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Report of the

# ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act  
1990 on the Prisoners' and Victims' Claims  
(Redirecting Prisoner Compensation)  
Amendment Bill

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*Presented to the House of Representatives pursuant to  
Section 7 of the New Zealand Bill of Rights Act 1990  
and Standing Order 261 of the Standing Orders of the  
House of Representatives*

1. I have considered this Bill for consistency with the New Zealand Bill of Rights Act 1990. I have concluded that the Bill appears to be inconsistent with the provision of effective remedy for breaches of rights contained in the Bill of Rights Act. The inconsistency may not be justifiable under s 5 of that Act.

### **The proposal**

2. The Prisoners' and Victims' Claims Act 2005 governs awards of compensation to prisoners for State breaches of the Bill of Rights Act, the Human Rights Act 1993 and the Privacy Act 1993 and liability in tort, while under control or supervision ("specified claims").<sup>1</sup> The Act currently allows for deductions from compensation to be made to satisfy victims' claims against the prisoner, and simplifies the process for victims to make claims. Remaining amounts of compensation are then paid to the prisoner. The operative provisions are set to expire on 30 June 2012.
3. The Bill proposes to amend the Prisoners' and Victims' Claims Act 2005 in the following relevant ways, by:
  - 3.1 Redirecting any remaining compensation (after all fees and victims' claims are deducted) away from the prisoner to the victim support fund for specified claims made after 30 June 2012;<sup>2</sup>
  - 3.2 Requiring courts to award compensation as though compensation was not to be redirected away from the prisoner;<sup>3</sup> and
  - 3.3 Providing that no person may be held liable to pay compensation as a result of the Bill's restriction of effective redress.<sup>4</sup>
4. It is interesting to note that a previous Attorney-General under the Labour Government declined to issue a section 7 report on the Prisoners' and Victims' Claims Act 2005. I find that surprising.
5. Section 7 reports are not designed to be politically convenient or appease the executive. The Attorney-General has a law officer duty to report to Parliament on legislative provisions which may be inconsistent with the New

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<sup>1</sup> Under s 4 of the Prisoners' and Victims' Claims Act 2005, "persons under control or supervision" includes prisoners in legal custody under the Corrections Act 2004 or Penal Institutions Act 1954, persons on home detention, subject to a community based sentence or subject to conditions under the Parole Act 2002 or the Sentencing Act 2002, service detainees and prisoners, or persons arrested or detained under the Armed Forces Disciplinary Act 1971.

<sup>2</sup> Clause 5(1) amends the purposes of the principal Act in s 3, while clauses 16, 17, 19 and 20 redirect prisoner compensation by amending ss 26, 32, 49 and 52 of the Prisoners' and Victims' Claims Act 2005.

<sup>3</sup> Clause 7 and 10 to 12, amending ss 11, 13 and 14 of the Prisoners' and Victims' Claims Act 2005 and inserting new s 14A.

<sup>4</sup> Clause 9, inserting new s 12A to the Prisoners' and Victims' Claims Act 2005.

Zealand Bill of Rights Act 1990.

### **The importance of damages as a remedy for breaches of the Bill of Rights Act**

6. The proposed amendments would prevent payment of compensation to a prisoner for breaches of the Bill of Rights Act in respect of any act or omission of the Crown affecting the prisoner as a person control or supervision.<sup>5</sup>
7. In addition, the Bill would prevent courts from awarding compensation for the Bill's restriction of effective remedies.<sup>6</sup>
8. It could arguably prevent the development of alternative effective remedies, by requiring courts to assess compensation as an effective remedy, as though the compensation was not to be redirected.<sup>7</sup>
9. While the Bill of Rights Act does not contain any express provision on remedies, the courts have repeatedly found that the availability of an appropriate remedy is necessary and implicit. In *Baigent's Case*, Cooke P (as he then was) warned:<sup>8</sup>

The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed. ...

10. Recognised remedies under the Bill of Rights Act cover a wide range of orders available in the court's discretion, including declarations, exclusion of evidence, and administrative orders. Awards of damages hold a special place, however, as a remedy of last resort, where no other effective remedy is available. The Supreme Court emphasised this in *Taunou v Attorney-General*:<sup>9</sup>

Although it can be accepted that in New Zealand any government agency will immediately take steps to mend its ways in compliance with the terms of a Court declaration, it is the making of a monetary award against the state and in favour of the victim which is more likely to ensure that it is brought home to officials that the conduct in question has been condemned by the Court on behalf of society. ...

When, therefore, a Court concludes that the plaintiff's right as guaranteed by the Bill of Rights Act has been infringed and turns to the question of remedy, it must begin by considering the non-

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<sup>5</sup> Clause 5(1) amends the purposes in s 3. while clauses 16, 17, 19 and 20 redirect prisoner compensation by amending ss 26, 32, 49 and 52 of the Prisoners' and Victims' Claims Act 2005.

<sup>6</sup> Clause 9 inserting new section 12A to the Prisoners' and Victims' Claims Act 2005.

<sup>7</sup> Clause 12 inserting new section 14A to the Prisoners' and Victims' Claims Act 2005.

<sup>8</sup> *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667, 676, affirmed in separate decisions by Casey J (as he then was), Hardie-Boys J and McKay J at 691, 702, 717.

<sup>9</sup> *Taunou v Attorney-General* [2008] 1 NZLR 429, for example at [255] – [258] per Blanchard J.

monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances... It is only if the Court concludes that just satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages.

11. As a remedy of last resort under the Bill of Rights Act, denial of damages in favour of a prisoner amounts to denial of an effective remedy. As *Baigent's Case* emphasised, such denial is contrary to the Bill of Rights Act.

#### **Denial of effective remedy to prisoners is not justifiable**

12. Enjoyment of the basic human rights is the entitlement of every citizen.<sup>10</sup> Denial of an effective remedy to a particular group of society excludes that group from the protection of the Bill of Rights Act.
13. The exclusion of prisoners from the protections of the rights affirmed in the Bill of Rights Act is objectionable. Prisoners are subject to the day to day control and exercise of coercive power by the state, and as such are especially vulnerable to misuse of state power.
14. This group's position is recognised by rights relating to those in custody in s 23(5), which provides that everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.<sup>11</sup> Denying prisoners the effective protection of the rights affirmed in s 23, specifically enacted for their protection, is unjustifiable.
15. Denying prisoners an effective remedy for breaches of these rights is inconsistent with the Bill of Rights Act. The proposal would prevent compensation being paid to a prisoner regardless of how serious or deliberate the established breach was.
16. The Bill would allow prisoners to recover compensation where they did not plead guilty, were not convicted, or their convictions were set aside without subsequent conviction.<sup>12</sup> While not a prohibited ground of discrimination under the Human Rights Act 1993, delineation between those who are entitled to the protection of the Bill of Rights Act on the basis of a criminal conviction does not justify the denial of effective remedies.

#### **International obligations**

17. This proposal may raise questions about New Zealand's obligations under the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture and Other Cruel, Degrading or Inhuman Treatment or Punishment (ICCPR).

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<sup>10</sup> *Baigent's Case* at 702, per Hardie-Boys J.

<sup>11</sup> *Taunoa* at [177] per Blanchard J.

<sup>12</sup> Clause 21, inserting new s 52A to the Prisoners' and Victims' Claims Act.

18. Excluding prisoners from the full protection of the Bill of Rights Act while under control or supervision appears to breach articles 2 and 3 of the ICCPR. These articles relate to the obligation to respect and ensure the rights in the ICCPR and the obligation to provide an effective remedy for their violation.
19. While New Zealand currently has a reservation against article 14 of the Convention Against Torture relating to the right to compensation under the Crimes of Torture Act 1989, the requirement for effective redress for breach of s 9 of the Bill of Rights Act appears to apply.
20. At the presentation of New Zealand's fifth periodic report, the United Nations Human Rights Committee expressed concern about the impact of the present Prisoners' and Victims' Claims Act 2005 on the right to an effective remedy. The United Nations Committee against Torture also expressed concerns at New Zealand's periodic review in 2009:<sup>13</sup>

The Committee is concerned that the State Party has maintained its reservation to article 14 of the Convention, which is incompatible with the letter and spirit of the Convention, as well as with its obligation to ensure the rights of victims of torture to a fair and adequate compensation including the means for as full rehabilitation as possible. The Committee is also concerned that the Prisoners and Victims Claims Act 2005 limits the award and payment of compensation to prisoners.

21. If enacted, the proposals contained in the Bill could attract further negative attention.

### Conclusion

22. For these reasons, I conclude that the Bill's denial of an effective remedy for breaches of rights appears to be inconsistent with the Bill of Rights Act. I cannot see how this can be justified under s 5 of that Act.



Hon Christopher Finlayson  
Attorney-General  
13 October 2011

<sup>13</sup> United Nations Committee against Torture. *Concluding Observations of the Committee against Torture. New Zealand*. CAT/C/NZL/CO/5. 14 May 2009, at paragraph 14.