



HUMAN RIGHTS FOUNDATION OF NEW ZEALAND
TŪĀPAPA TIKA TANGATA O AOTEAROA

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Submission on the draft New Zealand national report to the Universal Periodic Review

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The Human Rights Foundation 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 parallel 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.

We appreciate the opportunity to comment on the draft report, and hope that the process of consultation will prove meaningful. The comments made here should be read in conjunction with the submission we made in coalition with other organisations to the Universal Periodic Review, submitted to the Office of the High Commissioner for Human Rights in November last year. A copy is attached. We begin with some general comments on the report. Thereafter, for ease of reference, we have followed the same headings and numbering as the draft report, where we have specific comments to make.

We have not commented on some areas of the report where these areas are already covered by other organisations with expertise in those fields. For example, the Aotearoa Indigenous Rights Trust and Peace Movement Aotearoa have submitted comments on

the coverage of indigenous peoples' rights and the Treaty of Waitangi in the report; and Action for Children and Youth Aotearoa on childrens rights.

General comments

The Universal Periodic Review reporting process is a difficult one, given the amount of ground to cover and the limited space allowed. A specific structure is required, but the length of each section is not specified, leaving scope for some sections to be given more space than others. Given that this is a human rights review, information which concisely and accurately conveys information about the actual human rights situation on the ground should be given preference. Section 2 (Background on Country) could be shortened to enable better coverage in other sections. A model state report would be humble, avoiding a congratulatory tone, and would provide some depth and insight along with the necessary descriptive detail.

Capacity building: The report has not included a section on capacity building despite this being a standard section of Universal Periodic Review reports. As discussed at the consultation meeting with civil society held in Auckland on March 9 by the Ministry of Foreign Affairs and Trade (MFAT), this is because of the perception that capacity issues are the exclusive realm of developing countries. The difficulties in developing countries are of a different nature and magnitude, to be sure, but capacity building is absolutely relevant to New Zealand and should not be dismissed out of hand.

Capacity issues have been identified as one reason why human rights issues have not, at times, been adequately addressed in regulation or legislation. Recommendations to Cabinet or Cabinet papers, prepared at the beginning of the regulatory or legislative process, require a statement which includes an assessment of human rights implications. The standard of these varies between government agencies, highlighting the need for developing a greater understanding of human rights analysis within government departments.

Despite excellent awareness-building work and progress during the development of the NZ Action Plan for Human Rights, New Zealand has made no serious attempt to address the lack of formal knowledge and understanding of human rights by New

Zealand citizens identified in the Human Rights Commission's report *Human Rights in New Zealand Today* (2004). There are no implementation plans, for example, for the UN World Programme for Human Rights Education. This is a serious capacity issue that undermines all other attempts to improve New Zealand's human rights record. Capacity building is relevant to New Zealand, and should be included in the report.

2.3 New Zealand Human Rights Commission

The report introduces the Human Rights Commission (HRC) but the section could be given more depth by exploring the relationship between government and the HRC, and thus the effectiveness of the HRC's work. Failures to date to formally endorse the Human Rights Commission's National Action Plan for Human Rights, or the recommendations of the Human Rights Commission in *The Accessible Journey: Report of the Inquiry into Accessible Public Land Transport* could be cases in point.

2.4 International Commitments

The report states that NZ 'supported' the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by the United Nations General Assembly in November 2008. However the government has stated that it remains sceptical about the utility of establishing a complaints mechanism for economic, social and cultural rights, which it holds as ill-defined and not easily subjected to quasi-judicial assessment.¹ The report should make the government position clear, and indicate whether there is an intention to ratify the Optional Protocol.

The international conventions and declarations that New Zealand is not a State Party to should be noted in this section, along with brief explanations as to why New Zealand has not signed the said Conventions, and the current government's position on them, including the:

- Convention Relating to the Status of Stateless Persons;
- ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries;
- Convention for the Protection of All Persons from Enforced Disappearances;

¹ Phil Goff, then Minister of Defence, in response to Amnesty International New Zealand election questions, October 2008, <http://www.amnesty.org.nz/files/011008%20Phil%20Goff.pdf>.

- Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The section should also note that New Zealand has not made the necessary declaration under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) that would allow individual communications by New Zealanders to the Committee on the Elimination of Racial Discrimination (CERD).

2.6 Human Rights Legislation

In this section, the report mentions the Human Rights Committee's observation of the weak status of the Bill of Rights in New Zealand, but argues the current structure affords sufficient protection. The argument is unsatisfactory, and does not resolve the issue raised not only by the Human Rights Committee but also, in 2007, by the Committee on the Elimination of all forms of Racial Discrimination (CERD), that the New Zealand Bill of Rights Act (NZBORA) does not enjoy protected status and that the enactment of legislation contrary to the provisions of that Act is therefore possible.²

The listing of other legislation, institutions and mechanisms which have a role in human rights protection does not negate this fact, and the weakness is replicated throughout the framework. It is true, for example, that the Human Rights Tribunal can make declarations of inconsistency in respect of existing discriminatory legislation, but Parliament is not bound to act on them. Therefore it cannot be considered an effective remedy as defined by international human rights instruments. This section would be stronger if it reflected more deeply on the issue, particularly in light of recent remarks from some politicians that have been frighteningly dismissive of human rights.³

Further, the NZBORA does not incorporate economic, social and cultural rights, and also leaves out some elements of the International Covenant on Civil and Political Rights (ICCPR). The report should specify this, and should also specify New Zealand's position on the justiciability of economic, social and cultural rights. Note that the Committee on Economic, Social and Cultural Rights has reminded New Zealand of its obligation to give

² CERD/C/NZL/CO/17, para. 12. See also E/CN.4/2006/78/Add.3, para. 91.

³ Change Bill of Rights, says Three Strikes MP, Tuesday March 3 2009, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10559642.

full effect to the Covenant in the domestic legal order, providing for judicial and other remedies for violations of these rights.⁴

3.7 Ethnic Diversity and Tolerance

No mention is made in the report of legislation pending in this area, the Immigration Bill. The Bill raises many concerns, even after the Select Committee process. Overall, it was drafted from the perspective of security services and border control, undermining the fulfillment of New Zealand's domestic and international human rights obligations, as well as findings of the New Zealand Courts. Cumulatively, the approaches presented in the Bill would further undermine the institution of asylum. Concerns include:

- definition and use of classified information
- the ability to refuse consideration of a claim for asylum on the basis of having passed through a 'safe third country' (where agreements exist with those countries)
- the entrenchment in legislation of advance passenger processing
- the ability to use classified information in refugee determination
- the extension of detention periods.

Moreover the situation of asylum seekers and refugees could be addressed in this section, including human rights concerns such as:

- Asylum seeker detention in correctional facilities. This issue has been noted by both CERD and the Committee Against Torture (CAT). In 2007, CERD recommended putting an end to the practice of detaining asylum-seekers in correctional facilities;⁵ information on this practice has been requested in the list of issues for New Zealand's review before the CAT in May 2009.⁶
- Interdiction practices and other border control activities which may be compromising the right to asylum.

⁴ E/C.12/1/Add.88, para. 21.

⁵ CERD/C/NZL/CO/17, para. 24. Or see CERD/C/NZL/CO/66, para. 24

⁶ CAT/C/NZL/Q/5, para.9.

4.1.1 Achievements and Best Practices: Refugee Quota

The quota is presented in the report as an example of good practice. Accepting quota refugees is indeed excellent but a number of concerns exist around the quota which the report fails to mention; the report does not tell us explicitly *why* the quota should be counted as an achievement. Moreover, it seems somewhat disingenuous to claim the refugee quota as a strong human rights achievement when the area of immigration is excluded from the operations of the Human Rights Commission, rendering it unable to act as a watchdog.

The following points can be made:

- The quota number has remained at 750 since its implementation in 1987, despite steady declines in the numbers of spontaneous arrivals since 2001. Therefore the total number of refugees accepted by New Zealand has actually dropped in recent years. Moreover, the fulfillment of the quota of 750 has only been met four times in the last ten years.
- There is no explicit policy associated with the quota program. For human rights to operate, there needs to be a climate of accountability and transparency. Without a policy it is difficult to judge *how* human rights standards are incorporated into the practices of the quota program, or what training associated staff receive in human rights standards.
- It is unclear what role the Immigration Profiling Group (IPG) plays in the immigration process of quota refugees. Given the concerns surrounding the IPG, including its secretiveness, the severe impact it has had on regularising the immigration status of refugees from listed countries, and criticisms of its process and functioning, including inconsistent and excessively slow decision making, this fits uncomfortably with identifying the quota program as an achievement.
- There is no mention of what policies are in place to ensure the economic, social and cultural rights of people accepted onto the quota program, or how the individual, and often complex, needs of quota refugees are assessed on arrival.
- Refugees arriving on the quota program are granted permanent residency, yet they have to live in semi-detention alongside asylum seekers. There are concerns about asylum seekers and quota refugees as co-residents at Mangere Resettlement Centre. The fundamental purposes for the two groups being at MRRC are completely opposed. The quota refugees are there to aid their resettlement and eventual integration into New Zealand society. To do this they need to be able to move freely in and out of and about the Centre, and receive visitors freely. They should be able to do this as permanent New Zealand residents. On the other hand, asylum seekers are required to live at MRRC because they are under detention because of questions of their identity and for

security concerns. This means their movements are restricted. Even with the regime of leave consents in place, the facility is far from being an “Open Centre”.⁷

- As permanent residents and then citizens, many on the quota continue to experience discrimination in employment, and by customs staff when returning from travel overseas. This does not correlate well with a strong human rights record for New Zealand.
- Family reunification is problematic for quota refugees. Mechanisms in place are not working effectively. This raises human rights issues which need to be addressed.

4.2.2 Challenges and Constraints: Human Rights and Countering Terrorism

The report focuses exclusively on Operation Eight, a crucial issue to cover. However the human rights issues raised by Operation Eight are not adequately covered in the report. In particular, the treatment of, and subsequent impact on, Maori during the raids should be specified. For example, Tuhoe communities in the Ruatoki valley were locked down and blockaded by armed and masked police. During that time a number of human rights violations occurred, including the separation of children from their parents, and searches and seizure of property from individuals who were not under arrest nor subsequently charged with any offence.

In addition, there are other issues which challenge human rights in this arena, in particular the operation of the Immigration Profiling Group, and the security risk certificate system. CAT recommended reviewing that system in 2004 to meet international fair trial standards, and was assured by the NZ government that a review would take place in 2005.⁸ This has not yet happened.

⁷ ‘Freedom’s Ramparts on the Sea: the detention of asylum seekers’, HRF and Refugee Council, 2002, paragraphs 90, 91, <http://www.refugee.org.nz/Comment/elliott.htm>. Note also, paragraph [92]: ‘Refugees arriving on the quota are tired, anxious, confused and often fearful, but usually filled with hope of fair, non-discriminatory treatment. To have them living alongside those who are possibly to be deported and whose freedom of movement is severely restricted can only be further destabilising, which is counter to the purpose of the on-arrival programme. The Centre being patrolled by uniformed guards, who cause negative connotations and have psychological effects reminiscent of a traumatic past, fails to aid integration indeed does exactly the opposite. Ironically, some refugees entering New Zealand from places with questionable human rights records, such as Sudan, have been self settled in their country of first refuge; that is they have not lived in refugee camps. Living in a detention centre at MRRC will be their first experience of having their movement restricted or treated as a segregated community.’

⁸ CAT/C/CR/32/4, paras. 6 (b) and (c); CAT/C/CR/32/4/RESP .1, para. 8.

Challenges and Constraints: Further additions

Taser introduction: The report should mention the introduction of Tasers to Police, particularly in light of the CAT declaration in 2007 that Taser use can be a form of torture and has ‘proven risks of harm or death’.⁹ CAT has requested information from government about the Taser trial in its list of issues for the May review.¹⁰

Privacy Law: The report should include reference to recently released reports from the New Zealand Law Commission Privacy Review, which make it clear that we have gaps in privacy law in New Zealand.¹¹

Law and Order: The report should be updated with developments under the new National government, in particular around law and order. Issues to raise would include the two pieces of legislation which the Attorney General has found to have apparent inconsistencies with the NZBORA, the Criminal Investigations (Bodily Samples) Amendment Bill and the Sentencing and Parole Reform Bill.

In addition, the Corrections (Contract Management of Prisons) Amendment Bill should be noted, in light of the concern of the Human Rights Committee in 2002 around the contracting of prison escort services and prison management to private companies. The Committee expressed doubt about whether the practice of privatisation in such an area effectively meets the State’s obligations under the ICCPR and its accountability for violations.

NZAID: The report should include reference to the review of NZAID, including concerns about the human rights implications of reintegrating NZAID into MFAT and shifting the focus of aid from poverty elimination to economic development, which has been mooted in recent statements by the Minister for Foreign Affairs.

⁹ UNOG, ‘Committee against Torture Concludes Thirty-ninth Session’, 23 November 2007, [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/D3DD9DE87B278A87C125739C0054A81C?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/D3DD9DE87B278A87C125739C0054A81C?OpenDocument). Tasers are dart-firing electro-shock projectile weapons which can also be used as stun guns, and are among a class of weapon collectively known as “conducted energy devices” (CEDs). For further information, see Campaign Against the Taser, Stun Guns in Aotearoa New Zealand? The Shocking Trial: A report on the New Zealand Police Taser Trial 1 September 2006 – 1 September 2007, <http://www.converge.org.nz/pma/tasertrial.pdf>.

¹⁰ CAT/C/NZL/Q/5, para.6.

¹¹ See <http://www.privacy.org.nz/new-zealand-law-commission-privacy-review/>.