



NEW ZEALAND  
LAW SOCIETY

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NEW ZEALAND LAW SOCIETY  
HUMAN RIGHTS & PRIVACY COMMITTEE

SUBMISSION TO THE 18<sup>TH</sup> SESSION OF  
THE HUMAN RIGHTS COUNCIL

SHADOW REPORT TO NEW ZEALAND'S  
2<sup>ND</sup> UNIVERSAL PERIODIC REVIEW

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## Submission to the United Nations: New Zealand's 2<sup>nd</sup> Universal Periodic Review

### EXECUTIVE SUMMARY

1. New Zealand has a longstanding commitment to human rights, and a generally good record. Its constitutional arrangements are such that protection of human rights depends upon the observance of due process and political restraint by the legislative and executive branches of the government, allied with a strong and independent judiciary. In the absence of a supreme bill of rights, it is critical that:

- (a) policy and legislation are subject to systematic and comprehensive rights scrutiny that operates effectively to forestall breaches of domestic and international human rights standards; and
- (b) human rights standards are fully justiciable in the New Zealand courts, within the constraints of New Zealand's Parliamentary sovereignty paradigm.

2. In the New Zealand Law Society's view, the valuable mechanisms that promote and protect human rights in New Zealand would benefit from further strengthening. Legislative measures that have resulted from their occasional failure should be revisited. The Law Society refers in this submission to a number of legislative measures which, in its respectful view, fail to meet New Zealand's domestic and international human rights obligations.

### BACKGROUND

3. The Law Society is the statutory body, established in 1869, that regulates New Zealand's 12,000 lawyers. 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>1</sup> This submission has been prepared by the Law Society's Human Rights and Privacy Committee, which monitors adherence to international human rights standards in New Zealand.

### RULE OF LAW ISSUES OF PARTICULAR IMPORTANCE TO THE LEGAL PROFESSION

4. The Law Society and its members have a special statutory responsibility for upholding the rule of law in New Zealand.<sup>2</sup> The rule of law lies at the very foundation of a free and democratic society and is essential for the protection of human rights.<sup>3</sup> The Law Society is concerned that a number of recent legislative measures are fundamentally in conflict with the rule of law.

#### Access to justice

5. The right of access to the courts for the vindication of legal rights is an integral element of the rule of law. It is affirmed in section 27 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) and plays an important role in realising the right to an effective remedy contained in article 8 of the Universal Declaration of Human Rights (UDHR). The Law Society has expressed concern at a number of recent and proposed legislative measures that oust the review jurisdiction of the courts (listed in **Appendix A**). In the Law Society's view, the expectation that the courts' review jurisdiction should only be ousted in truly exceptional circumstances is not being met.

**R1: That New Zealand affirm its commitment to the principle that the courts' review jurisdiction should only be ousted in truly exceptional circumstances.**

6. Effective access to justice can also require access to legal representation. The Law Society is concerned that the Family Court Proceedings Reform Bill 2012 would see New Zealand stand almost alone in removing the right of a party to choose to be legally represented in proceedings before the Family Court.

**R2: That New Zealand amend the Family Court Proceedings Reform Bill 2012 to preserve the ability of parties to choose to be legally represented in all proceedings before the Family Court.**

#### Henry VIII clauses

7. Henry VIII clauses enable enactments to be overridden by regulation: that is, empower the executive to override Parliament. Henry VIII clauses derogate from the fundamental principle of the rule of law that

legislation should be enacted by Parliament. They are constitutionally permissible only in exceptional circumstances.

8. The Law Society has expressed concern at a number of recent legislative measures which have enacted Henry VIII clauses without proper justification and absent the necessary constraints (listed in **Appendix A**).

**R3: That New Zealand affirm its commitment to the principle that the power to amend primary legislation by delegated legislation should be granted only in truly exceptional circumstances and subject to strict controls.**

## **PROTECTION OF HUMAN RIGHTS IN NEW ZEALAND MORE GENERALLY**

9. New Zealand meets international human rights standards in many respects. It is a party to most of the core international human rights instruments. Civil and political rights are protected primarily under the Bill of Rights and the Human Rights Act 1993. Economic, social and cultural rights (as discussed below) largely depend for their protection and promotion upon other legislation and government policies.

### **Bill of Rights reporting**

10. New Zealand has responded to earlier criticism<sup>4</sup> that the Bill of Rights does not directly limit Parliament's legislative powers, by reference to the protection afforded by the Bill of Rights reporting mechanism. Section 7 of the Bill of Rights requires the Attorney-General to report to Parliament on any draft legislation that appears inconsistent with the Bill of Rights. The Ministry of Justice and the Crown Law Office examine all draft legislation and advise the Attorney-General accordingly. This vetting by the executive is New Zealand's sole formal rights scrutiny mechanism. Protection of civil and political rights depends in significant part upon its robustness and effectiveness.

11. Many aspects of the Bill of Rights reporting mechanism function well. Successive Attorneys-General (including the current Attorney-General) have reported in a fair, politically impartial and robust manner on a number of bills.<sup>5</sup> The Law Society commends the Attorney-General's practice of waiving privilege over and publishing section 7 advice on draft legislation. The Law Society does, however, have a number of concerns which it addresses below.

#### *Failure to report on substantive Supplementary Order Papers (SOPs)*

12. SOPs propose amendments to bills after their introduction into Parliament. SOPs are not routinely subject to Bill of Rights reporting. In the Law Society's view, this is problematic. Where proposed amendments engage domestic and international human rights obligations, the usual reporting mechanism ought to apply.

13. The Standing Orders Committee of the House of Representatives has recommended that Bill of Rights reporting be required on substantive SOPs.<sup>6</sup> The Law Society has also formally suggested to the Attorney-General that Bill of Rights advice and reporting on substantive SOPs ought to be standard procedure. In its view, this would be in the spirit of section 7 of the Bill of Rights and would provide the necessary assurance that the rights implications of SOPs had been considered as closely as if the proposed amendments had been in the Bill as originally introduced.

**R4: That New Zealand amend its Bill of Rights reporting mechanism to require section 7 advice and reporting on substantive SOPs.**

#### *Inadequate consideration/notification of section 7 advice/reports of the Attorney-General*

14. It is important that where Bill of Rights implications are raised they are subject to systematic and comprehensive parliamentary scrutiny. The Law Society endorses the recommendations of the Standing Orders Committee that:<sup>7</sup>

(a) select committees should consider Bill of Rights issues as an aspect of normal good committee practice (for example each select committee should follow up section 7 reports by hearing evidence or receiving a briefing from the Attorney-General);

(b) select committees should suggest in their advertisements that submitters may wish to comment in their submissions on section 7 advice or reports; and

(c) the Cabinet guidelines should be amended to require that analysis of Bill of Rights and other constitutional matters be included and given prominence in regulatory impact statements supporting the introduction of draft legislation, to assist submitters and select committees in their consideration of these issues.

**R5: That New Zealand amend its Bill of Rights reporting mechanism to require Bill of Rights analysis, section 7 advice and/or reports of the Attorney-General to be directly considered by select committees, directly addressed in select committee reports and properly advertised to aid submitters.**

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

15. The reporting mechanism is intended to ensure that all legislation complies with the Bill of Rights. The Law Society has expressed considerable concern on a number of occasions on which Parliament has enacted legislation despite a negative section 7 report (listed in **Appendix B**). In the Law Society's view, as in the Attorney-General's in each case, that legislation fails to meet the Bill of Rights standard, in breach of New Zealand's human rights obligations.

16. 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 (the principal legal adviser to the Crown) 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 in the select committee report. Legislation enacted despite a negative section 7 report should be subject to a "sunset clause" to enable it to be periodically reconsidered.

**R6: That no bill the subject of a section 7 report of the Attorney-General be enacted without consideration by a select committee with the opportunity for public submissions.**

**R7: 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.**

**R8: That the Minister for the time being responsible for the following enactments present to the House of Representatives a report containing advice on the Government's response to the apparent inconsistency of those enactments with the rights and freedoms contained in the Bill of Rights:**

- **Criminal Investigations (Bodily Samples) Amendment Act 2009;**
- **Parole (Extended Supervision Orders) Amendment Act 2009;**
- **Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010;**
- **Sentencing and Parole Reform Act 2010;**
- **New Zealand Public Health and Disability Amendment Act 2013;**
- **Social Security (Benefit Categories and Work Focus) Amendment Act 2013;**<sup>8</sup>
- **Corrections Amendment Act 2013;**<sup>9</sup> and
- **Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act 2013.**<sup>10</sup>

#### **Misuse of Parliamentary urgency**

17. Use of urgency allows Parliament to expedite the legislative process. New Zealand makes far greater use of urgency than other Westminster system democracies.<sup>11</sup> Misuse of urgency, particularly where it is used to bypass the select committee process, offends against principles of democratic legitimacy. Select committee scrutiny and the opportunity for public submissions are essential in discharging Parliament's constitutional deliberative and scrutiny functions and ensuring legislation is of high quality and consistent with human rights standards. Use of urgency to limit or bypass select committee scrutiny should be rare and justified by a genuine need for haste in relation to the particular measure. It should not be resorted to where the bill in question raises constitutional or human rights matters.

**R9: That New Zealand amends the Standing Orders of the House of Representatives such that a motion for urgency that would bypass the select committee process may be claimed only if the Speaker of the House agrees that recourse to urgency is justified,<sup>12</sup> provided that in no case may urgency be accorded the passage of a bill the subject of a section 7 report of the Attorney-General so as to bypass the select committee process.**

18. The New Zealand Public Health and Disability Amendment Act 2013 is a case in point. That Act prevents any discrimination challenge to government policies concerning payment for providing health and disability support services to specified family members. The Act, in effect, prevents the government from being subject to any judicial scrutiny of the sort that led to the New Zealand Court of Appeal holding that a blanket policy against such payments was contrary to the Bill of Rights. The Attorney-General reported to Parliament under section 7 of the Bill of Rights that the New Zealand Public Health and Disability Amendment Bill (No. 2) was inconsistent with the right to judicial review and potentially inconsistent with the right to freedom from discrimination. Despite such concerns, the Bill was passed into law under urgency in a single sitting day, bypassing select committee scrutiny and denying public participation or informed debate. No reasons were given as to why urgency was necessary. Both the Act and the manner in which it was passed have attracted widespread media and academic criticism. The Law Society has written to the Attorney-General expressing serious concern at the ouster of the courts' review jurisdiction and the unexplained urgency with which the legislation was passed, describing both as quite alien to our expectations of the parliamentary process.

### **Economic, social and cultural rights (ESCRs)**

19. ESCRs are not generally recognised in the Bill of Rights.<sup>13</sup> Nor is there any specific domestic reporting mechanism designed to promote consistency of legislation and policy with ESCRs.

20. In New Zealand's 2009 Universal Periodic Review, South Africa recommended that New Zealand consider integrating the International Covenant on Economic, Social and Cultural Rights (ICESCR) provisions into domestic legislation to ensure the justiciability of ESCRs.<sup>14</sup> New Zealand responded that it implemented ESCRs through subject-specific legislation and policies (for example, in its laws and policies on health, education and social assistance), while stating that it only partly accepted that such rights should be justiciable.<sup>15</sup>

21. In the Law Society's view, further consideration should be given to ESCRs' status in New Zealand law and the possibility of some more formal mechanism of their being considered as legislation and policy is developed.

**R10: That New Zealand give further consideration to the status of economic, social and cultural rights in New Zealand law. This could occur in, but not be limited to, the current review of New Zealand's constitutional arrangements.**

### **The limited influence of concluding observations and international human rights norms**

22. The concluding observations of the United Nations human rights treaty bodies on New Zealand State party reports, and the treaties themselves, have only a very limited influence on policy and law-making in New Zealand.<sup>16</sup> There is no formal process in New Zealand government for publicising, considering and responding to concluding observations.<sup>17</sup> Recent empirical research indicates that knowledge in the New Zealand public sector and by parliamentarians of New Zealand's international human rights obligations is very limited.<sup>18</sup>

23. Scant attention (if any) is paid in Parliament to concluding observations or New Zealand's international human rights obligations,<sup>19</sup> and the New Zealand courts have referred to concluding observations only once in their judgments.<sup>20</sup> Further, while the courts have cited the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child on various occasions, other human rights treaties have only been referred to sporadically.<sup>21</sup> The media pay little attention to concluding observations or international human rights obligations,<sup>22</sup> and there is a low level of awareness about them amongst the New Zealand public.<sup>23</sup>

24. The Law Society is concerned about the limited visibility and impact of concluding observations and international human rights obligations in New Zealand, and the effect of this on adherence to these obligations.

**R11: That New Zealand establish a formal process for publicising, considering and responding to concluding observations, and take concrete, targeted steps to develop knowledge of international human rights within the state. In this regard, consideration should be given to the establishment of a Parliamentary Human Rights Committee.**

#### **SPECIFIC CONCERNS**

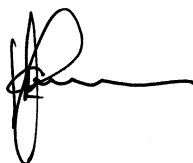
25. The Law Society expressed its concern above at examples of legislation enacted despite negative section 7 reports of the Attorney-General.<sup>24</sup> In its view, there are a number of other bills that raise serious questions of compliance with New Zealand's domestic and international human rights obligations. The bills in question and the Law Society's concerns in respect of each are listed in **Appendix C**.

**R12: That the following bills be freshly considered for consistency with the rights and freedoms affirmed in the Bill of Rights and international human rights standards and not be passed if considered inconsistent:**

- Immigration Amendment Bill 2012;
- Land Transport (Admissibility of Evidential Breath Tests) Amendment Bill 2012;
- Government Communications Security Bureau and Related Legislation Amendment Bill 2013; and
- Telecommunications (Interception Capability and Security) Bill 2013.

#### **CONCLUDING RECOMMENDATION**

**R13: That the Universal Periodic Review be tabled in the House of Representatives.**



**Chris Moore  
President  
17 June 2013**

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- <sup>1</sup> Lawyers and Conveyancers Act 2006, s 65(e).
- <sup>2</sup> Lawyers and Conveyancers Act 2006, ss 4(a) and 65(b) and (e).
- <sup>3</sup> See the preamble to the Universal Declaration of Human Rights.
- <sup>4</sup> See for example Human Rights Committee, *Concluding observations of the Human Rights Committee: New Zealand, 75<sup>th</sup> Sess.*, CCPR/CO/75/NZL (2002) at [8]; Human Rights Council, *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review – New Zealand, 12<sup>th</sup> Sess.*, A/HRC/12/8 (2009) at 17 (recommendation 16).
- <sup>5</sup> The Law Society has on occasion expressed concern about the rigour of section 7 advice and reporting. The Ministry of Justice's legal advice on the Immigration Amendment Bill 2012 is a case in point – despite the Bill being directed at asylum seekers, the legal advice failed to consider New Zealand's obligations under the Refugee Convention.
- <sup>6</sup> *Review of Standing Orders* (Report of the Standing Orders Committee, September 2011) at 37.
- <sup>7</sup> *Review of Standing Orders*, above n 6 at 37.
- <sup>8</sup> While this Act was not the subject of an Attorney-General's report under section 7 of the Bill of Rights, in the Law Society's view it does raise serious human rights concerns detailed in **Appendix B**.
- <sup>9</sup> As for n 8 above.
- <sup>10</sup> As for n 8 above.
- <sup>11</sup> See House of Lords Select Committee on the Constitution "Fast-track Legislation: Constitutional Implications and Safeguards" HL Paper 116-I (7 July 2009) at 77–82.
- <sup>12</sup> This part of the recommendation adopts that in the Urgency Project *Standing Orders Review 49<sup>th</sup> Parliament: Submission to Standing Orders Committee* (available at [www.parliament.govt.nz](http://www.parliament.govt.nz)).
- <sup>13</sup> There are however certain crossovers. Compare article 2(2) of the ICESCR with s 19 of the Bill of Rights and Parts 1A and 2 of the Human Rights Act 1993 (freedom from discrimination); article 8 of the ICESCR with s 17 of the Bill of Rights (freedom of association); and article 15(1)(a) of the ICESCR with s 20 of the Bill of Rights (cultural / minority rights).
- <sup>14</sup> Human Rights Council, *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review – New Zealand, 12<sup>th</sup> Sess.*, A/HRC/12/8 (2009) at 17 (recommendation 17). See also recommendations 4, 15, and 16.
- <sup>15</sup> Human Rights Council, *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review – New Zealand. Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 12<sup>th</sup> Sess.*, A/HRC/12/8/Add. 1 (2009) at [15].
- <sup>16</sup> Jasper Krommendijk *Can Mr Zaoui Freely Cross the Foreshore and Seabed? The Effectiveness of UN Human Rights Monitoring Mechanisms in New Zealand* (2012) 43 VUWLR 579 at 585, 600-604 and 615.
- <sup>17</sup> Krommendijk, above n 16 at 583.
- <sup>18</sup> Krommendijk, above n 16 at 585 and 591-592.
- <sup>19</sup> Krommendijk, above n 16 at 591.
- <sup>20</sup> Krommendijk, above n 16 at 592-593.
- <sup>21</sup> Krommendijk, above n 16 at 593.
- <sup>22</sup> Krommendijk, above n 16 at 606.
- <sup>23</sup> Krommendijk, above n 16 at 612.
- <sup>24</sup> See paragraphs 15 and following above.

## APPENDIX A

### Recent and proposed legislative measures that oust the courts' review jurisdiction

<b>New Zealand Public Health and Disability Amendment Act 2013</b>
Precludes future complaints and civil proceedings alleging unlawful discrimination in respect of policies on payment for providing health and disability support services to family members.
<b>Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010</b>
Denies access to the Environment Court for the resolution of environmental and resource-management matters in the Canterbury region.
<b>Taxation (Tax Administration and Remedial Matters) Act 2011</b>
Requires taxpayers to obtain the Commissioner of Inland Revenue's consent before commencing proceedings to challenge an assessment.
<b>Immigration Amendment Bill 2012</b>
Would further restrict judicial review of decisions of the Immigration and Protection Tribunal.
<b>Canterbury Earthquake Response and Recovery Act 2010</b>
Prevents challenge to or review of exercises of ministers' power to exempt, modify or extend provisions of primary legislation.

### Recent legislative measures that have enacted Henry VIII clauses without proper justification and absent the necessary constraints

<b>Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010</b>
Enables the Minister for the Environment to choose what law will or will not apply to Commissioners appointed to replace the Canterbury regional councillors.
<b>Immigration Amendment Bill 2012</b>
Would empower the suspension of the processing of refugee and protection claims by regulation.
<b>Canterbury Earthquake Response and Recovery Act 2010</b>
Accords ministers wide powers to exempt, modify or extend provisions of primary legislation, and prevents challenge to or review of exercises of such power in the courts.



**APPENDIX B****Legislation referred to in the Law Society's UPR submission****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>		
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.	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).	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.
<b>Parole (Extended Supervision Orders) Amendment Act 2009</b>		
Empowers the Parole Board to impose residential restrictions such as electronically monitored home detention on an offender for up to 10 years following conviction.	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.	The Law Society acknowledges the concerns expressed in the Attorney-General's report. It considers that the Act raises questions as to compliance with sections 22 and 26 of the Bill of Rights and the corresponding articles 14 and 9 of the ICCPR.
<b>Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010</b>		
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.	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.	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>

Act	Attorney-General's report	Law Society's position
<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>
<b>New Zealand Public Health and Disability Amendment Act 2013</b>		
<p>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.</p>	<p>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.</p>	<p>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.</p>

## Legislation passed notwithstanding serious human rights concerns

Act	Legal advice to the Attorney-General	Law Society's position
<b>Social Security (Benefit Categories and Work Focus) Amendment Act 2013</b>		
<p>The Bill imposes social obligations on certain beneficiaries with dependent children (to enrol dependent children in early childhood education or school, to enrol them with a primary health care provider and be up to date with core Well Child checks) with sanctions including deduction of social security benefits for non-compliance.</p>	<p>The Ministry of Justice's legal advice to the Attorney-General (prepared as a matter of urgency, the Ministry having only received the final version of the Bill the day before) concluded that the Bill was consistent with the right to be free from discrimination affirmed in section 19 of the Bill of Rights.</p>	<p>The Law Society respectfully disagreed with the Ministry of Justice's legal advice. It noted that the discrimination contemplated was serious, not justified on the evidence, risked stigmatising the beneficiaries concerned and their children, and that there appeared to be other reasonable and less intrusive means available to achieve the stated goals. The Law Society considers that the Act unlawfully discriminates on the basis of employment status in breach of section 19 of the Bill of Rights. The Act also raises questions of compliance with the right to social security contained in article 9 of ICESCR, the right to an adequate standard of living contained in article 11 of ICESCR and the right of children to an adequate standard of living contained in clause 27 of the United Nations Convention on the Rights of the Child.</p>
<b>Corrections Amendment Act 2013</b>		
<p>Authorises strip-searching of prisoners in a broader range of circumstances, in a more invasive manner and with fewer safeguards.</p>	<p>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.</p>	<p>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.</p>
<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>

<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.

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<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.

### APPENDIX C

#### Bills under consideration raising serious human rights concerns

Bill	Legal advice to the Attorney-General / Attorney-General's report	Law Society's position
<b>Immigration Amendment Bill 2012</b>		
<p>The Bill 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>
<b>Land Transport (Admissibility of Evidential Breath Tests) Amendment Bill 2012</b>		
<p>The Bill would provide that when a person fails an evidential breath test, but elects to take a blood test, the evidential breath test result will be admissible against them if a blood specimen cannot be taken "for any reason".</p>	<p>The Attorney-General reported that the Bill appeared to be inconsistent with the right to be presumed innocent until proved guilty affirmed by section 25 of the Bill of Rights. It would narrow the safeguard against error without justification.</p>	<p>The Law Society endorsed the conclusion in the Attorney-General's section 7 report. It considers that the Bill would breach section 25 of the Bill of Rights. The option of a blood test is an important safeguard against mechanical error and there is no principled basis upon which to fall back on an evidential breath test for reasons other than a motorist's non-compliance.</p>
<b>Government Communications Security Bureau and Related Legislation Amendment Bill 2013</b>		
<p>The Bill would allow the Government Communications Security Bureau (GCSB) to exercise interception powers for the purpose of information assurance/cybersecurity, foreign intelligence gathering and cooperation with other government agencies in discharging those agencies' own functions and powers.</p>	<p>The Crown Law Office's legal advice to the Attorney-General concluded that the Bill was consistent with the right to freedom of expression, the right to freedom from discrimination and the right against unreasonable search and seizure affirmed in sections 14, 19 and 21 of the Bill of Rights respectively.</p>	<p>The Law Society respectfully disagreed with the Crown Law Office's legal advice. It considers that the Bill is inconsistent with the right to freedom of expression and the right against unreasonable search and seizure, as well as privacy interests recognised in New Zealand law. The bill would empower the GCSB to spy on New Zealand citizens and residents, and to provide intelligence to other government agencies, in a way not previously contemplated. The Law Society's concerns regarding the absence of clear justification for such changes are exacerbated by the use of Parliamentary urgency, and the consequent short timeframe provided for consultation and submissions.</p>

Bill	Legal advice to the Attorney-General / Attorney-General's report	Law Society's position
<b>Telecommunications (Interception Capability and Security) Bill 2013</b>		
<p>The Bill would require network operators to ensure that telecommunications networks and services have full interception capability, and extend network operators' interception obligations. It would allow a court, in proceedings related to the administration or enforcement of the Act, to receive and hear "classified security information" in the absence of the defendant and/or the defendant's counsel.</p>	<p>The Ministry of Justice's legal advice to the Attorney-General concluded that the Bill was consistent with the right to freedom of expression, the right against unreasonable search and seizure and the right to natural justice affirmed in sections 14, 21 and 27 of the Bill of Rights respectively.</p>	<p>The Law Society respectfully disagreed with the Ministry of Justice's legal advice. It considers that the Bill is inconsistent with the right to natural justice affirmed in section 27(1) of the Bill of Rights. The Law Society recommends the addition of further safeguards to ensure the proposed provisions to protect classified security information in court proceedings impair the right to natural justice as little as possible.</p>