



Human Rights
Commission
Te Kāhui Tika Tangata

5 March 2010

The Committee Secretariat
Law and Order Committee
Parliament Buildings
WELLINGTON

Dear Chairperson

SENTENCING AND PAROLE REFORM BILL

1. In April 2009 the New Zealand Human Rights Commission (Commission) made a submission to the Law and Order Select Committee (Committee) on the Sentencing and Parole Reform Bill.
2. The Government has recently announced some proposed amendments to the Bill and the Committee has invited the Commission to make a further submission. The Commission welcomes this opportunity.

PROCEDURES ADOPTED BY THE COMMITTEE

3. Before addressing the substance of the Bill the Commission wishes to emphasize its deep concern about the manner in which this Bill has been handled. Some decisions of Government and aspects of the process adopted by the Committee undermine fundamental democratic values.
4. Under Article 25 of the International Covenant on Civil and Political Rights (ICCPR) everyone has the right to take part in the conduct of public affairs. A human rights approach requires participation that is both free and meaningful. The consultation process and aspects of the

Bill raise questions about whether participation and consultation was, or will be, adequate.

5. As Sir Geoffrey Palmer has observed¹

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

He identified the dangers which flow from the rapid passing of legislation including lack of time for the public to participate in the parliamentary process and make their views known. This has the potential to lessen the faith of the people in Parliament as a watchdog on government and a place where their opinions will be listened to.

6. Participation is a foundation stone of democracy in a modern society. While voting is fundamental to participation, so too is the ability to contribute in a meaningful way to the development of legislation.
7. By only allowing those who are specifically invited to do so by the Committee to make a further submission on the Bill (and refusing to conduct any further hearings of evidence on these submissions), the Committee has severely limited public consultation on the “new provisions” which represent major sentencing reform.
8. The Commission has expressed concern previously at the rushed manner in which legislative proposals have been handled. In this case it again appears that a perceived need for urgency is being allowed to suborn good democratic processes to the likely detriment of sound decision-making. In this context we note that the majority of the Committee has imposed a prohibition on minority members to deny them the opportunity to have dissenting views expressed in the report to the House.² We are informed that this is within the power of a Select

¹ *Unbridled Power* (OUP, 1987) at 160.

² Hansard for Wednesday 17 February 2010

Committee under Standing Order 241, but one that is seldom exercised. We can discern no compelling reason for the minority views to be suppressed in this way.

9. The Ministry of Justice (and the Attorney –General through his interim report under s7 of the New Zealand Bill of Rights Act 1990 (BORA)) has made plain its own views and as recently as last December cautioned the government against proceeding with the proposals. We note that since then responsibility for the Bill has been moved to the Minister of Police, and that as a consequence Ministry of Justice officials have ceased to be advisers to the Committee thus denying the process the benefit of their full and frank advice.

SUBSTANCE OF THE BILL

10. The Commission supports an objective that aims to ensure the security of persons in New Zealand and acknowledges that the State is responsible for determining appropriate measures to achieve this. However the Bill is unlikely to result in improved community protection from violent offending or a reduction in the level of crime. It reduces the protections and rights of offenders without enhancing those of their victims or of the wider society.
11. The Bill aims to address victims' concerns and public safety issues stemming from a number of cases where persons released on parole (or on bail) committed further violent offences. The failure in a number of these cases was in the enforcement of existing monitoring and reintegration mechanisms rather than the implementation of the sentencing regime. The Commission suggests that the objectives of the Bill could better be achieved with the full utilisation of the current sentencing regime.
12. Notwithstanding the proposed amendments the Commission considers that the Bill remains fundamentally flawed and is an inappropriate and

unjust response for the reasons identified in its April 2009 submission. In this submission the Commission identified a number of issues with the Bill which continue to apply and in some cases are exacerbated by the proposed changes. The April 2009 submission considered that:

- the Bill creates a sentencing regime which is disproportionate and inappropriate;
- the Bill would in several respects be at odds with New Zealand's commitment to international instruments to which it is a signatory and international human rights norms;
- the Bill will contravene fundamental rights contained in BORA;
- the Bill will disproportionately affect Maori as a large percentage of those likely to be subject to "third strike" maximum penalties under this Bill are Maori; and
- the existing sentencing regime allows sufficient discretion to achieve the objectives of this Bill without breaching human rights obligations or resulting in major injustice.

Attached as appendix 1 is a copy of the Commission's April 2009 submission.

13. The Commission considers that the proposed amendments to the Bill exacerbates:

- the Bill's inconsistency with BORA and New Zealand's international human rights obligations;
- the Bill's impact on Maori; and
- the Bill's inconsistency with Government policy.

14. In addition the Commission believes that the Bill has profound constitutional implications.

Human Rights obligations

15. Removing the five year sentence threshold and applying a conviction based regime greatly increases the risk of disproportionately severe treatment in terms of section 9 of BORA and Articles 7 and 9(1) of the ICCPR. Even first and second convictions resulting in fines or community service orders may be considered a “strike”.
16. The conviction based regime will also almost definitely result in the imposition of sentences which will violate New Zealand’s international obligations not to arbitrarily deprive individuals of their liberty and not to employ cruel, inhuman or degrading treatment or punishment (ICCPR and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment).
17. These concerns were raised in advice provided to the Minister of Justice by Ministry officials on 16 December 2009, advice from the Ministry of Foreign Affairs and Trade and more generally in the Attorney-General’s section 7 report.

Impact on Maori

18. Maori are over-represented in the criminal justice system. Research by the Ministry of Justice has identified that Maori comprised 40% of all Police apprehensions in 2006/07 but only 14% of the New Zealand population.³

³ Ministry of Justice Background Report: *Addressing the Cost Pressures in the Justice System*, September 2009.

19. The Bill will disproportionately affect Maori as a large percentage of those likely to be subject to the three tier regime are Maori. The proposed conviction based approach will increase the impact on Maori.
20. This view was reflected in advice provided to the Minister of Justice by Ministry officials on 16 December 2009.

Inconsistency with Government Policy

21. Qualifying on conviction would have the result that some minor offending would be subject to the three tier regime. This is inconsistent with the Government's policy of "targeting the worst repeat violent offenders".
22. At the Drivers of Crime Ministerial meeting on 3 April 2009, the over representation of Maori in the criminal justice system was discussed. Factors such as poverty, education and unemployment were identified. It is the view of the Ministry of Justice that the Bill by having a disproportionate impact on Maori will further increase the over representation of Maori in the criminal justice system and is inconsistent with the Government's policy to address the drivers of crime.

Constitutional Implications - Judicial Discretion

23. The thrust of the Bill is to remove judicial discretion from the sentencing process at the second and third "strike" stage of the regime, thus preventing judges from imposing a punishment that fits the crime. In so doing the legislature is undermining the rule of law and breaching fair trial rights to which New Zealand is committed to guaranteeing by virtue of being party to the ICCPR. The Commission views this as an unwarranted intrusion into the separation of powers. Without a definition in a written constitution, the judicial power is always at risk and so should be zealously guarded.

24. Judges have a duty in the administration of justice to foster universal respect for fundamental rights and freedoms. This duty includes:
- having regard for international obligations – whether or not they have been incorporated into domestic law ; and
 - drawing inconsistencies with international law to the Government's attention - since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.⁴
25. The Bill challenges judges to interpret the regime broadly in light of international obligations, and in particular to stretch the definition of “manifestly unjust” in order to discharge their judicial oath to “do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will”.
26. It is also likely that there would be an increase in comments from judges regarding the inconsistency of this regime with International law. This does not bode well for the smooth implementation of the scheme and would perpetuate the controversy surrounding it.

Other Unintended Consequences

27. In any law reform it is important to bear in mind that changes can have unintended consequences. The Commission considers that there are a number of important such consequences to consider in relation to this Bill (as amended). The Bill:
- may in practice raise the threshold required to prove certain crimes “beyond reasonable doubt”. Some jury members in some circumstances may well recoil from the responsibility for

⁴ Bangalore Principles, Reprinted in *Commonwealth Secretariat Developing Human Rights Jurisprudence* vol 3 151.

imprisoning a fellow citizen for a disproportionate length of time, thus leading to unwarranted verdicts of “not guilty”;

- may reduce the ability of the State to protect its employees (Police Officers and Corrections Staff) and so risk breaching its duty of care to – and the human rights of – staff. Some researchers in the United States of America (USA) have suggested that under a “three strikes” regime criminals can be more likely to commit more violent crimes (on the thesis that they would “rather be hanged for a sheep than a lamb”)⁵. Any such attitude would risk exposing police officers to higher levels of risk when dealing with them. Furthermore some life prisoners may consider that they have little to lose by assaulting prison staff.
- by creating a “menu” of offences, opens the possibility of further offences being added to the list in the wake of particular scandals without adequate consultation and reflection;
- increases the likelihood of “not guilty” pleas, election of trial by jury and appeals thus exposing more victims to the trauma of having to give evidence, and increasing further the present intolerable delays in court proceedings. There would be no incentive to plead “guilty” and every incentive not to do so; and
- creates a situation in which offenders can be “over charged” to achieve a third “strike” - Police and prosecutors can be selective in their choice of charges to bring. It is likely that they will come under pressure from victims to prefer more serious charges than the circumstances would ordinarily warrant. (This would lead to

⁵ Radha Iyengar, *I'd rather be hanged for a sheep than a lamb: The unintended consequences of “three-strikes” laws*, <http://www.nber.org/papers/w13784>

an argument that victims not be extended added rights in the prosecution process).⁶

CONCLUSION

28. The Bill is no durable solution to contemporary challenges in the field of law and order. Research suggests that the case made by those arguing in favour of the “Three Strikes” policy is based on a selective use of material and on the basis of the views of a single, partial US academic, and that the results of similar experiments in certain states of the USA are far from clear. In the Commission’s view it is most likely to add to the distress suffered by victims, not to alleviate it.
29. The Commission has a long-standing policy of seeking to identify ways in which Government proposals can be modified, rather than rejected, to bring them into line with the requirements of human rights obligations. We have adopted this approach on this occasion, but find that such is the inherently flawed nature of the whole proposal that we can come to no other conclusion than that enjoined by the editorial in the *NZ Herald* that “the three strikes legislation appeals only to those who crave a magic bullet in what is a matter of complexity. It should be sentenced to death long before the time any judge is forced to apply it.”⁷
30. To follow this advice may well be to offend an already vocal section of the community, but Members of Parliament have previously shown the courage to reject populist and poorly informed calls for the repeal of provisions that protect children from being assaulted, and in the Commission’s view they should do so again.⁸

⁶ We understand that it is planned that decisions as to an appropriate charge are to be reviewed by a Crown prosecutor but in practice this may simply be a review of the papers placed before him or her and so not constitute an effective safeguard against possible abuse.

⁷ *New Zealand Herald, Three Strikes Law deserves death sentence*, 22 January 2010.

⁸ Democratically reached decisions reflect the will of the people in a given moment, though, not necessarily a superior wisdom or power. Democratic decisions can be wrong, unjust and impractical, violate the country’s constitution and even violate basic human rights. They can even relate to issues for which the democratic system is quite simply inadequate. “The

31. Should you wish to discuss this further please do not hesitate to contact Michael White, Legal Officer at the Commission (DDI 04 471 6752).

Yours sincerely

Jeremy Pope
COMMISSIONER

danger of majority tyranny" (Thomas W. Bechtler, 2 March 2010) [see <http://www.opendemocracy.net/thomas-w-bechtler/danger-of-majority-tyranny>]

***Submission of the
Human Rights Commission on***

**Sentencing and Parole Reform
Bill**

***To the Law and Order
Select Committee***

24 April 2009

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**We wish to make oral representations
on this submission**

SENTENCING AND PAROLE REFORM BILL

1. INTRODUCTION

- 1.1 This submission is made by the Human Rights Commission ('the Commission'). The Commission is an independent Crown entity that has responsibility for administering the Human Rights Act 1993 (HRA). One of the Commission's primary functions is advocating and promoting respect for, and an understanding of, human rights in New Zealand society.
- 1.2 The Sentencing and Parole Reform Bill (Bill) proposes a number of changes to the Sentencing Act 2002 and the Parole Act 2002. In particular-

Repeat violent offenders

- 1.2.1 Offenders convicted of a second specified serious offence (other than murder) must be sentenced to serve their full sentence without parole.
- 1.2.2 Offenders convicted of murder as their second listed offence must be sentenced to life imprisonment without parole.
- 1.2.3 Offenders convicted of a third listed offence (other than murder) must be sentenced to life imprisonment with a non parole period of 25 years.
- 1.2.4 Offenders convicted of murder as their third listed offence must be sentenced to life imprisonment without parole.

1.2.5 In each case, the offender must have been sentenced to at least five years imprisonment for the listed offending to qualify under the scheme.

1.2.6 None of these sentences will apply to offenders aged below 18 years of age and the Court has a discretion not to impose a life sentence if to do so would be manifestly unjust.

Life without parole

1.2.7 The Court is also empowered to impose a sentence of life imprisonment without parole on any offender convicted of murder where a minimum non parole sentence would not satisfy the objectives of holding the offender accountable, denouncing the conduct, deterring similar offending and protecting the community.

1.3 The Explanatory note to the Bill describes the objectives of the Bill as follows:

- to increase public confidence in the criminal justice system;
- to ensure public safety;
- to contribute to truth-in sentencing/increase certainty around release dates; and
- encourage offenders to understand the consequences of repeat offending through increased certainty about these consequences.

1.4 The Commission recognises that these objectives are important to the effective functioning of the justice system, and particular endorses the

consideration of victims' rights¹ in this Bill. However the Commission considers that the Bill should be withdrawn for the following reasons:

- Aspects of the Bill breach certain rights in the New Zealand Bill of Rights Act 1990 (BORA) and are incompatible with the international human rights instruments, particularly the right of individuals not to be arbitrarily deprived of their liberty and the obligation on New Zealand not to employ cruel, inhuman and degrading treatment.
- The Bill will disproportionately affect Māori.
- The Bill is unlikely to enhance public safety to any significant extent and is unlikely to increase confidence in the justice system.
- The key objectives of the Bill can be achieved with the full utilisation of the current sentencing regime.

2. THE HUMAN RIGHTS COMMISSION'S INTEREST IN THE BILL

2.1 The *New Zealand Action Plan for Human Rights: Mana ki te Tangata* “(the Action Plan)”² identifies what must be done to ensure that the human rights of everyone in New Zealand are better recognised, protected and respected. One of the outcomes in the Action Plan was ensuring that legislation and policy were developed in accordance with human rights standards.

3. CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990

¹ “The policy is also intended to address the concerns of victims and their families facing uncertainty about when an offender may be released... and the strain of attending multiple parole hearings for the offender” (Explanatory note to the Bill)

² Human Rights Commission, Wellington (2005).

- 3.1 The long title to BORA describes it as an Act to “affirm, protect and promote human rights and fundamental freedoms in New Zealand.”
- 3.2 Parliament has a role in affirming, protecting and promoting human rights by ensuring that all legislation complies with human rights standards (through the select committee process and in the House of Representatives). This role is extremely important in a unicameral system where there are no other substantive checks and balances on the passing of legislation.
- 3.3 The Attorney-General is required to advise the House of Representatives pursuant to section 7 of BORA and Standing Order 261 of the Standing Orders of the House of Representatives if any provision in a Bill appears to be inconsistent with any of the rights and freedoms contained in BORA. Pre-legislative scrutiny by Parliament is even more vital in such cases, where notwithstanding an inconsistency with human rights standards, the Executive nevertheless introduces legislation.
- 3.4 The Attorney-General provided a detailed report on this Bill to the House of Representatives. The Commission agrees with the report in part, but considers that the Attorney-General’s analysis of the provisions in the bill relating to life without parole failed to take into account all the rights and freedoms contained in BORA.
- 3.5 In his report, the Attorney-General stated that:

“I have concluded that the provision for a life sentence to be imposed for a third listed offence in proposed 86D may raise an inconsistency with the right against disproportionately severe treatment affirmed by s 9 of the Bill of Rights Act.”

and

“I consider that the differential treatment of offenders, and in particular the imposition of a life sentence for offences that would otherwise be subject to a penalty of as little as five years, based on whether they have been previously convicted of listed offences and warned in terms of cl 5 may result in disparities between offenders that are not rationally based. The regime may also result in gross disproportionally in sentencing.”

3.6 The Commission agrees with the Attorney General's assessment that proposed section 86D is inconsistent with section 9 of BORA.

3.7 The Attorney General did not consider-

- “the distinction in treatment between offenders who may otherwise have received a sentence of life with a minimum non parole period of 10 years, but who instead receive a minimum non parole period of 25 years”; or
- the imposition of “life sentences without parole for offenders convicted of murder as their second or third listed offence”

as proposed by section 86E of the Bill to be inconsistent with section 9 of BORA.

3.8 The Commission accepts that the threshold of gross disproportionally may not be met in these instances. However proposed section 86E (and section 86D) may be inconsistent with another right affirmed by BORA, namely the right to Liberty of person.

3.9 Section 22 of BORA states:

“Everyone has the right not to be arbitrarily arrested or detained”

3.10 Lawful detentions may be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality.³

3.11 The Bill creates a sentencing regime which is disproportionate and inappropriate as it provides for the differential treatment of offenders by:

- the imposition of a life sentence for offences that would otherwise be subject to a penalty as little as five years, based on whether they have been previously convicted of listed offences and warned;
- the imposition of a life sentence with a minimum non parole period of 25 years for an offence that would otherwise be subject to a penalty of life with a minimum non parole period of 10 years⁴, based on whether they have been previously convicted of listed offences and warned; and
- the imposition of a life sentence without parole for an offence that would otherwise be subject to a penalty of life with a minimum non parole period of 10 years⁵, based on whether they have been previously convicted of listed offences and warned.

3.12 The Commission submits that on this basis, sections 86D and 86E are *prima facie* inconsistent with section 22 of the BORA.

4. A Human Rights Approach

4.1 In analysing the human rights dimensions of the Bill the Commission has applied a conceptual framework which embodies an approach designed to ensure that those most directly affected by a policy or law

³ See discussion below about Article 9(1) of the ICCPR against which section 22 was developed.

⁴ Or 17 years for particularly egregious crimes.

⁵ *Ibid.*

– especially those who are vulnerable or disenfranchised – are better able to enjoy the rights to which they are entitled under international law.

4.2 A human rights approach involves the application of a framework originally developed internationally and adapted for New Zealand by the Human Rights Commission. An outline of a human rights framework is attached as Appendix 1. Three of the six elements in the framework are applicable to this submission. They are-

- linking decision making to human rights norms;
- identification of all relevant rights involved, balancing rights where necessary to maximise respect for all rights and rights holders; and
- non-discrimination.

Linking decision making to international human rights standards

4.3 The international human rights standards are the civil and political, economic social and cultural rights set out in the Universal Declaration of Human Rights⁶ and codified in various United Nations Covenants and Conventions. The human rights standards relevant to this submission are found in the International Covenant on Civil and Political Rights (ICCPR) and in the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). New Zealand ratified the ICCPR in 1978 and the CAT in 1989.

4.4 The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) also contains a number of rights that are pertinent to this Bill, including the right to health. New Zealand ratified the ICESCR in 1978.

⁶ United Nations (December 1948) GA resolution 217AC(II): Geneva.

Differential Treatment and the imposition of life sentence for offenders that would otherwise be subject to a lesser penalty

4.5 Article 9(1) of the ICCPR provides in relevant part:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention...”

4.6 International jurisprudence and commentaries on Article 9(1) of the ICCPR has established that under the ICCPR all *unlawful* detentions are arbitrary, and *lawful detentions* may also be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality.⁷

4.7 The use of the word ‘arbitrary’ in the drafting of the ICCPR was to ensure that both ‘illegal’ and ‘unjust’ acts are caught.⁸

4.8 Article 7 of the ICCPR states in relevant part:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

4.9 Cruel or inhuman treatment or punishment includes treatment which is inappropriate, unjust, or lacks proportionality.

4.10 The Commission considers that the imposition of a life sentence with a minimum non-parole period of 25 years on the third ‘strike’ offence may result in disproportionate sentences. Such differential treatment of offenders and in particular the imposition of a life sentence for offences

⁷ *Manga v Attorney-General* [2000] 2NZLR 65.

⁸ Hassan, *The International Covenant on Civil and Political Rights Background and Perspective on Article 9(1)* (1973) 3 Den J I L P 153, 173-183.

that would otherwise be subject to a penalty of as little as five years may contravene Articles 7 and 9(1) of the ICCPR.

Life Sentence without Parole

4.11 Although there are no universal provisions to prohibit the sentencing of life imprisonment without the possibility of parole to adult offenders⁹, it is not considered international best practice. Life imprisonment without parole is not available as a punishment for the gravest of crimes: war crimes, crimes against humanity and genocide under the *Rome Statute of the International Criminal Court*. Article 110(3) states:

“When the person has served two-thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.”

4.12 Article 7 of the ICCPR states in relevant part:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

4.13 Article 10 (1) of the ICCPR states:

“all persons deprived of their liberty shall to be treated with humanity and respect for the inherent dignity of the person”.

4.14 The United Nations Human Rights Committee has commented on Article 10 as follows:

“Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable

⁹ Article 37 of the *UN Convention on the Rights of the Child* prohibits life imprisonment without the possibility of parole for offences committed by people below the age of 18.

rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available to the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁰

4.15 National jurisdictions such as the German Federal Constitutional Court, have ruled that sentencing without the possibility of release is an affront to human dignity.¹¹

4.16 The Council of Europe ruled in 1977 that “it is inhuman to imprison a person for life without the hope of release” and that it would “be compatible neither with modern principles on the treatment of prisoners...nor with the idea of the reintegration of offenders into society”¹². The European Court of Human Rights has more recently considered whether life imprisonment without parole amounts to contravention of Article 3 of the European Convention on Human Rights (prohibiting cruel and inhuman treatment or punishment)¹³. In *Einhorn v France*¹⁴ the Court held that it “does not rule out the possibility that the imposition of an irreducible life sentence may raise an issue under Article 3 of the Convention.”

4.17 CAT prohibits torture and related practices.¹⁵ Article 1(1) defines torture as:

“..any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as

¹⁰ Human Rights Committee, paragraph 4, General Comment 21, 1992.

¹¹ The German Federal Constitutional Court held in 1977 that life imprisonment could only be compatible with human dignity if there was a concrete and realisable expectation of being released. “The essence of human dignity is attacked if the prisoner notwithstanding his personal development, must abandon hope of ever regaining his freedom” (cited in *van Zyl Smit*, 2005:20).

¹² Council of Europe, 1977:22.

¹³ Reflecting Article 7 of the ICCPR..

¹⁴ 16 October 2001.

¹⁵ See for example Article 2.

obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspect of having committed, or intimidation or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official.”

4.18 The removal of the possibility of release not only renders the punishment inhuman but may also contravene the CAT.

4.19 Article 10(3) of the ICCPR states:

“The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”

4.20 Removing the possibility of release, consequently removes the recognition of the potential for rehabilitation or reform.

4.21 Life sentences without the possibility of parole should not be used for any category of offender. The removal of the possibility of release not only amounts to inhuman and degrading treatment, but denies the offender a meaningful opportunity for rehabilitation.

4.22 The Commission submits that the imposition of life sentences without parole may contravene both the ICCPR and the CAT.

Health

4.23 Deprivation of liberty is a severe punishment and should not be effected in a way which seriously undermines offender's mental wellbeing.

- 4.24 Prisoners serving long-term or life sentences experience high levels of depression, anxiety, and self injurious behaviour. In extreme cases, prolonged and indefinite imprisonment has been attributed to cases of prison suicide.¹⁶
- 4.25 Article 12 of the ICESCR recognises the right of everyone to the highest attainable standard of physical and mental health. The Commission is concerned that these standards may be unlikely to be met in conditions where there is an increase in the number of prisoners serving long-term sentences, some without parole.

Minimum Standards for the Treatment of Prisoners

- 4.26 The *United Nations Standard Minimum Rules for the Treatment of Prisoners* set out what is generally accepted as international best practice in the treatment of prisoners and the management of institutions.¹⁷
- 4.27 An increase in the prison population and in particular the number of prisoners serving life sentences may put pressure on the Department of Corrections' budget and jeopardise the maintenance of these minimum standards.
- 4.28 Curtailment of freedom and the separation from society (including family and employment) are inherent in imprisonment. However the prolonged deprivation of liberty and rights can lead to social isolation, and the loss of personal responsibility, resulting in mental health issues.

¹⁶ A recent study by the Prison Reform Trust found that the risk of suicide [for inmates serving life sentences] was twice as high as the average prisoner population (Prison Reform Trust 2004).

¹⁷ See observation 1.

4.29 If the Bill is enacted in its current form improvements in correctional systems and facilities will be required to ensure that New Zealand complies with the minimum standards

Identification of all relevant human rights and balancing those rights, where necessary, to maximise respect for all rights and rights holders

4.30 The criminal justice system is of considerable significance because of its impact on all New Zealanders. The consequences of crime are experienced by all New Zealanders. Any proposal for reform of the criminal justice system needs to consider the full range of rights and responsibilities of New Zealanders. Identifying the relevant rights and ensuring respect for all, involves consideration of the rights of the victims of crime and the interest of the community as a whole, as well as the rights and responsibilities of the offenders.

4.31 Credibility is critical to the effective functioning of the criminal justice system. Credibility requires a regime of sentencing, imprisonment and parole that meets the wider needs of society namely community safety; reduction in the level of crime; reduction in re-offending; rehabilitation of offenders; re-integration into society of offenders; and reduction in the over-representation of Māori.

4.32 This Bill aims to address victims concerns and public safety issues stemming from a number of cases where persons released on parole (or on bail) committed further violent offences.

4.33 The failure in a number of these cases was in the enforcement of existing monitoring and reintegration mechanisms (for example: parole monitoring provisions) rather than the implementation of the sentencing regime. Notwithstanding this Bill, credibility will continue to be

undermined if elements of the justice system continue to be under resourced and ineffectively delivered.

- 4.34 The Bill is unlikely to result in improved community protection from violent offending or a reduction in the level of crime. It reduces the protections and rights of offenders without enhancing those of their victims or of the wider society.

Non-discrimination among individual and groups through the equal enjoyment of rights

- 4.33 The standards in the international instruments apply to everyone equally without discrimination. The Universal Declaration of Human Rights states that everyone is entitled to equal protection of the law on a non-discriminatory basis.

- 4.34 Discrimination can be direct or indirect. Direct discrimination is said to occur when one of two comparable groups is treated differently, suffering disadvantage as a result¹⁸. Indirect discrimination involves a law, rule or practice which appears neutral but has a disproportionate and negative impact on one of the groups against which it is unlawful to discriminate.

- 4.35 Māori are disproportionately represented in the criminal justice system:
- Māori are apprehended for committing at least three times the number of offences as Europeans.
 - 12% of all convictions against Māori result in a custodial sentence

¹⁸ The grounds on which it is unlawful to discriminate are widely defined in the international instruments. A number are replicated in the HRA (and, by extension, the New Zealand Bill of Rights Act 1990). They include sex, marital status, religious and ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment and family status and sexual orientation.

- Māori have a higher risk of conviction, and likelihood of imprisonment compared with other ethnicities.
- Māori reconviction and re-imprisonment rates are high.

4.36 The Bill will disproportionately affect Māori as a large percentage of those likely to be subject to life sentences under this Bill are Maori.

5. OTHER MATTERS

5.1 The explanatory note describes one of the objectives of the Bill as an attempt to improve public safety by incapacitating offenders for longer periods.

5.2 While the Commission recognises that punishment and the confinement of dangerous people are legitimate aspects of the criminal justice process, there is little evidence that lengthy sentences or severe punishment reduce crime.

6. CONCLUSION

6.1 The Commission considers that the Bill should be withdrawn.

6.2 If the Bill is enacted, it will reflect poorly on New Zealand's commitment to international instruments to which it is a signatory and international human rights norms.

6.3 If the Bill is enacted in its current form it will contravene fundamental rights contained in the BORA.

6.4 The Bill reduces the rights and protections of offenders without enhancing those of their victims or of the wider community.

6.5 The existing sentencing regime allows sufficient discretion to achieve the objectives of this Bill without breaching human rights obligations or resulting in major injustice.

APPENDIX 1: SIX ELEMENTS OF A HUMAN RIGHTS APPROACH

The human rights approach forms the conceptual base that the Commission uses in all aspects of its work. The human rights approach, developed internationally and adapted for New Zealand by the Human Rights Commission, requires:

- ***Linking of decision making at every level to human rights standards*** set out in the relevant human rights Covenants and Conventions
- ***Identification of all relevant human rights involved***, and a balancing of rights, where necessary, prioritising those of the most vulnerable people, to maximise respect for all rights and rights-holders
- An emphasis on the ***participation*** of individuals and groups in decision-making that affects them
- ***Non-discrimination*** among individuals and groups through equal enjoyment of rights and obligations by all
- ***Empowerment of individuals and groups by their use of rights as leverage for action and to legitimise their voice in decision making***
- ***Accountability for actions and decisions, which enables individuals and groups to complain about decisions that affect them adversely.***