

12 July 2018

Human Rights Council  
United Nations  
Geneva, Switzerland

By email: [uprsubmissions@ohchr.org](mailto:uprsubmissions@ohchr.org)

## **New Zealand's 3<sup>rd</sup> Universal Periodic Review, 2018-19:**

### **Civil society shadow report to the UN Human Rights Council, from the New Zealand Law Society**

#### **A. Introduction**

1. The New Zealand Law Society is the statutory body, established in 1869, that regulates the New Zealand legal profession.<sup>1</sup> One of its functions is to "assist and promote, for the purpose of upholding the rule of law and facilitating the administration of justice in New Zealand, the reform of the law".<sup>2</sup> This submission has been prepared by the Law Society's Human Rights and Privacy Committee, which monitors adherence to domestic and international human rights standards in New Zealand.

#### **B. The protection of human rights in New Zealand**

2. New Zealand has a longstanding commitment to human rights, and a generally good record. It is a party to most of the core international human rights instruments. Civil and political rights are protected primarily under the New Zealand Bill of Rights Act 1990 (Bill of Rights) and the Human Rights Act 1993.
3. In the absence of a supreme bill of rights in New Zealand, it is critical that legislation is subject to systematic and comprehensive rights scrutiny that operates to forestall breaches of domestic and international human rights standards.
4. The Law Society considers that some recent legislation (outlined in sections C, D and E below) fails to meet New Zealand's human rights obligations, and should be revisited. United Nations committees have also expressed concerns about legislation relating to mass arrivals of asylum-seekers, prisoner strip-searching and prisoner compensation for rights breaches;<sup>3</sup> the Law Society is not aware of any recent attempts to address the concerns raised by these international bodies.
5. In some cases, legislation has been enacted despite negative reports by the Attorney-General under section 7 of the Bill of Rights, as discussed below.

#### **Enactment of legislation despite a negative section 7 report by the Attorney-General**

6. The section 7 reporting mechanism is critical: it requires the Attorney-General (the principal legal adviser to the Crown) to report to Parliament on any draft legislation that appears inconsistent with the Bill of Rights. It is the sole formal mechanism to ensure the consistency of New Zealand's

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<sup>1</sup> Currently 13,662 lawyers.

<sup>2</sup> Lawyers and Conveyancers Act 2006, s 65(e).

<sup>3</sup> Discussed below at [26], [29], [32].

legislation with domestic and international human rights standards. Protection of rights depends in significant part on its robustness and effectiveness.

7. Legislation the subject of a negative section 7 report should not be enacted unless MPs voting in favour of it disagree with the view of the Attorney-General that it is inconsistent with the Bill of Rights. Such disagreement can be expected to be rare and should not occur unless the draft legislation has been carefully considered by a select committee informed by public submissions. The basis for any disagreement should be carefully particularised.
8. It is a matter of concern when Parliament enacts legislation despite a negative section 7 report. In the Law Society's view, legislation enacted despite a negative section 7 report should be subject to a "sunset clause" to enable it to be periodically reconsidered.

**R1: That no bill the subject of a section 7 report of the Attorney-General should be enacted without consideration by a select committee with the opportunity for public submissions.**

**R2: That New Zealand consider amending the Bill of Rights so that any bill enacted despite a section 7 report of the Attorney-General ceases to have effect after three years (the length of the New Zealand parliamentary term) from the date of its enactment unless re-enacted or affirmed by Parliamentary resolution before that date, following in either case consideration by a select committee with the opportunity for public submissions.**

**C. Recent legislation enacted despite section 7 reports**

9. The following is a summary of recent examples of legislation enacted despite a negative section 7 report. (See **Appendix A** for detailed information.)

**DNA samples: unreasonable search and seizure (s 21, Bill of Rights)**

- **Criminal Investigations (Bodily Samples) Amendment Act 2009**

10. The Criminal Investigations (Bodily Samples) Amendment Act 2009 empowered the taking and retention of DNA samples without consent or judicial warrant (by reasonable force if necessary) from people charged with a broad range of offences.
11. The Law Society agrees with the Attorney-General that the Act breaches domestic and international human rights, namely the right against unreasonable search and seizure (section 21 Bill of Rights) and the protection against arbitrary or unlawful interference with privacy contained in Article 17 of the International Covenant on Civil and Political Rights (ICCPR).<sup>4</sup>

**Extended supervision of convicted offenders: arbitrary detention, retroactive penalties & double jeopardy (ss 22, 26, Bill of Rights)**

- **Parole (Extended Supervision Orders) Amendment Act 2009, and Parole (Extended Supervision Orders) Amendment Act 2014**

12. The Parole (Extended Supervision Orders) Amendment Act 2009, amending the Parole Act 2009, empowered the Parole Board to impose residential restrictions such as electronically monitored home detention on an offender for up to 10 years following conviction.
13. The Attorney-General reported that the 2009 bill (which would punish offenders twice for the same offence and authorise arbitrary detention) appeared to be inconsistent with the rights against retroactive penalties, double jeopardy and arbitrary detention affirmed in sections 26 and 22 of the Bill of Rights.

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<sup>4</sup> We note the Criminal Investigations (Bodily Samples) Act 1995 is due to be reviewed by the New Zealand Law Commission (an issues paper will be released this year).

14. The Parole (Extended Supervision Orders) Amendment Act 2014 further extended the regime by permitting renewal of an extended supervision order for consecutive 10-year periods, and was also passed despite a negative section 7 report by the Attorney-General.
15. The Law Society agrees with the concerns expressed by the Attorney-General, and believes the legislation limits fundamental rights to an extent not demonstrably justified in a free and democratic society (as required by section 5 of the Bill of Rights). It extends a regime of retroactive penalties to a wider class of offences for which offenders are effectively punished twice, and in some cases consecutively. The Law Society considers the rights against retroactive penalties and double jeopardy affirmed in the Bill of Rights are fundamental constitutional safeguards within New Zealand's system of criminal justice and should not be eroded.

#### **Disenfranchisement of sentenced prisoners: the right to vote (s 12, Bill of Rights)**

- **Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010**

16. The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 disenfranchised all persons imprisoned at the time of a general election. The Law Society endorses the Attorney-General's conclusion that this is contrary to section 12 of the Bill of Rights, which affirms the right to vote. A blanket disenfranchisement of prisoners has been held inconsistent with electoral rights by various overseas jurisdictions.<sup>5</sup>
17. Since the Act came into force, the matter has been considered extensively by New Zealand's High Court, Court of Appeal and most recently the Supreme Court, in the case of *Taylor v Attorney-General*. The High Court agreed with the reasoning and conclusions of the Attorney-General's section 7 report, describing the amendment as "constitutionally objectionable", and took the significant step of making a formal judicial declaration that the Act's prohibition on voting is inconsistent with the right to vote affirmed by section 12 of the Bill of Rights.<sup>6</sup>
18. The Government appealed the decision, raising the question whether the High Court had jurisdiction to make a declaration of inconsistency. In 2017 the Court of Appeal held that the higher courts do have a power to issue a declaration of inconsistency.<sup>7</sup> The matter has been appealed to the Supreme Court and a decision is expected to be released this year.

#### **Mandatory "three strikes" sentencing regime: disproportionately severe treatment (s 9, Bill of Rights)**

- **Sentencing and Parole Reform Act 2010**

19. Commonly known as the "three-strikes legislation", the Sentencing and Parole Reform Act 2010 provides for full sentences, including life sentences to be served without parole for repeat violent offenders convicted of a second or third specified serious violent offence. The Law Society agrees with the Attorney-General that the mandatory sentencing regime introduced by the Act breaches section 9 of the Bill of Rights, which affirms the right not to be subjected to disproportionately severe treatment, and might result in disparities between offenders that are not rationally based and gross disproportionality in sentencing.

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<sup>5</sup> The Supreme Court of Canada in *Sauvé v Canada (Attorney General)* [1993] 2 SCR 438; the European Court of Human Rights in *Hirst v the United Kingdom (No 2)* [2005] ECHR 681 (Grand Chamber, ECHR); the High Court of Australia in *Roach v Electoral Commissioner* [2007] HCA 43; and the South African Constitutional Court in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* 2004 (5) BCLR 445 (CC).

<sup>6</sup> *Taylor v Attorney-General* [2015] NZHC 1706.

<sup>7</sup> *The Attorney-General v Taylor* [2017] NZCA.

### **Precluding judicial review of potentially discriminatory government policy (ss 19, 27 Bill of Rights)**

- **New Zealand Public Health and Disability Amendment Act 2013**

20. The New Zealand Public Health and Disability Amendment Act 2013 was passed into law under urgency in a single sitting day, bypassing select committee scrutiny and precluding public participation or informed debate. The Law Society endorses the Attorney-General's conclusion that the Act breaches sections 19 and 27 of the Bill of Rights, concerning the right to be free from discrimination and the right to judicial review.

### **Child sex offender register: disproportionately severe treatment, double jeopardy (ss 9, 14, 20, 26(2), Bill of Rights)**

- **Child Protection (Child Sex Offender Government Agency Registration) Act 2016**

21. The Child Protection (Child Sex Offender Government Agency Registration) Act 2016 introduces a child sex offender register. The Law Society considers the register infringes rights under the Bill of Rights including the right not to be subjected to disproportionate treatment (section 9) and double jeopardy (section 26(2)).
22. In addition, in 2017 the Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill was passed under urgency, precluding select committee scrutiny and public input, amending the retrospective application of the principal Act so that all relevant child sex offenders would be registerable as originally intended. The Attorney-General noted that nothing in the principal Act or bill acknowledged or compensated for the prejudicial effects of the additional punishment faced by persons retrospectively affected.

### **Electronic monitoring of released prisoners: right to freedom of movement (s 18, Bill of Rights)**

- **Electronic Monitoring of Offenders legislation, 2016**

23. The Electronic Monitoring of Offenders legislation has been enacted via three separate acts.<sup>8</sup> The Law Society raised concerns that there was insufficient justification for removing the legislative prohibition against electronic monitoring conditions for offenders sentenced to intensive supervision and short terms of imprisonment. Intensive supervision and short sentences do not warrant the significant and ongoing restrictions on liberty that electronic monitoring imposes. The Law Society agrees with the Attorney-General that whilst the limitation on the offender's right to freedom of movement under section 18 is indirect, it is not insignificant.

### **D. Recent legislation enacted notwithstanding human rights concerns**

24. The following is a summary of recent examples of legislation enacted despite serious human rights concerns. (See **Appendix B** for more information.)

### **Immigration detention of "mass arrival" asylum seekers: arbitrary detention (s 22, Bill of Rights)**

- **Immigration Amendment Act 2013**

25. The Immigration Amendment Act 2013 allows for the detention of "mass arrivals" (more than 30 people) of asylum seekers into New Zealand for up to six months, and restricts judicial review proceedings. The detention period can be extended for up to 28 days by a District Court Judge. The Law Society considers the Act is inconsistent with section 22 of the Bill of Rights (the right not to be arbitrarily detained), the right to seek asylum contained in Article 14 of the Universal Declaration of Human Rights and the elaboration of that right in Article 31 of the Refugee Convention.

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<sup>8</sup> Corrections (Electronic Monitoring of Offenders) Amendment Act 2016, Parole (Electronic Monitoring of Offenders) Amendment Act 2016, and Sentencing (Electronic Monitoring of Offenders) Amendment Act 2016.

26. In 2014, the Subcommittee on Prevention of Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment expressed concern at the Immigration Amendment Bill, prior to it coming into force.<sup>9</sup> In 2016, the United Nations Committee Against Torture was similarly concerned about immigration legislation “seeking to reduce existing statutory standards of protection of asylum-seekers, in particular at the Immigration Amendment Act 2013, which inter alia allows the detention of ‘mass arrivals groups’ of asylum seekers for up to six months ...”.<sup>10</sup> The Committee made several recommendations in relation to the detention of asylum seekers.

### **Mandatory strip-searching of prisoners (ss 9, 21, 23, Bill of Rights)**

- **Corrections Amendment Act 2013**

27. The Corrections Amendment Act 2013 amends the Corrections Act 2004, authorising mandatory strip-searching of prisoners in a broader range of circumstances than previously allowed.
28. In its 2015 shadow report to the United Nations Committee Against Torture,<sup>11</sup> the Law Society raised concerns that prisoner strip-searching rules introduced by the 2013 Act authorised mandatory strip-searching of prisoners in a more invasive manner<sup>12</sup> and with fewer safeguards than had been provided for under previous legislation. The Law Society considers the Act breaches sections 9, 21 and 23 of the Bill of Rights,<sup>13</sup> and may well result in degrading treatment in breach of Article 16 of the Convention against Torture and Article 7 of the ICCPR. While the Law Society accepts that strip-searching of prisoners is necessary in certain circumstances, it is degrading and its use must be carefully circumscribed.
29. The United Nations Committee agreed with the Law Society's concerns and recommended the Corrections Amendment Act 2013 be amended accordingly.<sup>14</sup>
30. It is disappointing the opportunity has not been taken to address the United Nations Committee's criticisms of the mandatory strip-searching provisions, in the Corrections Amendment Bill 2018 which is currently before the New Zealand Parliament (discussed in section E below).

### **Prisoner compensation for rights breaches: freedom from discrimination (s 19, Bill of Rights)**

- **Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act 2013**

31. The Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act 2013 continues the application of the Prisoners' and Victims' Claims Act 2005 (which would otherwise have expired under a sunset clause), in restricting awards of compensation to prisoners for rights breaches. The Law Society considers the 2005 and 2013 Acts are unnecessary given the approach outlined by the

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<sup>9</sup> Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand CAT/OP/NZL/1 (2014) at [22]. Similar concern was also raised by the Committee on the Elimination of Racial Discrimination in its last report (Concluding observations of the Committee on the Elimination of Racial Discrimination: New Zealand CERD/C/NZL/CO/18-20 (2013) at [20]).

<sup>10</sup> United Nations Committee Against Torture, Concluding observations on the sixth periodic report of New Zealand (CAT/C/NZL/CO/6 2015, at [18]).

<sup>11</sup> Submission 13 February 2015: see [https://www.lawsociety.org.nz/\\_data/assets/pdf\\_file/0017/87101/I-UNCAT-NZ-6th-PR-13-2-15.pdf](https://www.lawsociety.org.nz/_data/assets/pdf_file/0017/87101/I-UNCAT-NZ-6th-PR-13-2-15.pdf).

<sup>12</sup> As detailed in **Appendix B**.

<sup>13</sup> The right not be subjected to degrading treatment (section 9), the right against unreasonable search and seizure (section 21) and the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the person (section 23).

<sup>14</sup> United Nations Committee Against Torture, Concluding observations on the sixth periodic report of New Zealand (CAT/C/NZL/CO/6 2015, at [13]: “The Committee is concerned at provisions of the Corrections Amendment Act 2013 which, inter alia, authorises mandatory strip-searching of prisoners in a broad range of circumstances.” “The State party should strengthen its efforts to bring the conditions of detention in all places of deprivation of liberty in line with relevant international norms and standards, ... in particular by: ... Amending the Corrections Amendment Act 2013 to the extent required to remove inconsistencies with the provision of the Convention.”

Supreme Court in 2007 in *Taunoa v Attorney-General*.<sup>15</sup> The Law Society considers the courts should be able to determine when it is necessary to compensate prisoners in order to provide an effective remedy for rights abuses.

32. In its 2015 Concluding Observations, the United Nations Committee against Torture noted that “the Prisoners’ and Victims’ Claims (Continuation and Reform) Amendment Act 2013 restricts the circumstances in which the courts are able to award compensation to prisoners [who are the] victim of acts that amount to torture and ill-treatment”. The Committee recommended that New Zealand “amend the provisions of [that Act] that might be inconsistent with the aim of the Convention” and “establish the legislative and structural framework necessary for ensuring that all victims of torture receive redress ...”.

#### **Public Protection Orders: arbitrary detention, double jeopardy (ss 22, 26, Bill of Rights)**

- **Public Safety (Public Protection Orders) Act 2014**

33. The Public Safety (Public Protections Orders) Act 2014 allows for indefinite civil detention in a residence on prison grounds for a specific group of serious sexual or violent offenders. The Attorney-General concluded the bill was consistent with sections 22 and 26(2) of the Bill of Rights (arbitrary detention and double jeopardy). The Law Society respectfully disagreed, and considers the Act provides for orders that are punitive in effect and consequent on earlier serious offending, thereby infringing the right against double punishment (section 26). In the Law Society’s view, the need for the Act was not established given the extensive range of sentencing and parole options already available for serious violent or sexual offenders, designed to protect public safety.

**R3: That the Ministers responsible for the Acts listed in sections C and D report to Parliament on the Government’s response to the apparent inconsistency of the Acts with the Bill of Rights and international human rights standards.**

#### **E. Current legislation raising human rights concerns**

34. Questions of compliance with New Zealand’s domestic and international human rights obligations also arise in relation to some legislation currently being considered by the New Zealand Parliament – as summarised below. (See **Appendix C** for more information.)

- **Electoral (Integrity) Amendment Bill: MPs’ freedoms of expression and association**

35. The Electoral (Integrity) Amendment Bill (known colloquially as the ‘waka jumping’ or ‘party-hopping’ bill) amends New Zealand’s constitutional provisions by changing the circumstances in which members of Parliament can be removed. The Law Society agrees with the Attorney-General that MPs’ freedoms of expression and association would be significantly infringed by the bill. It considers that further analysis and evidence is needed to ensure the infringements are demonstrably justified in a free and democratic society (as required by the Bill of Rights).
36. If the bill is enacted, it will introduce significant changes to New Zealand’s constitutional arrangements and the Law Society has recommended it should not come into force until the next parliamentary term.

- **Corrections Amendment Bill: cell-sharing; mechanical restraint of prisoners; strip-searching**

37. The Corrections Amendment Bill introduces amendments to the Corrections Act 2004, to improve the ability to safely and humanely manage prisoners and ensure the fair treatment of prisoners. The Law Society is concerned about amendments to cell-sharing provisions which will allow the use

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<sup>15</sup> *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

of 'double-bunking', and allowing the use of mechanical restraints on prisoners in hospital for more than 24 hours.

38. The current presumption of single-cell accommodation<sup>16</sup> is consistent with the United Nations Standard Minimum Rules for the Treatment of Prisoners.<sup>17</sup> The Law Society is concerned that removing the presumption is inconsistent with the Minimum Rules. While cell-sharing may be unavoidable in some cases, it should not be the statutorily prescribed norm.
39. The Law Society questions the Ministry of Justice's conclusion that the use of mechanical restraints for extended periods on prisoners in hospital is consistent with the rights and freedoms affirmed in the Bill of Rights. The use of restraints for lengthy periods is degrading treatment and inconsistent with the right of detained persons to be treated with humanity and dignity.
40. The Bill also proposes to authorise imaging technology searches: it appears that imaging scans are less intrusive and could be used as alternatives to strip searches in certain situations. If so that would be positive. However, as noted above (at [30]), it is disappointing that the opportunity has not been taken in this bill to amend the provisions of the Act governing strip searches that have been criticised by the United Nations Committee Against Torture.

- **Returning Offenders (Management and Information) Act 2015: retroactive penalties, double jeopardy**

41. The Returning Offenders (Management and Information) Act was passed under urgency in 2015, precluding public and select committee scrutiny. A Parliamentary select committee is currently reviewing the Act and is due to report to Parliament this year. The Law Society recently addressed the committee, urging public consultation and raising concerns about the appropriateness of the regime established by the Act. The legislation may apply retroactively to convictions in respect of offending which occurred before the Act was passed and an order under the Act may have an element of double jeopardy or additional punishment. The Law Society considers this would be a contravention of the rights set out in section 26 of the Bill of Rights.

**R4: That the Electoral (Integrity) Amendment Bill and Corrections Amendment Bill be freshly considered for consistency with the rights and freedoms affirmed in the Bill of Rights and international human rights standards, and not be enacted if considered inconsistent.**

**R5: That the review of the Returning Offenders (Management and Information) Act 2015 is open for public consultation and the Act is reconsidered for consistency with the rights and freedoms affirmed in the Bill of Rights.**



Kathryn Beck  
**President**

Appendices:

A – Legislation enacted in the face of a negative section 7 report

B – Legislation passed notwithstanding serious human rights concerns

C – Legislation currently under consideration that gives rise to human rights concerns

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<sup>16</sup> Regulation 66 of the Correction Regulations 2005.

<sup>17</sup> See

[https://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Treatment\\_of\\_Prisoners.pdf](https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf).

**APPENDIX A**

**Legislation enacted in the face of a negative section 7 report**

Act	Attorney-General's report	Law Society's position
<b>Criminal Investigations (Bodily Samples) Amendment Act 2009</b>		
<p>Empowers the taking and retention of DNA samples without consent or judicial warrant (by reasonable force if necessary) from people charged with a broad range of offences.</p>	<p>That the bill appeared to be inconsistent with the right against unreasonable search and seizure affirmed by section 21 of the Bill of Rights and the protection against arbitrary or unlawful interference with privacy contained in article 17 of the ICCPR. The bill lacked the strict substantive and procedural safeguards necessary to meet those standards (and accepted as necessary in comparable jurisdictions).</p>	<p>The Law Society endorsed the conclusions reached in the Attorney-General's section 7 report, and considered that no contrary view was reasonably possible. It considers that the Act breaches section 21 of the Bill of Rights and the corresponding article 17 of the ICCPR. It further considers that the Act as it applies to 14 to 16-year olds is difficult to reconcile with New Zealand's obligations under the United Nations Convention on the Rights of the Child.</p>
<b>Parole (Extended Supervision Orders) Amendment Act 2009 (and 2014 extension)</b>		
<p>Empowers the Parole Board to impose residential restrictions such as electronically monitored home detention on an offender for up to 10 years following conviction.</p> <p>The Parole (Extended Supervision Orders) Amendment Act 2014 further extended the regime by permitting renewal of an extended supervision order for consecutive 10-year periods.</p>	<p>That the bill appeared to be inconsistent with the rights against retroactive penalties, double jeopardy and arbitrary detention affirmed in sections 26 and 22 of the Bill of Rights. It would punish offenders twice for the same offence and authorise arbitrary detention.</p> <p>The Attorney-General's report on the 2014 amendment bill similarly found the regime would limit fundamental rights and freedoms to an extent not justified in a free and democratic society.</p>	<p>The Law Society acknowledges the concerns expressed by the Attorney-General in 2009 and 2014. It considers that the Act raises questions about compliance with sections 22 and 26 of the Bill of Rights and the corresponding articles 14 and 9 of the ICCPR.</p>



<b>Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010</b>		
<p>Removes the right of a person serving a term of imprisonment to register as an elector, meaning that all persons imprisoned in New Zealand at the time of a general election are unable to vote in that general election.</p>	<p>That the bill appeared to be inconsistent with the right to vote affirmed by section 12 of the Bill of Rights and the corresponding article 25 of the ICCPR.</p>	<p>The Law Society endorsed the analysis and conclusions reached in the Attorney-General's section 7 report. It considers that the bill's enactment was an unnecessary and retrograde step. It considers that the Act breaches section 12 of the Bill of Rights and the corresponding article 25 of the ICCPR. It notes (as did the Attorney-General) that blanket disenfranchisement of prisoners has been held inconsistent with electoral rights by the Supreme Court of Canada,<sup>1</sup> the European Court of Human Rights,<sup>2</sup> the High Court of Australia<sup>3</sup> and the South African Constitutional Court.<sup>4</sup></p>
<b>Sentencing and Parole Reform Act 2010</b>		
<p>Provides for full sentences, including life sentences, to be served without parole for repeat violent offenders convicted of a second or third specified serious offence (the "three-strikes" law).</p>	<p>That the provision for a life sentence to be imposed for a third listed offence appeared to be inconsistent with the right not to be subjected to disproportionately severe treatment affirmed by section 9 of the Bill of Rights, noting that the bill might result in disparities between offenders that are not rationally based and gross disproportionality in sentencing.</p>	<p>The Law Society endorsed the analysis and conclusions in the Attorney-General's section 7 report reproduced here. While it usually refrains from commenting on the policy behind a bill, it regarded the "three-strikes" sentencing regime as an exceptional case, noting that the bill had caused concern and disquiet among legal practitioners experienced in the criminal justice system. The Law Society considers that the Act breaches section 9 of the Bill of Rights and may well result in cruel or inhuman punishment in breach of article 7 of the ICCPR and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.</p>

**New Zealand Public Health and Disability Amendment Act 2013**

Limits the Crown's liability in respect of funding disability support or health services provided by family members, limits the effects of the New Zealand Court of Appeal's finding that the exclusion of family members from payment for the provision of funded disability support services was inconsistent with the right to be free from discrimination affirmed in section 19 of the Bill of Rights,<sup>5</sup> and precludes future complaints and civil proceedings alleging unlawful discrimination in respect of family care policies.

That the bill would authorise family care policies which could breach the right to be free from discrimination affirmed in section 19 of the Bill of Rights, and appeared to be inconsistent with the right to judicial review affirmed in section 27 of the Bill of Rights. The bill would prevent a person from challenging the lawfulness of a decision on the basis that it was inconsistent with the right to be free from discrimination.

The bill was passed into law under urgency in a single sitting day, bypassing select committee scrutiny and precluding public participation or informed debate. The Law Society has expressed its considerable concern to the Attorney-General at the legislative process, noting that no reasons had been given as to why urgency was necessary. It endorsed the conclusions in the Attorney-General's section 7 report. It considers that the Act breaches section 27 of the Bill of Rights. Not allowing the courts to review decisions made in exercise of a legislative function and refusing to provide reasons for rushing the legislation through is quite alien to the expectations we have of our parliamentary process.

**Child Protection (Child Sex Offender Register) Bill 2015**

**– enacted as the Child Protection (Child Sex Offender Government Agency Registration) Act 2016**

The 2016 Act establishes a child sex offender register.

The Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2017 amended the 2016 Act to address the retrospective application of the register. (The 2017 amendment bill was passed under urgency, so there was no opportunity for public submissions.)

The Attorney-General's report under section 7 of the Bill of Rights Act concluded that the 2015 bill was inconsistent with section 9 (disproportionately severe treatment or punishment) and section 26 (double jeopardy), and cannot be justified under section 5 of the Act.

The Attorney-General's report on the 2017 bill noted "nothing in the principal Act or the bill acknowledges or compensates for the particular prejudicial effect attendant to the additional punishment faced by persons retrospectively affected. It would still be possible to achieve the purpose of the bill to a similar level by providing for a lesser period of reporting obligations for those retrospectively affected. Likewise, the bill could provide for a specific mechanism to allow the courts some supervision over the appropriateness of retrospective application to these persons. As drafted, it only does so for those sentenced to a non-custodial sentence between 16 October 2016 and 13 March 2017."

The Law Society's 28.10.15 submission shared the Attorney's concerns about the 2015 bill, and raised further concerns about inconsistencies with the Bill of Rights Act including the right to receive and impart information (section 14) and the right to freedom of movement (section 20). It recommended the bill not proceed, but if it did that it should be amended to reduce the rights infringements.

**Electronic Monitoring of Offenders Legislation Bill 2015**

**– enacted as the Corrections (Electronic Monitoring of Offenders) Amendment Act 2016, the Parole (Electronic Monitoring of Offenders) Amendment Act 2016, and the Sentencing (Electronic Monitoring of Offenders) Amendment Act 2016.**

The Sentencing Act amendments remove prohibitions in the Sentencing Act 2002 on electronic monitoring of offenders released from a prison sentence of two years or less (short sentences); and offenders sentenced to intensive supervision.

The Parole Act amendments expand electronic monitoring conditions to offenders released on extended supervision orders.

The Corrections Act amendments enable the imposition of an electronic monitoring condition on offenders temporarily released or removed from prison, and prisoners permitted to reside or work outside the prison.

The Attorney-General reported to the House under section 7 of the Bill of Rights that the bill constitutes an unjustified limitation of the rights against double jeopardy, unreasonable search and seizure and of freedom of movement affirmed in the Bill of Rights. While the limitation on the freedom of movement is indirect the Attorney-General did not consider it to be insignificant.

The Law Society shared the concerns expressed in the Attorney-General’s report. The Law Society considers that insufficient justification has been given for removing the legislative prohibition against electronic monitoring conditions for offenders sentenced to intensive supervision and short terms of imprisonment. Intensive supervision and short sentences do not warrant the significant and ongoing restrictions on liberty that electronic monitoring would impose. A stronger case needs to be made to justify the intrusion on fundamental rights protected by the New Zealand Bill of Rights Act 1990.

**APPENDIX B**

**Legislation passed notwithstanding serious human rights concerns**

<b>Act</b>	<b>Legal advice to the Attorney-General</b>	<b>Law Society's position</b>
<b>Immigration Amendment Act 2013</b>		
<p>The Immigration Amendment Bill 2012, subsequently enacted in 2013, would allow for the detention of "mass arrivals" (more than 10 (subsequently increased to 30) people) of asylum seekers into New Zealand, and further restrict judicial review proceedings.</p>	<p>The Ministry of Justice's legal advice to the Attorney-General concluded that the bill was consistent with the right not to be arbitrarily detained and the right to judicial review affirmed in sections 22 and 27 of the Bill of Rights respectively.</p>	<p>The Law Society respectfully disagreed with the Ministry of Justice's legal advice. It noted that despite the bill being directed at asylum seekers, the legal advice was silent as to New Zealand's obligations under the Refugee Convention. The Law Society considers that the bill is inconsistent with section 22 of the Bill of Rights, the corresponding article 9 of the ICCPR, the right to seek asylum contained in article 14 of the UDHR and the elaboration of that right in article 31 of the Refugee Convention. It further considers that the further restriction on judicial review proceedings is inconsistent with section 27 of the Bill of Rights, wrong in principle and raises rule of law issues.</p>

**Corrections Amendment Act 2013**

Authorises strip-searching of prisoners in a broader range of circumstances, in a more invasive manner and with fewer safeguards.

The legislation:

- (a) provides that a prisoner may be required to bend his or her knees, with legs spread apart, until his or her buttocks are adjacent to his or her heels in all strip searches (rather than only where there are reasonable grounds for believing that a prisoner has in his or her possession an unauthorised item);
- (b) extends authority to use an illuminating or magnifying device to conduct a visual examination around the anal and genital areas to all strip searches (rather than only where there are reasonable grounds for believing that a prisoner has in his or her possession an unauthorised item); and
- (c) provides for mandatory strip-searching when prisoners are placed in, and each time the prisoner is returned to, segregation areas when subject to a segregation direction because of a risk of self-harm.

The Crown Law Office's legal advice to the Attorney-General concluded that the bill was consistent with the right against unreasonable search of the person affirmed in section 21 of the Bill of Rights.

The Law Society respectfully disagreed with the Crown Law Office's legal advice, noting that it did not address the right not to be subjected to degrading treatment and the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the person affirmed by sections 9 and 23 of the Bill of Rights respectively. It noted that the dehumanising of prisoners and a blanket authorisation of humiliating searches is not part of New Zealand's legal and human rights heritage. It considers that the Act breaches sections 9, 21 and 23 of the Bill of Rights and New Zealand's corresponding obligations under international human rights law.

<b>Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act 2013</b>		
<p>The 2013 Act continues the application of the Prisoners' and Victims' Claims Act 2005 (which would otherwise have expired under a sunset clause), restricting awards of compensation to prisoners for rights breaches.</p>	<p>The Crown Law Office's legal advice to the Attorney-General concluded that the bill was consistent with the right to an effective remedy and the right to freedom from discrimination affirmed in section 19 of the Bill of Rights.</p>	<p>The Law Society believes the 2005 and 2013 Acts are unnecessary given the approach outlined by the Supreme Court, which would apply if the Acts were not in place.<sup>6</sup></p>
<b>Public Safety (Public Protection Orders) Act 2014</b>		
<p>The Act allows for very high-risk offenders who have served their full prison sentence to be kept in detention indefinitely. Public Protection Orders allow indefinite civil detention in a residence on prison grounds for a specific group of serious sexual or violent offenders.</p>	<p>The Attorney-General concluded that the bill was consistent with sections 22 and 26 of the Bill of Rights (arbitrary detention and double jeopardy).</p>	<p>The Law Society respectfully disagreed with the Attorney-General's report and submitted that the bill as introduced to Parliament (and as passed in 2014) provided for orders that were punitive in effect and consequent on earlier serious offending, engaging section 26 of the Bill of Rights.</p> <p>In 2007, under similar legislation in Australia, the Human Rights Committee concluded in <i>Fardon v Australia</i> that preventive orders amounted to arbitrary detention and therefore a violation of Article 9 of the ICCPR.<sup>7</sup> There may be scope for a similar finding that public protection orders in New Zealand, if challenged, would amount to arbitrary detention in breach of section 22 of the Bill of Rights and Article 9 of the ICCPR.</p>

**APPENDIX C**

**Legislation currently under consideration that gives rise to human rights concerns**

<b>Bill</b>	<b>Legal advice to the Attorney-General / Attorney-General's report</b>	<b>Law Society's position</b>
<b>Electoral (Integrity) Amendment Bill</b>		
<p>The bill amends the Electoral Act 1993 to allow the seat of a member of parliament to be declared vacant if the member ceases to be a member of the political party for which they were elected.</p>	<p>The Attorney-General's advice on the bill's consistency with the Bill of Rights records that:</p> <p>a. By empowering the leader of a political party to cause a member of Parliament (MP) to vacate their seat the bill has the potential to cause a chilling effect on an MP's freedom to express themselves inside and outside the House and also limits their ability to exercise their freedom not to be associated with a political party.</p> <p>b. This raises a prime facie inconsistency with the rights to freedom of expression (section 14) and freedom of association (section 17).</p> <p>The impairment of the rights is significant, with freedom of expression in the House having a special constitutional value.</p>	<p>The bill amends New Zealand's constitutional provisions by changing the circumstances in which members of Parliament can, in effect, be removed and, in the process, limits their rights to freedom of association and speech.</p> <p>The Law Society agrees with the Attorney-General that the impairment of rights of freedom of expression and association are significant. It considers that further analysis and evidence is needed to ensure the infringements are demonstrably justified in a free and democratic society (as required by the Bill of Rights).</p> <p>Given the constitutional significance of the changes, the Law Society recommends the legislation should only come into force with the commencement of the next Parliament.<sup>8</sup></p>
<b>Corrections Amendment Bill</b>		
<p>The bill introduces amendments to the Corrections Act 2004 including, inter alia, double bunking, the use of mechanical restraints, and the use of imaging search technology.</p>	<p>The Ministry of Justice's legal advice to the Attorney-General concluded that the bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act namely, freedom of expression (section 14), right against unreasonable search and seizure (section 21) and rights of person deprived of liberty to be treated with humanity and dignity (section 23(5)).</p>	<p>The Law Society is concerned that the removal of the preference for single-cell accommodation is a breach of the United Nations Standard Minimum Rules for the Treatment of Prisoners.</p> <p>The Law Society also questions the Ministry of Justice's conclusion that the use of mechanical restraints for extended periods on prisoners in hospital is consistent with the rights and freedoms affirmed in the Bill of Rights.<sup>9</sup></p>



Bill	Legal advice to the Attorney-General / Attorney-General's report	Law Society's position
<b>Returning Offenders (Management and Information) Act 2015</b> – currently under statutory review by a Parliamentary select committee		
<p>The purpose of the Act is to obtain information from returning offenders and establish standard / special release conditions for offenders returning to New Zealand following a prison sentence of more than 1 year in an overseas jurisdiction.</p>	<p>The Attorney-General considered that special conditions (to be imposed only if necessary to address special circumstances, where there are increased risks posed by an individual prisoner) would be a more significant limitation on the freedom of movement, residence and association than standard conditions – but concluded that the limited circumstances in which these conditions would be imposed and the fact they could be imposed only by a court would provide sufficient protection.</p>	<p>In the Law Society's view, the Act contravenes the prohibition against retroactive penalties and double jeopardy set out in section 26 of the Bill of Rights. The imposition of additional punishment also creates an inconsistency in treatment between New Zealand offenders and overseas offenders. The Law Society considers the Act is operating in a way that is far more restrictive than intended: special conditions appear to be being routinely imposed, rather than on account of an individualised risk assessment of the offender. This is inconsistent with the Attorney-General's stated expectations when the Act was passed.<sup>10</sup></p>

<sup>1</sup> *Sauvé v Canada (Attorney General)* [1993] 2 SCR 438.

<sup>2</sup> *Hirst v the United Kingdom (No 2)* [2005] ECHR 681 (Grand Chamber, ECHR).

<sup>3</sup> *Roach v Electoral Commissioner* [2007] HCA 43.

<sup>4</sup> *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* 2004 (5) BCLR 445 (CC)

<sup>5</sup> *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

<sup>6</sup> *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

<sup>7</sup> *Fardon v Australia* (CCPR/C/98/D/1629/2007).

<sup>8</sup> See NZLS submission 15.3.18, available at

[http://www.lawsociety.org.nz/\\_data/assets/pdf\\_file/0005/119912/Electoral-Integrity-Amendment-Bill-15-3-18.pdf](http://www.lawsociety.org.nz/_data/assets/pdf_file/0005/119912/Electoral-Integrity-Amendment-Bill-15-3-18.pdf).

<sup>9</sup> See submission 17.5.18, available at

[http://www.lawsociety.org.nz/\\_data/assets/pdf\\_file/0012/122232/Corrections-Amendment-Bill-17-5-18.pdf](http://www.lawsociety.org.nz/_data/assets/pdf_file/0012/122232/Corrections-Amendment-Bill-17-5-18.pdf).

<sup>10</sup> See submission 30.1.18, available at

[http://www.lawsociety.org.nz/\\_data/assets/pdf\\_file/0020/118451/l-SC-Returning-Offenders-Act-review-30-1-18.pdf](http://www.lawsociety.org.nz/_data/assets/pdf_file/0020/118451/l-SC-Returning-Offenders-Act-review-30-1-18.pdf).