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Human Rights Foundation Aotearoa New Zealand

Alternative report on the

5th periodic report of the New Zealand Government under the International Covenant on Civil and Political Rights

being considered by the

United Nations Human Rights Committee

March 2010

1. **Introduction**

- 1.1 This submission is on behalf of the Human Rights Foundation of Aotearoa New Zealand. It is an alternative report to the New Zealand government's 5th periodic report under the International Covenant on Civil and Political Rights ("ICCPR") to the United Nations Human Rights Committee
- 1.2 The Human Rights Foundation ("HRF") is a non-governmental organisation, established in December 2001, to promote and defend human rights through research-based education and advocacy. We have made submissions on new laws with human rights implications. We also monitor compliance and implementation of New Zealand's international obligations in accordance with the requirements of the international conventions New Zealand has signed, and have prepared alternative reports for relevant United Nations treaty bodies to be considered alongside official reports. Though the primary focus of the Foundation is on human rights in New Zealand, we recognise the universality of human rights and have an interest in human rights in the Pacific and beyond.
- 1.3 We appreciate this valuable opportunity to present our views to the Committee.

2. **Executive Summary**

- 2.1 This report seeks to provide the Committee with information which will assist its consideration of New Zealand's periodic report ("the periodic report"). The periodic report covers many issues but the HRF's report focuses on one issue that has come to light very recently, in particular an inconsistency between the position the Attorney-General took on behalf of the Government in the New Zealand Court of Appeal in Attorney-General v Chapman [2009] NZCA 552 and statements made in New Zealand's National Report to the Universal Periodic Review conducted by the United Nations Human Rights Council in 2009.
- 2.2 The matter is relevant to Issue 3 in the List of Issues:

3. What measures does the State party take to ensure that every victim of a violation of the Covenant has a remedy in accordance with article 2 of the Covenant? Please provide examples of judicial decisions making reference to the Covenant in the period covered by the report.

- 2.3 In relation to the liability of the State to pay compensation for human rights breaches by the State party itself, on 7 May 2009, before the United Nations Human Rights Council in Geneva, New Zealand's stated position was that damages were an available remedy for breach by the State of "any" rights under the New Zealand Bill of Rights Act 1990 ("BORA"). This "Geneva position" was ICCPR compliant. However, 12 days later, in arguing *Chapman's* case before the Court of Appeal, the Government's case was that the Courts had no jurisdiction to award damages in respect of breach of BORA rights by the judicial branch. The two positions are inconsistent, indeed opposite.

- 2.4 The Geneva position was advanced by a delegation headed by the Minister of Justice but the submission had been earlier approved by the Attorney-General.
- 2.5 The Court of Appeal handed down its judgment on 25 November 2009. It ruled against the Attorney General, thus bringing New Zealand law into line with the Geneva position and the ICCPR. The Attorney-General has now appealed to the Supreme Court, although not apparently on the question whether the Courts can award damages in respect of BORA rights by the judicial branch.

The issue / Attorney-General v Chapman [2009] NZCA 552

- 2.6 The issue arises in relation to remedies for human rights infringements by the State party. This subject has both domestic law and international law aspects. As to New Zealand's municipal law, it is now well established that the Courts have jurisdiction to award compensation for breaches of BORA rights by the executive branch (*Baigent*). Mr. Chapman, however, did not allege breach of his BORA rights by executive government. Rather he claimed breach of his BORA rights (to a fair trial and natural justice) by the judicial branch of the state. Thus his case raised the issue whether a *Baigent*-type remedial jurisdiction, including compensation, exists in relation to rights-infringing actions by judicial, rather than executive, actors.
- 2.7 That question is obviously important for New Zealand's domestic law. But it also has significant ramifications for New Zealand's compliance with its ICCPR obligations. This is because the BORA rights which Chapman claimed had been infringed are also ICCPR rights and Art 2(3) of the Covenant obliges a state party to provide an "effective remedy" for breach, including by itself, of such rights.
- 2.8 Thus the question of remedies for rights-infringing actions by the state, including the judicial branch, appears to have placed the government in a bind. On the one hand it wants to appear before the international community to be ICCPR-compliant. On the other, it doesn't want to see any extension to its BORA liabilities at home. The State party's solution seems to be that it will say one thing to the UNHRC in Geneva and argue for something quite different in the Court of Appeal in Wellington.

The Government's Geneva position.

- 2.9 On 7 May 2009 the government presented "New Zealand's National Human Rights Report" to the UNHRC at a UPR hearing in Geneva. The New Zealand report was presented by a team of a dozen NZ officials led by the Minister of Justice. The Ministry of Foreign Affairs and Trade website says;

"Following public feedback, the Ministers of Justice, Foreign Affairs and Attorney-General approved the revised report in April 2009 that examines New Zealand's human rights record.

- *New Zealand National Human Rights Report
This report was submitted to the UN Human Rights Council for New Zealand's review under the Universal Periodic Review process on Thursday 7 May 2009"*

Paragraph 2.2.4 of the report says;

*“Individuals who consider that **any** of their rights under the BORA have been infringed can bring an action against the Government. A number of remedies are available, including the ability to award damages or compensation.....”*

(emphasis added)

- 2.10 There is no suggestion in the Government’s report to the UNHRC that individuals cannot bring an action, or receive compensation, when the rights-infringing action is that of the judicial branch. On the contrary, the “Geneva position” is that damages are available in respect of “**any**” breach of BORA rights. Yet, notwithstanding the Attorney-General’s approval of that report in April 2009, less than a month later he took a different position in *Chapman’s* case.

The Government’s Wellington position

- 2.11 The Attorney-General’s argument in the Court of Appeal was that there was no jurisdiction to entertain Mr. Chapman’s claim because, for public policy reasons, there should be no *Baigent*-type remedy available in respect of judicial breaches of BORA rights. The argument is summarised at paragraphs 7 and 10 of the (unanimous) judgment. At para. 7;

“The four preliminary questions (slightly reworded) are:

- a) *Does the Court have jurisdiction to hear and determine a claim for public law compensation for alleged breaches of ss 25 and 27 of the Bill of Rights occurring in the course of determining a criminal legal aid application and an appeal against conviction where a plaintiff’s conviction has subsequently been quashed on appeal and a retrial ordered?”*

And at para. 10:

“Dr. Collins submits that the proper remedy for judicial error in the criminal process is judicial correction within the criminal process itself. There can be no further review by way of civil proceedings for compensation. In Dr. Collin’s submission the special public policy considerations behind this approach outweigh any further relief being available, even in egregious cases.”

The Court’s conclusion is at para. 109;

“ The answer to the questions stated at [7] above are;

- a) *.... The answer is in the affirmative”*

A copy of the full Court of Appeal judgment has been provided to the Committee Secretariat.

Conclusion

- 2.12 Clearly the position taken before the Court of Appeal was inconsistent with that taken before the UNHRC. The fact that the latter was a generalised statement about BORA remedies whereas the former related to a particular situation does not alter this point. After all, the Geneva statement was expressed to apply when “***any*** of their rights under the BORA have been infringed” and the statement that “a number of remedies are available, including the ability to award damages or compensation...” makes no mention of the exception contended for two weeks later in *Chapman*.
- 2.13 Given the Attorney General’s approval of the UPR National Report, the unavoidable conclusion is that there has been not just inconsistency, but duplicity. On the one hand the State party has presented New Zealand internationally as ICCPR compliant (in relation to remedies for state breaches of rights). On the other, it tried to prevent the development in New Zealand common law of an aspect of the very remedy it had claimed existed in Geneva only days earlier.