying sexual offence or violent offence. Offenders may also source their own health assessments to place before the court.

158. The court must also take into account:

- Any pattern of serious offending disclosed by the offender's history
- The seriousness of the harm to the community caused by the offending
- Information indicating a tendency to commit serious offences in future
- The absence, or failure, of the offender's efforts to address the cause(s) of their offending and
- The principle that a lengthy determinate sentence is preferable if this provides adequate protection for society

159. The Court must be satisfied that the offender is likely to commit another qualifying sexual or violent offence if released at the sentence expiry date of any of the determinate sentences available. The Court of Appeal has held that the sentencing court is not required to be satisfied beyond reasonable doubt.[8] However, the court retains discretion to impose the sentence, even if

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[5] *R v. Kale* (1993) 9 CRNZ 575 (CA); *R v. Pauga* (1993) 9 CRNZ 685 (CA).

[6] *R v. Bailey* 22/7/03 CA 102/03.

[7] *R v. Dean* 17/12/04, CA 172/03, 74.

[8] *R v. White* [1988] 1 NZLR 264. Recently cited in *Bahadur v Auckland District Law Society* (unreported, High Court, Auckland CRI-2007-404-130, 23 August 2007, Asher J).

all the qualifying factors are met. For example, the Court may consider whether public safety can be adequately addressed by a determinate sentence followed by an extended supervision order.[9] An extended supervision order allows a child-sex offender to be supervised in the community for up to ten years following release from prison.

160. The New Zealand Parole Board is an independent statutory agency headed by a member of the judiciary and is responsible for administering a sentence of preventive detention. It has authority under the Parole Act 2002 to release prisoners in certain circumstances. The Parole Board may review an offender's sentence at any time. Once offenders have served the minimum term of their sentence, the Parole Board is required to review their detention annually, except where the Parole Board is satisfied that the prisoner will not be eligible for parole by the next parole hearing. The Parole Board may then, after the prisoner has had an opportunity to make written submissions and a formal hearing has taken place, postpone consideration of parole for up to three years. Sentence reviews may take place more frequently if the Parole Board requires, or at the prisoner's request. Parole Board decisions can be judicially reviewed by the High Court. The writ of habeas corpus is available for those who believe that they are wrongly imprisoned.

Sentencing practice

161. It is too early to determine whether the Sentencing Act has led to an increase in the use of preventive detention. In 2004, significantly more offenders were sentenced to preventive detention than in other years, but this is not true of 2003, 2005 or 2006. There were 10 sentences to preventive detention in 2002, 17 in 2003, 35 in 2004, 14 in 2005 and 12 in 2006.

162. Prior to 2002, non-parole periods other than the statutory minimum of 10 years were rare. Between 1996 and 2001, the average non-parole periods ranged between 10 and 12 years. In 2005, 71% of non-parole periods imposed were for less than 10 years, with the average being 7.4 years. Prior to 2004, preventive detention sentences were rarely imposed for non-sexual offending, with only three in the decade to 2003. In 2005, three of the fourteen sentences imposed involved non-sexual offending.

163. The Sentencing Council Act came into force on 1 November 2007. The Sentencing Council will draft sentencing and parole guidelines. The purpose of the Council is to increase the consistency and transparency of sentencing and parole decisions and to provide reliable information for the effective management of penal resources. It is expected that the inaugural guidelines will be presented in Parliament and come into effect mid-2009.

Rameka & Others

164. In 2002, the UN Human Rights Committee considered the sentence of preventive detention, on application by three offenders: Mr. Rameka, Mr. Tarawa and Mr. Harris. The preventive detention legislation applicable to these offenders was the Criminal Justice Act 1985. The Committee's views were split. It found that a sentence of preventive detention was not in

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[9] *R v. Parahi* [2005] 3 NZLR 356; (2005) 21 CRNZ 754 (CA), *R v. Gibson* (unreported, High Court, Rotorua CRI-2006-470-754, 15 June 2007, Frater J).

breach of the offenders' rights under the Covenant. However, the majority of the Committee found that the application of the sentence to Mr Harris was in breach of the Covenant because the sentencing court indicated that, but for the sentence of preventive detention, it would have imposed a finite sentence of "not less than seven and a half years". Mr. Harris had received the mandatory 10 year minimum non-parole period under the Act.

165. The Committee found that Mr. Harris' detention beyond seven and a half years was in violation of his rights under Article 9(4) of the Covenant to approach an independent court for a determination of the lawfulness of his detention. Although the Parole Board had authority to examine the lawfulness of Mr. Harris' detention before the expiry of the non-parole period, New Zealand was unable to give an example of this occurring.

166. In response, the Minister of Justice (by Gazette Notice) gave permission to the class of preventive detainees in the same circumstances as Mr. Harris to apply for parole once they reached the notional finite sentence indicated by the sentencing court. The Sentencing Act 2002 also addresses the Committee's concerns by reducing the minimum period of preventive detention from 10 to 5 years.

Bail Act 2000

167. The Bail Act 2000 came into force on 1 January 2001 and brought together the existing statutory and common law on bail with some additions. The Act provides that a defendant has the right to be bailed (must be released) if charged with:

(a) An offence not punishable by imprisonment;

(b) An offence carrying a maximum penalty of less than three years' imprisonment (except where the offence was an assault on a child, a male assaulting a female, or the breach of a protection order); or

(c) A specified offence.

168. A defendant charged with an imprisonable offence does not have the right to be released on bail if he or she has previously been convicted of an imprisonable offence.

169. A defendant who does not have the right to be released on bail must be released on reasonable terms and conditions unless the Court is satisfied that there is "just cause" for continued detention. When deciding "just cause", the Court must take into account whether there is a real and significant risk that the defendant may abscond, interfere with witnesses or evidence, or offend while on bail. The risk posed by a defendant must be weighed against any factors making it unjust to detain him or her.

170. The Bail Act contains more stringent provisions applicable to defendants with certain criminal histories, such as a history of offending on bail. Because of the greater risk they pose, the defendant must satisfy the Court on the balance of probabilities that he or she should be granted bail, rather than the prosecution showing beyond reasonable doubt that the defendant should not be granted bail.

171. When releasing a defendant on bail, the Court may impose any condition it considers necessary to ensure that the defendant appears in court when required, does not interfere with witnesses or evidence, or commit offences while on bail. Common conditions include curfews, non-association conditions, reporting conditions, and that the defendant not consume alcohol or drugs. A breach of bail conditions is not itself a criminal offence. Serious breaches of bail conditions result in defendants being remanded in custody. Failure to answer bail (not appearing in court when required) is an offence punishable by up to 1 year in prison.

172. The Bail Amendment Act 2007 (which came into force on 1 October 2007) clarifies the threshold for remand in custody, explicitly providing that the level of risk required to remand a defendant in custody is "real and significant". Previously the law only required "a risk". The Bail Amendment Act clarifies that the focus of bail decisions is on community safety. Defendants are innocent until proven guilty and should not be deprived of their liberty unless they pose a real and significant risk to the community or the administration of justice. *R v. Kāhui*[10] (High Court) was one of the first decisions after the changes came into force. In that case, Heath J stated that the change to a "real and significant risk":

> "does not seem to me to put the test any higher than was under the previous legislation, but rather to emphasise the need for a proper inference to be drawn from proved facts; as opposed to the Court engaging in speculation or guesswork about the possibility of a risk."

173. Bail with electronic monitoring (EM bail) has been operating nationally since 27 November 2006. Under the EM bail regime, a defendant who is remanded in custody may apply to be considered for release on bail on the condition that he or she must wear an electronic monitoring device. The objective of EM bail is to increase the number of defendants who can be released by reducing the risk that the defendant may, if released, fail to appear in court, interfere with witnesses or evidence, or offend while on bail. The operational processes of EM bail are well established. The application, assessment and monitoring processes are working effectively.

Home Detention

174. Home detention requires an offender to be at a specified residence in the community unless absent for an approved purpose, such as work. Offenders on home detention are subject to standard conditions, such as the requirement to comply with the directions of a probation officer. Special conditions may also be imposed, such as a requirement to participate in programmes, or not to associate with certain persons.

175. All offenders on home detention are subject to electronic monitoring, monitoring by security guards, and supervision by Probation Officers. It is a criminal offence to breach the conditions of home detention and there can be other consequences such as varying the conditions.

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[10] (Unreported, High Court, Auckland, CRI-2007-092-014990, 2 October 2007, Heath J).

176. Compared to prison sentences, home detention has high compliance rates, and low reconviction and re-imprisonment rates. Home detention allows offenders to maintain family relationships, continue working in gainful employment and aids rehabilitation.

177. In October 2007, the original imprisonment-based home detention regime was replaced by a new home detention sentence and a "residential restrictions" condition of parole. These changes are part of a package of reforms intended to provide the courts with more non-custodial sentencing options that can be tailored to address the causes of offending.

178. Both the original and new regimes impose similar restrictions on an offender. The regimes are further detailed below.

Pre 1 October 2007

179. Prior to 1 October 2007, home detention was a method of serving all or part of a sentence of imprisonment. Front-end home detention was available to offenders sentenced to a term of imprisonment of two years or less. The sentencing court decided whether considerations such as denunciation, deterrence, and the safety of the community made front-end home detention appropriate. The offender then applied to the Parole Board (responsible for granting home detention and imposing the conditions under which it would be served).

180. Back-end home detention was available for offenders sentenced to imprisonment for more than two years. Such offenders could be released to home detention by the Parole Board at any time from three months before their parole eligibility date.

181. Each year around 2000 offenders commenced a home detention order, with approximately 500 individuals at any one time serving their prison sentences in this way.

From 1 October 2007

182. From 1 October 2007, home detention became a sentence in its own right, and a special condition that can be imposed on parole (called "residential restrictions"). The residential restrictions condition of parole replaced back-end home detention and can be imposed from an offender's parole eligibility date (rather than three months before as under the previous regime). Offenders already serving a sentence of imprisonment on home detention continue to be subject to the previous regime.

183. A sentence of home detention can be imposed if the court would otherwise sentence the offender to imprisonment, and can be imposed for a minimum of 14 days and a maximum of 12 months. The sentence may also include a "judicial monitoring" condition, enabling the court to monitor the offender's progress on the sentence.

184. It is anticipated that more offenders will be sentenced to home detention and released on residential restrictions than were released under the old home detention regime.

Community Detention

185. A new sentence of community detention became available from 1 October 2007. Community detention subjects the offender to an electronically monitored curfew, and restricts them to a specified address for certain periods unless absent for a specified purpose (such as a medical emergency).

186. The sentence may be imposed for up to six months. Any one curfew period must be for at least two hours and total of the curfew periods for any one week must not exceed 84 hours. A typical example of a community detention curfew is 7 p.m. to 7 a.m. on Friday, Saturday, and Sunday every week (36 hours in total each week).

187. A court may impose a sentence of community detention if satisfied that:

(a) The sentence would:

(i) Reduce the likelihood of further offending by restricting the offender's movements during specified periods; or

(ii) Achieve certain purposes of sentencing, such as holding the offender accountable to the community; and

(b) An electronically monitored curfew is appropriate, taking into account the nature and seriousness of the offence and the offender's circumstances and background.

Detention under the Immigration Act 1987 and the Immigration Bill

188. The Immigration Act 1987 allows for persons who arrive in New Zealand to be detained for reasons including that their identity cannot be confirmed, their use of false documentation, or that they have been refused a permit.

189. The Mangere Accommodation Centre (the Centre) is designated as "approved premises" for detention, and is generally used only for asylum claimants. Detention at the Centre is "administrative" as opposed to "penal". Detainees generally do not pose a particular threat to members of the public, but their identity is unconfirmed. They remain at the Centre while their identity is satisfactorily established.

190. The Centre is also approved for the detention of unaccompanied minors between 14 and 17 years old. There is a separate one-block section for women and minors. Minors are only detained with adults at the Centre if these adults are family members and it is in the best interests of the minor. In practice, families are released with permits while their claims for asylum are processed. Unaccompanied minors are placed in the care of Child, Youth and Family Services, provided with student permits to allow them to attend school and are not detained.

191. Legal aid is available to refugee status claimants for the processing of their claims and appeals only. It cannot be accessed for warrant of commitment hearings, which authorise a claimant's detention for up to 28 days. The new Immigration Bill introduced in August 2007 proposes the Legal Services Act 2000 be amended to also allow legal aid to be available for warrant of commitment hearings for refugee or protection status claimants.

192. While it might be possible to separate Immigration Act detainees from accused prisoners, this could be to their detriment. Very few immigration detainees are held in prisons, and to keep them completely separate would require keeping them in virtual social isolation.

193. Under the Immigration Bill, a person can be arrested and detained if that person:

(a) Has been refused entry permission;

(b) Is liable for deportation;

(c) Is a person whose deportation is being facilitated;

(d) Is suspected of being liable for deportation and who can not satisfactorily establish their identify; or

(e) Is suspected to constitute a threat or risk to security.

194. People detained in prison under the Immigration Act are not mixed with convicted prisoners. Regulation 184 of the Corrections Regulations 2005 provides that, with stated exceptions, people detained under the Immigration Act are subject to the same regime and have the same entitlements as accused prisoners. In exceptional circumstances the Chief Executive may approve the mixing of accused prisoners (including immigration detainees) with convicted prisoners under regulation 186, but this is rare.

195. Non-citizens under 17 years old who are liable for arrest and detention may be detained in places:

(a) Defined as a residence under the Children, Young Persons and their Families Act 1989;

(b) Approved by the chief executive of the Department responsible for the Children, Young Persons and their Families Act 1989;

(c) Approved by their parent, guardian or the responsible adult nominated to represent the best interests of the non-citizen minor; or

(d) Agreed by the courts.

Article 10

Department of Corrections

196. The Department of Corrections has responsibility for the day-to-day administration of prisons and community based-sentences (excluding military penalties). It also provides information to assist the courts' and New Zealand Parole Board's consideration of decisions affecting those who have been convicted. The Department formerly administered the Penal Institutions Act 1954, and is now responsible for administering the Corrections Act 2004 and Corrections Regulations 2005.

197. The Department of Corrections maintains processes to enable prisoners to raise concerns with prison management about their treatment and management of their sentences. If prisoners are uncomfortable raising concerns with the prison management they can make a complaint to the Inspector of Corrections who reports directly to the Chief Executive and is independent of the rest of the Department. Prisoners can also raise their concerns with the Ombudsmen.

Corrections Legislation

198. During the reporting period corrections law has been extensively reformed. The Penal Institutions Act 1954 was repealed and replaced by the Corrections Act 2004 (the Act). The Act and the Corrections Regulations both came into force on 1 June 2005, introducing changes reflecting modern conditions, new approaches to offender management, and providing compatibility with other recent criminal justice legislation (in particular the Sentencing Act 2002 and the Parole Act 2002).

199. A number of the changes are relevant to the protection of offenders' civil and political rights. These include:

- A purpose statement and guidance principles on the operation of the corrections system, including an emphasis on fair treatment of prisoners, interventions to assist prisoners' rehabilitation and reintegration, and a requirement that regulations be based, amongst other things, on the UN Standard Minimum Rules for the Treatment of Prisoners

- The requirement that the Department of Corrections devise individual management plans for prisoners covering their safe, humane and secure containment, and in the case of sentenced prisoners, their rehabilitation and reintegration into the community upon release

- The provision of new entitlements relating to access to news, library and education services. The entitlements have been elevated from subordinate into primary legislation

- A more consistent approach to the use of non-lethal weapons, and a requirement that any such weapon may only be used where permitted by regulation. The Minister of Corrections must be satisfied that the weapon's use is compatible with the humane treatment of prisoners and that the potential benefits outweigh the potential risks

- An expanded complaints system (widening the role of inspectors to include offenders on community-based orders or sentences). This provides a legislative basis to the formal protocol between the Chief Ombudsman and the Department of Corrections

- An improved disciplinary offence regime provides that prisoners may be represented by counsel in certain circumstances; that Hearing Adjudicators conduct disciplinary hearings; that lawyers as well as Justices of the Peace be appointed as Visiting Justices; and clearly specifies behaviour constituting a disciplinary offence

- The end to contracts for the private management of prisons. This was done in response to government policy that significant coercive powers of the State should be used only by agencies with direct accountability to the respective Minister

Corrections Regulations 2005

200. The Corrections Regulations 2005 were made pursuant to the Corrections Act 2004 and replaced the Penal Institutions Regulations 2000. While the Act contains matters of principle and a policy framework for the corrections system, the Regulations provide for matters of detail and implementation. Many of the former regulations have been carried forward, but the new regulations include additional provisions. These include:

- Various functions and duties of probation officers
- Specification of who is eligible for temporary release and removal, and the purposes for which these measures may be approved
- Altered provisions regarding the segregation of prisoners
- Assignment, review and reconsideration processes for security classifications
- More detailed provisions covering the pre-approval of visitors
- Provisions covering the internal complaints system
- Provision for and restriction of the use of batons and mechanical restraints
- Clarification of privileges which may be forfeited or postponed
- New provisions regarding mixing young and adult prisoners
- More detailed provisions regarding the treatment of mothers with babies in prisons and
- Clarification that a prisoner does not have any legitimate expectation of similar accommodation or opportunities during their term of imprisonment

Prisoners and Victims Claims Act 2005

201. The Prisoners' and Victims' Claims Act 2005 contains guidelines on when certain compensation can be awarded to prisoners. The Act also contains a simplified special claims procedure for victims of prisoners' offences to make civil claims against that compensation. In addition, the Act extends the period during which a victim can bring a civil action against a prisoner to take account of the prisoner's time in custody.

202. The Act's guidelines on compensation apply to any actions for monetary compensation taken by prisoners for breaches of the rights affirmed by the Bill of Rights Act, the Human Rights Act and the Privacy Act 1993. A prisoner may not be awarded monetary compensation unless the prisoner has made reasonable use of available complaints procedures. This precondition recognises the availability of specialised complaints procedures for prisoners. The Act does not preclude an award of compensation where it is necessary in order to provide an effective remedy.

203. If an award of compensation is made by the courts, or an out of court settlement is reached, the Act provides that the money is paid in trust to the Secretary of Justice. Upon receiving the money, the Secretary deducts relevant legal aid charges, reparation and fines. Any surplus is paid into a trust account. Victims of offences by the prisoner concerned are notified when money is paid into the trust account. The victims then have six months to bring a claim against the money. Claims are decided by a Victims' Special Claims Tribunal, which, if a claim is upheld, orders a payment from the trust account. The balance of the trust account payment is returned to the prisoner once any claims have been determined.

204. The Act has two "sunset clauses", providing that the guidelines restricting compensation payments, and the special claims procedure, will expire in 2010.

The Behaviour Management Regime

205. In 1998 the Department of Corrections introduced the Behaviour Management Regime (BMR) into Auckland Prison to manage particularly dangerous and disruptive prisoners. The regime was used until early 2004.

206. The BMR involved a highly controlled environment that included limitations on association, unlock hours, movements and activities. Subject to improved conduct, prisoners received gradual increases in privileges until the prisoner could be reintegrated into the mainstream prison population.

207. In 2003, five current or former prisoners who had been subject to the BMR brought a case against the Crown under the Bill of Rights Act. The case was first heard by the High Court in late 2003 and early 2004. In its decision of 7 April 2004 the High Court held that some aspects of the BMR were unlawful and, in addition, in breach of the right of everyone deprived of liberty by the state to be treated with humanity and with respect for the inherent dignity of the person affirmed in section 23(5) of the Bill of Rights Act, which corresponds to Article 10 of the Covenant. The Court later awarded compensation in varying amounts to the plaintiffs.

208. Aspects of the decision were appealed to the Court of Appeal by both the Crown and the applicants. In December 2005 the Court of Appeal dismissed the Crown's appeal and allowed the Applicants' appeal in two respects. The award of compensation to one plaintiff was increased to correct an error in the calculation of the amount awarded to him. In addition a declaration was made that the detention of another plaintiff amounted to "disproportionately severe treatment", contrary to section 9 of the Bill of Rights Act, due to a health condition that made the conditions of the BMR programme particularly arduous.

209. The Supreme Court granted both parties leave to appeal. Approved grounds for the applicants' appeal were whether there were breaches of sections 9 or 27 (the right to natural justice) of the Bill of Rights Act. The approved grounds of the Crown's appeal were the appropriateness and quantum of the compensation awarded to four of the plaintiffs, excepting the plaintiff in respect of whom a breach of section 9 had been found. The Court's decision was released in August 2007. The majority of the Court declined the plaintiffs' appeals, holding that although the treatment was in breach of section 23(5), it could not be characterised as cruel, degrading or disproportionately severe. The Court also declined to make any declaration of

breach of the natural justice right. In turn, the Attorney-General successfully cross-appealed against the level of compensation awarded to three of the prisoners for the breach. Compensation of $113,000 originally awarded to the applicants were reduced to $59,000.[11]

The Canterbury Emergency Response Unit

210. The Canterbury Emergency Response Unit (CERU) was established in July 1999 as a temporary resource to support the new Paparua Remand Centre in Christchurch, during a period of significant change for the Prisons Services (PS) in the Canterbury region. It was intended as a temporary resource while PS completed work on the national staffing project (the Workplace Development Project) which would determine the level of staffing for the new Remand Centre.

211. The CERU was responsible for responding to incidents involving prisoners, and site-wide crime prevention activities such as drug testing and vehicle checkpoints. These activities are routinely conducted in all New Zealand prisons, and in similar jurisdictions worldwide. However, unusually, the CERU was a full-time, dedicated resource.

212. The CERU was disbanded in June 2000, following completion of the Workplace Development Project. After this time, serious allegations came to light about the CERU and the performance of three staff, relating to the use of Departmental resources for private purposes, inequitable and inappropriate staff rosters and disposition of overtime, and non-compliance with key security, human resources and financial procedures. There were also a small number of prisoner complaints to the Office of the Ombudsmen that were handled separately.

Duffy Report

213. In December 2003, Ailsa Duffy QC was appointed by the State Services Commissioner to conduct an inquiry into the Department of Corrections' handling of complaints received in relation to the CERU. Ms. Duffy reported in December 2004 and her report (attached as Annex M) raised a number of concerns relating to departmental processes.

214. The Department undertook a comprehensive review of the issues raised in Ms. Duffy's report. The review concluded that in some cases, robust departmental policies and systems existed at the time and there was non-compliance with these. In other cases, adequate systems and policies were not in place. Significant remedial action was taken which included new systems for quality assurance, audit and monitoring. The effect was that the establishment of any new unit in the future would be based on careful analysis, implemented in a planned way and subject to greater managerial scrutiny.

Ombudsmen's investigation into the detention and treatment of prisoners

215. Ombudsmen are independent Officers of Parliament appointed under the Ombudsmen Act 1975 to impartially investigate complaints directed at the administrative acts, omissions, decisions and recommendations of central government departments and organisations, statutory

[11] *Taunoa & others v. Attorney General* [2007] 2NZLR 457.

boards and local government organisations. Ombudsmen may undertake investigations of their own motion into any decision, act or omission, affecting anyone, made by any government department or by anyone in a government department.

216. In late 2004, following concerns that arose over the handling of the BMR and the CERU, two Ombudsmen commenced an investigation by their own motion into the detention and treatment of prisoners. Their report (attached as Annex N) was presented to Parliament in December 2005.

217. The Ombudsmen found no general ill-treatment of prisoners or inappropriate staff conduct. They found that cell searches were carried out with due respect and without gratuitous disruption, there was no systemic problem with personal searches, no general concerns with use of force and no fundamental problem with complaint procedures.

218. However, the Ombudsmen did identify areas of concern and made 37 recommendations, including that:

- The Department develop policy to prohibit general punishment of a whole unit or class of prisoner except in specified circumstances
- The Department review its requirement that prisoners be drug free before entering drug and alcohol treatment programmes
- The Department review policies on recreational opportunities, clothing, prisoner property, trust account processes, library services and dining arrangements
- The Department keep under review the possible introduction of standard on-going training for staff, particularly with regard to sentence management planning
- The Department provide more telephones, and consider the possibility of allowing some free telephone calls
- Interventions be better targeted and scheduled with increased opportunities for prisoners to participate in employment and other constructive activities

219. The Department of Corrections has taken action following the recommendations, including:

- Completion of a significant redesign of criminogenic programmes with a focus on developing more intensive programmes for higher risk offenders
- Completion of a review of the Identified Drug User programme, to improve identified drug using prisoners' access to rehabilitation programmes - drug treatment providers and clinical and unit managers will have discretion to retain prisoners who test positive for drugs on intensive rehabilitation programmes, or special treatment units when it is considered it is beneficial to do so

- Reviews of recreational opportunities policy, clothing, prisoner property, telephone calls by prisoners, and trust account processes being completed or almost completed

- Work in response to the recommendations is ongoing and progress continues to be made to determine the most appropriate steps to be taken in each case

Ombudsmen's Oversight of Prisons

220. New Zealand is committed to having a well-functioning and independent prison complaints and monitoring process, because it increases the ability for systemic issues to be identified and resolved more proactively. In September 2007, the Government announced an enhanced role of the Office of the Ombudsmen in relation to prisons so that an Ombudsman has primary responsibility for the independent oversight of prisons. The proposal includes:

- Continuing the current role of the Ombudsmen and Office of the Ombudsmen in relation to the oversight of prisons

- Enhancing this role and where applicable giving the Ombudsmen new responsibilities for:

  – Conducting investigations of all deaths in custody and designated serious incidents and

  – Undertaking more reviews of systemic issues identified during visits or as a result of incidents or complaints

- Designating an Ombudsman to have primary responsibility for prisons (this Ombudsman will continue to have appropriate responsibilities in the general jurisdictions of the Ombudsmen)

- Amending the Corrections Act 2004 to reflect the enhanced role of the Ombudsmen, including amendments to remove the current statutory role of the inspectors of corrections and

- Encouraging more public reporting of investigations (for example into systemic issues that may give rise to serious incidents) and regarding prison conditions and prisoner treatment more generally

Prisoner Escort and Courtroom Custodial Services

221. Under section 166 of the Corrections Act the Chief Executive may, on behalf of the Crown, contract with any other person for the provision of escort services, courtroom custodial services, or both. The prior written consent of the Minister of Corrections is required before any such contract can be entered into or extended. Chubb New Zealand Limited were contracted to carry out escort and courtroom custodial services in the Northland and Auckland regions from 1 October 1998 to 30 June 2004. Following a tender process carried out in 2004 the Chief Executive of the Department of Corrections entered into a new five-year contract with Chubb New Zealand Limited for the provision of escort and courtroom custodial services in the

Northland and Auckland regions from 1 July 2004. Escort and courtroom custodial duties in other parts of the country are shared between officers of the Department of Corrections and by members of the New Zealand Police.

Monitoring of Prisoner Escort and Courtroom Custodial Services Contract

222. Under section 172 of the Corrections Act the Chief Executive must appoint as many security monitors as are required in respect of a particular security contractor. The Department of Corrections employs a full-time security monitor who is responsible to the chief executive for the continuous assessment and review of Chubb New Zealand Limited's compliance with the obligations of the contract. The security monitor checks daily returns furnished by the security contractor, and talks to stakeholders who have daily contact with the security contractor, such as prison staff and the Police. The security monitor reports monthly to the chief executive about the security contractor's compliance with the terms of their contract, the provisions of the Corrections Act, any Regulations made under the Act, and any instructions given by the chief executive. The security monitor may, at any time, make recommendations to the chief executive on any matters relating to the security contract.

Ombudsman's Report into Prisoner Transport

223. On 12 June 2007, the Office of the Ombudsmen presented a report to the House of Representatives (attached as Annex O) following an investigation of the Department of Corrections in relation to the Transport of Prisoners. The Office of the Ombudsmen initiated the investigation on its own motion following the death of 17-year-old remand prisoner Liam Ashley on 25 August 2006. Liam Ashley died as a result of injuries sustained while being transported in a van with other prisoners. A 25-year-old prisoner was subsequently convicted of the murder of Liam Ashley and sentenced to life imprisonment, with a minimum non-parole period of 18 years.

224. Although the death of Liam Ashley prompted the investigation, the Ombudsmen were already aware of complaints by prisoners in respect of road transport relating to excess temperature in prisoner transport vehicles, lack of adequate rest breaks, and other forms of discomfort that were said to be unreasonable in the context of lengthy journeys. The investigation was directed at general transport conditions, and matters of broad and systemic impact affecting the day to day movements of prisoners. A copy of the Ombudsmen's report is annexed to this report.

225. The Ombudsmen found that it is undesirable for the Department to treat young prisoners as adults from the age of 18 years, whereas the Police treat them as adults from the age of 17 years. They recommended that the Department pursue consultations with the Police (and any other appropriate agencies) with a view to making consistent the age at which the Department and Police treat young prisoners as adult prisoners.

226. The Ombudsmen considered the lack of a specific duty of court custodial staff to note statements by judges and lawyers at court relating to the risk status of prisoners unsatisfactory. They recommended that the Department require its courtroom custodial staff to record these risk statements where relevant to transport or other custodial risks, and to liaise with escort staff who should seek additional transport instructions as appropriate.

227. The Ombudsmen noted that the optimum design of vehicles for prisoner transport is not a straightforward matter and that no single form of vehicle is likely to be cost effective for all prisoners, for all journeys, at all times. They recommended that the Department fully review prisoner transport needs, and re-design its fleet of vehicles in order that suitable vehicles may be available in the future to meet the problems identified.

228. The report reinforced work already underway by the Department to improve prisoner transportation. A project team has been established to examine all prisoner transportation procedures and work is being carried out on various related aspects. Steps have already been taken to ensure prisoners are appropriately separated according to age as well as separating those prisoners potentially at risk from others during transport. Regulation 179 of the Corrections Regulations 2005 requires that all prisoners under the age of 18, including those not yet convicted must, where practicable, be kept apart from prisoners who are 18 years or older when outside prison. Additionally, the Minister of Corrections directed the Chief Executive of the Department of Corrections to ensure that, as from 28 August 2006, no prisoner aged 17 years or under would be transported in the same vehicle compartment as prisoners aged 18 years or older.

229. The Department is now working to explore the use of waist restraints so that prisoners are physically unable to harm themselves or others during transportation. The use of waist restraints may have been an effective means of reducing the risk to Liam Ashley.

230. The Department has addressed, or will address, all recommendations made in the Ombudsmen's report and is considering further actions that are necessary in light of the Ombudsmen's recommendations. Other action taken since the release of the report includes:

- Discontinuing the use of unsuitable rear compartments in transport vehicles
- Taking steps to ensure that prisoners have sufficient water during journeys. The Department is in the process of implementing national standards for the supply of food and water
- Giving prisoners the opportunity to leave vehicles for fresh air and movement at intervals of not longer than 3 hours, other than in exceptional circumstances

Mixing Juveniles and Adults Deprived of their Liberty

231. New Zealand maintains a reservation to Article 10 of the Covenant regarding the mixing of accused juveniles and adults. New Zealand reserves the right not to apply this Article where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable, and when the interests of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned. New Zealand maintains a similar reservation to Article 37(c) of the UNCROC, which provides that "every child deprived of liberty be separated from adults unless it is considered to be in the child's best interest not to do so".

232. In November 2001, the New Zealand Government agreed "in principle" to the withdrawal of the reservation to Article 37(c) of UNCROC. Agreement was subject to the completion of specialist youth units within prisons. This condition has now largely been met in respect of male

prisoners with the building of specialist youth units at four prison sites. The low number of female prisoners under the age of 18 years makes a female youth facility unviable; however, females under the age of 18 are separated from females aged 18 and over unless it is in their best interests that they be mixed with older prisoners. If New Zealand is able to withdraw the reservation to Article 37(c) of UNCROC, there should also be no impediment to withdrawal of its reservation to Article 10 of the Covenant.

233. Following the death of Liam Ashley, agencies have acted to ensure that existing statutory regulations and practice governing the age-mixing of under 18-year-olds in transit to and from detention facilities, and age-mixing in police custody are compliant with UNCROC and the Covenant. The Minister of Corrections issued a directive in August 2006 stating that, without exception, there will be no age-mixing in transit. This means that the Department of Corrections' practice is compliant with Article 37(c) of UNCROC and with Article 10(2)(b) of the Covenant. A review of the Corrections Regulations 2005 is currently underway and it is expected that the Regulations will be brought into line with the Ministerial directive upon completion of the review.

Contracting out of Prison Service

234. The Committee commented on the contracting out of prison services in its concluding comments on the fourth periodic report. At the time, Auckland Central Remand Prison (ACRP) was the first and only privately-run prison in New Zealand. For a period of five years commencing on 13 July 2000, the prison was managed by Australasian Correctional Management Pty Limited (which later became GEO Group Australia Pty Limited), under a contract entered into pursuant to section 4A of the Penal Institutions Act 1954. The performance of the contracted company was in line with contract expectations. The company provided the Department with monthly and quarterly reports outlining performance against set criteria including those for incidents, complaints, searches, disciplinary proceedings, drug testing, and programme delivery.

235. The Corrections Act prohibited contracting out prison management, and no extensions to existing contracts were permitted. The management of ACRP was successfully transferred back to the Public Prisons Service on 13 July 2005, with minimal disruption to prisons and prison routine. Escorting prisoners outside of prisons continues to be largely contracted out to a private company.

Article 12

Visa Requirements for Returning Residents and Some Citizens

236. In its concluding comments on New Zealand's fourth periodic report, the Committee expressed concern about the requirement in the Immigration Act for permanent residents to have Returning Resident's Visas (RRVs) and that, in some circumstances, citizens require visas to enter New Zealand. For citizens, this will only be the case where a New Zealand citizen has dual citizenship and chooses to travel here on another country's passport. While the Immigration Act protects the rights of New Zealand citizens to be in New Zealand at any time, immigration

officials at the border will need proof of New Zealand citizenship, and this proof takes the form of a New Zealand passport or New Zealand emergency travel document. Citizens therefore require a valid New Zealand travel document or, failing that, a visa, to enter New Zealand.

237. The new Immigration Bill introduced in August 2007 proposes creating Permanent Resident and Resident status. This new legislation proposes that Permanent Residents will no longer have to obtain RRVs. Their right to return to New Zealand will be automatic once Permanent Resident status is gained. Those with Resident status will have conditions that they have to meet before obtaining Permanent Resident status. Permission to travel to New Zealand on multiple journeys will be allowed for the period of their Residence visa. In addition, under the Immigration Bill, New Zealand citizens travelling to New Zealand on foreign passports will not require a visa to enter the country. Provision is made for these people to obtain endorsements in their foreign passport which will indicate that they are New Zealand citizens, in order to facilitate their entry into New Zealand.

Passports Amendment Act 2005

238. The Passports Amendment Act 2005 introduced new provisions to enable the Minister of Internal Affairs to cancel and refuse to issue New Zealand travel documents (passports, certificates of identity, emergency travel documents and refugee travel documents) on grounds of national security. The purpose of these provisions is to prevent a person, who the Minister believes on reasonable grounds to be a danger to the security of New Zealand, travelling on a New Zealand passport to commit a terrorist or similar act. The provisions were implemented following resolution 1373 of the UN Security Council that required States to prevent the movement of terrorists by having controls on the issue of travel documents.

239. The provisions contain a number of procedural safeguards to ensure that an individual's rights are impaired as little as possible. For example, the decline period is restricted to twelve months, and the person denied the travel document may appeal the Minister's decision to the High Court. The 12-month decline period may only be renewed by the High Court, and the Court must be satisfied that the grounds for refusal to issue the travel document still apply. There is also provision for the issue of a journey-specific emergency travel document to enable a New Zealand citizen to come or return to New Zealand in circumstances where he or she has been refused a passport or had a passport cancelled on grounds of national security.

240. The Passports Amendment Act also makes provision for a court, when sentencing a person for a terrorism-related offence, to make an order forbidding the issue of a passport to that person for a specified period not exceeding fifteen years.

Article 13

241. New Zealand is party to the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol and is therefore obligated not to expel or return ("refouler") a person with a well-founded fear of persecution by reason of his or her race, religion, nationality, membership of a particular social group, or political opinion.

242. The Immigration Act provides a statutory basis for New Zealand's refugee status determination system. Refugee status claims are assessed initially by refugee status officers of

Immigration New Zealand. Those claimants declined refugee status by Immigration New Zealand may appeal to the independent Refugee Status Appeals Authority. Also, the Refugee Convention is incorporated as a schedule to the Immigration Act. The non-refoulement obligation of the Convention relating to the Status of Refugees is also incorporated in the Act and applies to both recognised refugees and refugee status claimants.

243. The New Zealand Government has conducted a fundamental review of the Immigration Act, with a Bill introduced in August 2007. As well as maintaining non-refoulement obligations and the Refugee Convention, there is a proposal to incorporate Articles 6 and 7 of the Covenant into New Zealand's immigration legislation. In addition, it is proposed that Article 6 and 7 claims for protection be considered alongside refugee status claims at first instance and on appeal.

244. A new Immigration and Protection Tribunal will be established consisting of the current Refugee Status Appeals Authority, Removal Review Authority, Residence Review Board and Deportation Review Tribunal. The individuals sitting on New Zealand's immigration tribunals are experts in immigration and refugee law, providing a trusted independent avenue of redress that helps avoid extensive litigation and judicial review. Streamlining these into one body will maximise fairness in the immigration system, ensure effective decision-making, and create a more efficient, understandable and accessible appeals system.

Removing the immigration risk offshore

245. Advance Passenger Processing (APP) is a check made by airlines. The validity of a passenger's passport and visa information is checked against data held in Department of Labour immigration systems at check-in. This effectively moves New Zealand's border offshore. The advance passenger information that it provides also enables airport staff to profile passenger details and to assist in identifying those passengers who may present risk before the flight arrives in New Zealand.

246. The screening process consists of two stages:

(a) *Electronic Screening at check-in*: This step involves an interactive check via an electronic system. Each passenger's data is captured from their passport and matched against information held in the APP system. Within approximately three seconds, the airline will receive back a message to either "board" or "do not board" each passenger;

(b) *Electronic Profiling based on passenger information*: Before an aircraft lands in New Zealand, an Immigration Officer "profiles" the passengers on board via separate tools within the APP system. This allows the Immigration Service to indicate to Customs the persons it specifically wants to talk to on arrival.

247. APP went live in July 2003. Since the passage of the Immigration Amendment Act 2004, screening passengers through APP has been mandatory for all airlines flying to New Zealand. In 2005/06, 680 people were prevented from boarding flights to New Zealand.

248. The Regional Movement Alert System (RMAS) is part of APP and allows participating countries to detect the use of invalid travel documents. RMAS has been in place since April 2006. Over 100 lost, stolen or otherwise invalid New Zealand passports have been detected while being used to enter the United States or Australia.

249. If any person about whom an airline receives a "do not board" message expresses an intention to seek asylum in New Zealand, staff have been trained to direct that person to the nearest UN High Commissioner for Refugees representative in that country. However, this has not happened since APP was initiated in 2003. Once an asylum seeker arrives in New Zealand, our obligations under the Refugee Convention, Covenant and other international conventions mean that their claim for protection will be processed as per New Zealand's international obligations and the relevant domestic legislation.

Detention of Ahmed Zaoui

Arrival and Refugee Status Claim

250. Ahmed Zaoui, an Algerian national, arrived in New Zealand on 4 December 2002. On arrival he sought refugee status at Auckland International Airport. He was detained on arrival because of security concerns held about him following interviews by Customs and Immigration. Police and the Security Intelligence Service then interviewed him. On 30 January 2003 his refugee application was declined by an officer of the Refugee Status Branch, Department of Labour. He appealed that decision to the Refugee Status Appeals Authority (RSAA).

Security Risk Certificate

251. On 20 March 2003 the Director of Security issued a security risk certificate in respect of Mr. Zaoui under Part 4A of the Immigration Act 1987, and provided that certificate to the Minister of Immigration. The certificate was based in part on classified security information and certified that Mr. Zaoui was a threat to national security. Classified security information is information which for security reasons cannot be released to the public or the person concerned. Part 4A recognises that there may be cases where classified security information is relevant to immigration matters. The Minister can choose whether to rely on the security risk certificate.

252. On 24 March 2003 the Immigration Minister made a preliminary decision to rely on the certificate. As a consequence, Mr. Zaoui was detained under Part 4A in a prison. On 27 March 2003 Mr. Zaoui exercised his right to apply to the Inspector-General of Intelligence and Security for a review of the issue of the certificate. The Inspector-General is an independent person of high judicial standing (a retired High Court Judge) whose responsibilities include oversight of intelligence and security. The Inspector-General's review was deferred until Mr. Zaoui's appeal about his refugee status had been decided by the RSAA.

Refugee Status Appeals Authority Decision

253. On 1 August 2003 the RSAA found that Mr. Zaoui had a well-founded fear of being persecuted if returned to Algeria and was a refugee within the meaning of the UN Convention Relating to the Status of Refugees. The RSAA process is entirely separate from the security risk certificate process. Indeed, the fact that a person is granted refugee status does not automatically

allow a person to remain in New Zealand. Further, in reaching its decision, the RSAA did not have and was not able to consider the classified information that underlies the security risk certificate.

Conduct of Inspector-General's Review

254. On 6 October 2003, after consultation with Mr. Zaoui's and the Crown's lawyers, the Inspector-General issued a decision setting out how he intended to conduct his review. Mr. Zaoui challenged a number of aspects of that decision in the High Court. The High Court found largely in Mr. Zaoui's favour and, in particular, held that Mr. Zaoui was entitled to receive a "summary of the allegations" lying behind the security risk certificate. The Director of Security provided the summary on 27 January 2004. That summary was made available to the New Zealand Herald newspaper and has since been published. The Crown appealed the High Court's decision, although not the part relating to the summary. Mr. Zaoui also appealed aspects of the High Court's decision.

255. The Court of Appeal found that the Inspector-General must decide whether there are reasonable grounds for regarding Mr. Zaoui as a danger to the security of New Zealand in terms of Article 33.2 of the Refugee Convention in considering whether the security risk certificate should be confirmed. The Court of Appeal held that Article 33.2 imposed a proportionality standard under which the level of danger posed by Mr. Zaoui must be sufficiently serious as to justify the severity of persecution that he was likely to face. The Court of Appeal said that questions relating to deportation (and therefore other human rights considerations that may arise in respect of any deportation) are for the Minister of Immigration to consider.

256. The Crown appealed the Court of Appeal's decision regarding the approach to article 33.2 of the Refugee Convention. That appeal was heard by the Supreme Court and the decision was delivered on 21 June 2005 (attached as Annex P).[12] The Court declared that Article 33.2, while imposing a high standard for refoulement of persons at risk of persecution, did not impose a proportionality standard. Accordingly, in carrying out a review the Inspector-General is concerned only to determine whether the relevant security criteria are satisfied. The Inspector-General does not determine whether a person is subject to a threat which would or might prevent that person being removed from New Zealand. Those are matters to be considered by the Minister of Immigration in determining whether or not to deport the person. The Court also held, consistent with Crown submissions, that Article 3 of the Convention Against Torture did not provide any exception for refoulement of persons at risk of torture.

Mr. Zaoui's Detention

257. On 7 May 2004, Mr. Zaoui issued further proceedings challenging his continuing detention while the Inspector-General carried out the review. The High Court held that Mr. Zaoui's detention was lawful. That decision was appealed by Mr. Zaoui to the Court of Appeal and then to the Supreme Court. The appeal was heard by the Supreme Court and the decision was delivered on 25 November 2004. The Court held that under Part 4A of the Immigration Act,

[12] *Zaoui v. Attorney-General (No 2)* [2006] 1 NZLR 289.

Mr. Zaoui could be transferred to alternative premises for any ongoing detention. Alternatively, the Court had jurisdiction to release him on bail. On 9 December 2004 the Supreme Court released Mr. Zaoui on bail with conditions to the Dominican Friars in Auckland.

Withdrawal of Security Risk Certificate

258. On 14 September 2007, the Director of Security withdrew the security risk certificate in respect of Mr. Zaoui. The Director made a public statement explaining that decision, in which he noted that he was, under statute, obliged to keep the certificate under review. The Director explained further that the risk in respect of Mr. Zaoui had been mitigated by further information that he had provided in the hearing process, other additional information and the passage of time. The refugee status granted to Mr. Zaoui in August 2003 is therefore no longer under review and, moreover, his family has now joined him in New Zealand.

Article 14

259. The New Zealand Defence Force has conducted a comprehensive review of the military justice system to ensure that it complies with Article 14. This review has included substantial consultation with the Ministry of Justice, the Crown Law Office and legal and military experts both in New Zealand and overseas. The result is four new Acts touching on the military justice system, which were recently passed by Parliament. Those Acts make substantial reforms to the existing system to improve its compliance with the Bill of Rights Act and therefore the Covenant.

Reservation to Article 14

260. New Zealand has a system of ex gratia payments for wrongful conviction and imprisonment which are made at the discretion of the Crown and not pursuant to any legal obligation. Since 1997, guidelines have been in place to determine eligibility for, and quantum of, ex gratia payments. The current guidelines are detailed, use mandatory language and instruct the Minister of Justice (or the Minister of Defence in cases involving conviction by court martial) to refer eligible cases to a Queen's Counsel for further assessment. The guidelines thus bring more certainty and transparency to the process. The New Zealand Government does not intend to take further action on this reservation at the moment.

Article 15

Preventive Detention

261. In considering New Zealand's Fourth Report, the Human Rights Committee expressed concern regarding Section 34 of the Criminal Justice Amendment Act 1993, which provides for a sentence of indeterminate detention for offenders convicted even once of a serious crime who are likely to re-offend in a similar manner. The Committee was concerned that preventive detention raised issues under article 15 of the Covenant and invited New Zealand to comment on its concern that preventive detention was a type of double sentencing, in breach of article 15.

262. Article 15 has counterparts in New Zealand domestic law, in particular, section 25(g) of the Bill of Rights Act and section 6 of the Sentencing Act 2002. These provisions are not

identical in phrasing to the Covenant, but provide that an offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.

263. A sentence of preventive detention cannot be imposed retrospectively. The Sentencing Act provides that an offender is liable to preventive detention for an offence committed before the Act came into force only if the offending qualified for preventive detention in terms of section 75(4) of the Criminal Justice Act 1985, and if the Court would have imposed such a sentence under that Act.

264. These provisions were considered by the Supreme Court in *R v. Mist* [2005] NZSC 77. Mr. Mist was 21 years old at the time of sentence, but less than 21 years when he committed the crimes that made him eligible for preventive detention. The Criminal Justice Act 1985 did not state whether the lower age limit of 21 should be taken at the commission of the offence, the date of conviction, or the date of sentencing. The Supreme Court noted that ratification of the Covenant was integral to a 1980 amendment to the Criminal Justice Act 1954 which placed a broad prohibition on retrospectivity into the statute book. The essence of that provision is now contained in the Crimes Act 1961 and the Sentencing Act. The Supreme Court found that, despite more restrictive wording in later statutes, the broad prohibition on retrospectivity was not changed and that the prohibition meant that Mr. Mist was not eligible for preventive detention.

Article 17

Developments in regard to the Privacy Act 1993

265. As noted in the previous periodic report, the Privacy Act 1993 protects personal information. It does this by providing a legislative framework for balancing society's interests in the free flow of information with individuals' interests in having some control over the collection, use, storage, and disclosure of personal information about them.

266. The work of the Privacy Commissioner under the Privacy Act is described in Annual Reports to Parliament (copies on www.privacy.org.nz). Some developments are noted below.

Privacy Commissioner 1998 Review

267. The 1998 review of the Privacy Act by the Privacy Commissioner, entitled *Necessary and Desirable*, contained a number of recommendations to improve the effectiveness and efficiency of the Privacy Act. The Prime Minister announced in June 2007 that a Privacy Amendment Bill is being drafted. The amendments in this Privacy Amendment Bill will address many of the technical and operational shortcomings identified in the Privacy Commissioner's review.

APEC Privacy Framework 2005

268. Asia Pacific Economic Co -operation (APEC) Ministers adopted the APEC Privacy framework in 2005. New Zealand had supported the adoption of the Framework, to work towards the better protection of New Zealanders' personal information across the region. Work continues on international implementation in cross-border enforcement and information sharing, and the development of cross border privacy rules (as a "Pathfinder" project).

Privacy Codes of Practice

269. One of the functions of the Privacy Commissioner is the issuing of codes of practice. A code of practice may modify the application of one or more of the information privacy principles or prescribe how to apply or comply with the information privacy principles.

270. At the time of this report, six Codes of Practice are currently in force:

- Health Information Privacy Code 1994
- Superannuation Schemes Unique Identifier Code 1995
- Justice Sector Unique Identifier Code 1998
- Post-Compulsory Education Unique Identifier Code 2001
- Telecommunications Information Privacy Code 2003 and
- Credit Reporting Privacy Code 2004

271. The Telecommunications Information Privacy Code 2003 principally covers the telecommunications industry in its dealings with the personal information of customers and users of telecommunications services.

272. The Credit Reporting Privacy Code 2004 applies specific rules to credit reporters, to better ensure the protection of individual privacy. The Code addresses the credit information collected, held, used, and disclosed by credit reporters. For credit reporters the Code takes the place of the Information Privacy Principles in the Privacy Act. The Code is scheduled to be reviewed in 2008.

273. The Health Information Privacy Code was reviewed and updated in 2007. The substantive amendment to the Code was an extension to the health sector agencies who can assign a unique identifier (the National Health Index number).

Judicial Decisions relating to Privacy

The Privacy Act 1993

Harder v. Proceedings Commissioner [2000] 3 NZLR 80

274. This decision of the Court of Appeal concerns the tape recording of two telephone conversations by one party without the knowledge of the other party. The issue was whether this constituted collecting information and whether this was in breach of the Privacy Act. It was held unanimously that:

(a) The unsolicited information (provided by the complainant in the first telephone conversation) was outside the scope of the Privacy Act;

(b) The solicited information (provided by the complainant in the second telephone conversation which occurred at the request of the respondent and was in response to the respondent's questions) was collected in terms of the Privacy Act;

(c) It was neither unlawful nor necessarily unfair to record a conversation without the knowledge of the other party - in the circumstances of a conversation between a legal practitioner and a witness for the prosecution of a client who was also the opposing party in civil proceedings, it was not unfair for the practitioner to make a complete and fully accurate record of what passed between them; and

(d) The purpose of the provision that information should not be collected by unfair means was to prevent people from being induced by unfair means into supplying personal information which they would not otherwise have supplied.

A Tort in Privacy

Hosking v. Runting [2005] 1 NZLR 1

275. This was a case in which a celebrity couple brought an action for a tort of invasion of privacy against a news media company for taking photos of their twin children without permission. The majority of the Court of Appeal affirmed the existence of a tort of interference with (or invasion of) privacy in New Zealand.

Rogers v. Television New Zealand [2007] 1 NZSC 91

276. By way of background, the appellant, Mr. Rogers, was tried by a jury in 2005 for the murder of a woman in 1994. Another man had previously been charged with the murder and was convicted of manslaughter in 1995. His conviction was set aside in 2004. Following further inquiries, Mr. Rogers was interviewed at the scene by the police and charged with the murder. Prior to the trial, the Court of Appeal decided that this interview had taken place in breach of Mr. Rogers' rights under the Bill of Rights Act and that the police videotape of the interview was not to be shown to the jury at his trial. The trial proceeded and Mr. Rogers was found not guilty.

277. In this case, Mr. Rogers sought to prevent Television New Zealand (TVNZ) broadcasting a copy of the police videotape of the interview. In the Supreme Court a majority of three Judges (Blanchard, Tipping and McGrath JJ), in separate judgments, decided that in the particular circumstances Mr. Rogers' privacy interests were outweighed by the interests of open justice. Those interests favoured permitting the broadcast of the videotape.

278. The tort of invasion of privacy was discussed in the course of the judgments in this case. McGrath J considered the decision in *Hosking v. Runting* and stated the following requirements to achieve a successful claim in the tort of privacy:

(a) There must be facts in existence in respect of which there is a reasonable expectation of privacy ("private facts");

(b) The publicity given to those private facts must be of a kind that an objective reasonable person would consider highly offensive.

279. McGrath J noted that even where these elements are established, if the information in question is a matter of legitimate public concern that justifies its publication, this will provide a defence to any claim.

280. Elias CJ, in a minority judgment, expressed concern about the discussion of the tort of invasion of privacy in this case, and observed that the Court of Appeal in *Hosking v. Runting* said that consideration of this tort is on a case by case and fact-specific basis, and that the Court of Appeal did not purport to establish the limits of the tort in all circumstances. The Chief Justice also noted that in light of developments in other jurisdictions since the decision in *Hosking v. Runting* it is necessary to be cautious.

Law Commission Review of Privacy

281. The Law Commission is conducting a review of privacy values, changes in technology, international trends, and their implications for New Zealand civil, criminal and statute law, with reports at each stage of the project. In short, the Commission's work will proceed in four stages:

- A high-level policy overview to assess privacy values, changes in technology, international trends, and their implications for New Zealand civil, criminal and statute law

- Consideration of whether the law relating to public registers requires systematic alteration as a result of privacy considerations and emerging technology

- Consider the adequacy of New Zealand's civil law remedies for invasions of privacy, including tortuous and equitable remedies; and the adequacy of New Zealand's criminal law to deal with invasions of privacy and

- A review of the Privacy Act 1993 with a view to updating it, taking into account any changes in the legislation that have been made once that stage of the overall review of the law relating to privacy has been reached

Section 21 of the New Zealand Bill of Rights Act 1990

282. As noted in the Third Periodic Report (at paragraph 83), although the Bill of Rights Act provides no direct reflection of Article 17, section 21 of the Bill of Rights Act accords a right to be secure against "unreasonable search or seizure, whether of the person, property, or correspondence or otherwise".

283. Section 21 of the Bill of Rights Act has been the subject of some judicial scrutiny since 1990. In an early leading case on section 21, the New Zealand Court of Appeal held that the intention of section 21 is:

> ... to ensure that governmental power is not exercised unreasonably ... The guarantee under section 21 to be free from unreasonable search and seizure reflects an amalgam of values. A search of premises is an invasion of property rights and an intrusion on privacy. It may also involve a restraint on individual liberty and an affront to dignity. [*R v. Grayson and Taylor* [1997] 1 NZLR 399, 406]

284. Other judicial decisions have helped clarify the ambit of the right in the New Zealand context, and the following are the main highlights:

- Consideration of section 21 involves an assessment of the reasonableness of the powers of the state to intrude into the lives of its citizens - such an assessment requires a consideration as to whether:
  - The power authorising the exercise of the search and seizure is unreasonable or
  - The search or seizure is carried out in an unreasonable manner
- Section 21 is commonly associated with law enforcement - both in terms of investigating offences and carrying out powers of inspection
- Section 21 does not of itself guarantee property rights (rights to own, use or enjoy property) and
- The privacy values underlying the section 21 guarantee are those held by the community at large - They are not merely the subjective expectations of privacy a particular owner or occupier may have and may demonstrate by signs or barricades (*R v. Grayson and Taylor* [1997] 1 NZLR 399, 406)
- Reasonable expectations of privacy are lower in public places than on private property. The expectation of privacy is greatest in relation to a person's body
- The nature of the activities carried on, particularly if involving public wellbeing or governmental control, may affect reasonable expectations of privacy

285. Many activities and industries are subject to a high degree of regulatory control and oversight by government agencies. Because there is an element of consent involved in such activities, persons participating in them have a lesser expectation of privacy than they might expect if they are in a private dwelling.

286. Although the Bill of Rights Act has no specific remedy provisions, the courts have developed various remedies for infringement of the rights and freedoms identified in the Act. In the context of claims under section 21 of the Bill of Rights Act, remedies that have been considered or awarded include:

- Excluding "tainted" evidence from a proceeding
- Reducing the sentence of an offender and
- Monetary compensation

Law Commission Review of Search and Seizure Powers

287. The Law Commission report *Search and Surveillance Powers* was tabled in Parliament on 7 August 2007 (a copy of the report is available at www.lawcom.govt.nz). This report makes 300 recommendations for clarifying, rationalising and codifying the present law relating to the

search and surveillance powers of law enforcement agencies. The recommendations include a number of proposals for modification or additions to the present law. The Commission is working with key government agencies to prepare a suite of papers for consideration by the Government covering the Commission's recommendations.

Article 18

288. In *Police v. Razamjoo*, Moore DCJ noted that "the rights of thought, conscience, religious and other belief affirmed by section 13 of the New Zealand Bill of Rights Act can be regarded as absolute rights".[13] However, the Judge also noted that rights of manifestation must necessarily be subject to constraints. The Court decided that whilst giving evidence, women were not permitted to wear their burqas in the interests of a fair trial. However, the Judge acknowledged that due to their faith and beliefs, requiring them to remove their burqas in public would be unduly harsh. Accordingly, to ensure a fair trial, the Judge ruled that the women were allowed to give evidence from behind a screen to ensure that only the Judge, counsel and female court staff were able to observe their faces.

289. There have been other significant developments in this area during the reporting period, such as the statement on religious diversity. The statement on religious diversity is discussed in detail under article 20.

Article 19

290. The case of *Moonen* as discussed in the fourth periodic report remains a leading case in New Zealand on the right to freedom of expression.

291. An important development in the case law during the reporting period was the case of *Hopkinson v. Police* [2004] 3 NZLR 704. Mr. Hopkinson had been convicted in the District Court of destroying the New Zealand flag with the intention of dishonouring it under the Flags, Emblems, and Names Protections Act 1981. The charge followed a protest in Parliament grounds that coincided with the Australian Prime Minister's visit to Parliament. As part of the protest Mr. Hopkinson put a New Zealand flag upside down on a pole, doused it in kerosene and set fire to it. The High Court found that "There cannot be any doubt that prohibition of the appellant's conduct is prima facie a breach of his right to freedom of expression. The scope of the right is broad and it is well established that it includes non-verbal conduct such as flag-burning".[14]

292. France J found that the prohibition of this conduct amounted to a prima facie breach of the right to freedom of expression. France J considered that the objectives of the prohibition were legitimate and important. However, she concluded that the prohibition of Mr. Hopkinson's conduct was not a justified limit on the right to freedom of expression, and therefore quashed the conviction. Justice France found that the offence provision could be read consistently with the Bill of Rights Act by adopting a narrow interpretation of "dishonouring".

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[13] *Police v. Razamjoo* [2005] DCR 408, para 97 (DC).

[14] *Hopkinson v. Police* [2004] 3 NZLR 704, 711.

293. In 2007, the Supreme Court considered the right to freedom of expression in *Brooker v. Police* [2007] NZSC 30, a case concerning the meaning of "disorderly behaviour". The Supreme Court noted that section 14 of the Bill of Rights Act is enacted to affirm New Zealand's commitment to the Covenant, noting Article 19 of the Covenant. Mr. Brooker was convicted of disorderly behaviour for protesting in the street outside the home of a police constable. The Court held that the protest constituted expressive behaviour that is protected by section 14 of the Bill of Rights Act. The majority of the Court held that, taking into account Mr. Brooker's right to freedom of expression, as affirmed by section 14 of the Bill of Rights Act, his behaviour did not constitute disorderly behaviour for the purpose of the Summary Offences Act in this instance.

Publication of cartoons of the Prophet Mohammed

294. Cartoons published in a Danish newspaper depicting the Prophet Mohammed led to global protests by Muslims. In February 2006, a number of New Zealand media reproduced the cartoons to illustrate the international news story. This led to peaceful local protests as well as threats of international sanctions.

295. Following the controversy, the Race Relations Commissioner convened a meeting of the media and religious leaders to discuss the issue. The editors of the newspapers concerned apologised for the offence caused and undertook not to further publish the cartoons, and this was accepted by the Federation of Islamic Associations. The HRC was asked by the meeting to facilitate further discussion, in consultation with the media, faith communities and educators, and the NZ Journalists Training Organisation was asked to address training issues arising from the controversy.

Seditious offences

296. In October 2007, the Crimes (Repeal of Seditious Offences) Amendment Act was passed. This Act repeals the sedition offences contained in sections 81 to 85 of the Crimes Act 1961. The amendments come into force on 1 January 2008.

297. The Act implements the recommendations of the Law Commission in its report of March 2007, *Reforming the Law of Sedition*. The Law Commission concluded that the sedition offences are overly broad and uncertain, the offences infringe on the principle of freedom of expression, and have the potential to stifle or punish political speech. The Law Commission said that "as long as the New Zealand sedition offences remain on the statute book there is potential for their misuse against people who criticise the Government publicly, especially at times of civil unrest and of perceived concern for national security."

298. Sedition has been used to prosecute and punish speech that may be inflammatory, vehement and unreasonable. The Government considers that the State should only be entitled to punish such statements advocating imminent violence against the State, the community, or individuals, when a criminal offence is the likely outcome, and there is proof of intention to advocate it. Abolishing the sedition offences will better protect the values of democracy and free speech.

Article 20

Interfaith and Inter-Cultural Dialogue

299. New Zealand is a strong supporter of regional and multilateral initiatives, such as the Asia-Pacific Regional Interfaith Dialogue, and the UN sponsored Alliance of Civilisations, which aim to encourage inter-religious and inter-cultural understanding and cooperation. Such dialogue can help to promote good relations amongst different faith communities and cultures and build understanding, tolerance and respect for each other's beliefs. New Zealand sees these initiatives as having real potential to counter religious radicalisation and promote peace and non-violence, thereby contributing to our wider regional and international security objectives.

The Asia-Pacific Regional Interfaith Dialogue

300. New Zealand is one of four co-sponsors of the Asia-Pacific Regional Interfaith Dialogue, along with Australia, Indonesia and the Philippines. New Zealand hosted the third meeting in the regional Dialogue process at Waitangi in May 2007, following on from the two previous meetings: in Yogyakarta, Indonesia (December 2004) and in Cebu, the Philippines (March 2006).

301. The Asia-Pacific Regional Interfaith Dialogue brings together representatives of the major faith and community groups of 15 countries from South East Asia and the adjacent South Pacific to explore how we might better cooperate and communicate with each other in order to build real understanding and mutual respect amongst the adherents of our region's different religious faiths. The Regional Interfaith Dialogue focuses the region's attention on the need for inclusion and respect for each other within our own diverse communities, so that no faith community feels marginalised or excluded.

302. The Action Plan from the Waitangi meeting sets out a range of proposals for practical action, including recommendations for improving the networking and connections between and within faith communities; recommendations aimed at fostering tolerance and understanding of other religions in both the public and religious education systems, and recommendations aimed at improving the quality, coverage, and critical consumption of religious issues reported in the media.

303. The fourth meeting of the Regional Interfaith Dialogue will be in Cambodia in early 2008. Australia will co-host the meeting with Cambodia.

304. The Regional Interfaith Dialogue is gaining momentum, and is already producing some very real outcomes in terms of improved security in our region. It complements other efforts at the national and multi-lateral level to build cohesion within and amongst societies.

The Alliance of Civilisations

305. New Zealand is a strong supporter of the Alliance of Civilisations (AOC) initiative launched by the UN Secretary-General in 2005. The AOC initiative is increasingly recognised as the focal point of multilateral efforts to build bridges between cultures and societies and to

strengthen the avenues for trust and cooperation. The Report of the Alliance's High-Level Group was a major step forward in identifying practical action states can take to bridge divide and improve relations between faiths, societies and cultures, particularly between Islam and the West.

306. The New Zealand Prime Minister considered it important for the Asia-Pacific region to have an opportunity to assess how it could best respond to the report of the AOC's High-Level Group. She convened a Symposium in Auckland on 23-24 May 2007, involving a broad cross-section of prominent leaders, thinkers, academics and experts from our region and beyond, including three members of the High-Level Group itself. The Symposium focused regional attention on the Report's recommendations, particularly in the four priority "fields of action" (education, youth, media and migration) and identified possibilities for practical follow-up action in the domestic, regional (Asia/Pacific) and international spheres by countries in our region.

Statement on Religious Diversity

307. Members of the New Zealand delegation to the first Interfaith Dialogue in Yogyakarta were inspired to propose the development of a broadly-based statement on religious diversity in New Zealand.

308. The Statement of Religious Diversity, which was endorsed at a National Interfaith Forum in February 2007, was developed as a community based initiative through the New Zealand Diversity Action Programme with the support of the HRC and Victoria University (with the support of the New Zealand National Commission for UNESCO). The statement provides a framework within which issues of religion can be discussed by faith communities and the wider public.

309. It emphasises the:

- Need for all faiths and beliefs to be treated equally before the law
- Right to freedom of expression of faith and belief
- Right to safety and security for those of all faiths and beliefs
- Need for our public services and workplaces to accommodate diverse beliefs and practices and
- Importance of education in promoting understanding

310. This statement is a positive outcome of New Zealand's involvement in interfaith processes.

311. The HRC also facilitates *Te Korowai Whakapono: National Interfaith Network Aotearoa New Zealand*, which is designed to facilitate cooperation and exchange between faith communities and government in New Zealand and the Asia Pacific region.

Connecting Diverse Communities

312. The Connecting Diverse Communities project is designed to pull together and better co-ordinate initiatives across many government agencies to promote social cohesion and stronger relationships between communities. The project is led by the Ministry of Social Development and the Office of Ethnic Affairs.

313. Ministers decided to commission this work following a series of international events, including riots in Sydney's Cronulla area and the debate on the publication of cartoons portraying Prophet Mohammed.

314. As an initial exercise, officials collected and mapped out more than 100 initiatives underway in New Zealand and overseas to explore how far they contributed to enhanced understanding between different communities, and where there is a need for new initiatives.

315. Over 70 initiatives are now included in the Connecting Diverse Communities work programme with new initiatives being added periodically. The work programme is organised around the following five areas:

- Strengthening intercultural relations
- Addressing discrimination and promoting respect
- Improving connections with cultural identity
- Capacity building and community development
- Building the knowledge base

316. A Connecting Diverse Communities public engagement process with communities, local government and community stakeholders was undertaken between July and December 2007. The aim of the public engagement was to identify what people thought is and is not working to connect communities, what they thought would strengthen relationships between diverse communities, and what role the Government and others can play. The findings of the public engagement will help inform the future direction of the Connecting Diverse Communities work.

Reservation to Article 20

317. The Government Administration Select Committee is conducting an inquiry into the laws on hate speech and will look at various issues including whether or not further legislation is warranted. This inquiry follows on from the Committee's consideration of the amendment to the Films, Videos and Publications Classifications Act 1993 where hate speech issues were raised but no specific amendments were made to the current law. Once the report is tabled in the House of Representatives, the Government will be required to consider and comment on the recommendations made. However, the Government has no current plans to withdraw the reservation.

Article 21

318. Section 16 of the Bill of Rights Act affirms the right of everyone to freedom of peaceful assembly.

319. In *Police v. Beggs*,[15] the High Court held that, in exercising the rights of the occupier of Parliament grounds, the Speaker of the House of Representatives is exercising a public function and has to act in a manner that is consistent with the Bill of Rights Act. In this case, the exercise of the right of warning persons to leave under section 3 of the Trespass Act 1980 interfered with the freedom of expression and peaceful assembly. It could only be exercised reasonably, both in the manner of its exercise and in the prevailing circumstances. The Court ordered a stay in the prosecution of 75 individuals involved in a protest on Parliament grounds.

Article 22

320. The most significant reform in this area has been the repeal and replacement of the Employment Contracts Act 1991 (ECA). The ECA favoured a liberalised labour market and was a legal expression of the ideology of an employment relationship based on contract law. Under the ECA, the labour market was fragmented because:

- Collective Awards were replaced by collective employment contracts and individual employment contracts, with no statutory preference for collective bargaining
- There was only limited statutory recognition of unions
- Union membership was showing a strong downward trend from approximately 680,000 at its height in 1985, to just over around 500,000 in 1991. In 2000, union membership was just over 300,000
- Increased recourse to legal approaches for employers and employees, in particular in relation to breakdown of employment relationships

The Employment Relations Act 2000

321. The ECA was repealed by the Employment Relations Act 2000 (ERA). The ERA governs work-place relations, and in 2004 the Act was amended to give better effect to the objectives of promoting productive employment relationships, good faith and collective bargaining, and the effective resolution of employment problems. “Good faith” refers to a set of principles governing parties’ relationships: the principles include dealing with each other honestly, openly and without misleading each other. The concept requires parties to be active and constructive in establishing and maintaining a productive relationship. The 2004 amendments to the ERA clarified that “good faith” principles apply to bargaining for individual employment agreements as well as to collective bargaining, and provided that penalties may be imposed for certain breaches of the duty of good faith.

[15] [1999] 3 NZLR 615.

322. The ERA:

- Is designed to build productive employment relations between employers, employees and unions
- Establishes a framework of responsibility, emphasising that employment is a relationship built on good faith, open communication and consultation obligations between employers and employees
- Provides problem resolution mechanisms for unions if employment relationship problems arise (for example mediation services prior to Court action)
- Promotes observance of the principles of freedom of association and of the right to collective bargaining that underlie ILO Conventions 87 and 98

Specific Information on the ERA and Trade Unions

323. A short term evaluation of the ERA's impact was conducted in 2003 by the Department of Labour and indicated:

- The majority of employers were aware of the good faith obligation and the requirement for written agreements between themselves and employees
- Interpretation of good faith principles varied among employers, but they considered themselves as acting in accordance with their obligations
- Most employers and employees perceived bargaining power to be equal at their workplaces
- Some unions felt that the ERA improved their ability to form new collective agreements, to increase wages and improve terms and conditions; and
- Most employers and employees preferred to directly resolve employment relationship problems

324. There has been a slow growth in union membership from 330,000 in 2003 to 390,000 in 2006, which is about 23% of waged and salaried employees.

Judicial Decisions

325. Since the last report a number of decisions of the Employment Court and Employment Relations Authority have considered aspects of the collective bargaining provisions and the ERA obligation to bargain in good faith.

Bargaining process

326. In *Association of University Staff Inc v. The Vice-Chancellor of the University of Auckland*,[16] the union had given the defendant and other Universities notice initiating bargaining for a Multi-employer Collective Agreement (MECA), and had sent them a draft bargaining process agreement. The defendant employer cross-initiated for a single-employer collective agreement, and agreed to meet the union but not for MECA negotiations. The main issue was whether the University employer was initially entitled to resist negotiating for a MECA, with secondary issues of whether the employer was entitled to cross-initiate bargaining for a single-employer collective agreement, and whether the employer's communications with non-union employees (offering them increased remuneration) undermined bargaining with the union. The Court held that an employer who received an initiation notice had to, at least initially, play by the rules explicit or implicit in the union's choice of bargaining modes. The Court held that the employer may be entitled to decline to enter a MECA after bargaining if it had a genuine reason and reasonable grounds, but on the facts it was premature for the employer to make that assessment. Neither party had used its "best endeavours" to reach a bargaining process agreement. This is a high threshold, and means more than making an initial proposal where that is either not responded to or simply rejected. Participating in a process to enter a bargaining process agreement did not necessarily lock the University into substantive bargaining for or being a party to a MECA. The Court held that the ERA did not prohibit counter-initiation of bargaining.

Good faith - direct communications with employees or employers rather than representatives during bargaining

327. In *Christchurch City Council v. Southern Local Government Officers' Union*[17] the Court of Appeal considered the position of employer/employee communications under the ERA. The Court noted that an employer was not entitled to communicate directly with its employees during bargaining for a collective agreement (i.e. once bargaining has been initiated) if that communication either:

(a) Amounts, directly or indirectly, to negotiation with those employees about terms and conditions of employment, without the union's consent; or

(b) Undermines or is likely to undermine the bargaining with the union, or the union's authority in the bargaining.

328. Otherwise, the relevant constraint is that all parties are bound to deal with each other in good faith and without misleading or deceiving the other(s), but entitled nonetheless to communicate any statement of fact or reasonably held opinion about an employer's business or a union's affairs.

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[16] [2005] 1 CRNZ 224.

[17] [2007] 1 ERNZ 37.

329. In *New Zealand Public Service Association (Inc.) (PSA)* v. *The Chief Executive in respect of the Ministry of Agriculture and Forestry (MAF)*,[18] the Employment Relations Authority held that the union's communication directly with the Chief Executive of MAF, rather than with the authorised employer representative, breached good faith.

Compliance with ILO Convention "Right to Organise and Collective Bargaining" 1949 (No. 98)

330. Between 2000 and 2002 officials undertook a compatibility assessment on potential ratification of the ILO Convention "Right to Organise and Collective Bargaining" 1949 (No. 98). That Convention was ratified in 2003.

Reservation to Article 22

331. New Zealand entered this reservation out of concern that Article 22 is similar to ILO Convention 87, which New Zealand had not ratified due to incompatibility with provisions of the Industrial Relations Act 1973. Article 3 of the ILO Convention 87 promotes workers' ability to participate lawfully in sympathy and protest strikes without penalty. The ILO has identified New Zealand's penalty for workers participating in such strikes as the only barrier to ratifying ILO Convention 87. The Government agreed in May 2003 that ILO Convention 87 should not be ratified because the jurisprudence lacks clarity regarding whether the ILO would consider New Zealand's law, policy and practice to be compatible with the ILO Convention. The Government will continue to monitor the national and international situation and future developments in ILO jurisprudence, with a view to the future ratification of ILO Convention 87.

Article 23

Giving Our Children the Best Start in Life

332. In recent years the New Zealand Government has made a strong commitment to developing effective early intervention initiatives for children and their families and whānau. These interventions integrate policy and practice, and include health, education and social services known to be effective in improving outcomes. It is based on: a co-ordinated continuum of support; integrated assessment and planning; and families and communities identifying their own needs and developing solutions. It includes: universal services such as antenatal services and early childhood education; targeted services such as services for teenage parents and their children; intensive services such as Family Start and Early Start; and statutory care and protection services.

Victims of Domestic Violence (Immigration Policy)

333. The Victims of Domestic Violence (VDV) immigration policy began in 2000. It enables migrants in New Zealand who have been living together in an established relationship with a New Zealand citizen or resident, and who had intended to seek residence in New Zealand on the basis of that marriage or relationship, to apply for a work or residence permit if:

[18] Unreported, P. Stapp, 8 December 2005, WA 189/05.

- That marriage or relationship has ended due to domestic violence by the New Zealand citizen or resident, and

- Upon returning to their home country, they would be disowned by their family and community as a result of their relationship ending, and have no means of independent support

334. Under this policy, "domestic violence" has the meaning set out in section 3 of the Domestic Violence Act 1995, which defines domestic violence as physical abuse, sexual abuse and psychological abuse. Examples of psychological abuse include harassment, damaging property, allowing a child to see or hear domestic violence, and controlling someone's contact with other people. The applicant must prove that domestic violence has occurred. Evidence of domestic violence means:

- A relevant New Zealand conviction of the New Zealand citizen, resident partner or intended partner for a domestic violence offence against the principal applicant, or a dependent child of the principal applicant

- A complaint of domestic violence against the principal applicant or a dependent child investigated by the New Zealand Police where the New Zealand Police are satisfied that domestic violence has occurred

- A final Protection Order made by the Court; or

- Referral to the Department of Child, Youth and Family by an approved Refuge Organisation

335. The policy was established in recognition of the difficulties for some migrant women who experience domestic violence, but cannot return to their home country.

The Domestic Violence Act 1995

336. The Domestic Violence Act 1995 took effect on 1 July 1996 with the primary objective of providing greater protection for the victims of domestic violence. The Act provides for a single protection order that protects against a wide range of behaviour amounting to physical, sexual or psychological abuse. The range of people to whom the Act applies includes not only married and de facto spouses (as under the Domestic Protection Act 1982) but also same sex partners, family and household members and those in close personal relationships.

337. The order involves certain statutory conditions, including conditions restricting the possession of firearms, and in addition, a court can impose special conditions to suit the circumstances of the particular case. A further key aspect of the legislation includes the provision of mandatory programmes for respondents to protection orders. The primary aim of these mandatory programmes is to stop or prevent domestic violence on the part of the respondent. Additionally, the legislation enables protected persons, including children, to request attendance at State-funded programmes directed at promoting their safety. The Act also strengthens the enforcement provisions, in particular by increasing the penalty for the offence of breach of a protection order.

338. The Domestic Violence Act 1995 also recognises that abuse can occur not just in relationships between domestic partners but also in the wider family. This is of particular significance for Māori who traditionally live in wider family groupings. Regulations have been made under the Act which specify that as a condition of approval, programmes which are to be delivered to a client group that is primarily Māori must demonstrate knowledge and understanding of tikanga Māori (traditions), including relevant Māori values and concepts.

339. Applications for protection orders under the Domestic Violence Act fell from 8262 in 2004 to 7956 in 2005; however, Police statistics show that domestic offences increased 3.4% since 2005 (though overall recorded offences increased 4.1%). An increase in the number of cases of domestic violence could be the result of an increasing willingness to report domestic violence, rather than an actual increase in violence.

Domestic Violence Act 1995 review and Discussion Document

340. A targeted survey of representative stakeholders was undertaken by the Ministry of Justice in 2005. The groups consulted included relevant government agencies, the judiciary and some representative interest groups. The Ministry asked if there were any current concerns with the operation of the Act, and welcomed any proposals of how the legislation might be improved.

341. The review focuses on any matters that are impeding the effectiveness of the current law in achieving its objective of reducing and preventing violence in domestic relationships and it may result in some amendments to the Act and related legislation. The discussion document (soon to be released) is a vehicle for comment on the proposals provided to date, as well as an opportunity for a wider group of interested parties to consider matters relating to the operation of New Zealand's domestic violence legislation.

Government's wider work programme on domestic violence

342. The Government is committed to reducing domestic violence in New Zealand and a significant programme of work is under way. Initiatives range from pilot programmes and targeted services in specific areas, to chief executive and ministerial involvement. Co-ordination across the government sector is a feature, as is collaboration with communities and with the voluntary sector. Programmes specific to the needs of different groups have been developed because it has been recognised that culturally relevant strategies have more success than a "one size fits all" approach.

Te Rito

343. In February 2002, the Ministry of Social Development published *Te Rito: New Zealand Family Violence Prevention Strategy* (attached as Annex Q). It sets out Government's key goals and objectives and a framework to work towards the vision of families/whānau living free from violence.

Taskforce for Action on Violence within Families

344. The Taskforce for Action on Violence within Families was established in June 2005 to advise the Government on how to make improvements to the way family violence is addressed and eliminate family violence in New Zealand. The Taskforce is a high level intersectoral group

including government and non-government agencies' chief executives, commissioners and judiciary representatives. The Taskforce builds on the action areas outlined in *Te Rito*, and aims to strengthen the response to violence within families. The Taskforce provides a forum for the government and non-government sectors, the Judiciary, the Children's Commissioner and the Families Commission to set the strategic direction for family violence prevention in New Zealand.

345. The Taskforce's work to date has included: initiation of a Campaign for Action on Family Violence; local case collaboration to support those affected by family violence; dedicated family violence courts; improving the information base to inform system and service development; and engaging with high needs communities.

346. The Taskforce's first Report was released in July 2006, and outlined four specific areas where the Taskforce aims to make progress in family violence prevention. These areas are:

- Improving action on leadership
- Changing attitudes and behaviours
- Ensuring safety and accountability and
- Effective support services

347. A plan of action was developed to achieve the objectives outlined in the four areas above and activities are being carried out to meet these objectives. For example, a multi-media campaign was launched in September 2007 with the goals of changing attitudes and behaviours towards family violence. This campaign uses various media to promote family safety, and resources are being put in place to support both government and non government organisations.

Taskforce for Action on Sexual Violence

348. In July 2007 the government established the Taskforce for Action on Sexual Violence to provide the leadership and coordination across government and non-government sectors required to address sexual violence. The Taskforce comprises the Chief Executives of ten government departments, four representatives from the sexual violence non-government sector and a member of the judiciary. A broad range of areas is being examined by the Taskforce - from prevention and education to crisis and longer-term support for victims; offender treatment and management; and the responsiveness of the criminal justice system. The Taskforce will operate until July 2009 when it will provide the government with advice on where future investments might be made to improve prevention and responses to sexual violence.

The Civil Union Act 2004

349. The primary purpose of the Civil Union Act 2004 is to allow two persons to formalise their relationship by entering into a civil union, recognised in New Zealand, and capable of registration under the Birth, Deaths, and Marriages Registration Act 1995. Civil unions allow for legal recognition of relationship for different-sex couples that do not wish to marry, as well as

for same-sex couples (who cannot marry). The Act allows for reference to, and recognition of civil unions in other legislation, with the necessary changes implemented by the Relationship (Statutory References) Act 2005.

350. The structure of the Civil Union Act is based heavily on the Marriage Act 1955, with the same prohibitions, based on the degree of consanguinity (blood relationship) and relativity (other relationship) applying to civil unions as already apply to marriage. Similarly, the prohibition of bigamy also applies to civil unions. Polygamy, in the form of multiple marriages, civil unions or a combination of the two, is also prohibited.

351. The legislation also set the age requirement for entering into a civil union at 18 years old, with those aged between 16 and 18 requiring the consent of a parent or guardian (or, failing that, from the Family Court). A corresponding change was made to the Marriage Act. This ensures consistency with the Human Rights Act, which identifies age restriction over the age of 16 years as a prohibited ground of discrimination.

The Relationship (Statutory References) Act 2005

352. The Relationship (Statutory References) Act 2005 was an "omnibus" Act which, along with a number of other more targeted amendment Acts, such as the Social Security Amendment Act 2005, made changes to a variety of different pieces of legislation. These statutory changes in part reflected the new legislative landscape that occurred with the advent of the Civil Union Act 2004 and also made legal recognition of relationships neutral, regardless of the gender or marital status of the people in that relationship.

Working for Families

353. In 2004 the Government introduced the Working for Families package, which is designed to make it easier to work and raise a family. Increased assistance, through Work and Income and Inland Revenue, has taken the form of family tax credits and an in-work tax credit and reaches almost all families with children, earning under $70,000 a year. It also sets out to assist many families with children, earning up to $100,000 a year and some larger families earning above this level. The test case by CPAG discussed at paragraph 81 above concerns alleged discrimination between families whose income is from an income tested benefit and those families who receive their income from the paid workforce. The Human Rights Review Tribunal expects to hear the case in mid-2008.

Families Commission

354. The Families Commission is an autonomous agency set up in July 2004 to actively speak out for better policies, services and support for all New Zealand families and whānau. The Families Commission Act 2003 provides that the Commission's main function is to act as an advocate for the interests of families generally. The Commission currently focuses on three main areas to improve outcomes for families. First, the Commission aims to make significant progress

towards preventing family abuse and violence. Second, the Commission has projects to ensure that parents and caregivers are well supported to make choices on balancing family responsibilities, paid work, study, community participation and other activities. Third, the Commission promotes parenting skills and knowledge so that parents/caregivers can access the support they need.

Social Sector Workforce Issues

355. In July 2007, the Government agreed to a plan to provide direction for building effective and sustainable child and family services. The plan was developed in partnership with government agencies and non-government organisations that deliver child and family services. The plan, "Pathway to Partnership", includes establishing a strong continuum of child and family services from prevention to remedial services. It will: improve the way that providers' infrastructure, workforce development and training needs are met; encourage providers to work together; increase availability and effectiveness of services; and increase investment in effective prevention and early intervention services.

Article 24

Domestic Violence Act 1995

356. The Domestic Violence Act 1995 provides that children will be able to request attendance at State-funded programmes aimed at promoting their safety. Under the Act, dependent children are protected under the applicant's protection order, and can also take out orders against their caregivers with the assistance of a representative.

Care of Children Act 2004

357. The Care of Children Act 2004, which repealed and replaced both the Guardianship Act 1968 and the Guardianship Amendment Act 1991, came into effect on 1 July 2005. The purpose of the Act is to promote children's welfare and best interests, and facilitate their development, by helping to ensure that appropriate arrangements are in place for their guardianship and care, and recognise certain rights of children. In relation to matters involving domestic violence, the Care of Children Act incorporated the relevant provisions of the Guardianship Act 1968.

358. Where allegations of violence are made in proceedings for parenting orders, the court must consider, as soon as practicable, whether to appoint a lawyer for the child, and determine, on the basis of the evidence presented to it by, or on behalf of, the parties to the proceedings, whether the allegation of violence is proved. If it is, the violent party is not to have day-to-day care of the child or have unsupervised contact with the child unless the court is satisfied that the child will be safe.

359. Under the Care of Children Act, the welfare and best interests of the child are the first and paramount consideration. In determining what serves the child's welfare and best interests the Court must take into account any of the principles in section 5 of the Act. Section 5 (e) states that "the child's safety must be protected and, in particular, he or she must be protected from all forms of violence".

Section 59 Crimes Act 1961

360. On 22 June 2007, to make better provision for children to live in a safe and secure environment free from violence, section 59 of the Crimes Act 1961 was repealed and replaced, removing the use of parental force for the purpose of correction as a defence against a charge of assault. Under the new section 59 (1), every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of:

- Preventing or minimising harm to the child or another person; or
- Preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or
- Preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or
- Performing the normal daily tasks that are incidental to good care and parenting

361. The new section 59 (2) provides that nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.

362. Police have the discretion not to prosecute complaints against a parent of a child, or person in the place of a parent of a child, in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.

Extraterritorial Sex Offences

363. As stated in the previous periodic report, the Crimes Amendment Act 1995 enhances the global protection of minors by creating an extraterritorial offence prohibiting sexual conduct by New Zealanders with children in other countries (see paragraph 207 of that report). The effect of the relevant provisions in this measure is to make New Zealand citizens and those ordinarily resident in New Zealand liable to prosecution under New Zealand law if they engage in sexual conduct with children under the age of 16 years while outside New Zealand.

364. There have been no extraterritorial sex offences brought under the Crimes Amendment Act since the last periodic report. In 2003 charges were laid and the first case to be brought under this legislation was scheduled for trial. The defendant was meant to face 46 sex charges, many allegedly involving children, but died before the trial proceeded.

Review of the Children, Young Persons, and Their Families Act

365. The Children Young Persons and Their Families Amendment Bill (No. 6) 2007 was introduced in December 2007. The Bill amends the Children, Young Persons, and Their Families Act 1989 (the CYPF Act) to:

- Give better effect to the CYPF Act’s objectives and principles

- Enable or direct best practice; and

- Strengthen the effectiveness of family group conferences

366. The proposed changes in the Bill are a result of wide public consultation. The Bill will make the CYPF Act 1989 more responsive to the needs of children and young people needing care and protection. It will improve the participation of children and young people in decisions about them. It will also ensure delivery of the right services at the right time to families in need and appropriate responses to children including those with disabilities.

Child Support Act 1991

367. As stated in the previous periodic report the guiding principle of the Child Support Act is to affirm the right of children to be financially maintained by their parents (see paragraph 215 of that report). Generally, liability is calculated according to a set formula based on the liable parent's taxable income, a living allowance based on current domestic arrangements, and the number of children for whom child support is payable.

368. The following is a summary of key legislative changes to New Zealand's Child Support Act 1991 that impact on civil and political rights from 1996 until June 2007.

Reciprocal Agreement between New Zealand and Australia

369. In 2000 the Governments of New Zealand and Australia signed an agreement on child and spousal maintenance ("the Reciprocal Agreement"). The Reciprocal Agreement was given effect by Order in Council and commenced on 1 July 2000. The Reciprocal Agreement relates only to the relationship between Australia and New Zealand, and is deemed a substitute for the 1956 UN Convention of the Recovery Abroad of Maintenance.

370. The intention was to acknowledge the practical and legal difficulties inherent in the enforcement of child support obligations when liable parents are overseas. The Reciprocal Agreement sets rules and guidelines around the acknowledgment and enforcement of administrative and judicial decisions, the exchange of information, and cooperation around the collection and payment of monies in relation to child and spousal maintenance. As at June 2007 there are approximately 6,000 parents with child support liability assessed in New Zealand whose assessment and arrears are being collected by the Australian Child Support Agency.

Extension of Exemption Provisions

371. The Child Support Act contains provisions for temporary exemption from payment of child support where a liable parent is imprisoned or hospitalised for 13 weeks or more. This acknowledges the liable parent's inability to earn income with which to pay child support. In 2006, these provisions were extended to cover other situations where, for social policy reasons, it is undesirable to require a parent to pay child support. A new exemption was added for victims of sexual offences. The new legislation provides that where a child is conceived as a result of a sexual offence, and another person has been convicted of that offence, a parent can apply for permanent exemption in respect of that child. An exemption was also added for liable parents who are under 16 years of age who do not earn sufficient income to meet even the minimum

child support liability. This will allow young parents to focus on educational achievements during their years of compulsory schooling. The exemption ends when the parent turns 16 or when their income reaches a certain threshold.

Commissioner Initiated Administrative Review

372. A new administrative review process was added to the Child Support Act in 2006 which allows the Commissioner of Inland Revenue to commence review proceedings to examine a liable parent's true income or earning capacity.

373. As child support obligations are based on taxable income, there can be incentives for liable parents to try and minimise their taxable income (such as through business or trust arrangements), so as to reduce the level of their child support obligations. Previously the onus was on the custodial parent to initiate an administrative review in such circumstances. However, this relied on custodial parents having access to financial details about liable parents. These details were not generally obtainable by a custodial parent, whereas the Commissioner of Income Revenue does have access via the income tax system.

374. Under the Commissioner initiated administrative review process, a liable parent has the right to provide whatever supporting information they see fit at various stages throughout the review process, and the review determination can be appealed to the Family Court.

Age of Criminal Responsibility

375. The Children, Young Persons, and their Families Amendment Bill, introduced into the House of Representatives in December 2007, includes a proposal to raise the age of young people covered by the Children, Young Persons, and their Families Act 1989 by one year to 17-years-old. This will enable 17-year-olds to be dealt with in the youth justice system which is more effective at stopping re-offending by young people.

376. The Law and Order Select Committee recently recommended that the Young Offenders (Serious Crimes) Bill, a non-Government Bill which would lower the age of criminal responsibility to 10 for certain crimes, not be enacted. That recommendation was based partly on the likelihood that the Bill was not consistent with UNCROC.

Reservation to UNCROC

377. New Zealand maintains a general reservation to UNCROC which reserves the right to take a person's immigration status into account when deciding whether that person can access publicly funded services. The Government has approved proposals contained in the Immigration Bill that, subject to its enactment, will enable New Zealand to withdraw the reservation. The Government has instructed the Ministry of Education (in consultation with the Ministry of Foreign Affairs and Trade and the Department of Labour) to begin the necessary action for the withdrawal of the reservation. Currently, where the Department of Labour becomes aware of children unlawfully in New Zealand, whether or not their parents are present, those children may be provided with Limited Purpose Permits in order to enable them to access education, while their immigration status is being resolved.

Article 25

Mixed-Member Proportional

378. The fourth periodic report indicated that a Mixed-Member Proportional (MMP) review committee had been established in 2000 to review MMP and consider whether there should be a further referendum on the electoral system (see paragraph 240 of that report).

379. This review has been completed. In recognition of the constitutional importance of the inquiry and to ensure a fair process for all parties represented, the committee was required to reach its conclusion on the basis of unanimity or near unanimity. The Committee considered whether there should be another referendum on MMP but was divided on the issue, and therefore did not make a recommendation.

380. The Committee released its report entitled "Inquiry into the Review of MMP" in August 2001 (attached as Annex R). The Government Response to the Committee's report can be found on the Ministry of Justice website www.justice.govt.nz.

381. MMP lets voters elect a range of parties reflecting their individual views. It is less likely that any one party will be able to govern alone and governments are now more likely to be minority governments in coalitions with other parties. A majority coalition government is made up of parties that do hold over half of the seats in Parliament, while a minority coalition government is made up of parties that do not hold over half of the seats in Parliament.

382. MMP has also increased the diversity of subsequent parliaments and improved representation of Māori, minorities and women. The representation of women in Parliament has been discussed under Article 3. As at 30 July 2007, the number of MPs of Māori ethnicity was 20, the number of Pacific MPs was 4 and the number of Asian MPs was 2 (out of a total of 121).

Electoral Rights

Electoral Reform

383. The Electoral Finance Act 2007 makes a number of amendments to the electoral finance regime, including the following areas:

- Election expenses - the Act extends the regulated period for election expenditure
- Third party advertising - the Act places limits on the maximum amount a third party may spend on election advertising
- Political donations - the Act limits the amount of political donations that may be made anonymously, or by overseas person
- Compliance and enforcement - the Act increases the penalties for offences against the electoral finance regime; and

- The membership of the Electoral Commission - the Act removes the requirement for political representation on the Electoral Commission; and

- Broadcasting of election programmes - the Act simplifies some aspects of the broadcasting regime

384. The Act helps bring New Zealand into line with other democracies. Its aim is to strengthen the law governing electoral financing and broadcasting, in order to:

- Maintain public and political confidence in the administration of elections

- Promote participation by the public in parliamentary democracy

- Prevent the undue influence of wealth on electoral outcomes

- Provide greater transparency and accountability on the part of candidates, parties, and other persons engaged in election advertising in order to minimise the perception of corruption; and

- Ensure that the controls on the conduct of electoral campaigns are effective, clear; and can be efficiently administered, complied with, and enforced

385. The Electoral Finance Bill was the subject of a high level of public and media interest. The focus was on the effect of the Bill on freedom of expression and the right to participate in political processes. The select committee received written submissions on the Bill from 575 individuals and organisations, and sat for extended hours to ensure that 101 oral submissions could be heard. The select committee recommended a number of changes to the Bill based on the submissions received, in part to respond to the concerns raised. The Government considers that it is a strong affirmation of the strength of democracy in New Zealand that there was such considerable public interest in the Bill.

Disability strategy

386. The electoral agencies in New Zealand, in consultation with community groups and disability service providers, including the Deaf Association, have developed a Disability Action Plan for the 2008 General Election. The aim of the action plan is to identify new initiatives and further improvements to existing initiatives to improve access to the enrolment process, information about MMP, and voting for people with disabilities. As a result, there are a number of initiatives in place to improve access to electoral processes for the next election.

Electronic Voting

387. The Chief Electoral Office is working to develop a long term electronic voting strategy by the end of 2007. The aim of the strategy will be to consider the desirability and feasibility of e-voting in New Zealand parliamentary elections in the future.

388. The Government recognises that there are important technical and social questions to be considered with regards to electronic voting - such as voter authentication, security of service, reliability, auditability, privacy issues, and the implications of any shift from publicly supervised elections to unsupervised voting.

Māori Electoral Option

389. The 2006 Māori Electoral Option ran from 3 April until 2 August giving every eligible Māori the opportunity to choose to enrol on the General Electoral Roll or the Māori Electoral Roll. The key results from the Māori Electoral Option were:

- 14,294 moving from the General Roll to the Māori Roll
- 7,294 moving from the Māori Roll to the General Roll
- 7,914 new enrolments of Māori descent on the Māori Roll
- 2,366 new enrolments of Māori descent on the General Roll

390. Data from the 2006 Census and Māori Electoral Option was used to determine the electoral district boundaries by the Representation Commission. As a result, there will be one new General electoral district in the North Island for the 2008 General Election, but no change in the number of Māori electoral districts for the next election.

391. The total number of General electoral districts will increase from 62 to 63. The number of South Island General electoral districts is set by the Electoral Act at 16. This number and the general electoral population of the South Island are used to calculate the South Island electoral quota. The South Island quota in turn, determines the number of North Island General electoral districts and the number of Māori electoral districts. The number of North Island General electoral districts will increase from 46 to 47. The number of Māori electoral districts remains at seven.

Voter turnout

392. In absolute terms more voters than ever turned out in the 2005 General Election - 2.3 million voters. This equates to 77% of estimated voting age population or almost 81 % of all registered voters. Voter turnout of the eligible population in 2002 was 72.5%.

393. Voter turnout in local authority elections is significantly lower. The voter turnout across city and district councils in the 2007 local council elections was approximately 43.5%, slightly lower than in the 2004 local authority elections when voter turnout was 45.5%.

Local Government

394. The Local Government Act 2002 replaced previous local government legislation. The purpose of the Act is to provide for democratic and effective local government. It specifies the purpose of local government to be:

(a) To enable democratic local decision-making and action by, and on behalf of, communities; and

(b) To promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.

395. The Act specifies principles in accordance with which local authorities must act. These include:

- A local authority should conduct its business in an open, transparent, and democratically accountable manner
- A local authority should make itself aware of, and should have regard to, the views of all of its communities; and
- A local authority should provide opportunities for Māori to contribute to its decision-making processes

396. The Act includes provisions relating to consultation and decision making that emphasise the right of people with an interest in any matter being decided by a local authority to be consulted and have their views considered in the decision making process. All local authorities must have processes in place for consulting with Māori.

397. The Local Electoral Act reformed local electoral legislation. Two key changes were that it gave communities the opportunity to provide specific seats on councils for Māori, based on parliamentary electoral rolls, and the opportunity to choose between the majoritarian system of elections commonly referred to as "First-Past-the-Post" and the Single Transferable Vote system of elections.

Article 26

Language as a Ground of Discrimination

398. The Committee has noted in previous concluding comments that language is not a separate ground of discrimination under the Human Rights Act. In the previous periodic report, New Zealand noted that complaints of discrimination on the ground of race have been upheld where an employer has refused to allow any language other than English in the workplace.

399. The HRC stated in its Consistency 2000 report that language is an inherent component of the prohibited ground of "country of origin". Language has also been dealt with under complaints on the ground of race. Therefore, the Government has not considered it necessary so far to explicitly include language as a separate prohibited ground of discrimination. The HRC's New Zealand Action Plan for Human Rights specifies the review of the grounds on which discrimination is prohibited in the Human Rights Act as a priority for action.[19]

[19] Human Rights Commission, *New Zealand Action Plan for Human Rights: Priorities for Action 2005-2010,* March 2005, para. 7.3.

Foreshore and Seabed

400. In November 2004, the New Zealand Parliament enacted the Foreshore and Seabed Act 2004. The Foreshore and Seabed Act deals with the relationship between two sets of important values:

(a) Preserving the foreshore and seabed as a communal space for all New Zealanders; and

(b) Recognising the rights and interests of individuals and groups in those areas.

401. The Foreshore and Seabed Act provides a clear framework to enable the rights and interests associated with those values to be identified and protected. The Foreshore and Seabed Act achieves three important goals:

- The foreshore and seabed is secured as an area to be preserved for all New Zealanders.
- There is a process for the identification and protection of customary uses, activities and practices by order of the Māori Land Court or High Court, (a customary rights order).
- There is provision for the High Court to find that a group would have been able to demonstrate territorial customary rights under the common law (but for the legislation). In this case the Government will, at the request of the applicant group, enter into discussions to negotiate an agreement about redress in recognition of the group's interest.

402. The recognition and redress provisions for former territorial customary rights are an innovation unique to New Zealand. These provisions provide for rights that have not been recognised in any other common law jurisdiction.

403. Now that the legislation is in place several Māori groups have taken up the opportunity to seek recognition and protection of their rights and interests in the foreshore and seabed. Three iwi groups have commenced negotiations with Government for the recognition of former territorial customary rights. Eight groups have filed applications for customary rights orders in the Māori Land Court for recognition of their customary uses, activities and practices.

The Need for the Legislation

404. The development of the Foreshore and Seabed Act was triggered by the New Zealand Court of Appeal's decision in *Ngati Apa v. Attorney-General* [2003] 3 NZLR 643, issued in June 2003. The Crown had argued in *Ngati Apa* that it owned the foreshore and seabed for all

New Zealanders and customary use rights co-existed with that Crown ownership. Based on those concepts, New Zealanders had assumed a right of public access in the marine area. Parliament had enacted a range of legislation dealing with allocation of space in, and management of, the marine area.

405. The Court of Appeal, however, found that it was theoretically possible that the Crown's title might be burdened by Māori customary title, in the sense of customary ownership. The Court of Appeal took care to caution that its decision was a preliminary one only, though the litigation had taken 6 years to reach that preliminary point. The judgments express reservations as to whether private ownership interests in the foreshore and seabed could be demonstrated by Māori. The Court noted the strong presumption of non-exclusivity of use, occupation and enjoyment in the coastal marine area.

406. The uncertainty which the Court of Appeal's decision represented was very real. Any regulatory consents for activity in the foreshore and seabed which relied on an assumption of Crown ownership were open to legal challenge based on undetermined claims to customary ownership. Litigation making such challenges was filed by Māori groups. The New Zealand public was concerned that access to the foreshore and seabed was not secure.

407. For Māori, there was the prospect of protracted litigation in an area of law where the fundamental tests had not been formulated by the courts and where the only directly relevant overseas precedent had found that the common law could not recognise exclusive customary ownership in the marine area.

408. The Government could not responsibly have left the matter unresolved.

Possible Discrimination under Article 26

409. The Government carefully examined the issue of whether the legislation might be discriminatory based on race. It accepted that there was a prima facie argument for discrimination and therefore it explored the justifications for the legislation and made efforts to ensure that a fair statutory regime to replace the existing legal regime was put in place.

410. The essence of concerns is that the Foreshore and Seabed Act differentiates between claims to ownership of land based upon aboriginal title, which are recognised through redress for former territorial customary rights, and existing freehold interests in the foreshore and seabed, which are preserved. However, that differentiation is consistent with Article 26 for the following reasons:

- The character and practical effect of claims under aboriginal title are substantively different from those of existing freehold interests. In particular, the latter involve small defined areas. Private titles that now encroach into the foreshore and seabed, which include Māori freehold land titles, were not granted with an intention of privatising the marine area. The titles have often arisen through the vagaries of coastal or estuarine erosion. The different treatment of private title and undetermined customary claims under the Foreshore and Seabed Act reflects their different character.

- It is not always possible to give full recognition to indigenous claims to land. This is particularly true in relation to the marine area, which in New Zealand is valued as a public space. Accordingly, the approach of the New Zealand Government is to provide negotiated redress that may include rights to particular land and measures to protect and manage areas of importance, such as wāhi tapu (sacred sites).

Perceived Discrimination

411. The Social Report 2007 (attached as Annex S) suggests that levels of perceived discrimination might be declining in New Zealand. The table below is based on responses to HRC surveys from 2000 - 2006 (attached as Annex T):

Proportion (%) of survey respondents who perceived selected groups as being subject to a great deal or some discrimination, December 2000-February 2006

Group	Dec. 2000	Dec. 2001	Jan. 2003	Jan. 2004	Feb. 2006
Asians	73	73	79	78	72
Recent immigrants	-	68	77	72	70
Refugees	-	68	72	70	63
People on welfare	75	70	68	66	63
People who are overweight	72	65	65	68	59
Gays and lesbians	74	65	61	58	57
Pacific peoples	71	65	65	57	54
People with disabilities	61	55	53	55	53
Māori	70	62	57	53	51
Older people	53	48	49	46	44
Women	50	44	41	38	38
Men	-	-	-	-	30

Article 27

412. In the 2006 Census, the Māori population was 565,329 or 14.6% of the overall New Zealand population. The Māori population is highly urbanised (84%). Although an increasing proportion of the New Zealand population is older (with a median age of 35.9 years), in general, the Māori population is younger (with a median age of 22.7 years). In addition, the Māori population is growing at a faster rate than the non-Māori population.

413. Positive developments during the reporting period include:

- An increased usage of Māori words and phrases across New Zealand, particularly in the broadcasting sector

- There are now around 1000 marae (meeting places) across New Zealand, which continue to be focal points for Māori communities

- According to Census 2006, there has been a significant increase in awareness about iwi (tribal) affiliations (84% of Māori know their iwi); and

- Approximately 24% of the Māori population can speak Māori, of which 10% use their Māori language skills on a regular basis

The Social Report 2007

414. The Social Report is an annual publication by the Ministry of Social Development that monitors the wellbeing of New Zealanders. It uses a set of statistical indicators to monitor trends across 10 "domains", or areas of people's lives. The domains include civil and political rights, cultural identity and leisure and recreation, as well as health, knowledge and skills, paid work, economic standard of living, physical environment, safety and social connectedness. Most indicators can be broken down by sex and ethnicity. Together these domains provide a picture of wellbeing and quality of life in New Zealand.

415. The Social Report has four key aims:

- To provide and monitor over time measures of wellbeing and quality of life that complement existing economic and environmental indicators

- To compare New Zealand with other countries on measures of wellbeing

- To provide greater transparency in government and to contribute to better informed public debate

- To help identify key issues and areas where we need to take action, which can in turn help with planning and decision making

416. The report enables us to examine the current level of wellbeing in New Zealand, how this has changed over time, and how different groups in the population are faring. It helps us to identify adverse trends in social outcomes at an early stage. While the report cannot always illuminate what is driving these trends, it can point to the need for further research to understand what is happening and what actions need to be taken to address them.

Māori Language and Broadcasting

417. The Māori language is an official language of New Zealand and is an important part of New Zealand's distinct and unique cultural identity. The Government has a clear and longstanding commitment to support the revitalisation of the Māori language. The Māori Language Strategy, published in 2003 by Te Puni Kōkiri (the Ministry of Māori Development)

and Te Taura Whiri i te Reo Māori (the Māori Language Commission) sets out a number of outcomes for the growth and development of the Māori language. The key purpose of the strategy is to increase the number of people with Māori language skills with a particular focus on its use in key areas (for example, homes and marae).

418. A significant development during the reporting period is the launch of a dedicated Māori Television Service. The primary purpose of the Māori Television Service is to play a major role in revitalising Māori language and culture. The Māori Television Service Act 2003 (Te Aratuku Whakaata Irirangi Māori) establishes the channel as a statutory corporation. It sets out that the channel should:

- Be a high quality, cost effective television provider which informs, educates and entertains
- Broadcast mainly in the Māori language; and
- Have regard to the needs of children participating in immersion education and all people learning Māori

Education and Language

419. In addition to the Māori language, New Zealand Sign Language is also an official language of New Zealand. The New Zealand Sign Language Act 2006 permits the use of NZSL in legal proceedings, facilitates competency standards for its interpretation and guides government departments in its promotion and use.[20] English, the medium for teaching and learning in most schools, is a de facto official language by virtue of its widespread use. For these reasons, these three languages have special mention in the New Zealand Curriculum. All three may be studied as first or additional languages in schools. They may also be the medium of instruction across all learning areas.

420. New Zealand society also includes a wide range of other ethnic groups who have rights to enjoy their cultures and use their languages in a range of contexts. In 2006, more than 80 different languages were spoken in New Zealand.

421. Pasifika peoples have strong geographical, cultural and historical ties with New Zealand. New Zealand has particular responsibility for Tokelau as a territory of New Zealand, and the Cook Islands and Niue as self-governing states in free association with New Zealand. Close links remain with Samoa through the Treaty of Friendship as well as with other Pacific nations such as Tonga. For many Pacific nations a significant proportion of the population reside in New Zealand. Maintenance of language and culture is of central interest to many within Pacific communities. The Tokelauan, Cook Islands Māori and Niuean languages in particular are vulnerable because of low numbers of speakers.

[20] The Māori Language Act 1987 and the New Zealand Sign Language Act 2006.

422. Groups within Pacific communities seek to support both first and second language learners through a variety of language programmes. Some of these operate within schools and others within early childhood or adult/community education. There has also been an increase in interest in outcomes for Pasifika bilingual learners. Further research within the education sector and at community level is needed to inform development and practice in this area.

423. A range of communities are concerned with the revitalisation and maintenance of their languages, particularly where there have been dramatic decreases in language use over a period of time. These goals require significant participation from those communities where the language is spoken fluently. Schools may choose to contribute support to these goals in various ways, possibly through their programmes or providing access to the use of facilities. A number of schools offer classrooms for after school language learning for children and adults in the community. Some schools integrate community languages and cultural practices into their learning programmes and general day to day activities.

424. The New Zealand Curriculum for schools is underpinned by a vision and a set of principles and values, which recognise and respect the different cultures and languages which make up New Zealand society. It acknowledges the place of New Zealand's official languages, and the Pacific communities in New Zealand society, and New Zealand's relationships with the peoples of Asia and the South Pacific. It will ensure that the experiences, cultural traditions, histories and languages of all New Zealanders are recognised and valued.

425. Schools design their learning programmes based on eight learning areas within the curriculum. There is flexibility for the recognition of varied cultures and languages across all learning areas.

426. The Ministry provides professional learning and resources for teachers of languages through the Learning Languages learning area of the curriculum. It also provides professional learning and resources for teachers of ESOL students (English for Speakers of Other Languages). These kinds of programmes encourage the active use of first languages in the learning process. They also encourage, along with all other curriculum areas, the recognition of cultural diversity.

427. Early childhood, community and adult education are also educational contexts where varied languages may be used, learned and affirmed by students and communities.

Fishing Rights

428. In the discussion with the Committee relating to New Zealand's Third Report, it was noted that an historic settlement of Māori fishing claims had been negotiated and effected by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. It provides Māori with a major ownership stake in the commercial fishing industry, and control over fishing quota through a joint venture company. The Treaty of Waitangi Fisheries Commission was allocated $174 million in quota and cash to be used in the implementation of the settlement. Section 10 of the Act provided that

customary fishing rights would continue to place Treaty obligations on the Crown; and within the reporting period regulations to recognise Māori custom were being developed in negotiation with Māori.

429. The allocation model to distribute the benefits of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 has been the subject of significant dispute and litigation amongst Māori. In response, the Treaty of Waitangi Fisheries Commission developed and presented an allocation model that enjoyed majority support form Māori. This model was passed into legislation through the Māori Fisheries Act 2004. Since December 2004 Te Ohu Kaimoana Trustee Limited (the successor to Commission) has distributed a significant proportion of the quota benefits to the mandated representatives of iwi (tribal groups).

Progress on Māori Claims Settlements

430. Since New Zealand's Fourth Report, the Government has continued to make progress towards the settlement of claims, its focus being on the final settlement of all historical (pre-1992) claims of large natural groupings of tribal interests. A key objective of settlements is to resolve the grievances of the past and provide a basis for an enhanced relationship between the Crown and Māori in future. For this reason, rights arising from the Treaty of Waitangi, aboriginal title and customary rights that are not covered by the definition of historical claims are not affected by the settlement.

431. Claimant groups generally enter negotiations following Waitangi Tribunal hearings and after mandated negotiators have been appointed by the claimant community. However claimant groups also have the option of entering into direct negotiations with the Crown without having had a Waitangi Tribunal hearing. Any settlement agreed between the Crown and claimant negotiators must be ratified by the claimant community through a well-publicised ballot process before it is signed. To date, the level of support for negotiated settlements has been high, generally over 90% of valid votes. Once a settlement is signed, it must be implemented through legislation, the final stage in the settlement process.

432. As at 24 December 2007 the Crown had signed settlements with 21 claimant groups involving financial redress of NZ$743 million (see table below). Settlements now cover over half of New Zealand's land area, around 25% of the Māori population and over half of the tribes who suffered raupatu (confiscation), recognised as the most serious Treaty breach.

433. The two early major settlements, the Waikato/Tainui Raupatu settlement in 1995 and the Ngai Tahu settlement in 1997, set important precedents regarding the process and general shape of negotiated settlements. Settlements generally comprise an agreed historical account, Crown apology, statutory instruments to recognise the claimant group's special interests in particular sites and species, and financial redress, which may be taken as cash or certain surplus Crown-owned properties. Each negotiation and settlement reflects the different interests and circumstances of each claimant group.

Settlements since 21 September 1992

Claimant Group	Year Settled	Value of Settlement (NZ$)[21]
Fisheries	1992/93	170 000 000
Ngāti Whakaue	1993/94	5 210 000
Ngāti Rangiteaorere	1993/94	760 000
Hauai	1993/94	715 682
Tainui Raupatu	1994/95	170 000 000
Waimakuku	1995/96	375 000
Rotoma	1996/97	43 931
Te Maunga	1996/97	129 032
Ngāi Tahu	1996/97	170 000 000
Ngāti Turangitukua	1998/99	5 000 000
Pouakani	1999/00	2 000 000
Te Uri o Hau	1999/00	15 600 000
Ngāti Ruanui	2000/01	41 000 000
Ngāti Tama	2001/02	14 500 000
Ngāti Awa	2002/03	42 980 000
Ngāti Tuwharetoa (Bay of Plenty)	2002/03	10 500 000
Ngaa Rauru Kiitahi	2004/05	31 000 000
Te Arawa Lakes	2004/05	2 700 000
Ngāti Mutunga	2005/06	14 900 000
Te Roroa[22]	2006/07	9 500 000
Affiliate Te Arawa Iwi/Hapū[23]	2006/07	36 000 000
Total Settlement Redress		743 323 645

434. Good progress has continued to be made in negotiations with claimant groups throughout the country. As at 24 December 2007, nine claimant groups had entered into Agreements in Principle or Heads of Agreement with the Crown (see table below) and are working towards Deeds of Settlement. An Agreement in Principle is a basic outline of a settlement package, and does not legally bind the claimants or the Crown. It replaces the more formal "Heads of Agreement" that used to serve the same purpose.

[21] This table does not include other expenses related to Treaty settlements such as claimant funding and part-settlements.

[22] Legislation to implement this settlement is pending.

[23] Legislation to implement this settlement is pending.

Agreements in Principle/Heads of Agreement reached by 24 December 2007

Claimant Group	Year Agreed	Value of agreement (NZ$)
Ngātikahu ki Whangaroa	2007/2008	n/a[24]
Waikato River	2007/2008	To be determined
Taranaki Whānui (Wellington)	2007/2008	25 000 000[25]
Te Rarawa	2007/2008	20 000 000
Ngati Apa (North Island)	2007/2008	14 000 000
Ngati Whatua o Orakei	2005/2006	10 000 000
Te Aupouri	2004/2005	12 000 000
Rangitaane o Manawatu	1999/2000	8 500 000
Te Atiawa	1999/2000	34 000 000

435. At any one time, the Crown is usually in settlement negotiations or pre-negotiation discussion with more than 20 claimant groups.

Māori Health

436. The Māori population has increased by 30% in the past 15 years, up from 434,847 in 1991 to reach 565,329 in 2006 (an increase of 130,482). In 2001, Māori life expectancy at birth was more than eight years less than non-Māori. Māori had higher mortality rates than non-Māori in cardiovascular disease, stroke, heart failure, rheumatic heart disease, heart disease and ischaemic heart disease. For many cancers the mortality rate for Māori compared with non-Māori is higher than for cancer rates. This suggests that Māori with cancer may be more likely to die from their cancer than non-Māori. Māori prevalence of diabetes is two-and-a-half times higher than non-Māori.

437. He Korowai Oranga seeks to support Māori-led initiatives to improve the health of whānau, hapū and iwi. The strategy recognises that the desire of Māori to have control over their future direction is a strong motivation for Māori to seek their own solutions and to manage their own services. It provides a framework for the Ministry, District Health Boards and key stakeholders to take a leadership role in improving Māori health outcomes.

438. *Whakatātaka Tuarua: Māori Health Action Plan 2006-2011* (attached as Annex U) sets out the activities for the Ministry of Health, District Health Boards and the health sector through to 2011. The Ministry of Health has overall responsibility to lead, monitor, review and ensure progress, and to foster collaboration and co-ordination across the sector. District Health Boards provide leadership, through their roles as planners, funders and providers, and through engaging with their local communities to participate in the implementation of *Whakatātaka Tuarua*. The

[24] The Ngātikahu ki Whangaroa Agreement in Principle proposes the return of Stony Creek Station, with no value to be attributed to the station because of its cultural significance to Ngātikahu ki Whangaroa.

[25] This figure does not include an additional $5.2 million to be paid as a contribution to the costs of settling the claim.

objectives of *Whakatātaka Tuarua* will only be achieved through effective ongoing engagement and participation by whānau, hapū, iwi and Māori communities, providers, and the wider health sector. *Whakatātaka Tuarua* recognises that improvements in Māori health outcomes and independence in disability are a sector-wide responsibility.

439. As part of *Whakatātaka Tuarua*, the Ministry of Health has identified the following areas for priority:

- Building quality data and monitoring Māori health
- Developing whānau-ora-based models
- Ensuring Māori participation in workforce development and governance; and
- Improving primary health care

440. Enhancing the effectiveness of mainstream services in delivering and positively contributing towards improving Māori health outcomes remains an important priority for the Ministry of Health. To date, the Ministry of Health has put considerable effort into supporting Māori capacity building within the sector. The focus has shifted in recent years from increasing the number of Māori providers to building, strengthening and sustaining the quality of the services provided. Alongside the work with Māori providers, an ongoing focus will remain on District Health Boards and mainstream providers to ensure greater effectiveness of the resources and initiatives aimed at improving Māori health outcomes. A high proportion of Māori continue to access mainstream services, and an overwhelming proportion of health and disability funding goes to mainstream providers and it is essential that these services respond effectively to improve the health status of Māori.

Māori Employment

441. The Ministry of Social Development is developing a training programme in cooperation with Te Puni Kōkiri, Housing New Zealand Corporation and other government agencies to create sustainable employment schemes that will contribute to the growth of on-going jobs in local communities. The Ministry of Social Development is also working actively with local and regional councils to create employment schemes that will be of benefit to local communities and will develop the skills of clients in those communities, particularly in provincial or rural communities.

Housing

442. The Ministry of Social Development, the Department of Building and Housing and the Housing New Zealand Corporation are developing stronger links with the Rural Housing Programme so that local unemployed Māori can develop skill sets that will be of long-term benefit to their local communities and enabling the Housing New Zealand Corporation to improve and develop its housing stocks and rural living conditions.

III. TOKELAU

Introduction

443. References should be made to previous reports for the situation in regards to Tokelau, particularly New Zealand's Fourth Periodic Report on the Covenant (CCPR/C/NZL/2001/4). For further background information, reference should be made to the report to Parliament of the Administrator of Tokelau and to the working papers issued each year by the UN Special Committee on Decolonization.

444. The 1466 people of Tokelau live in villages on three widely separated atolls. In each village/atoll the focus is on caring for individual members of the community in a communal manner.

445. Under a programme of constitutional devolution developed in discussions with Tokelau leaders in 1992, Tokelau, with New Zealand's support, has developed institutions and patterns of self-government to enable its people to make a valid choice, under an act of self-determination, concerning their future political status. As a first step, that part of Government which deals with the interests of all of Tokelau was returned to Tokelau in 1994. In 2003, the Administrator's powers were formally delegated to the three Village Councils, the General Fono (the national legislative and executive body) and the Council for Ongoing Government (which conducts the executive business of the General Fono when it is not in session).

446. Since 2003, work has been carried out in Tokelau and in New Zealand on a draft Constitution for Tokelau and draft Treaty of Free Association with New Zealand. These documents would form the basis of a new status for Tokelau - to be self governing in free association with New Zealand - if this was chosen by Tokelau under an act of self-determination. Two referenda on this change in status have since taken place in Tokelau under UN supervision; one in February 2006, and again in October 2007. On both occasions, the requisite two-thirds majority for a change in status was not reached. Tokelau therefore remains a non-self governing territory under the administration of New Zealand. It is important to note, however, that many of the provisions of the draft Constitution are already in force in Tokelau (although they are not entrenched).

447. As part of the work on the draft Constitution, Tokelau has been considering how it should express its commitment to basic human rights. Since the last century, Tokelauans have been familiar with these ideas as an important part of Christianity, but they are much less familiar with them in the context of law and government. As systems and personnel become better established, the Government of Tokelau will be able to consider what further steps Tokelau might take in the light of the obligations accepted by New Zealand on its behalf under the International Covenant on Civil and Political Rights.

448. Already Tokelau's Human Rights Rules 2003, which have legal effect in Tokelau, recognise that individual human rights for all people in Tokelau are those stated in the Universal Declaration of Human Rights, and reflected in the Covenant. The Rules also recognise that the rights of individuals in Tokelau shall be exercised having proper regard to the duties of other individuals, and to the community to which the individual belongs. The Constitution affirms Tokelau's commitment to the Universal Declaration on Human Rights and the Covenant.

449. Furthermore, Tokelau also now has a specific criminal code, set out in the Crimes, Procedure and Evidence Rules 2003. The Rules 2003 were developed in close consultation with the elders of each atoll in order to ensure that it reflects actual Tokelau needs, is consistent with Tokelau custom, and is determined by what is appropriate for Tokelau. The Rules are consistent with Tokelau's obligations under international law regarding human rights issues, including the Covenant containing, for example:

- A rule against double jeopardy
- Provision for a speedy trial
- Procedures in relation to arrest and detention
- Maximum penalties for criminal offences

450. Tokelau at the same time seeks understanding of its situation, and particularly of the challenge inherent in moving from socially known rules in an oral tradition to written law of the Western conception. As Tokelau considers its commitment to basic human rights, it is mindful that human rights promote the imported notion of individuality, while the idea of community, with which Tokelauans are familiar, promotes a sense of unity and sharing.

451. What is involved is a considerable evolution away from tradition. For Tokelauans this means a move away from following a particular set of rules and practices within their cultural setting, to following a set of rules and practices recognizable as consistent with life in the international community, and the rules and practices of other States.

452. Tokelau is assured of the continuing interest and support of the New Zealand Government in its development of self-government and in assisting Tokelau in its development as a country.

Information on Tokelau relating to specific Articles of the Covenant

453. This section does not report on all the individual Articles of the Covenant. The Human Rights Rules 2003 and, where applicable, the Crimes, Procedure and Evidence Rules 2003 apply more generally in relation to these Articles.

Article 1

454. The development of Tokelau towards the exercise of its right to self-determination is outlined in paragraph 55 and 56 of this report.

Article 2

455. Tokelau's Human Rights Rules accord generally with Article 2 by recognising the human rights contained in the Universal Declaration of Human Rights, and reflected in the Covenant for all people in Tokelau. The Rules also provide for a person to apply to Tokelau's Council for Ongoing Government for protection of that right.

Article 3

456. Developments in the equal rights of men and women to the enjoyment of all civil and political rights during the report period in Tokelau are covered by Appendix Three of New Zealand's Sixth Periodic Report to the Committee on the Elimination of all forms of Discrimination against Women (CEDAW/C/NZ/6).

Article 14

457. Tokelau's judicial system formally consists of the Commissioner's Court and Appeal Committee of each village, the High Court and the Court of Appeal.

458. Currently the judges of Tokelau are the Law Commissioners of each island. These are lay officers who perform their duties with the village councils in the context of the village structures and local tradition. In the fulfilment of their roles, Commissioners typically are informed more by custom than legislation, although, as discussed, the Crimes, Procedure and Evidence Rules 2003 have, where possible, incorporated these customs. The Commissioners are concerned primarily with criminal offences of a minor nature and, in cooperation with the local police officers, deal with offenders by way of reprimand, sentences of community service or fines. There are no prisons in Tokelau. In case of need, major criminal or civil matters would be dealt with by the High Court of New Zealand acting as a Court for Tokelau. An appeal committee may hear appeals from the Tokelau Law Commissioners.

459. The requirement of the availability of defence counsel, at public cost if necessary, presents practical problems for a community of Tokelau's type, given its small population (1466 people in the 2006 census) and physical isolation. However, there is provision in Rule 94 of the Crimes, Procedure and Evidence Rules for the grant of legal aid, taking into account the means of the applicant and the nature of the case. Under Rule 95 of the Crimes, Procedure and Evidence Rules the prior written approval of the Council for Ongoing Government is required in order to be able to practise law in Tokelau or before a court of Tokelau. To date three New Zealand qualified lawyers have been admitted to practice in the courts of Tokelau. Two of those are in the Government service and one in the private sector.

460. No dispute from Tokelau has ever been litigated outside Tokelau. There has been a strong community feeling that disputes are matters for the community and the community alone. This has meant that, to date, community thinking has been opposed to any thought of having a case decided in another village, let alone outside Tokelau.

Article 25

461. Under longstanding practice, two village leadership positions - Faipule and Pulenuku (one with an external focus and the other with an internal one) - are filled on the basis of three yearly elections, by universal adult suffrage. Most recently, on the basis of a decision taken by the General Fono in 1998, Tokelau has moved from a system of appointment by each village of its delegates to the General Fono, to a system of election of delegates. The first such elections were held in January 1999, when each village elected delegates proportionate to its overall population for three year terms. The next election will take place in January 2008.

LIST OF ANNEXES

Annex A	Human Rights in New Zealand Today 2004
Annex B	*R v. Hansen* [2007] 3 NZLR 1
Annex C	*Taunoa v. AG* [2007] 2 NZLR 457
Annex D	*Police v. Brooker* [2007] 3 NZLR 91
Annex E	*Rogers v. TVNZ* [2007] NZSC 91
Annex F	New Zealand Action Plan for Human Rights
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Annex J	*Drew v. Attorney-General* [2002] 1 NZLR 58
Annex K	New Zealand Census of Women's Participation 2006
Annex L	Pay and Employment Equity Plan of Action
Annex M	Report into Canterbury Emergency Response Unit
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Annex P	*Zaoui v. Attorney-General* (No. 2) [2006] 1 NZLR 289
Annex Q	Te Rito New Zealand Family Violence Prevention Strategy
Annex R	Inquiry into the Review of MMP (Report of the MMP Review Committee)
Annex S	Social Report 2007
Annex T	Perceived Discrimination in New Zealand February 2006
Annex U	Whakatātaka Tuarua Māori Health Action Plan 2006-2011

Legislation referred to in this report can be found at: www.legislation.govt.nz. New Zealand Law Commission Reports are available at: www.lawcom.govt.nz.
