

# INTERNATIONAL HUMAN RIGHTS LAW

## I. INTRODUCTION

The major event for New Zealand in 2009 was its review under the Universal Periodic Review (UPR) mechanism of the Human Rights Council (HRC). Before the treaty bodies, New Zealand received the concluding observations of the Committee against Torture and submitted its report to the Committee on Economic, Social and Cultural Rights. New Zealand also received and responded to the Views of the Human Rights Committee containing a finding that New Zealand had violated the International Covenant on Civil and Political Rights (ICCPR).<sup>1</sup> This note reviews these and other aspects of New Zealand's state practice in the area of human rights in 2009.

## II. UNIVERSAL PERIODIC REVIEW

New Zealand was the subject of the HRC's UPR process for the first time in 2009. This mechanism is the major new innovation of the HRC for protecting human rights. The UPR involves a review of the human rights records of all 192 United Nations (UN) member states once every four years. In contrast to the monitoring process used by the treaty bodies, the UPR process is an intergovernmental process, run by the member States of the HRC, and explicitly directed not to be "overly burdensome" or "overly long."<sup>2</sup>

In preparing its National Report, New Zealand conducted two domestic consultation processes in August 2008 and March 2009. Some stakeholders expressed concern about the consultation process and engagement with civil society and Maori.<sup>3</sup> There were 15 stakeholder submissions, including three joint submissions from groups of NGOs with a common interest.<sup>4</sup> The interactive dialogue between New Zealand and the HRC was held in Geneva in May. New Zealand was represented by an 11-member delegation, headed by the Minister of Justice, Hon Simon Power.

A total of 64 recommendations were made to New Zealand covering the full range of human rights issues. Overall, New Zealand accepted 33 recommendations unreservedly, provided a qualified response to 23 recommendations and rejected eight recommendations. As detailed in the

1 International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entry into force 23 March 1976).

2 *Institution-Building of the United Nations Human Rights Council* HRC Res 5/1, Annex at [3] (h) and (i), A/HRC/RES/5/1 (2007).

3 United Nations Human Rights Council "National report submitted in accordance with paragraph 15(a) of the annex to human rights council resolution 5/1 – New Zealand" A/HRC/WG.6/5/NZL/1 (2009) at [7].

4 United Nations Human Rights Council "Summary of Stakeholders' Information – New Zealand" A/HRC/WG.6/5/NZL/3 (2009).

Year in Review on Indigenous Rights, a major focus of the UPR was the rights of Maori.<sup>5</sup> The recommendations concerning Maori are not therefore further discussed in this Review. This Review details the remaining recommendations of particular note, and the New Zealand responses to these.

A number of recommendations concerned treaty action by New Zealand. New Zealand accepted recommendations suggesting ratification of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography<sup>6</sup> and the International Convention for the Protection of All Persons from Enforced Disappearance.<sup>7</sup> New Zealand also accepted a recommendation that it consider accepting the individual complaint procedure under art 14 of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>8</sup> New Zealand rejected recommendations to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,<sup>9</sup> and the Optional Protocol to ICESCR.<sup>10</sup>

The second set of recommendations concerned New Zealand's constitutional and legislative framework. Many of these recommendations continued the theme identified in numerous treaty body reports about the inadequacy of aspects of New Zealand's domestic human rights framework. For example, recommendations suggested that New Zealand expand the scope and enhance the status of the New Zealand Bill of Rights Act 1990, and incorporate ICESCR into domestic law to ensure justiciability of these rights.<sup>11</sup> New Zealand generally expressed support for the sentiment behind this type of recommendation but argued for a different and equally valid means of achieving the same ends, for example the protection of economic, social and cultural rights through subject-specific legislation and government policies and practices.<sup>12</sup>

5 F Adcock and C Charters "Year in Review: Indigenous Peoples Rights under International Law" (2009) 7 NZYIL (this volume).

6 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (opened for signature 25 May 2000, entry into force 18 January 2002).

7 International Convention for the Protection of All Persons from Enforced Disappearance (opened for signature 20 December 2006, not yet in force). See the United Nations Human Rights Council *Universal Periodic Review on New Zealand A/HRC/12/8/Add.1* (2009) at [3] and [7] (Report of the Working Group) ["Universal Periodic Review on New Zealand – Addendum"].

8 International Convention on the Elimination of All Forms of Racial Discrimination (opened for signature 21 December 1965, entered into force 4 January 1969). See the Universal Periodic Review on New Zealand – Addendum, above n 7, at [8].

9 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (opened for signature 18 December 1990, entered into force 1 July 2003).

10 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (opened for signature 10 December 2008, not yet in force). See the Universal Periodic Review on New Zealand – Addendum, above n 7, at [2] and [4].

11 United Nations Human Rights Council *Universal Periodic Review on New Zealand A/HRC/12/8* (2009) at [81] (16) and (17) (Report of the Working Group) ["Universal Periodic Review on New Zealand"].

12 Universal Periodic Review on New Zealand – Addendum, above n 7, at [15].

Twenty-two recommendations were made under the broad umbrella of equality and non-discrimination. Many of these, accepted by New Zealand, recommended action to address the socio-economic disparities of various groups including Maori, Pacific Islanders, Asians and those with disabilities.<sup>13</sup> Other recommendations which New Zealand accepted included protecting the interests of migrants and minority groups, and including the fight against xenophobia and racism in the education curricula.<sup>14</sup> A final group of recommendations concerned gender equality. While New Zealand agreed with the goal of reinforcing the rights of women in society, New Zealand noted that it did not consider that legislative gender quotas or targets were the best mechanisms to achieve these goals.<sup>15</sup>

Eleven recommendations related to the right to life, liberty and security of the person. New Zealand accepted recommendations on more effective prevention of child abuse, more effective institutional responses to domestic violence, and documenting cases of trafficking of women and children.<sup>16</sup> It rejected recommendations to raise the age of criminal responsibility, and adopt a more comprehensive definition of human trafficking.<sup>17</sup>

The next stage of the UPR cycle is domestic implementation of those recommendations accepted by New Zealand. In 2013, when New Zealand is next reviewed under the UPR, a full assessment of the merits of the new process, at least in relation to New Zealand, will be able to be made.

### III. PERIODIC REPORTS TO HUMAN RIGHTS TREATY BODIES

#### *A. Concluding Observations of the Committee Against Torture*

In May, the Committee against Torture issued its concluding observations on New Zealand's fifth periodic report to the Committee.<sup>18</sup> The Report covered the period 1 January 2003 to 1 January 2007. Matters receiving positive comment by the Committee included ratification of various treaties and the passage of domestic legislation. The Committee commended New Zealand for its ratification of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>19</sup> ratification of the Convention on the Rights of Persons with

13 Ibid, at [21].

14 Universal Periodic Review on New Zealand, above n 11, at [81](36) and (37); Universal Periodic Review on New Zealand – Addendum, above n 7, at [25]-[26].

15 Universal Periodic Review on New Zealand – Addendum, above n 7, at [29].

16 Ibid, at [34]-[36].

17 Ibid, at [32] and [37].

18 Committee Against Torture “Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: New Zealand” CAT/C/NZL/CO/5 (2009) (Concluding Observations) [“Concluding Observations on New Zealand of the Committee Against Torture”].

19 Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 18 December 2002, entered into force 22 June 2006).

Disabilities,<sup>20</sup> accession to the Convention on the Reduction of Statelessness,<sup>21</sup> and ratification of the Rome Statute of the International Criminal Court.<sup>22</sup> At the domestic level, the Committee welcomed the enactment of the Policing Act 2008, the Crimes Amendment Act 2007 (amending s 59 of the Crimes Act 1961 by repealing the legal defence for the use of reasonable force for the correction of children), and the Abolition of the Death Penalty Act 1989 (although this pre-dated the period of review).

The Committee also highlighted a number of areas of concern. At the systemic level, it noted its concerns that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>23</sup> had not been fully incorporated into domestic law, that the New Zealand Bill of Rights Act 1990 was an “ordinary” statute, and that “judicial decisions make little reference to international human rights instruments” including CAT.<sup>24</sup> This last statement is of particular interest in that it appears to conflict with domestic analysis on the approach of the New Zealand Supreme Court to international law. Claudia Geiringer has noted that the Supreme Court has adopted “a posture of profound receptivity to international law as a source of authority within the domestic legal system.”<sup>25</sup>

More specifically, the Committee noted its concern about the detention of asylum seekers and undocumented migrants in low security and correctional facilities, the continued issuance of security risk certificates and the use of classified information against asylum seekers and undocumented migrants.<sup>26</sup> The Committee recommended human rights training for immigration officials.<sup>27</sup> The Committee noted its concerns with New Zealand’s juvenile justice system especially the low age of criminal responsibility, the mixing of juvenile and adult offenders, and the detention of juveniles in police cells.<sup>28</sup> The insufficient number of prison facilities in light of the projected growth in prisoner numbers was also noted, as was the perceived inadequacy of measures to deal with historic abuse cases in state-run facilities.<sup>29</sup> The Committee raised two concerns in relation to the Independent Police conduct Authority

20 Convention on the Rights of Persons with Disabilities (opened for signature 13 December 2006, entered into force 3 May 2008).

21 Convention on the Reduction of Statelessness (opened for signature 30 August 1961, entered into force 13 December 1975).

22 Rome Statute of the International Criminal Court (opened for signature 17 July 1988, entered into force 1 July 2002).

23 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987).

24 Concluding Observations on New Zealand of the Committee Against Torture, above n 18, at [4].

25 C Geiringer “International law through the lens of Zaoui: Where is New Zealand at?” (2006) 17 PLR 300 at 318.

26 Concluding Observations on New Zealand of the Committee Against Torture, above n 18, at [6].

27 Ibid, at [7].

28 Ibid, at [8].

29 Ibid, at [9] and [11].

– impartiality of the Authority given the involvement of current and former police officers in its investigations, and the 12 month limitation which enables the Authority to decide not to take any action.<sup>30</sup> The Committee also expressed its concern in relation to ss 29 and 30 of the Evidence Act 2006 concerning prosecution use of statements obtained improperly, the police use of taser weapons, the prevalence of violence against women, and the lack of systematic data on cases of alleged torture.<sup>31</sup>

The Committee urged New Zealand to withdraw its reservation to art 14 of CAT.<sup>32</sup> Article 14 concerns redress for victims of torture, and imposes an obligation on states to ensure the rights of victims of torture to fair and adequate compensation including the means for as full rehabilitation as possible. New Zealand is currently the only state to have made a reservation to art 14. The reservation states: “The Government of New Zealand reserves the right to award compensation to torture victims referred to in article 14 of the Convention Against Torture only at the discretion of the Attorney-General of New Zealand.” New Zealand’s state Report had indicated that the Government was actively examining compliance with art 14 with a view to removing the reservation.<sup>33</sup> However, at the time of the meeting between the Committee and New Zealand in May, the work on compliance with art 14 was still ongoing, and no final decision had been reached.<sup>34</sup> The Committee noted that the reservation is “incompatible with the letter and spirit of the Convention.”

Finally, see the Year in Review on International Humanitarian Law and International Criminal Law for discussion of the Committee’s concerns in relation to the Crimes of Torture Act 1989,<sup>35</sup> and the Year in Review on Indigenous Rights for discussion of the Committee’s recommendations in relation to Maori.<sup>36</sup>

### *B. New Zealand’s Report to the CESCR Committee*

In April, New Zealand submitted its third periodic report<sup>37</sup> to the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic Social and Cultural Rights.<sup>38</sup> The Report covers the period January 1998 to December 2007.

30 Ibid, at [12]-[13].

31 Ibid, at [15]-[18].

32 Ibid, at [14].

33 *Fifth periodic reports of States parties due in 2007: New Zealand* CAT/C/NZL/5 (2007) at [226]-[230] (State Party Report).

34 *Summary record (partial) of the 876th meeting* CAT/C/SR.876 (2009) at [21] (Summary Record).

35 T Dunworth “Year in Review: International Humanitarian Law and International Criminal Law” (2009) 7 NZYIL (this volume).

36 Adcock and Charters, above n 5.

37 *New Zealand Government Third Periodic Report Submitted by State Parties Under Articles 16 and 17 of the Covenant to the United Nations Committee on Economic, Social and Cultural Rights* E/C.12/NZL/3 (2009).

38 International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976).

#### IV. JURISPRUDENCE OF HUMAN RIGHTS TREATY BODIES

In *Dean v New Zealand*,<sup>39</sup> the Human Rights Committee found that New Zealand had violated art 9(4) of the ICCPR. The decision can be seen as a postscript to the Committee's decision on preventive detention in *Rameka v New Zealand*.<sup>40</sup> A major hurdle to much of Mr Dean's communication was the decision of the Committee in *Rameka* that preventive detention may be imposed if proper safeguards are in place to ensure compliance with the ICCPR. However, nine of the 16 Committee members in *Rameka* dissented in one way or another from the majority opinion. Mr Dean therefore argued that the Committee was not bound by precedent, and relied on the dissents which were of the view that preventive detention per se was in violation of the ICCPR.

In 1995, Mr Dean pleaded guilty to an offence of indecency with a boy between 12 and 16 years old. He was sentenced to preventive detention, with a minimum ten year non-parole period. His appeal against sentence was initially dismissed. Following the Privy Council's decision in *Taito v R*<sup>41</sup> that the appeal procedure used in a number of cases including Mr Dean's was flawed, Mr Dean applied for a rehearing of his appeal. In December 2004, the Court of Appeal dismissed that appeal, and in 2005 the Supreme Court rejected leave to appeal.

Mr Dean alleged numerous violations of the ICCPR. First, he alleged that the sentence of preventive detention was manifestly excessive and violated arts 7 and 10(1). He also claimed that his sentence was disproportionate in violation of art 14(1). He further claimed a breach of his right to a fair trial in arts 14(1) and (3)(a) as his sentencing was transferred from the District Court to the High Court. Further, the delay in finally disposing of his appeal following the *Taito* decision breached arts 14(3)(c) and (5). He alleged that the Court of Appeal had improperly embarked on an inquisitorial fact-finding investigation by accessing his past criminal file, in breach of arts 14(1) and 3(d). He claimed that his counsel's submission was unreasonably dismissed and that the Court of Appeal should have requested an updated psychiatric report – both in violation of art 14(1). He claimed that he had been discriminated against on the basis of his sexual orientation in that he had been treated more harshly than non-homosexuals in sentencing. He further alleged that he had been denied access to a more lenient penalty in violations of arts 15(2) and 26. He claimed that New Zealand's preventive detention regime violates arts 9(1), 14(1) and (2), 15(1). The lack of regular review of detention and the lack of independence of the Parole Board were said to be a violation of art 9(4). Mr Dean claimed that he had been unreasonably denied treatment to aid

39 *Dean v New Zealand* CCPR/C/95/D/1512/2006 (2009).

40 *Rameka v New Zealand* CCPR/C/79/D/1090/2002 (2003). For discussion see C Geiringer "Case Note: *Rameka v New Zealand*" (2005) 2 NZYIL 185.

41 *Taito v R* [2002] UKPC 15, [2003] 3 NZLR 577; (2002) 19 CRNZ 224; (2002) 6 HRNZ 539.

his rehabilitation and release in violation of art 10(3). Further, there was no future prospect of review of his parole by an independent tribunal given his contention that he had already been arbitrarily detained beyond his parole eligibility date, in violation of art 9(1). Finally, Mr Dean claimed that his right to equal treatment before the law was violated as preventive detainees were not scheduled for treatment until after their parole eligibility date in contrast to detainees with finite sentences.

The Committee found that a number of aspects of Mr Dean's communication were inadmissible. There was a failure to exhaust domestic remedies in relation to the alleged improper transfer of his sentencing from the District Court to the High Court. The claim of discrimination on the basis of homosexuality was found to be unsubstantiated. So too were the claims concerning the Court of Appeal's alleged inquisitorial fact-finding process and failure to obtain an updated psychiatric report. The claim of discrimination compared to finite detainees was found not to be demonstrated. Mr Dean withdrew his claims concerning the independence of the Parole Board. Finally, the claims concerning the change in sentencing regime and the failure to apply a more lenient sentence were found not to be admissible as Mr Dean had not shown that he was a victim of an alleged violation.

The Committee considered four issues on the merits. First, it considered the claim of undue delay in the rehearing of Mr Dean's appeal, and found that in the particular circumstances of the case, there was no violation of arts 14(3)(c) and (5). Second, in relation to the claim that the imposition of the sentence of preventive detention was manifestly excessive, the Committee noted that Mr Dean had a long history of sexual assault and indecency offences, that he had been warned that re-offending might lead to preventive detention, and that he committed the offence for which he was sentenced to preventive detention within three months of release from prison for a similar offence. In these circumstances, there was therefore no violation of arts 7, 10(1) or 14. Third, in relation to the claims concerning review of sentence while in detention, the Committee recalled its finding in *Rameka* that the sentence of preventive detention did not amount to a violation of the ICCPR if such detention is justified by compelling reasons that are reviewable by a judicial authority. The Committee further applied its finding in *Rameka* and similarly held that Mr Dean's inability to challenge the existence of substantive justification for his continued detention for preventive reasons during that time was a violation of art 9(4). Finally, in relation to the claim concerning insufficient access to rehabilitation, the Committee found that there was no violation of arts 9(1) and 10(3) as Mr Dean himself was partly responsible for the lack of a sufficient release plan.

The significance of *Dean* is that it appears to lay to rest - at least until membership of the Committee changes - any suggestion that New Zealand's preventive detention regime per se is a violation of the Covenant. Unlike *Rameka*, there were no dissenting opinions, indicating that, for the time being, the Committee stands by the majority opinion in *Rameka*. The Committee

did not directly engage with submissions from Mr Dean on the operation of precedent in the Committee's decisions. Its reliance on *Rameka* does however imply that, at least in the context of New Zealand's preventive detention regime, it views itself as bound by precedent.

In an undated memorandum, New Zealand responded to the Views of the Committee and provided information about the measures taken to give effect to the Views.<sup>42</sup> First, New Zealand noted that the Committee was in error in identifying a three-year period during which Mr Dean was unable to apply for review of his detention. On 9 February 2004, in response to the Committee's decision in *Rameka*, the Government had made provision for prisoners sentenced to preventive detention to request parole consideration at any point after the expiry of the otherwise applicable finite sentence. This meant that Mr Dean was only ineligible for parole consideration for the shorter period of one year and seven months rather than the longer three year period. The Government also noted that Mr Dean had appeared before the Parole Board on seven occasions between June 2005 and September 2009, with parole being declined on each occasion. The introduction of the February 2004 measures ensured non-repetition of the violation, and since that time Mr Dean had had ongoing opportunity to apply for parole. In terms of Mr Dean's continued detention, he had failed to take sufficient steps for reintegration into society, and continued to pose a risk of reoffending.

## V. HUMAN RIGHTS COUNCIL

### *A. New Zealand's Withdrawn Candidature for the Human Rights Council*

In April, the Minister of Foreign Affairs, Hon Murray McCully, announced that New Zealand had withdrawn its bid for a seat on the HRC. New Zealand had been bidding, along with Norway and Belgium, for one of three seats allocated to the Group of Western European and other States on the 47-member Council. The New Zealand decision to withdraw was made following a decision by the United States to run for a seat. Following the change of Administration in the 2008 United States election, the United States changed its policy towards the HRC and indicated that it would seek a seat on the HRC. In announcing the withdrawal of the New Zealand bid, Mr McCully said "[f]rankly, by any objective measure, membership of the Council by the US is more likely to create positive changes more quickly than we could have hoped to achieve them."<sup>43</sup> The Human Rights Commission and

42 New Zealand Government *Response of the New Zealand Government to the views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights in Communication No 1512/2006* (2009) <[www.justice.govt.nz](http://www.justice.govt.nz)>.

43 Hon Murray McCully "NZ withdraws Human Rights Council bid" (press release, 1 April 2009).

Amnesty International Aotearoa New Zealand both expressed disappointment at the decision.<sup>44</sup> Both organisations noted that New Zealand's membership of the HRC would have provided a significant Pacific voice and presence.

More broadly, the New Zealand decision to withdraw its candidature in order to avoid a competitive election was disappointing as it left states with no opportunity to elect the best advocates of human rights that the region had to offer. The General Assembly Resolution establishing the HRC exhorted states to take into account a state's human rights record when voting for Council members.<sup>45</sup> The increasingly common practice of regions presenting the same number of candidates as there are seats makes this directive meaningless, and potentially undermines the integrity of the Council.

### *B. Resolution on Maternal Mortality and Morbidity*

New Zealand worked with Colombia to lead negotiations on a resolution on preventable maternal mortality and morbidity and human rights.<sup>46</sup> On 17 June, the resolution was adopted by consensus and co-sponsored by 72 states, reflecting broad cross-regional support for the issue. The resolution is the first to recognise the human rights implications of preventable maternal mortality and morbidity. It paves the way for more substantive discussion of women's rights in the HRC, as well as for greater emphasis on a human rights analysis of the Millenium Development Goal on maternal health.

## VIII. ACTIVITIES OF THE NEW ZEALAND HUMAN RIGHTS COMMISSION

Highlights of the work of the Human Rights Commission during 2009 include its significant contribution to New Zealand's UPR, the record nationwide participation in Race Relations Day on 21 March, and the growth of the Diversity Action Programme and the annual Diversity Forum.<sup>47</sup>

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44 Human Rights Commission "New Zealand loses opportunity to champion human rights" (press release, 1 April 2009); Amnesty International Aotearoa New Zealand "Decision a setback to NZ's human rights agenda" (press release, 1 April 2009).

45 *Human Rights Council* GA Res 60/251 at [8], A/Res/60/251 (2006).

46 *Preventable maternal mortality and morbidity and human rights* A/HRC/11/L.16/Rev.1 (2009) 4.

47 Human Rights Commission *Annual Report 2009* (Human Rights Commission, Wellington, 2009) 4.

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