

8 February 2005

Justice and Law Reform Committee  
Parliament House  
WELLINGTON

### Prisoners' and Victim's Claims Bill

1. I write this submission on behalf of the New Zealand Council of Civil Liberties, and wish to be heard on the submission.
2. The Council does not wish to comment on the drafting in detail, as the Bill is so unprincipled, it believes, it should be withdrawn in its entirety.
3. The unprincipled proposals contained in the Bill are in response to some sections of the public response to *Taunoa and Ors v AG and Ors* (2 Sept 2004, HC – appeal to Court of Appeal pending). In that case five prisoners were awarded \$130,000 compensation for inhumane treatment by state (Prison) officers whilst kept in the Behavioural Management Regime (“BMR”) at Auckland Prison.
4. The writer was, and still is, counsel for those persons as well as counsel for some 40 plus others, with cases pending before the High Court, and potentially for a class action of another 160.
5. Whilst the *Taunoa* case is left untouched by the Bill, the current High Court litigation, not yet completed, is caught by the proposed legislation, which raises serious constitutional questions as to retrospective effects.
6. I have seen the section 7 legal advice provided to the Attorney-General which claims the Bill is not in breach of the New Zealand Bill of Rights Act, or the International Covenant on Civil and Political Rights. I must respectfully seriously disagree. It would be in major breach of both.
7. I have on two previous occasions stated the opposite view to Crown Law, on such advice, and have been proved correct on both occasions. Firstly, in the Privy Council in **Taito v The Queen** [2003] 3 NZLR 577 (the unlawful system of Criminal Appeals run by the Court of Appeal in significant breach of the Bill of Rights), and secondly

before the UN Human Rights Committee in **Rameka et al v New Zealand**<sup>1</sup> a case involving preventive detention.

8. With respect, one must ask whether it is a principled position for Parliament to rely on advice given by the Executive Branch as to whether there is compliance. Parliament is of course an equally important constitutional limb of three limbs in the separation of powers doctrine (See Constitution Act 1986), Parliament, The Executive and The Judiciary.
9. The advice the Attorney-General has received is from 2 Crown Counsel at Crown Law, Val Sim and Ben Keith. The latter was opposing counsel in **Taunoa** where the Attorney-General wrongly claimed there was no breach of the Bill of Rights.
10. No doubt these same counsel will both be instructed by the Crown in due course to oppose the inevitable challenge to this legislation, which will be brought in the Domestic Courts, and before either, or both, of the UN Human Rights Committee, and/or UN Committee Against Torture.
11. In the Council's view is inappropriate where matters of such important principle are at stake for the Select Committee to rely on advice from such sources.
12. I respectfully submit you should commission an appropriate Law Professor or other senior expert of your own. As perhaps you should on all occasions.
13. The provisions for obtaining such guidance, and advice, adopted by the House of Commons are a valid role model. Following that process, or something similar would considerably enhance the effective scrutiny of legislation introduced by the Executive, and the entire legislative-making process would accordingly immensely benefit.
14. Essentially, as I am sure many others will say, this proposed legislation is unprincipled, being discriminatory between classes of individuals.
15. The existences of the current complaint mechanisms are already insufficient to properly protect prisoners. I refer to the comment by the UN Committee Against Torture in respect of the New Zealand 3<sup>rd</sup> periodic report in May 2004<sup>2</sup> in respect of *Taunoa*, and which still has not been responded to by the Government.

### Subjects of Concern

6(f) The findings of the Ombudsman regarding investigations of alleged staff assaults on inmates, in particular regarding the reluctance to confront such allegations promptly, and the quality, impartiality, and credibility of investigations.

<sup>1</sup> Comm No 1090/2002, CCPR/C/79/D/1090/2002, Views of 15 December 2003 (Human Rights Committee).

<sup>2</sup> CAT/C/CR/32/4 19 May 2004

### Recommendations

(g) Carry out an inquiry into the events that led to the decision of the High Court in the Taunua and al. case;

(h) Inform the Committee [within 12 months] about the results of the action taken in response to the concern expressed by the Ombudsman regarding investigations of staff assaults on inmates.

16. It is ironic that that the legislation allocates resources, for a District Court Judge, to be a special tribunal, in respect of victims claims.

17. There are currently major proceedings before the High Court alleging that the District Court does not have sufficient resources to investigate claims of torture by Prisoners, and that the State of New Zealand (Yourselves as Parliamentarians the legislative branch included) are as such committing major human rights, and international law breaches. Those pleadings include:

Extract from letter of Chief District Court Judge

“The District Court is not resourced to conduct investigations into allegations of conduct by Prison Officers that would constitute criminal offending.

...

3. There is the potential, if this request [to promptly investigate a complaint] was acceded to, for many hundreds of similar requests in view of the fact that such a request, and my acceding to it, would become very well known in the prison service. I can see my office being swamped with similar requests in future which would be hard to decline”.

...

The totality of the above pleaded errors and or/omissions is so extensive that the Defendant’s behavior amounts to lip service to the Human Rights Laws, Principles and Standards applicable, such that it amounts to a lack of good faith contrary to Article 26 of the Vienna Convention on the Law of Treaties.

18. This Bill will not only enhance the success of those pleadings, but will as well negatively influence New Zealand’s reputation internationally, as it will be seen for what it is—an unprincipled knee-jerk reaction.

19. Let it suffice to say that currently a victim could sue a prisoner, within six years of the event s/he complained of. The victim would then have 12 years to enforce that judgment. That is the current law and is all that is required.

20. The Bill should be withdrawn in its entirety .

Yours faithfully

**TONY ELLIS  
PRESIDENT NEW ZEALAND COUNCIL FOR CIVIL LIBERTIES**