

## 7. Right to Justice

Tika ki te Haepapa



*"All are equal  
before the law."*

## All are equal before the law.

Universal Declaration of Human Rights, Article 7 (plain text)

### Introduction Tīmatatanga

New Zealand has traditionally enjoyed a high regard for the right to justice, which is fundamentally linked in the popular imagination to the notion of a 'fair go' and to the belief that society should be based on the rule of law.

The rule of law is an essential foundation for a fully functioning democratic system and for full and effective protection of human rights. The rule of law is also fundamental to economic security, as it ensures that both the public and private sectors have a stable and reliable legal system for resolving commercial and other disputes. Furthermore, it establishes clear rules by which business can be conducted.

The core principle of the rule of law is that "all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and administered by the courts".<sup>1</sup> Lord Bingham of Cornhill, formerly senior Law Lord, has identified eight sub-rules to the rule of law. While all overlap to some degree with the right to justice, this chapter assesses the status of the right in New Zealand against five particularly relevant sub-rules.<sup>2</sup> These are:

1. The law must be accessible, intelligible, clear and predictable.
2. Fundamental human rights must be protected by the law.
3. Civil disputes, which the parties themselves are unable to solve, should be resolved through established procedures without prohibitive cost and in a timely fashion.
4. Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers.

1 Lord Bingham (2007), *The Rule of Law*, *Cambridge Law Journal*, Volume 66, Issue 1 pp 67–69

2 This assessment is not made from the perspective of those who are detained or are seeking asylum, which is covered in the chapters on rights of people who are detained and the rights of refugees.

5. Adjudicative procedures provided by the State should be fair. The overarching objective of the rule of law and the right to justice is that fair outcomes are realised by everyone encountering the judicial process.

Overall, New Zealand demonstrates an active commitment to the rule of law and the right to justice through continual review, evaluation and ongoing legal development. The convention is that judges are to be appointed without political bias. Where potential bias exists in the judiciary, it is identified and there are systems for ensuring that judgments are not tarnished by bias. Although the diversity of the judiciary has increased somewhat over recent years, the make-up of the judiciary as a whole is still not fully reflective of society.

International treaty bodies have criticised New Zealand for significant discrepancies in the realisation of the right to justice among different groups of New Zealanders, including disabled people; Māori and Pacific peoples; migrant communities and international students; and children and young people.

### International context Kaupapa ā taiao

The right to justice is fundamental to international human rights law. The right to justice is recognised under the Universal Declaration on Human Rights (UDHR) through the following Articles:

- Article 6: Everyone has the right to recognition everywhere as a person before the law.
- Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law.
- Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
- Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

◀ Lawyers David Peirse (far left) and Frances Joychild (far right) with clients (from second left) Jessie Raine, Jean Burnett and Stuart Burnett outside the High Court in Auckland. Jessie, Jean and Stuart are three of the plaintiffs in what has become known as the parents as caregiver case. The health ministry pays for carers to look after severely disabled people but not if that carer is a family member. (New Zealand Herald Photograph by Natalie Slade)

- Article 21: (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country.

The right to justice is referred to in the International Covenant on Civil and Political Rights (ICCPR)<sup>3</sup> and customary international law. In addition, the notion that decision-makers, including judges, should abide by the principles of natural justice is a common law principle.

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) explicitly protects the rights of disabled people in relation to legal process in Article 12, on equal recognition before the law; Article 13, on access to justice; and Article 14, on the liberty and security of the person.

## New Zealand context

### Kaupapa o Aotearoa

#### THE LAW MUST BE ACCESSIBLE, INTELLIGIBLE, CLEAR AND PREDICTABLE

There are six main sources of law in New Zealand:

- laws made by Parliament – statutes or acts of Parliament
- laws made by the executive under the delegated authority of Parliament – regulations and rules
- laws made by local authorities
- some United Kingdom statutes made by the British Parliament, following the Statute of Westminster Adoption Act 1947
- laws made by the courts – common law
- customary international law.<sup>4</sup>

The law-drafting process in New Zealand strives to ensure that legislation is drafted only when it is needed, consultative procedures are followed, and resultant laws are clearly drafted. Key players in this process include

the Legislation Advisory Committee, the Parliamentary Counsel Office, the Ombudsman, the Attorney-General (with respect to consistency with the New Zealand Bill of Rights Act 1990 (BoRA)), and parliamentary select committees.<sup>5</sup>

After a bill is introduced to Parliament and has been given its first reading, it is referred to a select committee. Select committees are small groups of MPs who can examine bills in detail and hear public submissions on proposed laws.

Nearly all bills, once referred to a select committee, are advertised in the metropolitan and major provincial newspapers for submissions from interested organisations or individuals. Bills and guidance on how to make a submission to select committees can be found on Parliament's website.<sup>6</sup> People may appear before select committees in person to support their written submissions. It is standard practice to make all submissions and officials' advice to select committees publicly available on Parliament's website as soon as the select committee has reported back to the House.

Additionally, openness and transparency of law-making is secured pursuant to several legislative enactments. The Official Information Act 1982 (OIA), for example, allows members of the public to seek official documents from government departments and some other public bodies.

#### FUNDAMENTAL HUMAN RIGHTS MUST BE PROTECTED BY THE LAW

New Zealand has constitutional safeguards designed to ensure adequate protection of human rights. The chapter on democratic rights outlines the elements of the constitution and the role of the executive, Parliament and the judiciary in providing checks and balances on each other.

One way in which human rights standards are incorporated into domestic law is through the BoRA. One of its purposes is to "affirm New Zealand's commitment to the

3 The ICCPR underscores the right to impartial and independent justice, cornerstones of the right to justice. For example, see Articles 3 and 14.

4 Customary international law is automatically a source of New Zealand law without the need for legislative action, and can thus be applied directly by the courts in the absence of any contrary statutory provision.

5 For more detail on the legislative drafting process, see the Legislative Advisory Committee Guidelines, accessible online at [http://www2.justice.govt.nz/lac/pubs/2001/legislative\\_guide\\_2000/combined-guidelines-2007v2.pdf](http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/combined-guidelines-2007v2.pdf)

6 <http://www.parliament.govt.nz>

ICCPR". However, this affirmation can not be relied upon to fill perceived gaps in the BoRA, such as the absence of economic, social and cultural rights. This reflects the domestic norm that international law is part of domestic law only to the extent that Parliament has incorporated it into the domestic system. Rather, international law is used as a helpful source of guidance in ascertaining the meaning of domestic law.

Section 27 of the BoRA guarantees three aspects of what the section heading refers to as the "right to justice": the right to observance of the principles of natural justice; the right to apply for judicial review; and the right to take and defend civil proceedings involving the Crown in the same way as civil proceedings between individuals. The concept of the "principles of natural justice" in section 27(1) can be (and is) developed as a matter of common law. The "principles of natural justice" include, as a minimum, the rights to notice (as to hearing and as to the content of the case against one, where relevant), to contradict, to representation, to an impartial determination, to an oral hearing, and to consultation in advance.<sup>7</sup>

The following institutional practices are designed to guarantee protection of fundamental human rights:

- The Regulations Review Committee ensures that regulations are made lawfully, and can draw to the attention of Parliament any regulations that "trespass unduly on personal rights and liberties".<sup>8</sup>
- The Cabinet Office Manual requires human rights assessments of proposals for new laws and policies. Government departments must act in a way that meets human rights standards.
- The Ministry of Justice (along with the Solicitor-General and the Crown Law Office) has a particular role in checking draft legislation of other government departments for compliance with the BoRA. In particular, under Standing Order 264 and section 7 of the BoRA, the Attorney-General is required to report

on any bill containing any provision that appears to be inconsistent with any of the rights and freedoms contained in the act.

Of these measures, the reporting mechanism under section 7 in the BoRA has the most important deterrent effect on policy-makers promoting measures contrary to the rights and freedoms contained in the BoRA.<sup>9</sup> It constitutes a safeguard designed to alert members of parliament to legislation which may give rise to an inconsistency, and accordingly to enable them to debate the proposals on that basis.<sup>10</sup> While Parliament can pass legislation inconsistent with a section 7 report, it is usually reluctant to do so.

The section 7 process is much more transparent now that all advice provided by the Ministry of Justice and the Crown Law Office to the Attorney-General on the consistency of bills with the BORA is placed on the Ministry of Justice's website, and all section 7 reports are available on Parliament's website.<sup>11</sup>

However, as observed by human rights experts, this reporting mechanism is deficient in a number of respects. First, the obligation to report arises only in respect of the introductory copy of a bill. Accordingly, there is no statutory obligation on the Attorney-General to report the BoRA inconsistencies that appear in amendments proposed after the initial introduction of the bill (although this does occasionally occur in the context of select-committee proceedings and in the tabling of supplementary order papers).

Secondly, section 7 of the BoRA focusses on a reporting obligation, but does not provide a mechanism that channels the productive use of the information gleaned through the making of such a report. The Attorney-General does not have a 'second look' at legislative proposals in the light of such information.

Thirdly, because the views of successive Attorneys-General have been that the obligation to report arises

7 Butler P and Butler A (2005), *New Zealand Bill of Rights Act: A Commentary* (Wellington: LexisNexis)

8 House of Representatives Standing Order 378

9 Palmer G (2006), *The Bill of Rights Fifteen Years On*, Keynote Speech at Ministry of Justice Symposium, 10 February, accessible online at <http://www.lawcom.govt.nz/media/speeches/2006/bill-rights-fifteen-years>

10 *Mangawaro Enterprises Ltd v Attorney General* [1994] 2 NZLR 451

11 Accessible online at <http://www.justice.govt.nz/policy-and-consultation/legislation/bill-of-rights> and <http://www.parliament.nz/en-NZ/PB/Presented/Papers/Default.htm>

only where he or she is of the view that a provision is inconsistent with the BoRA (not may be) and the concept of the BoRA inconsistency is triggered only where the limit placed on a right or freedom is not reasonable, parliamentarians are not advised through the section 7 mechanism of those instances where the consistency of a proposed measure with the BoRA is a matter of fine judgment.

A key element in the overseeing of law-making is the active participation of civil society: people making submissions, challenging proposals, and complaining when bills are too complex or difficult to understand (see the chapter on democratic rights).

Tribunals and courts must consider human rights when interpreting laws.<sup>13</sup> The courts do not have power to strike down acts of parliament that are inconsistent with human rights standards. However, the Court of Appeal has hinted at a willingness to make formal declarations where legislation is found to be inconsistent with the BoRA. Such declarations would be in addition to a similar remedy available through the Human Rights Tribunal, in respect of section 19 of the BoRA (freedom from discrimination). The courts can go further with regulations and rule them invalid in some circumstances.<sup>14</sup>

**CIVIL DISPUTES, WHICH THE PARTIES THEMSELVES ARE UNABLE TO SOLVE, SHOULD BE RESOLVED THROUGH ESTABLISHED PROCEDURES WITHOUT PROHIBITIVE COST AND IN A TIMELY FASHION**

It is a corollary of the principle that everyone is bound by and entitled to the benefit of the law that people should be able, in the last resort, to go to court to have their rights and liabilities determined. Although this sub-rule refers specifically to civil claims, it applies equally to the criminal justice system.

Section 24(f) of the BoRA guarantees anyone the right, when charged with a criminal offence, “to receive legal assistance without cost if the interests of justice so

require and the person does not have sufficient means to provide for that assistance”. New Zealand’s current legal aid system is administered by the Legal Services Agency under the Legal Services Act 2000, which grants legal aid to those who are unable to pay for legal services. Legal aid is also available in many civil proceedings, although the criteria to be met are stricter and include a requirement on the applicant to show reasonable grounds for taking or defending the proceedings, and whether the repayment amount will exceed the cost of proceedings.<sup>15</sup>

Community law centres (CLCs) have lawyers who give free legal advice and in some cases can provide representation at court.<sup>16</sup>

Auckland Disability Law, set up in 2008, has specialised knowledge of the issues and law that particularly affect disabled people, as well as being able to address the barriers, including support needs and communication assistance, to enable disabled people to exercise their legal rights and access justice.

The Duty Solicitor Scheme provides representation free of charge for a person’s first appearance.

Alternative disputes-resolution processes, such as mediation, are available in a number of specialist jurisdictions, such as employment and human rights.

**MINISTERS AND PUBLIC OFFICERS AT ALL LEVELS MUST EXERCISE THE POWERS CONFERRED ON THEM REASONABLY, IN GOOD FAITH, FOR THE PURPOSE FOR WHICH THE POWERS WERE CONFERRED AND WITHOUT EXCEEDING THE LIMITS OF SUCH POWERS**

Openness and transparency enhances public confidence in the impartial administration of justice and ensures that public officers do not exceed the limits of their powers.

The OIA and the Local Government Official Information and Meetings Act 1987 (LGOIMA) are useful tools to open up the internal processes of government departments and other public bodies, in order to assess whether they are

13 Hosking & Hosking v Runting & Ors, [2004] NZCA 34; [2003] 3 NZLR 385 [2004] NZCA 34; [2003] 3 NZLR 385

14 Drew v Attorney-General [2001] 2 NZLR 428

15 Legal Services Act 2000, section 9

16 The CLCs are largely funded by interest from the trust (client) accounts of practising lawyers. With the economic downturn, it has been necessary for the Government to make substantial contributions to their running costs.

acting in accordance with the law. Section 47 of LGOIMA also confirms that, subject to the limited exceptions, every meeting of a local authority shall be open to the public (including the media).

Judicial review forms part of the New Zealand legal tradition. Judicial review is the body of law relating to the review of the justiciable acts, decisions, determinations, orders and omissions of individuals and bodies performing public functions. Judicial review of the decision-making activities of these bodies is generally perceived as an important constitutional procedure to prevent those exercising public functions from abusing their powers.

### ADJUDICATIVE PROCEDURES PROVIDED BY THE STATE SHOULD BE FAIR

Equality and fairness are not just about having laws and processes that appear to treat everyone equally or in the same way (sometimes called 'formal equality'). Equality and fairness are also about what happens in practice in everyday life (sometimes called 'substantive equality').<sup>17</sup>

Neither the BoRA nor the Human Rights Act 1993 (HRA) address the right to equality. However, the BoRA indirectly affirms it by reference to New Zealand's commitment to the ICCPR. The White Paper (which preceded the BoRA) considered that the term was "elusive and its significance difficult to discern".<sup>18</sup> Rather, it said that the 'general notion' of equality before the law was implicit in reference in the proposed bill to "New Zealand being founded on the rule of law".<sup>19</sup> The White Paper considered that a notion would bind the legislature.

An independent and impartial judiciary is a cornerstone of a legal system, ensuring that questions of legal right and liability are resolved by application of the law. Judicial independence from political interference by the executive is protected by the Judicature Act 1908 and the Constitution Act 1986. Most judges are appointed by the Governor-General on the advice of the Attorney-General.

In giving this advice, the Attorney-General takes advice from the Solicitor-General and the Chief Justice of the court to which the judge is to be appointed. Measures such as permanent tenure,<sup>20</sup> judicial immunity and the setting of salaries by an independent body all protect judicial independence. Judges are also prohibited from undertaking other employment, unless the employment is compatible with judicial office.<sup>21</sup> Bias (including a perception of bias) is a reason for overturning judicial decisions. Where any potential conflicts of interest arise, the convention is that judges will voluntarily step down or 'recuse' themselves.

The Office of the Judicial Conduct Commissioner was established in August 2005 to deal with complaints about the conduct of judges. The Judicial Conduct Commissioner's role is to receive and assess complaints about judges' conduct that would warrant removal from office.

New Zealand has a well-developed legal system, with a range of courts and tribunals. The final appeal court is the Supreme Court, below which are the Court of Appeal, the High Court and the District Courts.

There are a number of specialist courts, including the Family Court, the Youth Court, the Environment Court, the Employment Court and the Māori Land Court. There are over a hundred specialist tribunals, authorities, boards, committees or related bodies to deal with specific types of disputes (largely between individuals) on matters such as human rights,<sup>22</sup> employment disputes, censorship, welfare and benefits, taxation, and licensing.

The Waitangi Tribunal is a permanent commission of inquiry, established by the Treaty of Waitangi Act 1975, to inquire into claims by Māori relating to the Treaty of Waitangi. It reports its non-binding findings and recommendations to the Government. New Zealand also has specialist officers in the private sector, such as the Banking Ombudsman.

17 The differences between formal and substantive equality are widely recognised in sociological and legal writing. For examples, see: General Recommendation No. 25, on CEDAW, Article 4, para 1, on temporary special measures, paras 4–9

18 White Paper (1985), *A Bill of Rights for New Zealand* (Wellington: Government Printer).

19 This principle is further reflected in the Supreme Court Act 2003

20 Judges must retire at the age of 68. A bill is currently before Parliament raising the retirement age to 70.

21 Section 4(2a) Judicature Act 1908

22 The Human Rights Review Tribunal hears cases involving claims of discrimination under the Human Rights Act 1993, as well as cases involving privacy issues under the Privacy Act 1993, and some cases involving health and disability issues.

## New Zealand today Aotearoa i tēnei rā

### THE LAW MUST BE ACCESSIBLE, INTELLIGIBLE, CLEAR AND PREDICTABLE

Increasingly, agencies and departments are consulting with the Legislation Advisory Committee in advance of framing their legislative proposals, and there is considerable benefit in that practice.<sup>23</sup>

It has been stated that the Parliamentary Counsel Office strives to “improve access to legislation so that legislation is drafted as clearly and simply as possible”, and to ensure that “New Zealand legislation is readily accessible”.<sup>24</sup> The New Zealand Legislation website provides access to acts, statutory regulations, bills and supplementary order papers. In 2010 the Legislation Bill was introduced to Parliament. The purpose of this bill is to modernise and improve the law relating to the publication, availability, reprinting, revision and official versions of legislation, and to bring this law together in a single piece of legislation.

A variety of information and assistance is available from government and other bodies (such as community law centres) about legal requirements across a range of areas. Increasingly, this is available in a range of different languages.

Periodic review of New Zealand’s laws and regulations ensures that improvements can be made to enacted legislation. This is the responsibility not only of government departments and agencies administering legislation, but also of specialist bodies. For example, the Rules Committee continuously reviews procedural rules in the Supreme Court, the Court of Appeal, the High Court

and District Courts, in the light of national and overseas developments. The Rules Committee has made significant contributions, simplifying and streamlining procedures in the District and High Court, drafting the Judicature (High Court Rules) Amendment Act 2008 and the District Court Rules 2009. In relation to the new District Court Rules, the Rules Committee described the need for the change as follows:

**The traditional interlocutory process is cumbersome, time-consuming, and comes at a disproportionate cost to most litigation in the District Court... Fundamental to the new rules is the principle that litigants in the District Court should be able to give notice of their claims and defences simply and economically. They should be empowered readily, easily and efficiently to receive and obtain from each other relevant evidential and documentary information at the earliest practicable points.**<sup>27</sup>

### Urgency

As Sir Geoffrey Palmer has observed:

**Law-making should be a solemn and deliberate business. It ought to permit time for reflection and sober second thought. It ought to be organised so that people have a chance of knowing what is happening and making representations about it if they wish.**<sup>28</sup>

He identified the dangers that flow from the rapid passing of legislation, including lack of time for the public to

23 Palmer G (2006), Law reform and the Law Commission after 20 years – we need to try a little harder, Speech to para 89. Accessible online at <http://www.lawcom.govt.nz/UploadFiles/SpeechPaper/d0c9b674-5a55-405d-9b3c-2cfd467a0d5d/Law%20Reform%20and%20the%20Law%20Commission%20in%20NZ%20after%2020%20years.pdf>

24 Parliamentary Counsel Office, PCO’s Mission and Vision Statements, accessible online at <http://www.pco.parliament.govt.nz/mission-and-vision/>

25 <http://www.legislation.govt.nz>

26 The Rules Committee is a statutory body established by section 51b of the Judicature Act 1908.

27 Rules Committee Information Paper, paras 5 and 7 [http://www.courtsofnz.govt.nz/about/system/rules\\_committee/district-courts-revision/Rules-Committee-DCR-overview.pdf](http://www.courtsofnz.govt.nz/about/system/rules_committee/district-courts-revision/Rules-Committee-DCR-overview.pdf). The rules provide a streamlined process with a logically staged exchange of relevant information which is conducive to exploration of settlement. If early settlement is not achieved, a more elaborate ‘information capsule’ exchange procedure provides adequate foundation for examination of the merits and the parties’ needs and interests at an early settlement conference. If settlement is not reached, the dispute can be promptly channelled into a form of adjudication proportionate to the case. It is anticipated the information exchanged by that point will largely remove the current discovery complications and their attendant expense.

28 Palmer G (1987), *Unbridled Power* (Auckland: OUP) at 160

participate in the parliamentary process in order to make their views known. This has the potential to diminish public confidence in Parliament, both as a watchdog on the executive branch of government and as a forum for public opinion to be heard.

Participation is a foundation stone of democracy in a modern society. While voting is fundamental to participation, so too is the ability to contribute in a meaningful way to the development of legislation. From time to time governments expedite legislative proposals through all the parliamentary processes, under a perceived need for 'urgency'. This limits the possibility for public participation in several respects, for example by severely truncating select committee deadlines,<sup>29</sup> or in some cases by accepting submissions only from those expressly requested to provide them.<sup>30</sup> This practice suborns good democratic processes to the potential detriment of sound decision-making. This has led the Commission to advocate for at least 12 weeks as the minimum period for consultation on proposed legislation.<sup>31</sup>

Disabled people report an overload of legislative changes in the past two years, including significant amounts of legislation passed under urgency. Among the concerns raised by disabled people are the short periods of time in which submissions must be made; the complexity of the submission processes; discussion documents being lengthy, difficult to read and rarely available in alternative formats; and, more generally, the lack of consideration of the impact of law changes on disabled people.

The use of government majorities on select committees to muzzle opposition critics (for example, by not allowing a minority report) has also been the subject of criticism.

### **FUNDAMENTAL HUMAN RIGHTS MUST BE PROTECTED BY THE LAW**

While, generally speaking, New Zealand is committed to the rule of law and the right to justice, legislation does

not encapsulate all the civil and political rights recognised in the ICCPR, nor are economic, cultural and social rights protected. As such, persons seeking to claim violations of economic, cultural, and social rights are precluded from doing so before the courts.

The Human Rights Committee stated in its concluding remarks, in relation to New Zealand's fifth periodic review under the ICCPR:

**The committee reiterates its concern that the Bill of Rights Act 1990 (BoRA) does not reflect all Covenant rights. It also remains concerned that the Bill of Rights does not take precedence over ordinary law, despite the 2002 recommendation of the committee in this regard. Furthermore, it remains concerned that laws adversely affecting the protection of human rights have been enacted in the state party, notwithstanding that they have been acknowledged by the Attorney-General as being inconsistent with the BoRA.<sup>32</sup>**

### **Limited effect of constitutional safeguards**

While the Attorney-General's section 7 report is probably the strongest tool against enacting laws inconsistent with BoRA, under the doctrine of parliamentary sovereignty (and until there is an entrenched Bill of Rights), Parliament is unconstrained in the legislation it can pass. Since 1990, section 7 reports have been tabled in Parliament in relation to 56 bills. Of these, 19 (mostly private members' bills) were not enacted, and 10 were amended to address the inconsistency. However, 19 bills were enacted substantially unchanged, and eight remain before the House. The following examples demonstrate the limited effect of the reporting function:

(a) An amendment to the Crimes Act 1961 sought to introduce two exceptions to the double jeopardy rule, whereby a defendant in a criminal case could not be tried

29 In practice this prevents NGOs from being able to consult members to inform their submissions.

30 For example, the limited timeframe for the public to make submissions on the Local Government (Auckland Council) Bill 2009; or legislation such as the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 which was introduced under urgency and forced through all three readings in a single sitting; or the precedent set when a law such as the Canterbury Earthquake Response and Recovery Act 2010 is enacted under urgency, abrogating established constitutional protections.

31 The Commission's position is outlined on [www.hrc.co.nz/nz/home/hrc/newsandissues/publicconsultation](http://www.hrc.co.nz/nz/home/hrc/newsandissues/publicconsultation).

32 CCPR/C/NZL/CO/5



twice for the same offence.<sup>33</sup> Under the original bill, a defendant could be tried twice in two circumstances: ‘tainted acquittal’, where a person found not guilty of a crime is subsequently convicted of an administration of justice offence that significantly contributed to the person’s acquittal;<sup>34</sup> and where there is new and compelling evidence in relation to an offence that is punishable by imprisonment of 14 years or more.

In his section 7 report, the Attorney-General found the ‘tainted acquittal’ exception to be a justifiable breach of section 26(2) of the BoRA.<sup>35</sup> However, he considered that the ‘new and compelling evidence’ exception was not justified. He was concerned about the disproportionately wide range of offences caught by the 14-year penalty threshold. He considered that a specific and limited schedule of offences must be regarded as a minimum requirement of any scheme that makes an exception to the double jeopardy rule for fresh and compelling evidence cases. He noted that the new and compelling evidence exception enacted under the United Kingdom’s Criminal Justice Act 2003 captured significantly fewer offences than was proposed under the bill.<sup>36</sup> National, NZ First, the New Zealand Law Society and the Law Commission also considered that the exception was a major inroad into the double jeopardy principle, which is

a cornerstone of criminal justice, and that there was no principled foundation for allowing retrial on the basis of new and compelling evidence.

Even though the Attorney-General had provided concrete examples of how to amend the legislation to make it compliant with the BoRA, while still achieving the policy objective, the select committee did not share his concerns.<sup>37</sup> The final amendments to the Crimes Act were largely unchanged from the original proposal.<sup>38</sup>

(b) A 2009 bill, popularly known as the ‘three strikes bill’, proposed the imposition of a life sentence for a third listed offence, with a non-parole period of 25 years. The Attorney-General concluded, in his section 7 report, that this provision “may raise an inconsistency with the right against disproportionately severe treatment affirmed by section 9 of the BoRA”, noting that “where section 9 is engaged, there is no scope for justification in terms of section 5”.<sup>39</sup>

The Attorney-General was one of many individuals and groups to raise concerns about the human rights implications of this bill.<sup>40</sup> Following the Attorney-General’s section 7 report, the Government and the select committee made additional changes to the bill. However, the revised bill required judges to impose the maximum sentence on a third-strike conviction, regardless of the

33 The rule against double jeopardy is a fundamental principle of law, which declares that a person should not be tried for the same crime more than once. The basic premise is that the State, with all its resources and powers, should not be allowed to make repeated attempts to convict a person for an alleged offence. Without the rule, the possibility of convicting an innocent defendant is higher. The principle stems from the Magna Carta and is codified under section 26(2) of the Bill of Rights Act and the special pleas of previous acquittal and previous conviction in the Crimes Act.

34 The ‘tainted acquittal’ exception was intended to apply to persons who escape probable conviction for a serious crime by committing an administration-of-justice offence leading to their acquittal.

35 Because a tainted acquittal is not legally a legitimate verdict but a nullity, a rule relating to a retrial of such an acquittal is not an exception to the double-jeopardy rule.

36 The Attorney-General was concerned the circumstances of many charges would be unlikely to warrant 14 years’ imprisonment if the accused were found guilty. Not all of the current offences that would qualify for the exception are of the type that justify departure from the double-jeopardy rule. The bill’s method of determining qualifying offences will result in the automatic capture of any future offences enacted with this maximum penalty. Moreover, lifting current maximum penalties above the threshold will offer an expedient way to extend the reach of the exception without having to give proper consideration to the consequences of undermining the double jeopardy rule.

37 It considered that “the new and compelling evidence proposal represents, in our view, a principled balancing of the two competing interests of finality and justice in the criminal system”.

38 Enacted under the Crimes Amendment Act 2008.

39 Attorney-General (2009), Interim report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform Bill, para 4.

40 Then New Zealand Law Society noted that the sentencing regime proposed in the bill had aroused “concern and disquiet” among legal practitioners experienced in the criminal justice system. Dr Richard Ekins and Professor Warren Brookbanks of Auckland University Law Faculty spoke on ‘three strikes’ at a public lecture co-hosted by Maxim Institute and the Institute of Policy Studies in Wellington on 31 March 2010 and Auckland on 7 April 2010.

gravity of that particular wrong, and did not address the BoRA issues. The bill was subsequently passed by Parliament.

Although cabinet guidelines<sup>41</sup> require that government departments are aware of the NZ Disability Strategy, and consider whether a disability perspective is required in papers submitted to Cabinet, this arguably is not a robust assessment and does not generally require input from disabled people.

### Bias in the criminal justice system

Every second person serving a prison sentence in New Zealand is Māori. About 50 per cent of the people in jail come from 14 per cent of the population. Among imprisoned women, about 60 per cent are Māori. Recent policy and legislative proposals – such as the ‘three strikes’ legislation, which will disproportionately affect Māori – risk exacerbating the over-representation of Māori in prisons. The criminal justice system continues to fail to ensure substantive equality before the law.<sup>42</sup>

The Human Rights Committee stated in its concluding remarks, in relation to New Zealand’s fifth periodic review under the ICCPR, that:

**The State party should strengthen its efforts to reduce the over-representation of Māori, in particular Māori women, in prisons and continue addressing the root causes of this phenomenon. The state party should also increase its efforts to prevent discrimination against Māori in the administration of justice. Law enforcement officials and the judiciary should receive adequate human rights training, in particular on the principle of equality and non-discrimination.**<sup>43</sup>

In 2009, the Government agreed that “addressing drivers of crime” be established as a whole of government priority, and that this approach to reduce offending and victimisation would include:

- addressing the underlying issues that drive and facilitate offending and victimisation, particularly for Māori

- responding effectively to the drivers of crime along the pathways of offending, including early prevention, treatment for specific needs related to offending, and justice sector responses that reduce reoffending
- resolving civil disputes, which the parties themselves are unable to solve, through established procedures without prohibitive cost and in a timely fashion.

It has been suggested that people with intellectual disabilities are also over-represented in the criminal justice system, and that there is a lack of support for such individuals throughout the criminal justice process.

### Equal access to court

Although New Zealand law generally provides for equal access to courts and other dispute resolution mechanisms, significant barriers remain for a large proportion of New Zealanders.

Access to justice is to some degree dependent on financial circumstances, with those who are unable to pay the substantial costs of litigation prevented from obtaining an effective remedy or, at best, obtaining a remedy available in lower levels of tribunal or mediation which is less than what would otherwise be available through court processes.

Disabled people often report challenges of being expected to represent themselves due to lack of reasonable accommodation, including barriers to access, communication and information. Access problems include physical and wheelchair access; lack of accessible facilities and parking at courts; inaccessible documents and information; and, despite the New Zealand Sign Language Act 2006, lack of access to sign language interpreters for deaf people attending courts.

In 2010, a new Special Circumstances Court was established in Auckland on a pilot basis. It is a specialised, solution-focussed court designed to “aid in the reduction of chronic public space offending in Auckland’s inner city by those who are homeless ... and have ongoing mental illness and/or addictions, or who are mentally impaired through either injury or disability”. It will be important

41 Cabinet Office: Guide to cabinet and cabinet committee processes. Retrieved 15 Oct 2010 from: <http://cabguide.cabinetoffice.govt.nz/procedures/papers/sections-in-papers#disability-perspective>

42 See the chapter on the rights of people who are detained

43 CCPR/C/NZL/CO/5

to monitor this pilot programme's impact on access to justice.

### Legal Aid

Certain groups continue to have difficulty in accessing legal aid, including disabled people, women, refugees, victims of collapsed financial institutions and victims of historic claims of abuse. In its 2007 comments on New Zealand's sixth periodic report under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the CEDAW Committee noted its concern about the barriers women faced in accessing legal aid.<sup>44</sup>

In 2009, Dame Margaret Bazley completed her review of the legal aid system.<sup>45</sup> Her report found "system-wide failings". As a result, the Government has initiated a number of changes to the system, which include:

- competency testing for legal aid providers (performance monitoring will be in place by July 2012)
- expanding the Public Defence Service to Hamilton, Wellington and Christchurch
- introducing changes to improve the duty lawyer scheme
- streamlining processes for assessing applications for low-cost criminal cases in the summary jurisdiction
- developing national standards for community law centres
- bringing the functions of the Legal Services Agency into the Ministry of Justice – an independent statutory officer will be responsible for granting legal aid.

Changes that do not require legislative amendment are being implemented over the next year; those that do require amendment will follow the legislative process. These changes are designed to "deliver access to justice for those who are most in need in a way that is appropriate to both their needs and those of the justice system".<sup>46</sup>

While most of the recommendations in the report are highly critical of the existing system, the extension of the Public Defence Service to Hamilton, Wellington and Christchurch reflects positively on the public defenders programme piloted in Auckland. The evaluation report for the Public Defence Service showed that, where the volumes of work are sufficient (such as in the major centres), the Public Defence Service could provide services more efficiently than private lawyers, with no perceivable decline in quality.<sup>47</sup> In the context of the Ministry of Justice's current review of community law centres, the report also made positive observations that "community law centres are too important to be allowed to fail or to have their services restricted significantly".<sup>48</sup>

### Security for costs

Concerns have been raised about the use of discretionary costs orders in civil courts. Such orders essentially require a party to pay into court an amount equal to what the judge decides the opposing party would likely spend in defending the case. The sum is forfeited where the instigating party loses. The financial burden imposed by these costs orders can effectively preclude a large proportion of New Zealanders from being able to seek redress through the civil courts.

### The legal profession

A committed legal profession is also critical to ensuring access to justice. Sir Owen Dixon said on the occasion of taking his oath as Chief Justice of Australia:

**[T]here is no more important contribution to the doing of justice than the elucidation of the facts and the ascertainment of what a case is really about, which is done before it comes to counsel's hands. Counsel, who brings his learning, ability, character and firmness of mind to the conduct of causes and maintains the very high tradition of honour and independence of English advocacy, in my opinion makes a greater contribution to justice than the judge himself.**<sup>49</sup>

44 CEDAW/C/NZL/CO/6 (2007)

45 Legal Aid Review (2009), *Transforming the Legal Aid System – Final Report and Recommendations* (Wellington: Ministry of Justice)

46 Legal Aid Review (2009), p 11

47 Legal Aid Review (2009), para 407

48 Legal Aid Review (2009), p 7

49 Owen Dixon, 'Upon Taking the Oath of Office as Chief Justice' in *Jesting Pilate*, 1965, p 247

Speaking to the Bar Association's AGM in September 2009, Attorney-General Christopher Finlayson said the quality of the bar needed to improve. He made a number of suggestions for reform, including improvements to pre-admission professional legal education and mandatory continuing legal education, at least for those in the early years of legal practice.

**Unfortunately, what I am picking up [from speaking with judges about any concerns they may have] is counsel incompetence. Some people contend that the overall standard of the bar, and particularly the criminal bar, is not high enough in New Zealand and that is why we have so many delays... Too many lawyers practising at the bar are incompetent or worse and there is no proper means of assessing their competence.** <sup>50</sup>

Following this speech, the New Zealand Law Society announced restrictions on barristers practising without supervision in their first three years following admission to the bar.<sup>51</sup> This will go some way toward ensuring that barristers sole are given adequate supervision as they begin to practise.

#### Excessive delays in court proceedings

Section 25(b) of the BoRA provides that everyone charged with an offence has "the right to be tried without undue delay". The current average wait for a jury trial in the High Court from committal to trial date is 305 days, and for the District Courts 283 days. In 2008, Parliament passed the Criminal Procedure Bill, which contains a number of procedural reforms aimed in part at addressing issues of efficiency in the justice system.

However, a raft of recent criminal justice proposals have tested the strength of New Zealand's constitutional

protections and may impact negatively on the right to justice. These include, for example, restricting availability of jury trials.<sup>52</sup>

There was also a move to introduce a form of trial by video, in which defendants held in custody could be denied their right to be physically present at their trials. The Human Rights Commission expressed its opposition to a select committee hearing, arguing that this infringed the BoRA right to be present at trial, but it was only during the parliamentary debates at the third reading that this particular proposal was effectively dropped. While these proposed changes are designed to further simplify procedures and deliver 'justice' to victims,<sup>53</sup> they also have significant implications in relation to the realisation of the right to justice.

#### Historic claims of abuse while under the care of the State

There are a significant number of claims before the courts relating to abuse and mistreatment suffered while under the care of the State. The courts have heard five cases to date, all of which have failed, primarily because of technical legal defences such as a time-bar.<sup>54</sup>

It has been suggested a number of times that the courts are not an appropriate forum for dealing with claims of historic abuse, and that the Government should consider other ways of resolving them. Dame Margaret Bazley stated in her report on the legal aid system:<sup>55</sup>

**The historic abuse claims in particular have the potential to place enormous pressure on the ISA's [Legal Services Agency's] granting process and on legal aid expenditure, both because of the large number of claims and the high cost involved. Urgent consideration**

50 Christopher Finlayson, Counsel's Duty to Cooperate – Achieving Efficiency and Fairness in Litigation, 2009

51 New Zealand Law Society (2010), Starting Practice as Barrister. Accessible online at [http://www.lawsociety.org.nz/home/for\\_lawyers/regulatory/starting\\_practice\\_as\\_a\\_barrister](http://www.lawsociety.org.nz/home/for_lawyers/regulatory/starting_practice_as_a_barrister). Under regulations expected to be promulgated by the middle of 2010, applicants must have had at least three years' relevant legal experience in New Zealand within the last eight years before they can start practice as a barrister.

52 Section 24 of the BoRA currently provides the right to trial before a jury where a person is charged with an offence which carries a penalty of three months or more.

53 See also Ministry of Justice (2009), 'A Focus on Victims of Crime: A Review of Victims' Rights' (consultation document), (Wellington: Ministry of Justice). Accessible online at <http://www.justice.govt.nz/publications/global-publications/a/a-focus-on-victims-of-crime-a-review-of-victims-rights>

54 The Commission is currently undertaking a review of New Zealand's response to historic claims of abuse while under the care of the State.

55 See also *J v CHFA CIV-2005-485-2678*, 16 November 2007

**should be given to alternative ways of resolving these claims.**<sup>56</sup>

The litigation process results in claimants being re-traumatised by telling their story a number of times and is ineffective in providing any resolution to these claims.

In its concluding observations in 2009 the United Nations Committee against Torture (UNCAT) stated:

**[New Zealand] should take appropriate measures to ensure that allegations of cruel, inhuman or degrading treatment in the ‘historic’ cases are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation.**<sup>57</sup>

**MINISTERS AND PUBLIC OFFICERS AT ALL LEVELS MUST EXERCISE THE POWERS CONFERRED ON THEM REASONABLY, IN GOOD FAITH, FOR THE PURPOSE FOR WHICH THE POWERS WERE CONFERRED AND WITHOUT EXCEEDING THE LIMITS OF SUCH POWERS**

The fact that New Zealand has consistently ranked as one of the least corrupt countries in the world on Transparency International’s Corruption Perceptions Index suggests that the system is operating satisfactorily.

**Courts**

Most court hearings are open to the public and the media, with some limitations in proceedings involving child, youth and family matters. In 2006, the Law Commission released a report on access to court records.<sup>58</sup> It found that access to court records is not as open as access to court hearings.

**Government**

In 2009, the Law Commission commenced a review of the OIA and the LGOIMA.<sup>59</sup> This review is intended to assess these two acts to ensure that they continue to operate efficiently and remain influential. Both acts have been successful in promoting a culture of openness in relation to central and local government activities, and their underlying principles are not in question. The strength of these acts is the underlying principle of general availability of information, subject to listed exceptions.

However, the Law Commission has identified a number of issues that are so prevalent as to thwart the underlying objective of transparency. In his media release on the review, Sir Geoffrey Palmer stated that “the political landscape is different than in the 1980s and advances in information technology have transformed the management of all information”.<sup>60</sup> Recently a lawyer commenting on the acts observed that when the legislation was first enacted, government departments gave away large amounts of information, whereas today, doing so is seen as naive.<sup>61</sup>

The Law Commission has analysed the responses from a survey and conducted further research. An issues paper was released for public consultation in 2010.<sup>62</sup>

Section 48 of the LGOIMA states that a local authority may, by resolution, exclude the public (including the media) from the proceedings of any meeting on certain grounds. For example, a local authority may exclude the public from the whole or any part of the proceedings where: there is good reason for withholding the information;<sup>63</sup> disclosure would be unlawful;<sup>64</sup> or the

56 Legal Aid Review (2009), p 103

57 CAT/C/NZL/CO/5, 14 MAY 2009, para 11

58 New Zealand Law Commission (2006), *Access to Court Records* (Wellington: NZLC), p 93. Accessible online at [http://www.lawcom.govt.nz/project/access-court-records?quicktabs\\_23=report#node-643](http://www.lawcom.govt.nz/project/access-court-records?quicktabs_23=report#node-643)

59 Parts I to VI of LGOIMA are, in most respects, identical to the OIA

60 [http://www.lawcom.govt.nz/sites/default/files/press-releases/2009/12/Publication\\_159\\_448\\_PR%20-%20Official%20Information%20Act%2009122009.pdf](http://www.lawcom.govt.nz/sites/default/files/press-releases/2009/12/Publication_159_448_PR%20-%20Official%20Information%20Act%2009122009.pdf)

61 Catriona McLennan, speaking on National Radio, 3 March 2010

62 New Zealand Law Commission (2010), *The Public’s Right to Know – A Review of the Official Information Act 1982 and parts 1–6 of the Local Government Official Information and Meetings Act 1987*

63 LGOIMA, section 48(1)(a)

64 LGOIMA, section 48(1)(b)

purpose of the proceedings is to consider a recommendation made by an Ombudsman.<sup>65</sup>

It is important that these exceptions are invoked only in exceptional circumstances, where exclusion is a necessity. A wider application risks undermining the purpose of LGOIMA and bringing the legitimacy of local authorities as democratic bodies into question.

## **ADJUDICATIVE PROCEDURES PROVIDED BY THE STATE SHOULD BE FAIR**

### **Judiciary**

An independent and impartial judiciary is a cornerstone of a legal system. This convention has recently come under scrutiny following the 'Saxmere interests' cases. Wilson J did not recuse himself when a case came before him in the Court of Appeal where he had a long-term business relationship with counsel for the (successful) Wool Board. The Saxmere interests were successful in having Wilson J's decision remitted for hearing, when the Supreme Court found (reversing their earlier judgment) that there was an apprehension of bias in the mind of a fair-minded lay observer.<sup>66</sup> Following this decision, and the instigation of a formal judicial-conduct inquiry, Wilson J resigned from his position as Supreme Court judge.

This case raises questions as to whether the conventions surrounding judges recusing themselves are too informal. However, it should be noted that prior to this case, there were no reported decisions on apparent bias relating to the relationship between judges and counsel, reflecting that the conventions are largely followed.<sup>67</sup> No judicial system is immune from allegations of apparent bias. For example, in *Re Pinochet*,<sup>68</sup> the House of Lords recalled one of its earlier decisions.

The Judicial Conduct Commissioner received 139 complaints in 2008–09. These were based on various grounds, including rudeness, unfairness, inappropriate remarks, failure to listen, bias and predetermination. The Commissioner dismissed 113 complaints during the year upon

one or more of the grounds set out in section 16(1) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. The most common ground for the dismissal of complaints occurred, in essence, where the complaint called into question the correctness of a decision made by a judge. Section 8(2) of the act provides that it is not a function of the Commissioner to challenge or call into question the legality or correctness of any judgment or other decision made by a judge in relation to any legal proceedings. The proper avenue for that is by way of appeal or application for judicial review. Other grounds for dismissal were varied, including complaints being frivolous, vexatious or not in good faith. Four complaints were referred to the Heads of Bench.

As an unelected body, the legitimacy of the judiciary rests largely on its credibility and the acceptance by the public of its rulings as fair. A 2004 UK government consultation paper, entitled 'Increasing Diversity in the Judiciary' noted:

**[I]f the make-up of the judiciary as a whole is not reflective of the diversity of the nation, people may question whether judges are able fully to appreciate the circumstances in which people of different backgrounds find themselves.**<sup>69</sup>

The importance of women judges in this regard was described by Justice Judith Potter (then President of the New Zealand Law Society) at the swearing in of Dame Silvia Cartwright as the first woman judge of the High Court in 1993:

**I am increasingly concerned about the widening credibility gap between the law and the citizens it serves – for one reason or another, or for a whole host of reasons, the law is not seen to be relevant to the lives of many people living in our society.**

**It would be idle to pretend that the presence of women in representative numbers on our**

65 LGOIMA, section 48(1)(c)

66 *Saxmere v the Wool Board Disestablishment Company Ltd* [2009] NZSC 122

67 This convention was followed in early 2008 when Sian Elias recused herself from a Supreme Court case involving jockey Lisa Cropp. The judge part-owns the galloper Resolution that Cropp rides and decided that if she sat on the case her judgment could appear biased.

68 [1999] All ER (d) 18

69 Department for Constitutional Affairs, 'Increasing Diversity in the Judiciary', 2004, p 14

**judiciary could alone bridge the credibility gap. But the necessity for women to be actively represented is a fundamental starting point. Without adequate representation, the integrity of this system and the wisdom and compassion our judges bring to it are seriously at risk.**<sup>70</sup>

Since its inception, the New Zealand judiciary has been drawn from a remarkably homogenous group. This homogeneity was well described by J E Hodder in 'Judicial Appointments in New Zealand' over 30 years ago and has stood the test of time. He observed:

**[T]he person appointed to be a judge in New Zealand in the years since the Second World War is a middle-aged Caucasian male; he is well-educated; and he is a successful and prominent member of the legal profession and, as such, is almost certainly wealthy, a member of the upper-middle class, and lives in an urban environment.**<sup>71</sup>

Although the diversity of the judiciary has increased somewhat over recent years, the make-up of the judiciary as a whole is still not fully reflective of society. The number of women in the judiciary, for example, is currently around 25 per cent. CEDAW has requested that the New Zealand Government outline a programme of concrete action, goals and time frames to increase the number of female judges.

There also continues to be few people of Māori, Pacific, Asian or other minority ethnic origins appointed as judges, and even fewer judges with a disability. A submission received from Amicus Lawyers during public consultation on this chapter suggests that:

- There are no judges of minority ethnic origin in the Supreme Court or Court of Appeal.

- There is only one Maori judge in the High Court and no other-origin judges in this jurisdiction.
- Less than 10 per cent of District Court judges are of minority ethnic origin.

#### **The right to be informed of what is said against oneself**

There is no easy balance to be struck between the need to protect classified security information (in case divulging this information damages its provision and/or source) and the need to protect the right to a fair trial.<sup>72</sup>

In 2005, the Government reviewed the Terrorism Suppression Act 2002 (TSA). In its submission to the select committee, the Human Rights Commission was one of many submitters concerned with provisions in the TSA allowing for classified security information to be presented to the court in the absence of the "designated entity", its lawyers, and the public. The Commission raised concerns about access as a basic prerequisite to a fair trial, if an accused is not provided with all (classified security) information held about them that is to be relied on in the proceedings.

The select committee agreed that processes involving special advocates and security-cleared counsel would add additional elements of protection, but considered that the inclusion of such procedures in the act should not be considered in isolation. It noted that the Immigration Bill, which was then before the Transport and Industrial Relations Committee, had a number of clauses relating to the use of classified information in decisions to be made under the proposed new Immigration Act, and included provision for the use of special advocates. The committee recommended that if the Immigration Act as finally enacted made special provision for the use of classified information in decisions under that act, consideration should be given to the application of those procedures to decisions made under the Terrorism Suppression Act.<sup>73</sup>

70 [1993] NZLJ 337

71 Hodder J E (1974)

72 Human Rights Commission, submission on the review of the Terrorism Suppression Act 2002, to the Foreign Affairs, Defence and Trade Select Committee, 19 June 2005. <http://www.hrc.co.nz/home/hrc/newsandissues/reviewoftheterrorismsuppressionact2002.php>.

73 Foreign Affairs, Defence and Trade Committee (2007), Report on the Terrorism Suppression Amendment Bill (105-2) (27 September 2007), pp 5–6. Accessible online at [http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/b/d/7/48DBSCH\\_SCR3888\\_1-Terrorism-Suppression-Amendment-Bill-105-2.htm](http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/b/d/7/48DBSCH_SCR3888_1-Terrorism-Suppression-Amendment-Bill-105-2.htm)

The Immigration Act has now been passed, adopting this “special advocate” procedure.<sup>74</sup> It is therefore timely for the TSA be reviewed to consider how it might adopt an analogous procedure. Discussion of this legislation will raise issues regarding the appropriate balance between giving effect to our international obligations, and maintaining respect for human rights and civil liberties in New Zealand.

#### **Vulnerable victims and witnesses**

Ensuring that all accused persons have a fair trial and obtaining the most accurate and complete testimony from witnesses are both critical to the quality of justice delivered by the courts. Testifying can be a considerable ordeal for adults, let alone children.

**Children:** Following the legislative and procedural changes of the 1980s and subsequently, there are now special measures available aimed at making it less stressful for children to testify, thereby enhancing the quality of their evidence. The members of New Zealand’s specialised forensic interviewing service, comprising police and statutory social workers, are jointly trained in best practice for communicating with children. Interviews are expected to cover both evidential issues and care and protection issues.

In the meantime, children continue to be subjected to suggestive questioning in the courtroom by defence lawyers, using complex language and employing dubious tactics, such as abrupt changes in topics and intense questioning on irrelevant details. These practices go against the best interests of the child, but worse still, they risk undermining the integrity of the evidence being given. The Minister of Justice has stated that the handling of child witnesses is currently under review.

**Disabled people:** Following the Law Commission’s work on children and other vulnerable witnesses, legislative amendments were made. For example, the Evidence Act 2006 provides for interpreters by way of “communication assistance” for anyone with a communication

disability. However, such procedures have yet to be fully implemented.

## **Conclusion Whakamutunga**

For the large part, New Zealand has clear laws which incorporate human rights standards (including the right to justice) supported by adequate systems, to ensure that human rights are taken into account.

Overall, New Zealand demonstrates an active commitment to the rule of law and the right to justice through continual review, evaluation and ongoing legal development. The convention is that judges are appointed without political bias. Where potential bias exists in the judiciary, it is identified, and there are systems for ensuring that judgments are not tarnished by bias.

However, New Zealand has, through the Universal Periodic Review process, come under international criticism for significant variations in the realisation of the right to justice among various groups of New Zealanders, including disabled people, Māori, Pacific peoples, and children and young people.

Since 2004 there has been a rise in popular anxiety about crime. The Government has responded by implementing legislation and policy to simplify the justice system, ensure greater access to justice and protect the rights of victims and their families. However, significant issues remain:

- The legal aid system has been found to need major reform. Until these reforms are successfully carried out, this has serious ramifications for those in need of legal aid, which is indispensable for achieving access to justice.
- While there are some conventions and laws for ensuring that human rights standards are incorporated

74 Section 263 of the Immigration Act 2009 defines the role of the special advocate as: (1) The role of a special advocate is to represent a person who is the subject of (a) a decision made involving classified information; or (b) proceedings involving classified information. (2) In particular, a special advocate may (a) lodge or commence proceedings on behalf of the person; (b) make oral submissions and cross-examine witnesses at any closed hearing; (c) make written submissions to the Tribunal or the court, as the case may be. (3) At all times a special advocate must (a) ensure that the confidentiality of the classified information remains protected; and (b) act in accordance with his or her duties as an officer of the High Court. The designated agency may recognise a lawyer as a special advocate if (a) the lawyer holds an appropriate security clearance given by the chief executive of the Ministry of Justice; and (b) the designated agency is satisfied that the lawyer has appropriate knowledge and experience to be recognised as a special advocate. (S264)



into law, proposed criminal law-reform initiatives are testing the strength of those conventions.

- Aspects of proposed criminal law-reform have the potential to violate fundamental human rights and New Zealand's international obligations.
- Legislation does not encapsulate all the rights recognised by the ICCPR.
- Economic, social and cultural rights are not contained in the BoRA and the Government continues to question their justiciability.
- Māori are disproportionately represented in the criminal justice system.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance the right to justice:

#### **Historic cases of abuse**

Developing a comprehensive mechanism outside the court system to address historic cases of abuse while under the care of the State.

#### **Evidence from vulnerable people**

Developing more appropriate methods for the taking and recording of evidence from vulnerable victims and witnesses in criminal proceedings.

#### **Use of urgency**

Reviewing the excessive use of urgency in the passage of legislation.

#### **Judiciary**

Increasing diversity in the judiciary.

