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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Fifth periodic reports of States parties due in 2007[*]
Addendum

NEW ZEALAND[** *** ****]

[8 January 2007]

[*] The Committee, considering that the third periodic report also includes the fourth periodic report due on 8 January 2003, invites the State party to submit its fifth periodic report on 8 January 2007 (See document CAT/C/CR/32/4).

[**] For the initial report of New Zealand, see document CAT/C/12/Add.2; for its consideration by the Committee, see documents CAT/C/SR.126, CAT/C/SR.127, CAT/C/SR.127/Add.1 and CAT/C/SR.127/Add.2 and *Official Records of the General Assembly, Forty-eighth session, Supplement No. 48* (A/48/44), paras. 133 -160. For the second periodic report, see document CAT/C/29/Add.4; for its consideration by the Committee, see documents CAT/C/SR.326 and CAT/C/SR.327 and *Official Records of the General Assembly, Fifty-third session, Supplement No. 53* (A/53/44), paras. 167-178. For the third and fourth periodic reports, see document CAT/C/49/Add.3; for its consideration by the Committee, see documents CAT/C/SR.604; CAT/C/SR.607; CAT/C/SR.616 and the Conclusions and Recommendations of the Committee CAT/C/CR/32/4

[***] Annexes to the present report are available with the Secretariat of the Committee

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

Foreword

It is my privilege, on behalf of the New Zealand Government, to present New Zealand's fifth periodic report on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

New Zealand has had a long commitment to the protection and promotion of international human rights and now has a sound focus on further strengthening the legal and policy framework to ensure that New Zealand's strong commitment to human rights is upheld.

This report provides a comprehensive outline of New Zealand's compliance with the Convention as well as providing detailed information on legal and policy changes since the third and fourth consolidated report. Responses to the concluding recommendations made by the Committee following consideration of New Zealand's last report are also included.

During the reporting period considerable progress has been made in further addressing New Zealand's obligations under the Convention. Specific areas of note include accession to the Convention on the Reduction of Statelessness, the enactment of the Citizenship Amendment Act 2005, the Corrections Act 2004 and associated regulations, and the Crimes of Torture Amendment Act 2006. The Crimes of Torture Amendment Act provides a robust regime for compliance with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Government is committed to ensuring that New Zealand continues to lead the world in the development of human rights law; the measures outlined in this periodic report are a clear illustration of that commitment.

I would like to acknowledge the work of non-governmental organisations, persons with an interest in the field of human rights and other groups in the New Zealand community, as well as departmental officials, who have all contributed to the preparation of this report. I take great pride in presenting this report to the Committee.

Signed
Hon Mark Burton
Minister of Justice

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Introduction

1. New Zealand signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Convention") on 14 January 1986. New Zealand ratified the Convention on 10 December 1989. On ratification New Zealand made declarations recognising the competence of the Committee against Torture (the "Committee") to receive and consider communications made in accordance with articles 21 and 22 of the Convention.

2. The following is New Zealand's fifth periodic report to the Committee against Torture submitted in accordance with article 19 of the Convention.

3. The report deals with measures which give effect to the provisions of the Convention and other relevant developments. The report covers the review period 1 January 2003 to 1 January 2007.[1] It also addresses issues raised by the Committee in consideration of New Zealand's third and fourth consolidated periodic report (CAT/C/49/Add.3).

4. New Zealand's previous reports under the Convention were submitted in July 1992, July 1997 and August 2002.[2] The Committee considered these reports in November 1992 and February 1993, May 1998 and May 2004 respectively.

5. The fifth periodic report represents a consolidation of the previous reports to ensure that United Nations representatives and officials, the public and New Zealand officials can rely on this report for a concise and comprehensive presentation on New Zealand's measures to achieve compliance with the Convention.[3] During consideration of this report, the Committee should also refer to New Zealand's Core Document. [4]

Summary of key developments

6. Since submission of the third and fourth consolidated report the following legislation has been enacted in New Zealand relevant to compliance with the Convention. These statutes improve protections against torture and ill-treatment:

a) Corrections Act 2004

b) Citizenship Amendment Act 2005

c) Crimes of Torture Amendment Act 2006

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[1] The Report reflects developments as at 7 December 2006 given the time necessary to finalise the report for submission on 8 January 2007. Developments after this time can be addressed during the Committee's consideration of the report.

[2] Initial Report CAT/C/12/Add.2; Second Report CAT/C/29/Add.4; Third and Fourth Consolidated Report CAT/C/49/Add.3. (Note that at paragraph 10 of the Committee's Conclusions and Recommendations (CAT/C/CR/32/4) the Committee considered that the third periodic report also included the fourth periodic report due on 8 January 2003.)

[3] Information on new measures and new developments relating to the implementation of the Convention during the reporting period are listed under the heading 'New Developments'.

[4] A copy of New Zealand's current Core Document is attached.

7. New Zealand has also undertaken a number of other key measures to ensure compliance with the Convention, including:

a) Becoming a signatory to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

b) Accession to the Convention on the Reduction of Statelessness*;*

c) Introduction of the Independent Police Complaints Authority Bill;

d) The Corrections Regulations 2005.

8. Detailed discussion of these measures is contained in Part I of the report.

Consultation

9. In preparing this report the Government has sought the views of interested non-governmental organisations, other persons with an interest in the field of human rights and other groups in the New Zealand community. Organisations that have made shadow reports in addition to previous reports of the Government under the Convention were included in the consultation. The contributions and views of these persons and organisations were welcomed, and have aided the Government in the preparation of this report.

10. The Government received 27 public submissions on the draft report.

PART I

Information on Measures Relating to the Implementation of the Convention

Article 2

Legislation

11. New Zealand gives effect to article 2 via a number of statutes.

New Zealand Bill of Rights Act 1990

12. Three provisions of the New Zealand Bill of Rights Act 1990 (NZBORA) are directed towards the prevention of torture in New Zealand:

a) Section 9: Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment

b) Section 10: Every person has the right not to be subjected to medical or scientific experimentation without that person's consent

c) Section 23(5): Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

13. Two other provisions of the NZBORA are also relevant to the prevention of torture:

a) Section 21: Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise.

b) Section 22: Everyone has the right not to be arbitrarily arrested or detained.

14. The NZBORA requires public officials to ensure the recognition of these rights, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society or which are prescribed by statute. The Government considers the prohibition of torture under article 2(2) of the Convention and section 9 of the NZBORA to be absolute and thus not amenable to reasonable limitations.

Crimes of Torture Act 1989

16. The Crimes of Torture Act 1989 has specific and directly enforceable provisions to prohibit acts of torture and was enacted to give effect to the Convention in New Zealand law. Section 3 of the Act provides that any person who is a public official or is acting in an official capacity, or any person who acts at the instigation or with the consent of a public official or a person acting in an official capacity, who commits an act of torture is liable to imprisonment for a term not exceeding 14 years.

17. Section 2 defines ”act of torture” as any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

a) For such purposes as-

(i) Obtaining from that person or some other person information or a confession; or

(ii) Punishing that person for any act or omission for which that person or some other person is responsible or is suspected of being responsible; or

(iii) Intimidating or coercing that person or some other person; or

b) For any reason based on discrimination of any kind; but does not include any act or omission arising only from, or inherent in, or incidental to, any lawful sanctions that are not inconsistent with the articles of the International Covenant on Civil and Political Rights.

18. Section 2 defines “public official” as:

a) Any person in the service of Her Majesty in right of New Zealand, including:

(i) A member of any of the Armed Forces of New Zealand; and

(ii) A judicial officer and a law enforcement officer within the meaning of Part 6 of the Crimes Act 1961; and

(iii) An officer within the meaning of the Corrections Act 2004; and

(iv) A security officer within the meaning of the Corrections Act 2004; and

(v) A member and an employee of any local authority or public body; and

b) Any person who may exercise any power, pursuant to any law in force in a foreign state, that would be exercised in New Zealand by any person described in paragraph (a) of this definition.

19. The Act provides that no proceedings for the trial and punishment of a person charged with torture under the Act shall be instituted without the consent of the Attorney-General, who is the chief legal officer of New Zealand. This provision ensures that no one is tried for such a serious offence, in respect of which New Zealand owes international obligations, until

the Attorney-General has had an opportunity to consider the matter. The provision does not, however, prevent the arrest and detention of a person who is suspected of having committed an act of torture, pending the consent of the Attorney General.

20. The Government considers this provision to be a reflection of the serious nature of the crime to be prosecuted, and that where the allegations were clear that an act of torture may have been committed the Attorney-General would consent to prosecution.

21. The Attorney-General's consent has not been sought for such a prosecution to date.

Crimes Act 1961

22. The Crimes Act 1961 provides for a number of offences for actions which, depending on the circumstances, could constitute torture. The offences include common assault (s 196), assault with intent to injure (s 193), wounding with intent (s 188), female genital mutilation (ss 204A-204B), sexual violation (s 128), murder (ss 167-168) and manslaughter (s 171). A person suspected of having committed an act of torture could, depending on the circumstances, be charged with such offences, in addition to being charged under the Crimes of Torture Act. Prosecutions under the Crimes Act do not require the consent of the Attorney-General.

Geneva Conventions Act 1958

23. Legal effect is given in New Zealand to the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 by the Geneva Conventions Act 1958. Under that Act, any person who in New Zealand or elsewhere, commits or aids or abets or procures the commission by another person of a grave breach of any of the Conventions or the First Protocol, such as the torture or inhuman treatment of a person covered by the Conventions or the Protocol, commits an offence for which he or she may be tried under New Zealand law.

International Crimes and International Criminal Court Act 2000

24. Torture is a "crime against humanity" and, in a state of armed conflict, a "war crime", which are both indictable offences under sections 10 and 11 of the International Crimes and International Criminal Court Act 2000. These sections of the International Crimes and International Criminal Court Act incorporate articles 7 and 8 of the Rome Statute of the International Criminal Court into New Zealand law. If the act of torture was committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, it could also found a charge under section 9 of the International Crimes and International Criminal Court Act, which incorporates article 6 of the Rome Statute.

New developments

The Crimes of Torture Amendment Act and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

25. The Government considers the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Optional Protocol") to be a crucial instrument able to strengthen both States' and the United Nations' ability to prevent torture and other forms of ill-treatment.

26. During its examination of the Optional Protocol a New Zealand Parliamentary Select Committee observed that "the Optional Protocol is a major advancement in international human rights architecture and will further enable the United Nations, with the cooperation of State Parties, to prevent and monitor torture at both a systemic and case-by-case level".[5]

27. The Select Committee further noted that "ratification will reinforce New Zealand's reputation as a country that has a strong and unfaltering commitment to human rights and is prepared to take steps in order to ensure human rights are protected in New Zealand and the international community".

28. The Crimes of Torture Amendment Act is an illustration of the Government's commitment to the protection and promotion of fundamental human rights especially the prevention of torture. The Act provides a regime that enables New Zealand to comply with the Optional Protocol and includes provisions:

a) enabling the United Nations Subcommittee to visit places where people are deprived of their liberty;

b) allowing the designation of one or more domestic bodies 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.

29. The Crimes of Torture Amendment Act was enacted in December 2006.[6] The Government is currently making the necessary arrangements to enable ratification of the Optional Protocol.

Government departments

30. In addition to the provisions of the Crimes Act, the Geneva Conventions Act, the International Crimes and International Criminal Court Act and the Crimes of Torture Act, government departments are also subject to a number of administrative and other legislative regimes that seek, amongst other things, to prevent torture and ill-treatment.

New Zealand Police

31. Members of the New Zealand Police are subject to the Police Act 1958, General Instructions issued by the Commissioner of Police pursuant to that Act, and the Police Regulations 1992. In addition, the provisions of the Crimes Act 1961 relating to the use of force in arresting and detaining offenders apply to members of the police, and police conduct can be investigated by the Police Complaints Authority under the Police Complaints Authority Act 1988.

32. The head of the New Zealand Police is the Commissioner of Police. The Police Act gives the Commissioner power to issue General Instructions for the regulation and discipline of members of the police. The Commissioner has issued a detailed set of instructions for

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[5] International treaty examination of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Foreign Affairs, Defence and Trade Committee, *9 December 2005*.

[6] The Crimes of Torture Amendment Act 2006 can be accessed at www.legislation.govt.nz.

police officers to follow when undertaking searches of prisoners and which specify conditions in which prisoners must be kept during their time in police custody.

33. The Instructions also provide specific guidance on the circumstances in which force may be used in arresting and detaining offenders and require a written report to be provided wherever the force used is more than minor. Special guidance is provided with respect to the use of restraining holds; a "choker" or trachea hold is strictly forbidden.

34. Members of the police are also subject to the disciplinary provisions of the Police Regulations 1992. Regulation 9 sets out 42 disciplinary offences for which police officers can be held guilty of misconduct or neglect of duties. Included among them is Regulation 9(5) - treating any person or prisoner cruelly, harshly, or with unnecessary violence.

Allegations of misconduct

35. There are procedures for both internal and external investigation of allegations of police misconduct. First and foremost, police conduct is subject to the Crimes Act. Any member of the Police involved in criminal activity during the performance of his/her duty could be prosecuted under the Crimes Act. Where any misconduct or neglect is alleged against a sworn member of the police, an internal inquiry can be conducted under the Police Act and the Police Regulations, which allow for the establishment of a tribunal to hear the charges, including the calling of evidence and cross-examination, and to report to the Commissioner of Police. Police are not protected from prosecution for the use of excessive force.

36. The protection for Police in legislation is confined to the execution of warrants or other processes. While there is some specific protection in some Acts, Police do not have any comprehensive protection where they are exercising warrantless powers and they do not qualify for immunities from personal liability.

37. An external inquiry can be held pursuant to the Police Complaints Authority Act 1988. Under that Act, any complaint alleging misconduct or neglect of duty by a member of the police may be reported to the Police Complaints Authority or to any member of the police, to any Ombudsman or to the Registrar or Deputy Registrar of any District Court. Any of the above persons, other than the Complaints Authority itself, receiving such a complaint must forward the complaint to the Authority. In addition, when a member acting in the execution of their duty causes or appears to have caused death or serious bodily harm to a person the Commissioner of Police must notify the Authority. The Commissioner of Police has issued a set of General Instructions providing specific direction and guidance to members of the police on how to respond to and handle complaints made under the Police Complaints Authority Act.

38. Under section 17 of the Police Complaints Authority Act, the Authority has a range of options open to it upon receiving a complaint. It may choose either to:

a) investigate the complaint itself (whether or not the police have commenced a police investigation); or

a) defer action until receiving a report from the Commissioner of Police on such a police investigation; or

b) oversee a police investigation of the complaint; or

c) decide to take no action on the complaint in circumstances where the complainant has had knowledge of the matters under complaint for more than 12 months before the complaint was made, or if, in the opinion of the Authority, the subject matter of the complaint is trivial, frivolous, vexatious or not made in good faith.

39. Other circumstances in which the Authority may choose to take no action are where the person alleged to have been aggrieved by the police does not wish action to be taken, or where the identity of the complainant is unknown and this would substantially impede the investigation of the complaint, or where there is already an adequate remedy or right of appeal, which it would be reasonable for the person alleged to have been aggrieved to exercise.

New developments

40. A "Guide to the Management of Prisoners held on behalf of the Department of Corrections" was released on 18 May 2005. This provides guidance and advice on appropriate practices and treatment of overflow mainstream prisoners from the Corrections regime who are held in 24 designated police jails. The key principles of these guidelines are discussed in the commentary on article 10 of the Convention.

41. New Zealand's Minister of Police recently announced a comprehensive review of the Police Act 1958 and the Police Regulations 1992. The review will consider, amongst other things, whether:

a) the new legislative framework should expressly state that all New Zealand Police staff must respect human rights; and

b) the Code(s) of Conduct should further detail ethical behaviour requirements.

42. A new Police Bill is intended to be introduced to Parliament in 2008. The associated regulations are likely to be drafted around this time also.

Corrections

New developments

43. The conduct of officers and employees of correctional facilities in New Zealand, including any prison or police jail, is subject to the Corrections Act 2004 and the Corrections Regulations 2005. The Act and associated regulations commenced on 1 June 2005. The new legislation introduced changes to reflect modern approaches to offender management and to provide compatibility with other recent criminal justice legislation, in particular the Sentencing Act 2002 and the Parole Act 2002.

44. Sections 5 and 6 of the Corrections Act set out the purpose and principles guiding the operation of the corrections system, including an emphasis on fair treatment of prisoners, the provision of interventions to assist prisoners' rehabilitation and reintegration and a provision that corrections facilities be operated in accordance with rules and regulations based, amongst other things, on the United Nations Standard Minimum Rules for the Treatment of Prisoners.

45. The Act imposes a requirement on the Department of Corrections to devise an individual management plan for each prisoner covering their safe, humane and secure containment, and in the case of sentenced prisoners, their rehabilitation and reintegration.

46. The minimum entitlements of prisoners have been elevated from regulations into primary legislation and the provision of new entitlements relating to access to news, library services and education is now contained in the Corrections Regulations to provide greater consistency with the United Nations Standard Minimum Rules for the Treatment of Prisoners.

47. The Corrections Act carried over (with some amendments) provisions in the previous legislation covering the inspection of prisons and the system for making complaints. Inspections are generally undertaken by inspectors of corrections appointed by the Chief Executive of the Department of Corrections. Inspectors have powers to visit and inspect, examine the treatment and conduct of persons under control or supervision, and inquire into abuses or alleged abuses. The new legislation widens the role of inspectors to cover any place where offenders are under control or supervision, including probation offices (for those serving community-based sentences) and dwelling houses (for those serving their sentence of imprisonment on home detention). Visiting Justices have similar inspection powers to inspectors, although in practice their main role is conducting hearings of prisoners charged with offences against discipline. They include all District Court Judges, as well as Justices of the Peace and barristers or solicitors appointed by the Governor-General as Visiting Justices.

48. Prisoners or other offenders have three main avenues for making complaints. These avenues are covered at paragraphs 207-209. The Act strengthened and extended the statutory provisions relating to complaints by:

a) elevating the statutory provisions from regulations to the primary legislation;

b) extending the provisions to cover work centres and probation offices in addition to prisons and providing access beyond current prisoners to any person who is or was under the control or supervision of the Department; and

c) providing a legislative basis to the existing protocol between the Chief Ombudsman and the Chief Executive of the Department. (The protocol is explained in further detail in paragraph 210).

49. The Corrections Act provides for a more consistent approach to the use of non-lethal weapons with a requirement that any such weapon can be used only if allowed by regulation. The Minister of Corrections must be satisfied the weapon's use would be compatible with the humane treatment of prisoners and that the potential benefits of the use of the weapon outweigh the potential risks.

50. The Corrections Act has an improved disciplinary offence regime. The Act provides that prisoners may be represented by counsel in certain circumstances, establishes the position of a Hearing Adjudicator to conduct disciplinary hearings, provides for lawyers as well as Justices of the Peace to be appointed as Visiting Justices and clearly specifies the behaviours that constitute a disciplinary offence.

51. The Act requires that decisions to segregate prisoners for the purpose of good order and discipline expire after 14 days unless extended by the Chief Executive. Extensions of

segregation need to be reviewed at least monthly, and decisions to segregate for more than three months are to be approved by a Visiting Justice.

52. The annual reports of the Department of Corrections are required to include a report of the work undertaken by inspectors during the year including statistics about the disposition of complaints and comment on issues arising out of complaints or visits during the year.

53. The Ombudsmen's 2002 annual report recommended that permanent video recording equipment be installed in more volatile units within prisons in order to assist investigations of alleged assaults of prisoners by staff and to provide a safeguard for staff in the case of false allegations being made against them.

54. Significant progress to meet this recommendation has now been made, with approximately 2000 new video cameras having been fitted in correctional facilities. Since 2003 all new and refurbished cameras are providing digital recordings. Improvements continue to be made to closed circuit television (CCTV) and other aspects of prison surveillance systems as technology evolves. At the end of 2004, work was initiated in New Zealand's only maximum security facility (the East Wing of Auckland Prison), to install video cameras in every prisoner space in that facility with all new and existing cameras providing digital recordings.

55. In addition, the installation of CCTV has become a standard facility for the recreation and common areas in all new prisons. Current government policy is to upgrade all CCTV technology in existing prisons on an incremental basis as funding permits.

New Zealand Defence Force

56. Members of the New Zealand Armed Forces, and certain civilians with a close connection to the Armed Forces, are subject to the Armed Forces Discipline Act 1971, which provides for the administration of justice within the Armed Forces. Although the primary emphasis of the Act is on service offences, section 74 of the Act provides jurisdiction to courts-martial to deal with offences by Armed Forces personnel against the civil law of New Zealand. Accordingly, a member of the Armed Forces can be tried by court-martial for an offence against the Crimes of Torture Act 1989 or for offences against the Crimes Act 1961.

New developments

57. The New Zealand Defence Force is currently working on a proposal to enhance oversight of the Services Corrective Establishment (for compliance with the Convention and the United Nations Standard Minimum Rules for the Treatment of Prisoners) by introducing random un-notified visits by the Office of the Judge Advocate General, which is a judicial authority independent of the New Zealand Defence Force with responsibility for oversight of the military justice system. The New Zealand Defence Force is currently consulting with the Office of the Judge Advocate General on these proposals.

Health

58. The legislation relating to disability support, mental health and public health services establishes powers of detention in clearly defined circumstances. The laws are designed to

assist people with mental health or disability challenges, or people living in severely unhygienic circumstances or with an infectious disease, to not harm themselves or others.

59. The powers of detention are set out in the following legislation:

a) Tuberculosis Act 1948

b) Health Act 1956

c) Mental Health (Compulsory Assessment and Treatment) Act 1992

d) Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003

e) Alcoholism and Drug Addiction Act 1966.

60. The Health Act is being reviewed and a new Public Health Bill is planned for introduction to Parliament in 2007.

61. In addition, the Criminal Procedure (Mentally Impaired Persons) Act 2003, which is administered by the Ministry of Justice, allows a Court to order that a defendant be detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 where that defendant is unfit to stand trial or found not guilty by reason of insanity.

62. The Mental Health (Compulsory Assessment and Treatment) Act 1992 and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 both contain schemes governing:

a) assessment procedures

b) the rights of patients or care recipients

c) the duties of providers

d) review processes

e) release from treatment or care.

63. Parallel legislation also exists in New Zealand to ensure the quality and safety of health services, the proper training of health professionals and assurance of their ongoing competence, and to protect the rights of patients or clients in the health and disability system. Relevant legislation in the health sector includes:

a) Health and Disability Commissioner Act 1994

b) Health and Disability Commissioner (Code of Health and Disability Consumer Rights) Regulations 1996

c) Health and Disability Services (Safety) Act 2001

d) Health Practitioners Competence Assurance Act 2003.

64. The Health and Disability Commissioner Act is designed to promote and protect the rights of health and disability consumers, and to facilitate the fair, simple, speedy and efficient resolution of complaints. The central basis of consumer rights under the Act is proper informed consent. However, where other legislation, such as certain provisions of the

Mental Health (Compulsory Assessment and Treatment) Act, or necessity applies, assessment or treatment may legally proceed without consent.

65. The Health and Disability Commissioner Act allows the Commissioner to investigate any health and disability service provider if it appears that there has been a breach of the Code. The Commissioner does not have a pre-emptive or regulatory inspection power with respect to providers of health and disability services; such inspections are undertaken by other offices and agencies.

66. The purpose of the Health and Disability Services (Safety) Act 2001 is to promote the safe provision of health and disability services to the public by certified facilities; enable the establishment of consistent and reasonable standards for safe provision of those services; encourage providers to take responsibility for safe provision; and encourage providers to improve the quality of services. Under the Act, Designated Audit Agencies assess all health and disability facilities seeking certification.

New developments

67. The Health Practitioners Competence Assurance Act 2003 provides a framework for the regulation of health practitioners in order to protect the public where there is a risk of harm from the practice of the profession. The framework covers a diverse range of health professional occupational groups and allows for consistent procedures and terminology across the professions. The principal purpose of protecting the health and safety of the public is emphasised, and the Act includes mechanisms whereby practitioners who are not competent and fit to practice their profession may lose their ability to practice.

68. The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 specifies the rights of the care recipient and has safeguards such as the appointment of District Inspectors to ensure legal rights are upheld. High Court Judges also have the ability to conduct inquiries with respect to the care recipient and their treatment.

Summary

69. All the health sector Acts identified above provide an integrated formal framework designed to protect patients' interests in New Zealand, starting from the competence of professionals and the quality certification of facilities, through to mechanisms for patient complaints and disciplinary or accountability proceedings where practitioners or facilities are not safe.

Non-Waiver of Provisions

70. New Zealand law makes no provision for waiver of the provisions of the Crimes of Torture Act 1989 or of the Crimes Act 1961, nor can exceptional circumstances such as a state or threat of war, internal and political instability or other public emergency be invoked as defences for any offence referred to in the above paragraphs.

Superior Orders

71. The Armed Forces Discipline Act 1971 (section 38), the Police Regulations 1992 (Regulation 9(1)) and the Corrections Regulations 2005 (Regulation 13) require obedience to "any lawful order" given by a superior officer. An order to do an act which constituted an

offence under the Crimes of Torture Act 1989 or the Crimes Act 1961 would not be a lawful order.

72. If a prosecution for torture, being an act of genocide, a war crime or a crime against humanity, were brought under the International Crimes and International Criminal Court Act 2000, the question of superior orders would be dealt with under section 12(1)(a)(xi) of that Act in the same manner that it would be under article 33 of the Rome Statute of the International Criminal Court.

73. The question of superior orders has not arisen in a case involving torture before the New Zealand courts. However, in *Police v Vialle* [1989] 1 NZLR 521, 524, the New Zealand Court of Appeal left open the question as to whether there is a general defence of superior orders in New Zealand law. Section 47 of the Crimes Act 1961 provides that members of the New Zealand Armed Forces are justified in obeying any command given by their superior officer for the suppression of a riot unless the command is manifestly unlawful. In *Police v Vialle*, the Court of Appeal noted that, "that special provision tends by implication to support the view that in general a superior order cannot be itself a defence if what was done or ordered to be done was unlawful". Moreover, the Crimes of Torture Act specifically provides that it is itself an offence for any person to commit an act of torture at the instigation of a public official or anyone acting in an official capacity.

Article 3

The Immigration and Refugee Context

74. New Zealand is committed to compliance with article 3(1) in all immigration decisions. Human rights obligations such as article 3(1) are mandatory factors in immigration decision-making and are enforced as such by the New Zealand courts.

75. Instructions to Immigration Officers currently require officers to take New Zealand's obligations under international law (including the Convention against Torture) into account when determining whether to refuse entry or remove persons present in New Zealand unlawfully. In the case of the Convention against Torture, this means that no person will be removed from New Zealand contrary to its provisions.

76. Claims for protection under article 3 may also be dealt with by the Removal Review Authority, the Deportation Review Tribunal and the Minister of Immigration, as individual cases arise.

77. Fewer than 20 people are known to have claimed protection under article 3 in New Zealand, of which one claim has been successful on torture grounds.

Refugees

78. In New Zealand, article 3 obligations most commonly arise in the refugee context. New Zealand is party to the United Nations Convention relating to the Status of Refugees of 1951 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.

79. The Immigration Act 1987 provides a statutory basis for New Zealand's refugee status determination system. Refugee status claims are assessed initially by refugee status officers of the New Zealand Immigration Service. Those claimants declined refugee status by the New Zealand Immigration Service 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 applied to both recognised refugees and refugee status claimants.

New developments

80. The Government is conducting a fundamental review of the Immigration Act 1987. A discussion paper was released in April 2006 to the public, and can be viewed at www.dol.govt.nz/actreview/. Proposals in the discussion paper relevant to the Convention are contained in Section 14: New Zealand's Role as an International Citizen.

81. The ideas in the document were for public discussion purposes only and do not necessarily reflect Government policy. There is a proposal to incorporate the non-refoulement obligation in article 3 of the Convention against Torture into New Zealand's immigration legislation. In addition, there is a proposal for article 3 claims to be considered alongside refugee status claims at first instance and on appeal.

82. A Bill is planned for introduction to Parliament in 2007.

Extradition and Surrender of Offenders

83. The Extradition Act 1999 includes a provision to prevent a person from being extradited where the Minister of Justice has substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the country of extradition. This obligation cannot be overridden by an extradition treaty.

Article 4

Offences of Torture

84. As noted in relation to article 2, section 3(1) of the Crimes of Torture Act 1989 provides that it is an offence for a public official or someone acting in an official capacity, or for a person acting at the instigation or with the consent of a public official or someone acting in an official capacity, whether in or outside New Zealand:

a) to commit an act of torture; or

b) to do or omit an act for the purpose of aiding any person to commit an act of torture; or

c) to abet any person in the commission of an act of torture; or

d) to incite, counsel, or procure any person to commit an act of torture.

85. Section 3(2) of the Act provides that it is a criminal offence for a public official or someone acting in an official capacity, or for a person acting at the instigation or with the consent of a public official or someone acting in an official capacity:

a) to attempt to commit an act of torture; or

b) to conspire with any other person to commit an act or torture; or

c) to be an accessory after the fact to an act of torture.

86. These provisions ensure that all offences referred to in article 4 of the Convention are offences under the law of New Zealand.

87. The International Crimes and International Criminal Court Act 2000 implements New Zealand's obligations under the Rome Statute of the International Criminal Court. The Act creates new offences of "crimes against humanity" and "war crimes" in New Zealand law. The offences reflect the wording of the Rome Statute and therefore contain express prohibitions on torture.

88. It is an offence under the Mental Health (Compulsory Assessment and Treatment) Act 1992 for a person concerned with the care, oversight and control of mentally disordered people to neglect or ill-treat them.

Penalties

89. Any person convicted of an offence against section 3(1) of the Crimes of Torture Act is liable to a term of imprisonment not exceeding 14 years. A prison term of 14 years is amongst the most severe penalties provided under New Zealand law. Persons convicted of an offence against section 3(2) of the Crimes of Torture Act are liable to imprisonment for a term not exceeding 10 years. If criminal charges were laid under the Crimes Act 1961, a person convicted of an offence such as wounding with intent would be liable to imprisonment for a term not exceeding 14 years and in the case of sexual violation, a term not exceeding 20 years. In the cases of the other offences, maximum penalties range from one year imprisonment in the case of common assault to 10 years in the case of injuring with intent. In the case of female genital mutilation, a person convicted of such an offence would be liable to imprisonment for a term not exceeding 7 years. Where a person is convicted of murder there is a presumption in favour of imposing a sentence of life imprisonment except where such a sentence could be deemed to be manifestly unjust.

90. In recognition of the seriousness of the offences under the International Crimes and International Criminal Court Act 2000, the new offences carry a maximum penalty of life imprisonment.

91. Under the Mental Health (Compulsory Assessment and Treatment) Act 1992, offences are punishable on summary conviction by way of monetary fine. In addition, mistreatment of medical patients can be the subject of a complaint to the Health and Disability Commissioner whose impartial investigation can lead to public reports, revocation of professional registration, or monetary fines.

Article 5

92. Section 4 of the Crimes of Torture Act 1989 provides that no proceedings for an offence under the Act shall be brought unless:

a) The person to be charged is a New Zealand citizen; or

b) The person to be charged is present in New Zealand; or

c) The act or omission constituting the offence charged is alleged to have occurred in New Zealand or on board a ship or an aircraft that is registered in New Zealand.

93. As a consequence of this provision, New Zealand complies fully with the requirements of article 5(1)(a), (b) and (c) and article 5(2).

94. In addition, the International Crimes and Criminal Court Act 2000 gives New Zealand's courts universal jurisdiction over the crimes contained in the Rome Statute, including torture, allowing for prosecution in New Zealand regardless of where the offending might occur and regardless of citizenship. This jurisdiction has never been exercised.

Article 6

95. A person who is present in New Zealand and is suspected of having committed an act of torture can be charged with an offence under the Crimes of Torture Act 1989 and may be arrested without warrant, or a warrant for his or her arrest may be issued and executed. The Extradition Act 1999 contains provisions under which a warrant may be issued for the arrest and detention of a person suspected of having committed an act of torture, where the country in which the offence was committed requests the return of that person to face trial.

96. The decision whether to grant bail is at the discretion of the Court and would be taken in light of the circumstances of the case, including, in particular, the likelihood of the alleged offender appearing at a trial for the alleged offence, or at proceedings pursuant to the Extradition Act. It would be unusual for a person charged with a serious offence such as torture to be granted bail.

97. Section 316(5) of the Crimes Act provides that every person who is arrested on a charge of an offence such as an offence against the Crimes of Torture Act must be brought before a court as soon as possible to be dealt with according to the law. In practice, this means that a person who is arrested on any particular day will in normal circumstances appear in court the following morning to be remanded in custody or granted bail. If a person were to be detained without being charged, a writ of habeas corpus could be brought before the court so that the reason for detention could be examined. If the detention could not be justified, the court would order the release of the person concerned. An action for false imprisonment could also be brought against anyone who wrongfully confines another person.

98. The Extradition Act similarly provides that every person arrested under a warrant issued under that Act must be brought before the court as soon as possible and a hearing conducted in accordance with the provisions of the Summary Proceedings Act 1957. The Extradition Act also requires that the hearing of the case shall not proceed until the court has received from the Minister of Justice a written notice stating that the Minister has received a request for the surrender of the offender. If no such notice is received within a reasonable time, or within the time specified in the relevant extradition treaty, the court is required to discharge the offender, although the court has discretion to extend the time within which notice may be received.

99. It is standard procedure in all cases of extradition for the police to maintain close liaison with the Ministry of Foreign Affairs and Trade, which is responsible for the conduct of New Zealand's external relations and which acts as liaison with diplomatic and consular

representatives accredited to New Zealand. In accordance with those procedures, the Ministry would be responsible for communicating with foreign States in the circumstances envisaged in article 6(4) of the Convention and in accordance with article 36 of the Vienna Convention on Consular Relations.

Article 7

100. Sections 3 and 4 of the Crimes of Torture Act 1989 ensure that the New Zealand authorities have jurisdiction to prosecute anyone suspected of having committed an offence referred to in article 4 of the Convention in the cases set out in article 5. As noted above, the New Zealand courts have jurisdiction to try a person for such an offence where the person to be charged is a New Zealand citizen, or is present in New Zealand, or the act or omission constituting the offence is alleged to have occurred in New Zealand or on board a ship or aircraft registered in New Zealand.

101. Accordingly, in such a case, a prosecution can be brought in New Zealand against such a person if it is decided that the alleged offender should not be extradited. In addition, section 11 of the Crimes of Torture Act provides that a person shall not be surrendered from New Zealand to another country in respect of an act or omission that amounts to a crime under the Act if proceedings have been brought in New Zealand, or if the Attorney-General certifies that the case is being or is about to be considered to determine whether or not proceedings should be brought in New Zealand, against that person in respect of that act or omission.

Standards of Evidence

102. As the offences referred to in article 4 of the Convention are crimes under New Zealand law by virtue of the Crimes of Torture Act 1989, decisions by the New Zealand authorities as to whether to prosecute someone suspected of having committed such an offence will be taken on the same basis as decisions made with respect to the prosecution of persons suspected of having committed other serious offences against New Zealand's criminal law. The standards of evidence and proof required for prosecution and conviction for any offence against the Crimes of Torture Act – whether jurisdiction for such prosecution is established by virtue of the fact that the act or omission constituting the offence took place in New Zealand or on board a New Zealand ship or aircraft, or by virtue of the fact that the alleged offender is present in New Zealand – will be the same standards as are applied in all prosecutions for crimes under New Zealand law.

Fair Treatment for Persons Prosecuted

103. Any person prosecuted for any of the offences referred to in article 4 is accorded the same treatment throughout all stages of the proceedings as are other persons accused of serious offences against New Zealand law. All persons charged with criminal offences in New Zealand are guaranteed the rights and freedoms provided for in article 14 of the International Covenant on Civil and Political Rights regardless of nationality.

104. It is a fundamental principle of New Zealand's criminal law that an accused person is presumed to be innocent and this presumption may only be rebutted by proof "beyond reasonable doubt" of the guilt of the person concerned. Except in exceptional circumstances, criminal proceedings are conducted in open court to which the public have free access. An

accused person has a right to counsel and, depending on the circumstances, to legal aid and is assured of a trial before an independent judiciary. These rights are affirmed in sections 23-25 of the New Zealand Bill of Rights Act 1990, which provide for rights of persons arrested or detained, charged, and minimum standards of criminal procedure. These sections affirm the respective rights in the International Covenant on Civil and Political Rights.

Article 8

105. Section 8 of the Crimes of Torture Act 1989 provides that all offences under the Act shall, if not already described in the Convention, be deemed to be offences described in any extradition treaty concluded before the commencement of the section between New Zealand and any foreign country that is a party to the Convention. In accordance, however, with section 26 of the New Zealand Bill of Rights Act 1990 (which provides that no one shall be liable to conviction of any offence which did not constitute an offence by such person under the law of New Zealand at the time it occurred), section 8 of the Crimes of Torture Act also provides that no person shall be liable for extradition on the basis of acts or omissions that took place before the commencement of Crimes of Torture Act.

106. The Extradition Act 1999 provides for extradition between New Zealand and any other country, Commonwealth or non-Commonwealth, without the need for an extradition treaty. The Act provides for extradition for "extradition offences", defined under section 4 of the Act as an offence punishable by at least 12 months imprisonment in both the requesting country and New Zealand. The offences listed in article 4 of the Convention are offences punishable in New Zealand under the Crimes of Torture Act, the penalties for which are greater than 12 months imprisonment.

Article 9

107. Information relevant to investigations into offences referred to in article 4 of the Convention is also covered by the Mutual Assistance in Criminal Matters Act 1992. The Act allows New Zealand to provide mutual assistance to other countries in criminal investigations and proceedings without any treaty or other formal arrangement. The Act makes explicit reference to the Convention against Torture and provides for assistance to be given to any State party to the Convention.

Article 10

Police

108. Comprehensive training for Police recruits addresses areas of custody, interrogation and the treatment of prisoners detained in custody (including the prohibition against torture). A general theme of recruit training is gaining a comprehensive understanding of the relevant legal framework and ensuring that officers act lawfully and in a manner that is reasonable and justifiable in all respects. Some of the training components relevant to the Convention include:

a) training on the New Zealand Bill of Rights Act 1990 and Judges Rules (in particular the rights of persons detained and charged);

b) use of force (the Tactical Options Framework) and communication strategies;

c) interviewing (the PEACE model);

d) custodial suicide training;

e) custodial management training;

f) risk assessment of persons in custody training;

g) advice to prisoners training; and

h) ethics training.

109. At the completion of recruit training, officers become probationary constables and are required to undertake a further two years of training (which includes workplace assessment and university papers) and upon successful completion receive 'permanent appointment' as a constable. One of the probationary constable modules is “Interviewing”. Officers must provide interview plans, examples of written statements (complainants and witnesses) and examples of suspect video interviews. All these pieces of work must reach the standard required by assessors for the officer to be accredited as working at the required level.

110. Criminal Investigation Branch (CIB) staff also have training modules on search and investigative interviewing that they must complete successfully to gain entry onto the Detective induction and qualifying courses.

111. The independent New Zealand Human Rights Commission has recently been contracted by the Police to provide a comprehensive human rights education programme for police that will reflect international best practice.

Police operational manuals

112. There are currently 5 best-practice manuals that are regularly updated and available to all police staff. These include best-practice information on police searches, prisoners’ rights and interviewing.

113. The information on police searches provides guidance on reasonable and appropriate searches. For example, prisoners must be treated with dignity, privacy and respect.

114. With regard to prisoners’ rights, the manual states that prisoners must be treated as humanely as their situation and safety will permit. No unnecessary force, violence, harshness or restraint should be used. Prisoners should also be advised of their custodial rights, for example, the provision of a toilet, bedding and adequate meals.

115. On interviewing, the manual details arrestee’s rights and outlines appropriate interview practice. For example, Police should not use force, violence, compulsion or unfair methods such as trickery when interviewing.

116. Police General Instructions contain extensive guidelines on areas such as use of force and appropriate use of certain holds; handcuffs and Oleoresin capsicum (OC) spray[7]; treatment and rights of prisoners; and measures to prevent harm to persons in custody such as custodial suicide risk management and the separation of certain prisoners.

[7] OC spray is also referred to as “pepper spray”. Oleoresin capsicum is a chemical incapacitant which can cause intense temporary irritation of the mucous membranes and skin.

New Developments

117. There are guidelines in place that advise police officers on the appropriate practices and treatment of prisoners held in police jails. The key principles state that:

a) careful oversight is needed where prisoners stay for long periods in police jails;

b) only prisoners sentenced to 28 days or less should be held in police jails;

c) prisoners should be promptly provided with written information on entitlements and jail rules;

d) the general complaints procedure should be displayed in police jails;

e) prisoners should never be denied: a bed and bedding; food and drink; statutory visitors and specified visitors; access to legal advisers; and receipt of medical treatment.

f) prisoners are also entitled to, where practicable: access to private visitors; physical exercise; send and receive mail; and make outgoing telephone calls.

118. Generally most persons in Police custody in New Zealand spend a relatively short time in Police cells due to the requirement that they be taken before a court as soon as possible. Usually a person will remain in a cell until they are either processed and charged, or overnight, depending on the time of the arrest, whether the person is a suitable candidate for Police bail, and other relevant factors pertaining to the individual (i.e. whether they are intoxicated).

119. Washing facilities are offered to persons in Police custody who stay overnight. The vast majority of Police stations have showers and as a general rule all those who are in the cells overnight have the opportunity to shower in the morning before going to court if they wish to do so. Detainees are also provided with soap and towels.

Corrections

120. The training of New Zealand's corrections officers is constantly being enhanced and improved. All officers new to the Public Prisons Service currently receive training through the Corrections Officers' Initial Basic Training Course. Part of that training is to become familiar with a number of relevant pieces of legislation, including the Crimes of Torture Act and the NZBORA. The course takes 6 weeks, and the material is subject to ongoing review. The course devotes an increased amount of time to suicide awareness, and ensuring officers have a sound understanding of the complaints procedure, including the role of the Ombudsmen's Office. The course incorporates elements of the assessment requirements for the first level of the National Certificate in Offender Management. This is a three level qualification registered on the New Zealand Qualifications Framework. The first level of this qualification is considered necessary as a competency indicator for all corrections officers.

121. Training on the NZBORA given to Corrections officers has a strong emphasis on the need for Corrections officers to treat prisoners humanely and not to subject them to cruel or degrading treatment or punishment. Training on the Crimes of Torture Act stresses the importance of this legislation to corrections officers and includes descriptions of what acts and failures to act can amount to torture.

122. Training also covers other New Zealand legislation and the United Nations Standard Minimum Rules for the Treatment of Prisoners. Once initial training is completed officers

receive further training on the job and are expected to demonstrate knowledge of a variety of prison legislation, policy and procedures. This includes familiarity with the 'Use of Force' policy and use of control and restraint responses in a prison.

New Zealand Defence Force

123. The New Zealand Defence Force has an advanced Law of Armed Conflict training programme, which trains all armed forces personnel to respect relevant principles and practices derived from treaty law and customary international law. This programme includes substantial elements on the prohibition against torture. The Chief of Defence Force requires every member of the armed forces to attend this training. In addition to a routine programme of instruction, refresher lectures are provided for personnel deploying overseas on peace support operations. The New Zealand Defence Force is also actively involved in dissemination of material on the law of armed conflict to foreign armed forces students studying in New Zealand.

124. In May 2000, the Chief of Defence Force issued a Code of Conduct card for armed forces personnel. The card states, amongst other things, that a member of the armed forces will not abuse, torture or kill prisoners of war, detainees or civilians.

New developments

125. The New Zealand Defence Force has recently completed a major rewrite of its Law of Armed Conflict Manual. That manual deals in considerable depth with the prohibition against torture. The manual has been made available to all members of the Armed Forces through electronic means and will eventually be distributed in printed form.

Ministry of Social Development (Child, Youth and Family)

126. The Social Workers Registration Act 2003 defines the professional standards that must be met for social work registration including academic qualifications and accreditation. New Zealand is promoting the professional development of its statutory social workers by assisting them to achieve registration.

127. Statutory social workers who work with children and young people including those who work with children and young people detained in residences also receive initial and ongoing training based on the Children, Young Persons, and Their Families Act 1989 (CYPF Act), the Children, Young Persons, and Their Families (Residential Care) Regulations 1996 (the Regulations), and extensive policies and practice guidelines. All of these emphasise that torture, cruel, inhuman or degrading treatment or punishment of children and young people is prohibited under New Zealand law and is totally unacceptable.

128. The CYPF Act contains general principles, and others that are specific to care and protection or youth justice matters. The overarching care and protection principle is that the welfare and best interests of the child or young person are the first and paramount consideration, having regards to other principles, the first of which is the requirement that children and young persons be protected from harm, their rights upheld, and their welfare promoted (section 13(a)).

129. The youth justice principles[8] apply to children and young people who have committed, or are suspected of having committed, offences against New Zealand law. Three key principles in the context of the Convention are:

a) a child or young person who commits an offence should be kept in the community so far as practicable and consonant with the need to ensure the safety of the public

b) any sanctions imposed on a child or young person who commits an offence should take the form most likely to maintain and promote their development within their family, whanau, hapu, iwi and family group; and take the least restrictive form that is appropriate in the circumstances

c) the vulnerability of children and young people entitles them to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

130 The CYPF Act is reinforced by the greater level of detail contained in the Regulations that apply to children and young people detained in a residence. Regulation 21 states that "torture, cruelty, and inhuman, humiliating, or degrading discipline or treatment" are prohibited.

131. A range of policies provide a greater level of detail on desired practice including how legislation should be applied. These include:

a) the Ministry of Social Development's Child, Youth and Family Code of Practice: Residential Care Services, which is an overarching document to guide residential practice. The Code of Practice is consistent with the UN Rules for the Protection of Juveniles Deprived of their Liberty (1990), UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines (1990)) and UN Standard Minimum Rules of the Administration of Juvenile Justice (The Beijing Rules (1985)).

b) the Residential Standards Operating Procedures (SOP's) which define the minimum standards of practice within residences include specific information on:

(i) treating children and young persons with respect

(ii) limitations on searches involving a child or young person, and on seizing articles

c) the Care and Protection and Youth Justice Handbook provides specific policies and practice guidelines for social workers working with children and young persons in residential care. It includes policies on:

(i) punishment and discipline

(ii) use of physical force

(iii) grievance procedures.

132. Children and young persons placed with caregivers by the State are protected from degrading treatment or punishment by policies including a "no smacking" policy. These

[8] Annex III contains the full list of youth justice principles.

policies are emphasised in the *Caregivers' Handbook*, and reinforced during initial and on-going training of caregivers.

133. There is a clear process for resolving children and young people's complaints within MSD (Child, Youth and Family) residences. This process is outlined below in the discussion of article 13.

Health

134. The training and education of persons involved in the medical profession places primary emphasis on the duty of such persons to minimise suffering and to respect the rights and dignity of patients. This duty is reinforced by the ethical codes adopted by the various branches of the profession such as the New Zealand Medical Association and the New Zealand Nurses' Organisation, which emphasise the duty of health care professionals to respect the human rights of persons in their care and not to participate in or condone acts such as torture.

135. Further, while there is currently no legislative requirement that such training be included in the curriculum for medical practitioners, the prohibition against torture is covered in professional development courses available via the Wellington Clinical School of Medicine.

Other government departments

136. The Ministry of Justice has published online Guidelines on the New Zealand Bill of Rights Act and a complementary handbook that is widely circulated throughout the public sector. The *Handbook* and the Guidelines are intended to make NZBORA more accessible to the public sector, and encourage the consideration of human rights issues in the development of legislation, policies and practices.

Article 11

Police

137. Police General Instructions are internal rules that guide behaviour and practices. A wilful breach of a General Instruction is a disciplinary offence under regulation 9 of the Police Regulations 1992. The Police General Instructions include a specific requirement for police officers to be at all times fully conversant and comply with the Crimes of Torture Act.

138. The New Zealand Police regularly review procedures relating to the treatment of persons being interviewed, and persons in custody and subject to arrest, detention or imprisonment, in order to ensure that the procedures are properly implemented and that amendments are made in light of any deficiencies that become apparent.

New developments

139. In September 2005, a substantial study into investigative interviewing in the New Zealand Police context was completed by Police. Following on from this work a specific division working on interviewing and interviewing standards has been set up at Police National Headquarters to review training on interviewing.

140. At this stage the group recommends that recruit training on interviewing should be replaced by a new module. The module incorporates training based on the PEACE model. The PEACE model of interviewing is recognised in other jurisdictions as best practice for interviewing victims, witnesses and persons suspected of offences. The module also focuses on interviewing suspects in the context of New Zealand legislation (i.e. the New Zealand Bill of Rights Act, the Crimes of Torture Act and the Judges' Rules) and case-law.

141. Police are currently planning to begin training in the new model in July 2007, beginning with two Police Districts, and eventually delivering across all 12 Districts. It is envisaged that the training will be provided to all supervisors from non-commissioned officer level, to all CIB staff and all general duty officers.

142. The Advisory Council of Jurists' Minimum Interrogation Standards are also reflected in New Zealand legislation and a part of Police practice.

The Taser

143. Due to the Government's wish to be transparent and because of the level of domestic interest in the issue, New Zealand has included information on the police Taser trial. This does not in any way imply that New Zealand considers that the lawful use of Taser amounts to torture or cruel, inhuman or degrading treatment or punishment.

144. The New Zealand Police are currently undertaking a 12 month trial of the Taser in 4 districts, Northshore/Waitakere/Rodney, Counties Manukau, Auckland city and Wellington city. 180 officers from these districts were selected and trained for the trial.

145. Taser is classified internationally as a less lethal weapon, which is a term used to describe tactical options that involve a threat of injury to the person against whom they are used, which results in consequences that are likely to be less lethal than the use of a lethal weapon (for example a firearm).

146. The Police Commissioner approved the operational trial of Taser on the basis that the introduction of the tactical option would enhance the safety of the public, offenders and police. This followed a significant analysis and review of the way Police deal with violent offenders to ensure the tactics and equipment options are the most effective, and least likely to endanger the safety of the public, offenders or police staff.

147. Prior to the commencement of the operational trial, policies and procedures were developed to ensure that the Taser would be used lawfully and safely and in a manner that is consistent with the Tactical Options Framework. All officers received specific training on the Taser including protocols for standard operating procedures, carriage, use, aftercare and reporting requirements.

148. For the purposes of the operational trial of Taser, New Zealand Police trained in the weapon may only use Taser where they have a perceived cumulative assessment that it is necessary to use the Taser to:

a) defend themselves or others if they fear physical injury to themselves or to others, and they cannot reasonably protect themselves, or others less forcefully

b) arrest an offender if they believe on reasonable grounds that the offender poses a threat of physical injury and the arrest cannot be effected less forcefully

c) resolve an incident where a person is acting in a manner likely to seriously injure themselves and the incident cannot reasonably be resolved less forcefully

d) deter attacking animals

e) prevent the escape of an offender if they believe on reasonable grounds that the offender poses a threat of physical injury to any person (whether an identifiable individual or members of the public at large) and the escape cannot be prevented less forcefully.

149. Taser offer those involved in the trial with an alternative tactical option with minimal risk to the public, the officer or the individual resisting arrest. If used, in many cases it is likely that Taser would have pre-empted the necessity to use a firearm.

150. The New Zealand Police have established a comprehensive system for the collection and analysis of data on the use of force by Police. This complements existing use of force reporting requirements and has been in place since the operational trial of Taser began.

151. Additionally, Police have established an independent expert medical advisory forum. This forum will provide Police with current expert advice on any medical matters that might arise.

152. As already noted, any excessive use of force by Police is a criminal offence for which an officer is individually criminally responsible. Section 62 of the Crimes Act 1961 makes any person authorised to use force individually criminally responsible for any part of the force used that is excessive.

New Zealand Defence Force

153. The procedures for military investigations and detention by service police under the Armed Forces Discipline Act 1971 are kept under regular review through the Directorate of Legal Services for the New Zealand Defence Force. The Government recently agreed to the recommendations of the Military Justice Review, a comprehensive review of New Zealand's military justice system for compliance with human rights law. The Review includes a recommendation to enhance the availability of legal aid to members of the Armed Forces, suspected of connection with an offence, who are in custody or being questioned.

Corrections

154. The legislation governing the Department of Corrections is subject to periodic review and amendment. Similarly, there is ongoing review by the Department of best practice in the custody and treatment of prisoners.

155. In addition to these reviews, correctional facilities are subject to inspections by the Office of the Ombudsmen, and Inspectors (inspectors of corrections under the Corrections Act 2004). Inspectors are statutorily required to make reports to the Chief Executive, which they generally do within a month of any investigation. The Office of the Ombudsmen is required to report to Parliament annually but the Ombudsmen may report more frequently as they think necessary or appropriate.

156. There is also an Internal Audit unit that reports to the Chief Executive and to the Assurance Board.[9] The audits conducted include operational audits, and security and custodial audits. The unit considers areas of risk identified by the Department and the effectiveness of the controls mitigating those risks. The Internal Audit unit may also be called on to investigate incidents within the Department for special or ad hoc investigations.

157. Ombudsmen also have the mandate to initiate their own specific investigations related to prison administration issues. In December 2004 the Office of the Ombudsmen initiated such an investigation. This was in response to concerns about the functional operation of prisons, and in particular the circumstances surrounding the 1998 riot in Auckland Prison, the Behaviour Management Regime (BMR), and the Canterbury Emergency Response Unit. The investigation was of a general nature targeted at identifying systemic issues rather than responding to any specific complaint.

158. The investigation, which took nearly a year to complete, critically examined the Department's policies, practices and procedures, and the implementation of legislative requirements. The investigation included interviews with a number of serving prisoners; and a range of staff of different levels of rank and experience, exercising different functions within prisons.

159. Input was also sought from the principal trade union for corrections officers. The investigation also included inspection of prison facilities and court cells.

160. The Report following the investigation found no general ill-treatment of prisoners or inappropriate conduct of staff. The findings of the Ombudsmen's investigation are discussed further in Part III of this periodic report.

161. The Government may also initiate investigations in response to particular incidents. For example, this occurred in December 2003, when Ms 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 Canterbury Emergency Response Unit (CERU) that was in operation between July 1999 and May 2000. Ms Duffy reported in December 2004 and her report raised a number of concerns relating to departmental processes.

162. The Department has undertaken a comprehensive review of the issues raised in the Duffy Report. It has 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 and significant remedial action has been taken since then. This includes new systems for quality assurance, audit and monitoring. The effect is 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 scrutiny.

163. Processes for considering complaints have also been improved as discussed in relation to article 13.

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[9] The Assurance Board is chaired by the Chief Executive and includes members from outside the Department. The purpose of the Board is to assist the Chief Executive to ensure that the Department's risk management framework is operating effectively.

Investigating deaths in custody

164. Deaths of prisoners in custody are rare but regrettably they do occur from time to time and are treated very seriously by the Department of Corrections. Statistics on deaths and serious assaults in custody are contained in Annex IV.

165. Following the death in custody of a 17-year-old remand prisoner being transported to prison in a van on 25 August 2006, four reviews are to be carried out.

a) The Public Prisons Service is carrying out an internal investigation into the circumstances surrounding the death.

b) The Department's Inspectorate is carrying out an investigation separate from the Public Prisons Service. The investigation began in August 2006. The Inspectorate is committed to ensuring that all investigations are carried out with integrity and respect to all involved.

c) The conduct and outcome of the Inspectorate's investigation is closely monitored by the Office of the Ombudsmen. An Ombudsman or his/her delegate may attend any and all interviews relevant to the death in custody and if considered appropriate, pursue their own line of enquiry. The Ombudsman will examine the report that follows the completion of the Inspectorate's investigation. The Ombudsman will either confirm that the investigation was carried out thoroughly and fairly, or they will make any additional recommendations they consider are necessary.

d) The Coroner, an independent judicial officer whose role is to enquire into the facts of a death, will also conduct a public inquest hearing. This inquest will not be held until after the completion of all other inquiries and any court proceedings. After hearing all the evidence the Coroner will make a finding as to the cause of and circumstances of the death and may make recommendations. The Inspectorates' report of the investigations into this death in custody will be made available to the Coroner and if requested, can be released subject to any restrictions imposed by the Official Information Act 1982, or by the Coroner.

e) The Police have investigated the incident. After pleading guilty to the murder of the prisoner, the offender was given a life sentence, with a minimum non-parole period of 18 years.

166. The Office of the Ombudsmen has indicated it will also conduct an independent investigation into the procedures around the escorting of prisoners in custody. The investigation will not directly inquire into the recent death in custody but will consider whether the Department of Corrections transports prisoners in conditions that are safe and humane in respect of both prisoners and staff.

167. In accordance with its practice, the Department will review all the findings of the various investigations and determine whether changes are required to any processes and procedures.

168. The Department has already acted in response to the recent death in custody by requiring a notation to be made on the form used by those escorting prisoners to or from a prison when any prisoner under 18 is being escorted. All those involved in the escorting and transferring of prisoners have been notified of the requirement to separate those aged under 18 years from those aged 18 years and older.

169. Regulation 179 of the Corrections Regulations 2005 requires that all prisoners, including those not yet convicted, under the age of 18 years must, when outside a prison, be kept apart from prisoners who are 18 years or older, where practicable. However, the Minister of Corrections has directed the Chief Executive of the Department of Corrections that, as from 28 August 2006, no prisoner aged 17 years or under shall be transported in the same vehicle compartment as prisoners 18 years and older.

Health

170. The Mental Health (Compulsory Assessment and Treatment) Act 1992 established a system for assessing and treating patients held involuntarily because of mental disorder,[10] and for the regular review of their condition and legal status. The Act extends to "proposed patients", i.e. those persons who are undergoing assessment to determine whether they are mentally disordered within the meaning of the Act, as well as the provision of more information to the families of persons in care. The Guidelines to the Act set out in detail the roles and functions of various statutory appointees under the Act.

New developments

171. In 2005 and 2006, there were two substantive reviews of the Act which led to the revision and updating of the Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992.

Ministry of Social Development (Child, Youth and Family)

New developments

172. The Ministry of Social Development is developing an overarching Residential Practice Framework (the Framework) covering all phases of residential services from engagement and assessment, through securing safety and motivating behaviour change, to future planning. The Framework, and its components, reinforce the prohibition on torture and other cruel, inhuman or degrading treatment or punishment, as well as providing a mechanism for investigating any claims of its occurrence.

173. The Framework will be accompanied by practice triggers, standards and measurable criteria[11] that draw on legislation, policies and standard operating procedures (SOPs). The purpose of the SOPs is to:

a) create practice standards to ensure safe practice

b) provide comprehensive quality performance measures that will enhance staff performance

c) define roles and responsibilities.

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[10] The Act's definition of "mental disorder" sets a high threshold as it requires not only an abnormal state of mind but also to such a degree that the person poses a serious danger to the health and safety of that person or of others; or seriously diminishes the capacity of that person to take care of himself of herself.

[11] An example of a draft practice trigger, standard and measurement criteria directly impacting on enforcement of the Convention against Torture is included in Annex III.

174. Residences are audited annually for compliance with legislation and policies. In 2005/06 the audit process was made more robust by each residence being audited and reported against individually. Previously one report covered all residences. This change allows for closer monitoring of any issues identified in the audit.

175. The Office of the Ombudsmen and the Office of the Children's Commissioner also have jurisdiction to conduct pre-emptive visits on their own motion to children and young person's residences. These roles have been strengthened under the Crimes of Torture Amendment Act 2006.

Young People in Police Cells

176. An issue that concerned the Committee in the third and fourth consolidated report was the remanding of young people in Police cells, when beds are not available at youth justice residences.

177. Young people on remand may be held in police cells temporarily[12]. Police policy requires that they do not share cells with adult prisoners, and that they are closely monitored.

178. New Zealand has made substantial progress in addressing the issue of young people being remanded in Police cells, and it remains a priority for all agencies involved in the youth justice sector.

179. In 2004 New Zealand indicated that its youth justice residential bed capacity was between 19 and 32 beds short of the number required.

180. Youth justice residential bed capacity has now increased to 102 beds across three sites, with the construction of new residential facilities. Eight new beds will be added to one of these facilities in 2007. In addition, a new 24 bed residence is expected to open in 2009.

181. Despite the increase in capacity, there are still concerns about the ongoing demand for residential placements. This is partly due to increasing use by the Youth Court of the Supervision with Residence order, which requires a young person to be held in residential custody.

182. A multi-agency project is underway to review and analyse the demand drivers for youth justice custody placements, with a particular emphasis on the factors influencing long periods on remand.

183. A steering group concerned with young people being held in Police cells, with representatives from government agencies and the judiciary, has been established, and has set a target of no young person spending more than 24 hours in a Police cell. A project team has been set up to develop and implement a range of options to achieve the steering group's target. These options include:

a) increasing the capacity of the youth justice system;

[12] CYPF Act section 239(2) specifies that this can only occur when the child or young person is likely to abscond or be violent, or when suitable facilities for safe custody are not available.

b) providing more community-based alternatives to Residences for young offenders, including alternatives to residential facilities;

c) greater use of Supported Bail, a short-term, intensive, community-based programme that involves working with a young person and their family to address risk factors associated with offending;[13] and

d) facilitating other alternative placements for young people likely to be detained in Police cells.

Immigration

New developments – the case of Mr Ahmed Zaoui

184. The situation involving Mr Ahmed Zaoui, as reported to the Committee in consideration of New Zealand's previous report, is still in the process of review (a chronology of Mr Zaoui's case from his arrival in New Zealand is attached as Annex II).

185. On 9 December 2004, the Supreme Court released Mr Zaoui on bail with conditions to the Dominican Friars in Auckland pending completion of the Inspector-General of Intelligence and Security's review of the security risk certificate.

186. A number of outcomes are possible once the review of the security risk certificate is complete:

a) If the Inspector-General does not confirm that the certificate was properly made, Mr Zaoui will be released immediately and may remain in New Zealand as a refugee.

b) If the Inspector-General confirms that the certificate was properly made, the Minister of Immigration must finally decide whether or not to rely on the certificate.

c) If the Minister finally decides not to rely on the certificate, Mr Zaoui will be released immediately and may remain in New Zealand as a refugee.

d) If the Minister finally decides to rely on the certificate, Mr Zaoui may either remain on bail or be taken back into custody pending deportation. Before deportation could occur, the Minister would need to be satisfied that deporting Mr Zaoui would not give rise to a breach of his human rights. In particular, deportation could not occur if there were substantial grounds for believing that, as a result of such deportation, Mr Zaoui would be in danger of being arbitrarily deprived of his life, subject to torture or subject to cruel, inhuman or degrading treatment or punishment.

187. However, it must be noted that the Director may withdraw his certificate at any time or the Minister may withdraw reliance on it. In either case, Mr Zaoui would be released as if the certificate did not exist and/or had not been relied upon.

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13 The Supported Bail scheme is currently being piloted in seven sites and expansion of the scheme is being considered.

Article 12

Police

188. Primary responsibility for investigating alleged criminal offences, including offences under the Crimes of Torture Act 1989, rests with the New Zealand Police. By virtue of the Police Oath and the Police Regulations 1992, every member of the police is under a general obligation to serve "without favour or affection, malice or ill will". It is a disciplinary offence to fail to take due and prompt measures for the investigation of any matter requiring to be investigated or for the arrest of any offender. Accordingly, if it is alleged that an act of torture has been committed in New Zealand, in normal circumstances the investigation would be undertaken by the Police.

Corrections

189. During the consideration of New Zealand's third and fourth consolidated periodic report, the Committee considered the decision of the High Court in *Taunoa & Ors v Attorney-General* (2004) 7 HRNZ 379. The case related to the Behaviour Management Regime (BMR), which operated between 1998 and 2004 in New Zealand's only dedicated maximum security facility.

190. The BMR was a phased programme developed to deal with a group of particularly dangerous and disruptive prisoners. The intention of the programme was to use incentives to encourage prisoners to modify and maintain appropriate behaviour and ultimately allow them to be reintegrated into the mainstream prison population.

191. The High Court found that some aspects of the regime were unlawful. The Court found that the programme breached section 23(5) of the New Zealand Bill of Rights Act, for five of the nine applicants. Section 23(5), provides that everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person and parallels article 10(1) of the ICCPR. However, the Court rejected the proposition that the programme breached section 9 NZBORA, which provides that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment and largely parallels articles 3 and 16 of the Convention and article 7 of the ICCPR.

192. Compensation of varying amounts was awarded to the five successful applicants. Aspects of the High Court decision were appealed to the Court of Appeal by the Crown and by the applicants.

193. The Court of Appeal delivered its decision on December 2005 (*Attorney-General v Taunoa* [2006] 2 NZLR 457). The Court dismissed the Crown's appeal and allowed the applicants' appeal in two respects. The award of compensation to Mr Taunoa was increased by $10,000 to correct an error in the calculation of the amount awarded to him. The finding that there was no breach of section 9 NZBORA in relation to the treatment of one other prisoner, Mr Tofts, was quashed, and a declaration was made that his detention under the BMR was in breach of that section.

194. Mr Tofts had a pre-existing psychiatric condition that should have precluded his placement on the programme. His psychiatric difficulties made him more vulnerable to adapting to a harsher environment and had been aggravated by the programme. The Court

considered that the breach did not constitute torture, nor could it be considered as cruel or degrading. However, the Court considered that his treatment did constitute disproportionately severe treatment in terms of section 9.

195. The Supreme Court has granted both parties leave to appeal. Approved grounds for the applicants' appeal are whether there were breaches of section 9, or 27 (denial of natural justice) of NZBORA. The approved grounds of the Crown's appeal are the appropriateness and quantum of the compensation awarded. The Crown has not appealed the finding of the breach of NZBORA nor the compensation awarded to Mr Tofts.

Health

196. Under the Mental Health (Compulsory Assessment and Treatment) Act 1992, District Inspectors are appointed to investigate complaints and uphold patients' rights under that Act. District inspectors are required to communicate with patients at various stages of the assessment process. In particular, the inspectors must talk with patients to ascertain whether the patient wishes to challenge their detention via the process set out in the Act.

197. Under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, district inspectors are appointed to visit facilities in which care recipients are required to receive care, to investigate complaints about a breach of the care recipient's rights under the Act, and to inquire into any other matter relating to a care recipient or the management of a service. The district inspector is required to conduct an inquiry, report the matter to the care manager, the care recipient, any person who complained on behalf of the care recipient, and also send a copy of the report to the Director-General of Health. The care manager must take all steps necessary to correct every deficiency identified in the report.

198. The Health and Disability Commissioner Act 1994 established an independent process for the investigation of alleged mistreatment or abuse of patients. This Act requires the Health and Disability Commissioner to create a Code of Health and Disability Services Consumers' Rights, which must be complied with whenever health and disability services are being delivered. The Act requires that the Code includes the right to appropriate standards of service and the principles of informed consent to medical treatment. The Code came into force in 1996. An act of torture or other cruel, inhuman or degrading treatment that occurs during the provision of health or disability services would clearly constitute a breach of the Code.

199. The Health and Disability Commissioner also has the mandate to independently investigate complaints about the treatment of patients in the health and disability sector.

New Zealand Defence Force

200. If it were alleged that a member of the New Zealand Armed Forces had committed an offence under the Crimes of Torture Act, the commanding officer of that person would be required under section 103 of the Armed Forces Discipline Act 1971 to record a charge under that Act or refer the allegation to the appropriate civil authority for investigation, unless the commanding officer considered that the allegation was not well-founded. The question as to whether or not an allegation is "well-founded" is required to be addressed by reference to an objective test of evidential sufficiency.

Ministry of Social Development (Child, Youth and Family)

201. New Zealand's Children's Commissioner (the Commissioner) has a monitoring role in respect of children and young people in the care of the State. The Commissioner's role and functions are defined in the CYPF Act and include the function to:

a) investigate decisions, recommendations, or acts done or omitted under the CYPF Act in respect of any child or young person

b) promote the establishment of accessible and effective complaints mechanisms for children and to monitor the nature and level of complaints

c) monitor and assess the policies and practices of any person or organisation exercising functions, duties or powers under the Act

d) advise government on matters relating to the administration of the CYPF Act.

202. A formal grievance procedure is a requirement of the Regulations which specifies:

a) that Grievance Panels must be established in each residence to hear any complaints of the resident children and young people

b) how appointments to the membership of the Grievance panels are to be made

c) how the Panels are to operate.

New developments

203. The coordination of Grievance Panels has recently been enhanced to improve effectiveness. Each Grievance Panel provides a quarterly report to the Children's Commissioner, the Principal Youth Court Judge, and the Principal Family Court Judge who are responsible for monitoring the Panels. MSD (Child, Youth and Family) then develop a "Response Report" which specifies how the recommendations and any identified issues will be addressed. Copies of the Response Reports are sent to the Panel and other interested parties. This more active management of Grievance Panels includes the provision of support and advice to Panels to enhance their performance, including their function to monitor compliance with the process. Compliance is also monitored by MSD's internal audit processes.

Article 13

Police

204. In the normal course of events, if it were alleged that a serious crime such as an offence under the Crimes of Torture Act had been committed, a complaint would be laid with the police who would investigate to see whether there is admissible and reliable evidence an offence has been committed and whether that evidence is sufficiently strong to establish a prima facie case. If both of these matters are satisfied, and also Police consider it is in the public interest to prosecute and the offender can be located, then, subject to obtaining the Attorney-General's consent to the prosecution, the offender will usually be arrested and charged.

205. The Police Complaints Authority was established in 1988 to receive complaints alleging any misconduct or neglect of duty by any member of the Police, or concerning any

practice, policy, or procedure of the Police affecting the complainant. Where a member of the Police acting in the execution of the member's duty causes, or appears to have caused, death or serious bodily harm to any person, the Commissioner of Police must give to the Authority a written notice setting out particulars of the incident in which the death or serious bodily harm was caused.

206. The Authority is independent from the Police, and the Government cannot direct the Authority on the exercise of its functions. The governing legislation requires that the Authority act independently in performing its statutory functions and duties, and exercising its statutory powers. The person appointed as the Authority can only be removed for just cause by the Governor-General acting on the advice of the House of Representatives.

New developments

207. The Independent Police Complaints Authority Amendment Bill currently before Parliament will further enhance the independence of the Authority. Amendments include increasing its membership to three members, providing it with an increased independent investigative capacity, and giving it Commission of Inquiry powers. The name of the Authority will be changed to better reflect its status.

Corrections

208. There are three principal avenues for making complaints. The first is an internal complaints process where prisoners are encouraged to discuss matters of concern with management within the prison. The second is to contact inspectors of corrections who, while staff of the Department of Corrections, report directly to the Chief Executive and are independent of individual prisons. While inspectors do encourage complaints to be resolved at the prison level before they become involved, there is no requirement for the prison process to be completed first and a prisoner with concerns may contact an inspector at any time. A free telephone number was established in 1998 to allow prisoners to have quick and easy contact with inspectors. In 2005/06 5,754 contacts by or on behalf of prisoners were made to inspectors of corrections. A total of 3,589 formal complaints were received covering 18 different categories, the main ones being prisoner property, prisoner discipline and misconduct, and prisoner transfers and movements. Of these, 114 were found to be justified complaints. A complaint is regarded as being justified if it requires the intervention of an Inspector in order to achieve the appropriate outcome for the prisoner concerned.

209. The third main avenue for complaints is to contact the Office of the Ombudsmen. Since 1995 a prisoner who is not comfortable or is dissatisfied with the internal process has been able to contact one of four specially recruited and trained officers at the Office of the Ombudsmen. These officers visit each prison an average of nine times a year and are also available on demand. A free telephone number is available to facilitate direct contact with the Office of the Ombudsmen. Prisoners are provided with information explaining the jurisdiction of the Office and in 2005/06 approximately 6,500 complaints and contacts by or on behalf of prisoners were registered with the Office. Such complaints cover a variety of matters but range from access to privileges, to physical conditions in prisons and prisoner treatment. The Office of the Ombudsmen must be notified of serious incidents which occur in prisons, such as deaths in custody or allegations of assault. Any such instance is monitored by the investigative officers. Ombudsmen also have the power to investigate on their own initiative

issues related to prison administration. An example of this occurring was the Ombudsmen's own motion investigation in 2004 referred to above at article 11.

210. In addition, New Zealand legislation provides that prisoners can complain to the Commissioner for Children, the Health and Disability Commissioner, the Human Rights Commission, the Police Complaints Authority and the Privacy Commissioner on matters within their respective areas of jurisdiction.

New developments

211. The role of the Office of the Ombudsmen in relation to prisons is elaborated in a formal protocol between the Chief Ombudsman and the Chief Executive of the Department of Corrections, and the Corrections Act now provides a legislative basis for that protocol.

212. In October 2004, the Government initiated a review of existing prisoner complaints mechanisms to ensure that they are effective in practice and deal with matters in a timely way. This issue arose due to government proposals that prisoners be required to first make reasonable use of the complaints mechanisms reasonably available to them before they can seek damages/compensation for any mistreatment in prison. This proposal became law when the Prisoners' and Victims' Claims Act 2005 was enacted.[14]

213. The review was undertaken by the Ministry of Justice which reported to the Government in May 2005. The Report concluded that "the contribution of the inspectors and Ombudsmen means that overall, the complaints system can be relied upon to identify most breaches of the minimum legal conditions under which inmates are required to be held." However, there was criticism of the apparent under-utilisation of the internal complaints process, and the Report highlighted the need to ensure the internal complaints system is consistent with the requirements of the new legislation. It was also critical of the lack of departmental responsiveness to requests for information by the Ombudsmen.

214. In response, the Department has included in its formal protocol with the Office of the Ombudsmen, performance standards relating to the timeliness of its responses, and is taking steps to improve its system for recording internal complaints.

215. In June 2005 the Government announced that a new independent prison complaints body would be established. Officials have carried out work on options for the form of such a body, and it is expected that decisions will be taken in the near future.

Health

216. The Health and Disability Commissioner is required to promote and enforce the Code of Health and Disability Services Consumers' Rights by receiving complaints about medical professionals and organisations. The Code sets out the rights of consumers and corresponding obligations on the providers of health services. The rights include the right to be free from coercion and the right to be treated with respect.

[14] The Prisoners' and Victims' Claims Act 2005 came into force on 4 June 2005. The Act is discussed in detail in the commentary on article 14 in this report.

New Zealand Defence Force

217. Any member of the Armed Forces who considers that he or she has been wronged in any matter has a statutory right to state a complaint to successively higher military authorities in his or her chain of command under section 49 of the Defence Act 1990. The military authorities have a statutory duty to investigate such complaints. The law permits the complainant to complain directly to the Chief of Defence Force if a lower-level authority refused to forward the complaint to the Chief of Defence Force when requested. All complaints to the Chief of Defence Force are investigated by the Judge Advocate General, an independent statutory judicial officer. If a complaint contained an allegation that a member of the Armed Forces had committed an act of torture, it would be referred to the member's commanding officer who would be required by law to proceed as stated above in paragraph 199.

Ministry of Social Development (Child, Youth and Family)

218. Any person who believes that any child or young person has been or is likely to be harmed, ill-treated, abused, neglected, or deprived may report the matter to statutory social worker or the Police.[15] Threats to the complainant or witnesses are addressed by the Police.

219. Any child or young person detained in a residence has the right to make a complaint and to have that complaint heard by the Grievance Panel. Details about Grievance Panels are included under article 12.

220. Children and young people are advised of the complaints process when they arrive at a residence. There are posters and pamphlets available throughout each residence, and the complaint process is described in regular orientation briefings.

221. The process requires complaints to be logged and their resolution closely managed by the manager of the residence. Volunteer Grievance Advocates are also available to help children and young people to identify and clarify the key issues, assist them to write a complaint and support them through the grievance process. When a child or young person makes a complaint against a staff member or another child or young person in the residence, the manager must take immediate steps to ensure that the child or young person making the complaint is kept safe from any potential harm.

222. Children and young people in State care who are not detained in a residence have the right to make a complaint. This is normally made to their social worker or to any other person in authority.

223. A National Complaints Management Policy is currently being developed that will make it much easier for children and young people in the care of the State to make a complaint. The Policy will include a mechanism for recording and monitoring complaints to ensure they have been addressed. Other policies provide mechanisms for addressing allegations or complaints against the caregivers of children and young people in State care.

[15] Section 15 Children, Young Persons, and Their Families Act 1989.

Protection from Ill-Treatment and Intimidation

224. Complainants and witnesses in all criminal proceedings are protected against ill-treatment or intimidation by section 117 of the Crimes Act 1961. Section 117 makes it an offence to dissuade or attempt to dissuade any person, by threats, bribes, or other corrupt means, from giving evidence in any cause or matter, civil or criminal, or to wilfully attempt in any other way to obstruct, prevent, pervert, or defeat the course of justice.

225. In the case of complaints to the Police Complaints Authority, section 25 of the Police Complaints Authority Act 1988 provides that every person shall have the same privileges in relation to the giving of information to the Authority, the answering of questions put by the Authority, and the production of documents to the Authority, as witnesses have in court. In addition, section 32 of the Act requires the Authority to maintain secrecy in respect of all matters that come to its knowledge in the exercise of its functions, and not to communicate such matter to any person, except for the purpose of carrying out its functions under the Act.

Article 14

New Zealand's Reservation

226. In so far as article 14 imposes an obligation on a state to compensate and to treat victims of torture separately from other persons who have suffered harm, New Zealand entered the following reservation to article 14: "The Government of New Zealand reserves the right to award compensation to torture victims referred to in article 14 of the Convention only at the discretion of the Attorney-General of New Zealand."

227. New Zealand made the reservation to ensure consistency with its policy of dealing with the question of compensation to victims of crime, or to persons who suffer as a result of a miscarriage of justice, on an *ex gratia* basis so that every case can be considered on its own merits.

228. In the Committee's conclusions and recommendations the committee noted with appreciation at paragraph 4(j) New Zealand's "declared intent to withdraw reservations to the Convention against Torture […]."

229. New Zealand wishes to clarify the correct position regarding New Zealand's reservation to article 14. The Ministry of Justice and the Ministry of Foreign Affairs and Trade have been actively examining New Zealand compliance with article 14 with a view to removing the reservation. However, work is continuing to determine the exact scope of the requirements of article 14 to ensure that were New Zealand to remove the reservation, it would adhere in all respects with article 14.

230. At the conclusion of the review, final decisions will be taken at Ministerial level as to whether to remove the reservation.

New Zealand Compliance

Section 5 Crimes of Torture Act 1989

231. Section 5 of the Crimes of Torture Act gives effect to article 14 of the Convention, as qualified by the reservation. Section 5 requires that where any person has been convicted of

an act of torture, the Attorney-General must consider whether it would be appropriate in all the circumstances for the Crown to pay compensation to the person against whom the offence was committed or, if that person has died as a result of the offence, to that person's family. Section 5 does not limit or affect any other rights to compensation that a victim of torture may have under any other enactment.

Injury Prevention, Rehabilitation, and Compensation Act 2001

232. The Injury Prevention, Rehabilitation, and Compensation Act 2001 (IPRCA) provides a fair and sustainable scheme for managing personal injury. Under the Act, persons who suffer personal injury, regardless of how the injury occurred, can obtain compensation. Victims of torture who suffer physical injury are eligible for compensation under the Act for both the physical injuries sustained and any mental injury arising from the physical injury.

233. The IPRCA bars those who are eligible for compensation under its provisions from bringing civil proceedings for compensatory damages in court. However, those individuals may still bring a claim for exemplary damages arising out of an act or omission which caused personal injury.

234. The IPRCA provides persons with compensation allowing for comprehensive medical treatment, rehabilitation, and other forms of assistance necessary for a full recovery. Earnings related weekly compensation is also available, as well as lump sum payments for significant permanent incapacity.

235. The IPRCA does not provide compensation for mental injury that does not arise from a physical injury except in a number of clearly defined instances, such as where a victim of sexual offending suffers mental injury as a result of that sexual offending.

Actions for compensation

236. Claims for compensation for mental injury that does not arise from physical injury, for example, where solely psychological torture has been inflicted, do not appear to be subject to the IPRCA bar on civil proceedings; therefore, civil compensation could be sought. The courts have the power to ensure that the sum awarded covers the costs of a full recovery.

New Zealand Bill of Rights Act 1990

237. Since 1994, the common law has provided for public law compensation to be paid where it is necessary to provide an effective remedy for a breach of NZBORA.[16] A victim of torture could bring an action for such compensation as NZBORA provides a number of protections against torture, cruel, inhuman and degrading treatment or punishment.

Court ordered reparation

238. Under the Sentencing Act 2002, an offender found guilty of an act of torture can be given a sentence of reparation in addition to any other sentence the Court considers appropriate. Reparation requires monetary payments to be made to the offender's victim/s.

[16] See the case of *Simpson v Attorney-General* [Baigent's Case] [1994] 3 NZLR 667 where the court recognised that public law damages could be awarded for a breach of the NZBORA.

Victims' Rights Act 2002

239. The Victims' Rights Act 2002 assists in the rehabilitation of victims of torture by imposing clear obligations on specified agencies to provide information and offer assistance to victims of offences. The Act:

a) mandates the provision of assistance and information to victims

b) encourages the holding of meetings between victims and offenders, in accordance with principles of restorative justice

c) prohibits the disclosure in court of the victim's address except in particular circumstances

d) requires that in all cases a Victim Impact Statement is sought, for the information of the sentencing judge

e) requires that victims' views on any application for orders prohibiting the publication of the accused/offender's name are sought

f) provides comprehensive rights of notification, to victims of certain offences, of the occurrence of specified (including forthcoming) events relating to the accused/offender

g) provides that victims of certain offences may participate in decision-making processes, such as processes for the offender's release from prison under the Parole Act 2002 or for the deportation of the offender under the Immigration Act 1987.

240. Under the Act a "victim" is anyone who:

a) has had an offence committed against him or her; or

b) has suffered physical injury, or loss or damage to property as a result of an offence; or

c) is a member of the immediate family of someone who has died or who is unable to make decisions about his or her welfare because of an offence committed against him or her (for example, is incapable or unconscious); or

d) is a parent or legal guardian of a child or young person who is a victim, so long as the parent or guardian is not charged with, convicted of or found guilty of the offence.

241. A victim may exercise his or her rights under the Act, irrespective of whether anyone is arrested, charged or convicted of the offence(s) in question.

Victim Support

242. The Government contracts with Victim Support, which is a non-government organisation, to provide a range of services to ensure that victims of crime and trauma are well supported, safe, and in control of restoring their lives.

243. Victim Support is a confederation of 68 independently incorporated local Victim Support groups. Nationally, it is overseen by a board and managed through the National Office (based in Wellington) and nine district offices.

244. Victim Support provides round-the-clock personalised support services, follow-up support through the criminal justice process, administration of victim assistance schemes,

counselling for families of murder victims, and financial assistance to help victims attend court trials and make submissions to the New Zealand Parole Board.

245. Victim Support receives direct funding from the Government and the Government has recently greatly increased the level of funding for Victim Support. In 2005/06 the government provided Victim Support with $3.319 million. The Government recently agreed to increase funding for 2006/07 and out-years by providing an additional $10.780 million over the budget forecast period which will enable Victim Support to complete its organisational and operational restructure.

Inquiry into Victims' Rights

246. In May 2006, the Justice and Electoral Select Committee of the New Zealand Parliament commenced an inquiry into victims' rights.

247. The terms of reference for the inquiry are to examine the place of, and outcomes for, victims of crime and their families in the criminal justice system by:

a) reviewing legislation affecting victims, including the Victims' Rights Act 2002;

b) considering the terminology used for victims;

c) identifying services available to victims;

d) examining the concept that criminals owe a debt to individuals as well as society, including issues of compensation and reimbursement of costs;

e) examining the effect of the current court system on victims, including the role and status of complainants during court proceedings and the adequacy of court room layout and facilities;

f) examining the place of restorative justice programmes in the criminal justice system and their impact on victims; and

g) considering any other relevant matters.

248. The Committee received a number of public submissions on victims' rights. The inquiry is scheduled to conclude in 2007. The Government has arranged for officials from the Ministry of Justice to provide advice to Committee members to assist with the inquiry.

Refugees as Survivors

249. The Government contributes to funding "Refugees as Survivors" centres. The centres provide mental health and counselling services to refugees with the aim of ensuring that refugees and people with related backgrounds have access to quality, culturally-responsive mental and general health services to assist positive resettlement in New Zealand.

250. The centres provide a very important and accessible service given the high proportion of refugees who have been subject to torture and cruel inhuman and degrading treatment or punishment in their country of origin or countries through which they have passed before arriving in New Zealand.

Prisoners' and Victims' Claims Act 2005

251. The Prisoners' and Victims' Claims Act 2005 creates specialised schemes for the award and receipt of monetary compensation under NZBORA, the Human Rights Act 1993 and the Privacy Act 1993 in respect of claims brought by prisoners and others subject to control or supervision as a result of a prison sentence ("prisoner claims") and for the bringing of civil proceedings against plaintiffs who receive compensation for prisoner claims by the victims of their offending.

Constraints upon award and payment of monetary compensation

252. The Act places procedural constraints on both the award and the payment of monetary compensation in respect of prisoner claims. The Government recognises that the availability of monetary compensation, where appropriate, to a person whose rights have been breached is an underlying element of the right to an effective remedy for breach and so to the protection and promotion of those rights under the NZBORA.

Award of monetary compensation

253. The Act provides that monetary compensation may not be paid in a prisoner claim unless the plaintiff has made reasonable use of available complaints procedures. It thus imposes a precondition on the availability of monetary compensation as a remedy.

254. The Government considers this precondition to be justifiable by reason of the availability of specialised complaints procedures and the desirability in the context of prisons and associated regimes of prisoners making appropriate use of those procedures.

255. Further, the Act confers a discretion on the responsible Court or Tribunal to determine the scope of reasonable use in the circumstances and allows that Court or Tribunal to take into account the nature of the breach claimed in determining whether a plaintiff has satisfied that requirement.

256. The Government does not consider that the Act precludes an award of compensation where an award is necessary to provide an effective remedy.

Payment of monetary compensation

257. The payment of monetary compensation to plaintiffs in prisoner claims is subject to procedural constraints, for example, monetary compensation is paid to the Secretary for Justice and is subject both to deduction of legal aid, reparation and related debts and to retention pending the making and determination of claims by any victim of the plaintiff's offending.

258. The effect of these provisions is that a plaintiff awarded monetary compensation in a prisoner claim may be prevented from receiving some or all of the amount awarded and, in any event, the payment of compensation would be delayed for some time whether or not claims against the plaintiff are made.

259. The deduction of amounts from compensation is not considered inconsistent with the obligation to provide an effective remedy. The fact that a plaintiff may not receive the benefit

of some or all of a judgment sum because he or she has debts or other liabilities to others does not render that judgment ineffectual as a vindication of the right breached.

260. The delay in payment of compensation pending the making of claims does amount to a prima facie constraint on the availability of an effective remedy for breach of the plaintiff's rights. However, the imposition of such a delay can be understood as proportionate in light of the intention of the Act to lessen the disincentives encountered by victims of criminal offending in seeking civil redress against offenders by affording an opportunity to bring claims after an award of compensation has been made and before the proceeds of prisoner claims can be dissipated.

261. The total amount paid into the Victims' claims trust bank account as at 28 November 2006 was NZ$54,154.84c as result of seven separate awards.

262. As a result of the public notification procedure, one claim has been lodged with the Victims' Special Claims Tribunal.

Article 15

Inadmissibility of Statements Obtained by Torture

263. Statements made by an accused are generally admissible in proceedings as an exception to the rules governing hearsay[17]. The common law provided that such statements were only admissible in legal proceedings if the prosecution could show that the statement was made voluntarily. The common law in New Zealand recognised that actual violence to the prisoner at the hands of the authorities may render his or her confession inadmissible. However, since the enactment of the New Zealand Bill of Rights Act 1990, in determining whether a statement made by the accused was made voluntarily, the courts are required to consider section 9 and the right not to be subjected to torture. The range of remedies available to the Courts includes the exclusion of evidence. However, before excluding evidence the Courts must carry out a balancing exercise that requires them to consider a number of factors such as[18]:

a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it;

b) the nature of the impropriety, including whether it was done deliberately or in bad faith;

c) the nature and quality of the evidence;

d) the seriousness of the offence; and

e) the availability and suitability of alternative remedies.

264. Although the issue of the admissibility of evidence obtained as a result of torture has not been addressed by the New Zealand Courts, the Courts will act consistently with New Zealand's international obligations, and particularly obligations under the Convention. The

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[17] Out of time statements made by a person against the accused are covered by the laws on hearsay and are generally not admissible.
[18] *R v Shaheed* [2002] 2 NZLR 377.

Courts would also consider the prohibition of reliance upon evidence obtained by torture under common law and customary international law, as enunciated in the recent United Kingdom decision in *Av Secretary of State for the Home Department (No 2)* [2005] UKHL 71.

New developments

265. A new Evidence Act was enacted in December 2006. The Act replaces most of the existing evidence law on the admissibility and use of evidence in court proceedings and consolidates the laws of evidence into one comprehensive scheme.

266. Amongst other things, the Act provides that if the defence raises in proceedings an issue as to whether a statement made by the defendant has been influenced by oppression, the Judge must exclude that statement unless the prosecution can prove beyond reasonable doubt that the statement was not influenced by oppression. The Act defines oppression to mean:

a) oppressive, violent, inhuman, or degrading conduct towards, or treatment of, the defendant or another person; or

b) a threat of conduct or treatment of that kind.

267. Section 30 of the Act also addresses how the Courts are to respond to evidence that has been improperly obtained. Evidence is improperly obtained if it, amongst other things, is obtained in breach of NZBORA or rule of law. If evidence is obtained improperly, the admissibility of the statement is weighed against factors such as those enumerated above.

268. The Act further protects the right not to be subjected to torture by providing that if any provisions of the Act are inconsistent with NZBORA, the NZBORA will prevail.

269. The Evidence Act is scheduled to come into force in May 2007.

Article 16

270. Acts of cruel, inhuman or degrading treatment or punishment that do not amount to torture as defined in article 1 of the Convention or section 2 of the Crimes of Torture Act are punishable in New Zealand under the general criminal law. In particular, the crimes of assault, aggravated assault, aggravated wounding or injury, injuring by unlawful act, injuring with intent (sections 188-196 of the Crimes Act 1961), female genital mutilation (sections 204A and 204B), sexual violation (section 128), murder (sections 167-168 of the Crimes Act), manslaughter (section 171), kidnapping and abduction (sections 208-210 of the Crimes Act) would apply to such acts depending on the circumstances of the particular case.

271. Any person, regardless of whether he or she is a public official or is acting at the instigation of a public official, can be prosecuted for offences under the above sections. In addition, police officers are subject to Police Regulations 1992. Regulation 9(5) provides that it is an offence for any member of the police to treat any person or prisoner cruelly, harshly, or with unnecessary force or violence. It is a requirement that prison officers shall not use force in dealing with any prisoner except in self defence or in defence of another person. The procedures described in this report are available for the investigation of other acts of cruel, inhuman or degrading treatment or punishment.

272. The comments made under articles 10, 11, 12 and 13 apply equally in respect of cruel, inhuman or degrading treatment or punishment.

New case law of relevance for the implementation of the Convention

273. The Convention against Torture and/or the prohibition of torture and cruel, inhuman or degrading or disproportionately severe treatment or punishment under section 9 of the New Zealand Bill of Rights Act was considered in several decisions of the New Zealand courts during the period under review:

a) In *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289, the Supreme Court observed, consistent with submissions made for the Attorney-General, that section 9, article 3 of the Convention and other instruments prevented the refoulement of persons at risk of torture.

b) As has been noted, in *Attorney-General v Taunoa*, above, the Court of Appeal held that the treatment of a psychologically vulnerable prisoner in the Behaviour Management Regime ("BMR") at Auckland Prison amounted to disproportionately severe treatment contrary to section 9. Claims of torture and of cruel, inhuman or degrading treatment or punishment were rejected but are currently under appeal to the Supreme Court. Claims have been filed by a number of other prisoners who were or claim to have been held in the BMR regime. These have been adjourned pending the Supreme Court decision.

c) Issues concerning complaint and investigation have also been raised in *Taunoa* and also in *Clark v Attorney-General* (High Court, CIV-2004-485-001902), but have either been rejected or have not been determined to date.

d) In *Vaihu v Attorney-General* [2006] NZAR 276, a claim of disproportionately severe treatment under section 9 by a man who was inadvertently bitten by a Police dog that was searching for offenders was upheld by the District Court. The High Court reversed the decision holding that the dog bite did not reach the standard of severity required to amount to cruel, degrading, inhuman or disproportionately severe treatment. The claim is currently under appeal to the Court of Appeal.

Complaints, inquiries, indictments, proceedings, sentences, reparation and compensation for acts of torture and other cruel, inhuman or degrading treatment or punishment

274. In addition to the case law noted above, claims of cruel, inhuman or degrading treatment or punishment and of disproportionately severe treatment under section 9 of the New Zealand Bill of Rights Act 1990 were made in a small number of civil proceedings. Aside from the decisions noted above, none of these have been upheld and no compensation has been ordered. It is noted that civil proceedings in New Zealand engage obligations of disclosure of relevant records and other material, which can be enforced or clarified by the courts in case of dispute.

275. No criminal investigation into specific claims of torture or cruel, inhuman or degrading treatment or punishment was made during the period under review and no indictments, convictions or sentences have occurred. As has been noted, there have been reviews of procedures for dealing with detained persons and other ancillary matters during this period.

Tokelau

276. The Convention applies to Tokelau, having been extended to that territory by New Zealand when it ratified the Convention on 10 December 1989.

277. Tokelau consists of three remote atolls in the South Pacific Ocean, 500km to the north of Samoa. Tokelau's total land area is 12.2 square kilometres, and its population is approximately 1600. Tokelau is a non-self-governing territory of New Zealand and its people are New Zealand citizens.

278. Tokelau has a separate legal and judicial system. New Zealand statute law is generally not applicable in Tokelau, and only applies where expressly provided. Since the early 1980s steps have been taken to build up for Tokelau a body of its own law based, where applicable, on local custom.

279. Criminal offences in Tokelau tend to be of a minor nature, and are dealt with by lay Judges, in cooperation with village police officers, by way of reprimand, sentences of community service, or fines. The most serious criminal and civil matters are within the jurisdiction of the New Zealand High Court and Court of Appeal, although courts have never exercised their jurisdiction over Tokelau.

280. There are no prisons or other places of restricted movement in Tokelau. Torture is not a feature of government or community behaviour and has not been viewed as warranting special attention in the law of Tokelau beyond the provisions in the criminal code for offences against the person and an administrative mechanism for protection of human rights contained in the Human Rights Rules 2003.

New developments

281. The Crimes Procedure and Evidence Rules 2003 (referred to in the third and fourth consolidated report as the 'new code') provide for a system of criminal law suited to Tokelau's unique village-based circumstances. Work continues on the Law Commissioner's handbook on the rules and funding has been sought to carry out this work.

New Zealand Action Plan for Human Rights

282. At the conclusion of its consideration of New Zealand's third and fourth consolidated periodic report the Committee noted with appreciation at paragraph 4(i) "the ongoing elaboration of a national plan of action on human rights by the Human Rights Commission".[19]

283. In accordance with its obligations under the Human Rights Amendment Act 2001, the Human Rights Commission developed an action plan called *New Zealand Action Plan for Human Rights.* The Commission's plan was publicly released in March 2005.

284. The Commission's plan makes recommendations across a wide range of activities, and calls for central and local government, communities, and individuals to take steps to improve the realisation of human rights in New Zealand.

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[19] *Conclusions and recommendations of the Committee against Torture* (CAT/C/CR/32/4).

285. The Government has acknowledged the hard work and dedication of the Human Rights Commission in developing its Plan. No deadline has been set for completion of the Government's response. However, it is expected that Cabinet will consider the matter in the near future.

Prisoners with Disabilities

286. Under section 75 of the Corrections Act 2004 the Department of Corrections is required to provide health care to prisoners that is reasonably equivalent to the standard of health care available to the general population. This derives from the United Nations Minimum Standard Rules for the Treatment of Prisoners and is referred to in section 5 of the Act.

287. The Department's Prison Health and Disability Support Service Specifications outline the range and nature of health and disability support services that are to be provided to defined groups of prisoners in New Zealand.

288. Disability support services for prisoners are currently defined under primary health care, which is the responsibility of the Department of Corrections, and currently provided by the Public Prisons Service.

289. The Public Prisons Service Policy and Procedure Manual sets out the policy and performance standards for dealing with prisoners who have special needs, either because of a congenital or acquired physical condition, or because of impaired learning ability and a lack of adequate social skills. Disability information is provided to assist staff in dealing with prisoners who have special needs. Community support agencies with recognised expertise in working with people with disabilities are encouraged to participate in the prisoner's development.

290. Prison routines and cell placements are adjusted to take into account the needs of prisoners with special needs. Hygiene, medical and dietary needs specific to the prisoner's disability are met and appropriate independent advocates support prisoners where the level of disability or particular circumstances requires such support.

PART II: Additional Information Requested By the Committee

291. Apart from a response to recommendation 6(f), all information requested by the Committee during its consideration of New Zealand's third and fourth consolidated periodic report was provided during the Committee's consideration of that report and in subsequent correspondence with the Committee.

292. A response to recommendation 6(f) is included in Part III.

PART III: Compliance with the Committee's Conclusions and Recommendations

293. At the conclusion of its consideration of New Zealand's third and fourth consolidated periodic report the Committee made ten recommendations in *Conclusions and recommendations of the Committee against Torture* (CAT/C/CR/32/4). New Zealand responded to four of these recommendations (6(b),(c),(d) and (h)) in *Comments by the*

Government of New Zealand to the conclusions and recommendations of the Committee against Torture (CAT/C/CR/32/4/RESP.1)

294. Below are comments on the remaining six recommendations of the Committee.

Recommendation 6(a)

The Committee recommends that the State party incorporate in its immigration legislation the non-refoulement obligation contained in article 3 of the Convention against Torture and consider establishing a single refugee determination procedure in which there is first an examination of the grounds for recognizing refugee status as contained in the 1951 Convention relating to the Status of Refugees, to be followed by the examination of other possible grounds for the grant of complementary forms of protection, in particular under article 3 of the Convention against Torture.

295. As noted in the comments under article 3, above, the Government is conducting a fundamental review of the Immigration Act 1987. The Government is conducting a fundamental review of the Immigration Act 1987. A discussion paper was released in April 2006 to the public, and can be viewed at www.dol.govt.nz/actreview/.

296. The ideas in the document were for public discussion purposes only and do not necessarily reflect Government policy. There is a proposal to incorporate the non-refoulement obligation in article 3 of the Convention against Torture into New Zealand's immigration legislation. In addition, there is a proposal for article 3 claims to be considered alongside refugee status claims at first instance and on appeal.

Recommendation 6(e)

The Committee recommends that the State party implement the recommendations made by the Committee on the Rights of the Child (CRC/C/15/Add.216, paragraphs 30 and 50).

Paragraph 30

The Committee recommends that the State party:

(a) Amend legislation to prohibit corporal punishment in the home;

297. Section 59 of the Crimes Act, which provides a defence to parents or caregivers charged with physical assaults against their children, has been under review by the New Zealand Government since 2000.

298. Section 59 states that "every parent of a child and, subject to subsection (3) of this section[20], every person in the place of a parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances".

299. Since June 2005 a Member's Bill[21] to repeal section 59 has been going through the legislative process. A Parliamentary Select Committee reported back on the Bill on 22

[20] Subsection 3 forbids corporal punishment in early childhood centres or registered schools.
[21] Every second week that Parliament sits, time is set aside for Members' bills. These are bills promoted by individual MPs, not by the Government.

November 2006, with a majority recommendation. The majority of the Committee recommended that the Act be amended to effectively remove the defence of using "reasonable force" against a child for the purpose of correction. The Committee recommended that section 59 be replaced with a new provision to clarify that reasonable force may be used for the purposes of preventing or minimising harm to a child or another person, preventing a child from engaging or continuing to engage in criminal conduct, or offensive or disruptive behaviour, and performing the normal daily tasks of good care and parenting. The Bill may proceed in 2007.

300. The CYPF Act provides protection for children in situations where unreasonable physical punishment may be considered abuse.

301. MSD has had a "no smacking" policy for over 20 years for the caregivers with whom it places the children and young persons who are in its care. Corporal punishment of any sort or infliction of physical pain on a child or young person by a caregiver is not acceptable. Caregivers are expected not to use corporal punishment on their own children.

***(*b) Strengthen public education campaigns and activities aimed at promoting positive, non-violent forms of discipline and respect for children's right to human dignity and physical integrity, while raising awareness about the negative consequences of corporal punishment.**

302. The New Zealand Government is actively promoting positive parenting and families that are free from abuse, neglect and offending. The Government supports a number of initiatives to provide parents, caregivers and communities with information and advice on positive parenting practices and alternatives to corporal punishment, including how violence in families can adversely impact on the ability of children to reach their potential.

303. In 2003, the Government decided that before a decision could be made about change to section 59 of the Crimes Act, it was necessary to undertake a public education campaign on the alternatives to physical punishment of children and to build on existing initiatives targeted at reducing child abuse.

304. Initiatives include the *Everyday Communities* programme, the *Alternatives to Smacking* campaign, and *SKIP: Strategies with Kids – Information for Parents.*

305. The *Everyday Communities* programme uses a community engagement approach to raise public awareness about child abuse, neglect and family violence. *Everyday Communities* recognises that all New Zealanders have a part to play in preventing child abuse and encourages everyone to take action to achieve well being and safety for children.[22]

306. Programmes promoting alternatives to smacking have formed part of government child abuse prevention activities since 1995. A specific campaign was launched in 1998 with the aim of raising awareness of the alternatives to smacking, and encouraging parents and caregivers to think about using them.

[22] Information on the Everyday Communities programme is included in Appendix I.

307. Part of the public education campaign is *SKIP: Strategies with Kids – Information for Parents*, a practical community-based programme that provides parents and caregivers with information about positive parenting approaches suitable for children aged five and under.[23] The Government has invested $14.8 million over the next four years to continue the SKIP programme; part of this funding will enable further research and monitoring of the initiative. Results to date show a significant increase in awareness and understanding of alternatives to physical punishment.

The Taskforce for Action on Violence in Families

308. In June 2005 the Government established *The Taskforce for Action on Violence within Families*[24] (the Taskforce) to provide leadership at the highest levels of government. The Taskforce's objective is to advise government on how to improve the way family violence is addressed, and how to eliminate family violence in New Zealand. It will build on current work and look at other measures to reduce the prevalence of family violence in New Zealand.

309. The Taskforce released its first report in July 2006 which presents a programme of action in four key areas:

a) leadership

b) changing attitudes and behaviours, including a comprehensive campaign to eliminate society's tolerance of family violence and change people's behaviour will be implemented at community, regional and national levels

c) ensuring safety and accountability by improving how agencies work together to keep victims safe, stop re-offending and hold perpetrators to account, and ensure people get easy access to the support they need

d) effective support services by ensuring service providers have the capacity to meet the demand for services.

310. The Taskforce will identify further opportunities for preventing family violence and intervening at key developmental and transitional stages in the lives of individuals and families.

Paragraph 50

The Committee reiterates its recommendation contained in paragraph 21, and further recommends that the State party:

(a) Ensure the full implementation of juvenile justice standards, in particular articles 37, 39 and 40 of the Convention as well the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines),

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[23] Further details of the SKIP Programme are contained in Appendix I.

[24] The Taskforce includes the Chief Executives of relevant government agencies, representatives of the Judiciary, the Children's Commissioner, the Chief Families Commissioner and the Chief Executives of five non-government organisations involved in family violence prevention.

and in the light of the Committee's discussion day on the administration of juvenile justice in 1995 (CRC/C/69);

311. New Zealand's youth justice residences are operated by MSD. The Code of Practice for Residential Care Services discussed in the response to article 10 complies with the juvenile justice standards and specifically refers to the Beijing Rules and the Riyadh Guidelines. Compliance has been reinforced with operating standards and policies.

312. As already indicated in the response to article 11, MSD's Internal Audit team audits residences annually for compliance with legislation and policies. The audit process has been made more robust for 2005/06 by having an audit and report on each residence. This change allows for closer, more effective monitoring.

(b) Ensure the availability of sufficient youth facilities so that all juveniles in conflict with the law are held separately from adults in pre- and post-trial detention; and

Ministry of Social Development (Child, Youth and Family)

313. MSD's youth justice residences provide separate facilities for young people aged 14 to 16 years (inclusive) in pre - and post - trial detention. Some young people considered to be adults by law (i.e. 17 years and over) are also held in an MSD residential facility because they committed an offence(s) prior to their 17th birthday.

314. Young people on remand may be held in police cells temporarily[25]. Police policy requires that they do not share cells with adult prisoners, and that they are closely monitored.

315. Key New Zealand youth justice stakeholders including government agencies and the Judiciary have set a target of no young people spending more than 24 hours in a Police cell. A project team has been set up to develop and implement a range of options to achieve the target. This work is related to an MSD-led multi-agency project to review and analyse youth justice custody placements of children and young people.

Department of Corrections

316. Specialist young offender units have now been established at Hawkes Bay, Waikeria, Rimutaka and Christchurch Men's Prisons to accommodate male prisoners under the age of 18 separately from those aged 18 and older, as well as those aged 18 and 19 if assessed as being vulnerable to intimidation or bullying by older prisoners in mainstream prison units. Due to the small number of female prisoners under the age of 18 there are no specialist units for young women prisoners. Decisions on whether to allow young women to mix with women prisoners aged 18 and over in mainstream prison units are made on a case-by-case basis. Where possible, young women are placed together in a separate wing in one of the adult women facilities.

317. The Department of Corrections has developed and is now piloting tests of "best interest" to inform placement of young offenders, remanded or sentenced to imprisonment to provide a more objective and transparent decision-making process on their placement.

[25] CYPF Act section 239(2) specifies that this can only occur when the child or young person is likely to abscond or be violent, or when suitable facilities for safe custody are not available.

318. If the pilot is successful the tests of best interest will be rolled out internally.

319. The Ministry of Foreign Affairs and Trade, Ministry of Youth Development and Department of Corrections are continuing to review New Zealand compliance with article 37(c) of the United Nations Convention on the Rights of the Child.

(c) Undertake a systematic evaluation of the use of family group conferencing in juvenile justice.

320. MSD has undertaken a comprehensive review of the capacity necessary to provide effective youth justice services, including Family Group Conferences (FGCs), to young people and their families and to the public. This review included:

a) an assessment of capability including resourcing and leadership

b) the development of practice frameworks and service process models

c) a literature review to identify any international practices that New Zealand can learn from.

321. The literature review confirmed that the New Zealand youth justice system, including its FGC component, is sound in its approach to youth offending.

322. MSD data indicates that referrals for youth justice FGCs are increasing, and that more FGCs are being convened and plans reviewed on time. The review has not been able to determine with accuracy the reasons for increasing demand for youth justice FGCs. Increases in the youth population and slight increases in apprehensions for serious offending do not completely account for the increased demand. Police have suggested that increased demand might also be driven by an increased satisfaction with the FGC process. The Police may make more referrals for FGC where they consider the FGC process to be worthwhile and that the FGC will be convened and held on time.

323. An evaluation of the effect of improvements recommended in the review, including FGC outcomes, will be built into an implementation plan.

324. An independent study is also being commissioned which will evaluate youth justice FGC practice across regions and over time. It is expected that the study will provide a greater understanding of what constitutes an effective FGC.

Age of Responsibility in Juvenile Justice Legislation

325. The Committee has previously noted its concern at the low age of criminal responsibility in New Zealand.

326. The statutory principles that guide responses to child offenders are:

a) children should not be held criminally responsible until they have sufficient maturity to appreciate the criminality of their behaviour;[26]

b) there is an age below which it is inappropriate and serves no good purpose to deal with criminal behaviour by way of prosecution and the imposition of punishment; and[27]

[26] Section 22 Crimes Act.

c) the processes and dispositions available to the courts should be appropriate to the age of the child or young person.[28]

327. These principles are reflected in both the care and protection and youth justice systems for young people.

328. Children under the age of 10 are considered to lack the capacity to commit offences, and such behaviour is often dealt with as a civil, rather than a criminal, matter in the Family Court.[29]

329. Children aged between 10 and 13 may be convicted of murder or manslaughter, but only if the child knew that the act or omission was wrong or that it was unlawful.[30] If a child aged 10 or over is alleged to have committed one of these offences, a preliminary hearing of the charge will take place before the Youth Court.[31]

330. At the age of 14 years a young person in New Zealand is deemed not only to be criminally responsible, but to have full capacity to commit crimes, and can be formally charged with any offence.

331. A report in 1997 from the United Nations Committee on the Rights of the Child raised concerns with New Zealand's minimum age for charging children with serious offences. In 2003, the Government agreed that adjustments to the minimum age of criminal prosecution be considered after further work had been undertaken to improve the effectiveness of responses to offending by children. The focus of work to date has therefore been on improvements in practice and procedures dealing with child offenders.

332. On 29 March 2006 a non-government Member's Bill was referred by Parliament for consideration. The Bill seeks to address serious crimes committed by young offenders by making young offenders accountable for their crimes, more or less in the same way as adult offenders. This Bill provides an opportunity for public submissions on the matter of the age of prosecution. Deliberations on the Bill will are expected to be complete in 2007 and will be used to inform future policy decisions.

The Upper-Age of the CYPF Act

333. The Committee has previously noted its concern at the fact that the CYPF Act does not apply to 17 year olds.

334. The New Zealand Government is currently in the process of undertaking a review of the CYPF Act. This includes considering the legislative and operational implications of raising the upper age of the CYPF Act.

335. This review is due to be reported back to Government in 2007.

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[27] Section 272 CYPF Act, and section 18 Sentencing Act.
[28] Section 208(e) CYPF Act.
[29] For example, proceedings are brought on the basis of care and protection issues under the CYPF Act; section 21 Crimes Act.
[30] Section 22 Crimes Act.
[31] Section 272(2) CYPF Act.

Recommendation 6(f)

The Committee recommends that the State party report on the results of the development strategy aimed at ensuring that minors are not subjected to unreasonable searches.

336. Children and young people in MSD residences are not subjected to routine searches on admission or during their stay in the residence.

337. New Zealand legislation[32] and MSD policy allows a child or young person to be searched only when a residential staff member has formed a belief, based on reasonable grounds, that a child or young person in the residence has an unlawful or harmful item in his or her possession. There are strict requirements for approving and carrying out searches and these emphasise that searches must be undertaken with decency and sensitivity towards the child or young person. The reasons for searches are documented and monitored.

Recommendation 6(g)

The Committee recommends that the State party carry out an inquiry into the events that led to the decision of the High Court in the Taunoa et al. case.

338. The *Taunoa* case was brought by nine current and former prisoners and principally related to the Behaviour Management Regime (BMR) in place between 1998 and 2004 in New Zealand's only dedicated maximum security facility.

339. An Ombudsman had investigated complaints from prisoners on the BMR in 2001 and some aspects of the BMR procedures were modified in response to his report. However, a number of issues of a legal nature remained outstanding and it was considered that the appropriate place to resolve these lay with the High Court. The case has involved review by that Court and by the appellate courts of both the particular circumstances and concerns of the respective claimants and of the BMR programme more widely.

340. Since the High Court judgment and in addition to the hearing of appeals by both the claimants and the Government before the Court of Appeal and, currently, the Supreme Court (see paragraphs 188-194), the circumstances of the *Taunoa et al* case have been considered in two significant reviews of systems relating to the management of prisoners in the last two years.

341. Firstly, in late 2004 the Office of the Ombudsmen initiated a comprehensive investigation into prison management. Of particular but not exclusive focus were the circumstances around the BMR and associated litigation. The Ombudsmen's Report, issued in December 2005, found there was no general ill-treatment of prisoners or inappropriate conduct on the part of Corrections staff. In particular, it found that cell searches were carried out with due respect and without gratuitous disruption, no systemic problem with personal

[32] The legal provisions for searching children and young people in residences have been moved from the Children, Young Persons and Their Families (Residential Care) Regulations 1996 into the main body of the Children, Young Persons and Their Families Act, 1989 in recognition of their importance.

searches, no general concerns with use of force and no fundamental problem with complaint procedures.

342. Secondly, in 2005 the Ministry of Justice completed a review of the prisoner complaints system (refer to paragraphs 210-214). That review concluded that the three-tier system for prisoner complaints was "basically sound". Notwithstanding that conclusion, the Government has decided that a new independent prison complaints body be established. Work has been carried out on options for the form this body might take and it is expected that decisions will be taken in the near future.

343. Once the Supreme Court has given its decision on the current appeals, the Government will consider what, if any, further inquiry is necessary.

Recommendation 7

The Committee welcomes the State party's willingness to ratify the 1954 Convention relating to the Status of Stateless Persons, and the Convention relating to the Reduction of Statelessness, and recommends that it ratify these instruments in a timely manner.

344. The Instrument of Accession to the *Convention on the Reduction of Statelessness* was deposited at the United Nations' General Assembly by the Minister of Foreign Affairs on 20 September 2006. The required legislative changes were implemented in the Citizenship Amendment Act 2005, which came into force on 21 April 2005.

345. As part of the review of the Immigration Act, New Zealand is currently considering whether to become party to the *Convention relating to the Status of Stateless Persons.*

Recommendation 8

The Committee recommends that the State party disseminate widely the Committee's conclusions and recommendations, in appropriate languages, through official web sites, the media and non-governmental organizations.

346. The official documents containing the Committee's conclusions and recommendations were distributed through an information bulletin to a mailing list that includes all public libraries. In addition, a copy is available on the website of the Ministry of Foreign Affairs and Trade.

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Tokelau Crime Regulations 1975

Draft legislation

Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill

Independent Police Complaints Authority Amendment Bill

Law Reform (Epidemic Preparedness) Bill

Young Offenders (Serious Crimes) Bill

* All New Zealand legislation can be accessed at www.legislation.govt.nz

Administrative procedures

Code of Conduct card (Armed Forces)

Code of Practice for Child Youth and Family Residences

Law of Armed Conflict Manual

Performance Standards for Grievance Procedures in Child, Youth and Family Residences

Performance Standards for Searches Involving a Child or Young Person (CYFS)

Police General Instructions

Police Oath

Publications and Reports

Ailsa Duffy QC (December 2004): *Report for the State Services Commissioner into the Department of Corrections Canterbury Emergency Response Unit*

Comments by the Government of New Zealand to the conclusions and recommendations of the Committee against Torture (CAT/C/CR/32/4/RESP.1)

Conclusions and recommendations of the Committee against Torture (CAT/C/CR/32/4)

Department of Corrections (April 2006): *Ombudsman Own Motion Prison Investigation: Update Regarding Recommendations*

Department of Labour (2006): *Immigration Act Review – Discussion paper*

Initial report of New Zealand under the Convention against Torture (CAT/C/12/Add.2)

Ministry of Foreign Affairs and Trade: *Core Document - New Zealand*

Ministry of Justice: *Guidelines on Compliance with the New Zealand Bill of Rights Act* (www.justice.govt.nz)

Ministry of Justice (2005): *Review of Prisoner Complaints Processes*

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New Zealand Police: *Guide to the Management of Prisoners held on behalf of the Department of Corrections*

Office of the Ombudsmen (December 2005): *Ombudsmen's Investigation of the Department of Corrections in Relation to the Detention and Treatment of Prisoners*

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Third and fourth periodic reports of New Zealand under the Convention Against Torture (CAT/C/49/Add.3)
