NEW ZEALAND

NGO Coalition Submission to the United Nations Universal Periodic Review
Sixth Session of the UPR Working Group of the Human Rights Council
June 2013

JustSpeak and Wellington Community Justice Project

Introduction

1. This submission, focussing on New Zealand's compliance with human rights obligations in the area of criminal justice, has been coordinated by JustSpeak and the Wellington Community Justice Project.

2. JustSpeak (www.justspeak.org.nz/) is a non-partisan network that empowers young people to speak out for change in the criminal justice system, informed by evidence and experience, towards a more just Aotearoa. We conduct research, engage in law reform and with the media and organise public educational events. JustSpeak was established in 2011, and, along with Rethinking Crime and Punishment (www.rethinking.org.nz/), JustSpeak forms one of the two branches of the Robson Hanan Trust.

3. The Wellington Community Justice Project (WCJP) (www.wellingtoncjp.org/) is a student-led society at Victoria University of Wellington. The Project, formed in 2010, has twin aims: to improve access to justice and legal services in the community, and to provide law students with an opportunity to gain practical legal experience. It pursues these goals by establishing community-based volunteer projects, working with various existing organisations that share similar goals.

Executive Summary

4. In this submission, the NGO coalition provides information under sections (c) ("Promotion and protection of human rights on the ground: implementation of international human rights" and "public awareness of human rights, cooperation with human rights mechanisms") and (e) ("Identification of achievements, best practices, challenges and constraints in relation to the implementation of accepted recommendations and the development of human rights situations in the State") of the "Scope" section of the guidelines for relevant stakeholders' written submissions.

5. The submission considers these sections in an examination of four key areas of New Zealand's criminal justice system:

   a) The Youth Justice System (drawing on recommendations 76 and 77 of the 2009 Outcome Report)
   b) Māori and the Criminal Justice System (drawing on recommendation 33 of the 2009 Outcome Report)
   c) Women in Prison; and
   d) Specific Legislative Erosion of Human Rights in the Criminal Justice System.

A. The Youth Justice System

i) Youth Court Jurisdiction

6. In New Zealand, the Youth Court has jurisdiction to deal with young people between the ages of 14 and 16 inclusive. In 2010, the Government legislated to allow children aged between 12 and 13 who have committed serious crimes or are recidivist offenders to appear in the Youth Court. Young people aged 10-14 charged with murder or manslaughter will be prosecuted in the High Court. There are two significant problems with this – firstly, that young people aged 17 do not fall within the Youth Court's jurisdiction and secondly, that children between the ages of 12 and 13 inclusive can fall within its jurisdiction.

Young people aged 17

7. The United Nations Committee on the Rights of the Child has repeatedly recommended that New Zealand consider extending the jurisdiction of the Youth Court to include any person under the age of 18.[1] In New Zealand many of the legal rights of adulthood (such as the right to vote) do not apply until one reaches 18. This is based on the premise that individuals under 18 have not matured (cognitively and socially) to the extent that they can appropriately exercise those

[1] Most recently in the United Nations Committee on the Rights of the Child *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention* 11 April 2011 CRC/C/NZL/CO/3-4.

rights. It is well documented in developmental science literature that the brain is not fully developed until early 20s, and that full cognitive maturity is not achieved until at least the age of 25 years. In New Zealand, this has been acknowledged by the Prime Minister's Chief Science Advisor in a comprehensive review of adolescent social and psychological comorbidity, and in recent judicial decisions.[2] New Zealand's position is inconsistent with almost all comparable OECD states.

Children aged 12 – 13

8. The United Nations Committee on the Rights of the Child also criticised New Zealand's decision to lower the Youth Court's jurisdiction. Prior to the 2013 amendments, children aged 12 – 13 who committed serious or repeated criminal offences were dealt with in the Family Court. This is the most appropriate forum for managing the often deep-seated care and protection needs which most of these children demonstrate, and for minimalising exposure to the formal criminal justice system at a young age.

ii) Separation of Juveniles in Detention Facilities[3]

9. Recommendation 49 of the 2009 Outcome report is that New Zealand "ensure separate juvenile detention facilities for all juvenile offenders". Separate juvenile detention facilities are available for young people whose detention is ordered by the Youth Court. However, young people aged 15 or over can be transferred from the Youth Court to the District Court, where they can be sentenced to adult detention facilities. It is appropriate to comment on young people aged 18 and under who are placed in adult detention, given the definition of a minor in the United Nations Convention on the Rights of the Child.

10. Young men aged 17 and below are now detained in specially designed Youth Units attached to adult male prisons (currently in three New Zealand prisons: Hawkes Bay, Waikeria and Christchurch). However, these units will also house 18 or 19 year olds who are assessed as being vulnerable or 'at risk' in the mainstream. This practice has been deemed 'a highly undesirable phenomenon' by Principal Youth Court Judge Andrew Becroft. The location of these Units means that young people will often be held far from their family. There are no specialist units for young female prisoners. All young females are held alongside adult prisoners. The justification for this is that there are too few young women in prison. These practices have faced consistent

[2] See Office of the Prime Minister's Chief Science Advisory Committee "Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence" (Wellington, 2011) www.pmcsa.org.nz/wp-content/uploads/Improving-the-Transition-report.pdf, *R v Churchward* [2011] NZCA 531.

[3] This section draws in large part on the work of Dr Elizabeth Stanley for the New Zealand Human Rights Commission "Human Rights in Prisons" (Wellington, 2011) www.hrc.co.nz/2011/human-rights-values-key-to-prisoner-rehabilitation.

criticisms from the UN Committee on the Rights of the Child and the UN Committee against Torture (2009). This lessens the opportunities for young women to receive child-centred treatment and may increase the likelihood of serving further time in prison in the future.

iii) Young People in Police Cell Detention

11. A 2012 review of young people in police cell detention[4] highlighted several ongoing issues with police cell detention for young people in New Zealand, including 24-hour lighting and issues with cleanliness and ventilation. It also found that some young people had limited or no access to adequate healthcare, food or showering facilities and no ability to communicate with family, or, on some occasions, with professionals such as social workers. It also found that the population of young people in police cells has almost tripled since 2009.

12. In 2012, JustSpeak challenged the review's assumption that the use of Police cells for young people may be permissible where there are resource pressures. JustSpeak emphasizes that logistics and resourcing issues should not trump the special protections which international law affords young people, and that that changing the law to prohibit Police cell detention could free our resources for more appropriate solutions, such as skilled specialist homes, supported bail programmes, and empowering iwi social service providers to provide care.

Recommendations

a. Raise the age of the Youth Court's jurisdiction to include 17 year olds;
b. Exclude 12 and 13 year olds from the Youth Court's jurisdiction;
c. Review reservations to the United Nations Convention on the Rights of the Child, in relation to age-mixing in detention, in light of better accommodating in particular young women; and
d. Consider implementing national policy that prohibits the use of police cell detention for young people.

B. Māori and the Criminal Justice System

13. New Zealand has ratified the Universal Declaration of Human Rights (1948), the Convention on the Elimination of all Forms of Racial Discrimination (ratified in 1972), and openly supported the Declaration on the Rights of Indigenous Peoples since 2010, when Pita Sharples in his capacity as Minister of Maori Affairs gave an endorsement speech in New York.

[4] Independent Police Conduct Authority, Human Rights Commission and Office of the Children's Commissioner "Joint Thematic Review of Young Persons in Police Detention" (Wellington, 2012) < http://www.ipca.govt.nz/Site/media/2012/2012-October-23-Joint-Thematic-Review.aspx>.

14. The 2009 Outcome report highlighted that disparities continue to exist in the criminal justice system. These disparities only continue in 2013. Outcomes worsen for Māori at every stage of the criminal justice process. Despite making up 12% of the adult population, Māori accounted for a third of all adults prosecuted in 2012,[5] and 54% of those sentenced to imprisonment.[6] This is the same in the youth justice system. In 2012, Māori constituted 23% of the population of 14-16 year olds,[7] but 52% of apprehensions of 14 – 16 year olds,[8] 55% of young people who were prosecuted in the Youth Court[9] and 67% of young people given adult orders in the Youth Court.[10] In 2013, JustSpeak collated and released publicly available police statistics to demonstrate the proportion of youth and child apprehensions leading to prosecution in 2011, broken down by offence type. Across every offence type, with the exception of "miscellaneous offences", Māori were more likely to be prosecuted than Caucasian young people. JustSpeak's release is appended ("Appendix 1").

15. JustSpeak produced a 2012 report "Māori and the Criminal Justice System: A Youth Perspective" which summarises research and consultation at public forums. Amongst the twelve preliminary positions contained in this report (appended: "Appendix 2"), is a view that Moana Jackson's 1988 report He Whaipaanga Hou continue to be considered. One of the ideas that this report underscores is that discretion is central to discrimination, and that discretion can enable institutional racism to occur. JustSpeak supports research being carried out on the extent of bias in the adult and youth criminal justice system. This should extend to policing practices and which areas are targeted, arrest approaches and rates, as well as whether alternative action or diversion is offered. It would be useful for this proposed research to cover any differences in whether or not bail is offered, whether or not there is a conviction, and on the sentence offered. This research is important because while there appears to be some acknowledgement of the risk of bias in the criminal justice system, it is far from generally accepted. Until it is, it may be more difficult to encourage police officers and others working in the criminal justice system to engage in education and to introduce further checks to ensure that non-discrimination rights are safeguarded.

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[5] Ministry of Justice Trends in Conviction and Sentencing 2012 (Wellington, 2012) < http://www.justice.govt.nz/publications/global-publications/c/trends-in-conviction-and-sentencing-court-statistics-for-adults-in-2012/publication

[6] Statistics New Zealand www.stats.govt.nz "Conviction and Sentencing Tables" "Convicted Offenders by ANZSOC"

[7] Statistics New Zealand www.stats.govt.nz "Population: Estimates and Projections" "National Population Estimates"

[8] Statistics New Zealand www.stats.govt.nz "New Zealand Police Recorded Crime and Apprehensions Tables"

[9] Statistics New Zealand www.stats.govt.nz "Child and Youth Prosecution Tables" "Multiple Offence Type Prosecution"

[10] Ibid.

16. It is acknowledged by many that approaches which connect Māori to their culture are vital. In New Zealand, a strong best practice example of this is our ten Rangatahi Courts. Rangatahi Courts hold part of the youth justice process (the monitoring of a Family Group Conference plan) on a marae (Māori centre of living) and incorporate tikanga Māori (Māori customs) and te reo Māori (the Māori language). Kaumatua and kuia (Māori elders) sit alongside the Judge and give advice to young people who appear before the Court. Young people of any ethnicity can attend the court, and a victim's consent is required. A qualitative evaluation of the courts in 2012[11] showed successful results, including:

    i) High levels of attendance by young people and their families;
    ii) Young people and their families reporting feeling welcomed and respected;
    iii) Young people reporting a perception of the process as legitimate;
    iv) Families reporting a sense of being supported in their role by the courts; and
    v) Validation of the mana (sovereignty) and identity of the marae community and creating opportunities for people within it.

17. Some key barriers identified by researchers to the success of the court included a need to better cater to educational, health and cultural needs of young people appearing in the Court. A further barrier identified by JustSpeak is the need for more Māori Judges (appended as "Appendix 4" are comments released by JustSpeak member and law lecturer Tai Ahu to Radio New Zealand). A lack of Māori Judges in certain areas of New Zealand could stall the expansion of the courts. The Attorney-General has reported an understanding that "something needs to be done to encourage Māori lawyers to work towards becoming judges."

Recommendations:

a) That comprehensive national research is carried out on the extent of bias in the adult and youth criminal justice system;
b) That the twelve preliminary positions of JustSpeak in the position paper "Māori and the Criminal Justice System: a Youth Perspective" be considered; and
c) That barriers to development of the Rangatahi Courts addressed by the 2012 evaluation be considered and addressed; and
d) That policies be implemented for the appointment of further Māori Judges and to further encourage and support Māori to enter the legal profession.

C. Women in Prison

[11] Ministry of Justice "Evaluation of the Early Outcomes of Te Kooti Rangatahi" (Wellington, 2012) www.justice.govt.nz/publications/global-publications/r/rangatahi-court-evaluation-of-the-early-outcomes-of-te-kooti-rangatahi/publication.

18. As at 31 March 2012, women made up 7.5% of the New Zealand prison population.[12] In New Zealand, there are three prisons solely for housing women prisoners; Auckland Region Women's Correction Facility (ARWCF), Arohata Prison in Wellington and Christchurch Women's Prison.

19. The Department of Corrections has gathered some general information about women prisoners in New Zealand prisons. They are generally serving sentences of two years or less, and are typically unemployed prior to imprisonment. They generally have a low level of educational achievement, and have high incidences of mental health issues, health issues generally, and drug and alcohol problems; combined with prevalent histories of trauma and abuse.[13]

20. There has been international recognition of the need for special provision for the unique characteristics and needs of women prisoners. The Department of Corrections operates prisons in accordance with New Zealand's legislative requirements – primarily prescribed in the Corrections Act 2004 and the Corrections Regulations 2005. According to the Act and Regulations, the Department of Corrections must administer all sentences in a safe, secure, humane and effective manner; operating prisons in accordance with New Zealand legislation and based on other agreements (such as the United Nations Standard Minimum Rules for the Treatment of Prisoners). Other relevant governing mechanisms for prison standards are the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Sentencing Act 2002 and the Parole Act 2002.

i) Mothers with babies in prison

21. Rule 23(2) of the United Nations Standard Minimum Rules for the Treatment of Prisoners provides that "where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers."

22. In September 2008 the Corrections (Mothers with Babies) Amendment Bill was passed into law, which allowed mothers to keep their children with them in prison up to the age of two years. The Bill extended the time from the previous nine months.

23. All three of the women's prisons in New Zealand provide "Self Care Units" and "Feeding and Bonding Facilities" to address the needs of

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[12] Department of Corrections "Prison Facts and Statistics – March 2012" http://www.corrections.govt.nz/about-us/facts_and_statistics/prisons/ps-march-2012.html

[13] "Women in Prisons" Information Sheet, Department of Corrections, accessed online via http://www.corrections.govt.nz/about-us/fact-sheets/managing-offenders/general_info/women-in-prison.html, on 15 June 2013.

mothers in prison.[14] The "Self Care Unit" allows a mother to live with her child in an independent type unit, allowing freedom to structure her own living arrangements. This is only available to women classed as low to medium security prisoners however, and must be considered to be in the best interests of the child. "Feeding and Bonding Facilities" are also available at all three women's prisons. These allow women whose child is being cared for in the community up to twelve hours contact a day with the child in a lounge type facility with a kitchenette, bathroom and sleeping room for the baby.

24. In response to the legislative amendment in 2008 two new units were built at ARWCF to provide 6 places for mothers with babies of up to two years old. At Christchurch Women's prison, two of the existing 8 units were refurbished, creating capacity for 4 mothers with babies of up to two years old.[15]

25. At Arohata Prison however there are no facilities to accommodate mothers with babies of up to two years of age. The facilities that exist only accommodate mothers with babies of up to only 9 months old. Changes were not made in response to the legislative provisions due to 'the nature of the site' at Arohata making upgrades particularly expensive, and the 'limited demand' at the site.[16]

ii) Young Women in Prison

26. As mentioned at (A), age mixing in prisons is a particular issue for young women which needs to be addressed.

Recommendations

i) Review practices surrounding mothers and babies in prison to ensure compliance with the United Nation Standard Minimum Rules for the Treatment of Prisoners.

D. Specific Legislative Erosion of Human Rights in the Criminal Justice System

i) Prisoners' Right to Compensation

27. Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) specifically requires that an individual subject to a human rights breach have an enforceable

[14] "Mothers and Babies" Information Sheet, Department of Corrections, accessed online via http://www.corrections.govt.nz/about-us/fact-sheets/managing-offenders/specialist_units/mothers-and-babies-options.html, on 16 June 2013.
[15] "Mothers and Babies Units" Fact Sheet, Department of Corrections, accessed online via http://www.corrections.govt.nz/about-us/fact-sheets/managing-offenders/specialist_units/mothers-and-babies-options.html, on 16 June 2013.
[16] Ibid.

right to compensation. New Zealand does not comply with this, and has entered a reservation to this article.

28. Consequently, New Zealand's Prisoners' and Victims' Claims Act 2005 dealt with compensation owed to prisoners as redress for specified human rights and tort claims (including breaches of rights in the New Zealand Bill of Rights Act 1990, Human Rights Act 1993, and Privacy Act 1993). It provided that any victim would have first claim against the money. The Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act was passed in 2013. It essentially continued the legislative scheme enacted in the Prisoners' and Victims' Claims Act 2005, with the exception that any money left over from an award of compensation to a prisoner (after victims have made claims) would now go to a prisoner, rather than a victims' fund as it did under the original legislation.

29. Despite this amendment, the Act is fundamentally problematic and should be abandoned. Though the rights and needs of victims are of the utmost importance, they cannot and should not be met by allowing victims to claim against compensation received by prisoners for breaches of their rights. In a sense this mechanism for compensating victims penalises offenders twice for the same offending, contrary to the rule against double jeopardy contained in New Zealand's Bill of Rights Act (given that this financial penalty would not have been accounted for by the sentencing judge in determining the offender's sentence. It undermines prisoners' right to natural justice and their right to meaningful redress for breaches of their rights provided by various statutes. Where a prisoner is due compensation, it is because that prisoner is a victim of a wrong committed by the Crown. It undermines prisoners' right to natural justice and their right to meaningful redress for breaches of their rights provided by various statutes. Where a prisoner is due compensation, it is because that prisoner is a victim of a wrong committed by the Crown. The Crown is the offender and the prisoner is the victim.

30. Furthermore, allowing victims to claim against compensation awarded to prisoners for breaches of their rights will disincentivises prisoners making claims. The maintenance and enforcement of human rights relies on the ability to report, sanction and receive redress for breaches of such rights. Without this, a culture of impunity and disregard for human rights will develop. Prisoners are some of the most vulnerable and disadvantaged members of society with respect to the power of the State. It is of paramount importance that prisoners' human rights and rights under the law of tort are protected when they are breached by agents of the Crown, these breaches are reported and investigated; and that the perpetrators are appropriately sanctioned and the prisoners receive meaningful redress. However, if there is the very real prospect that any compensation received by a prisoner will be subject to a claim by a victim, prisoners will be disinclined to report breaches of their rights and pursue compensation. In this manner the substantive rights of prisoners under New Zealand's human rights

legislation and tort law are undermined, along with the rights to redress provided within, and their rights to natural justice.

Recommendations

a) That New Zealand reconsider its reservation to article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
b) That New Zealand abolish the Prisoners and Victims' Claims Act in favour of legislation allowing prisoners the right to redress for human rights and tort claims.

ii) Prisoner Disenfranchisement

In accordance with article 25 of the International Covenant on Civil and Political Rights (ICCPR) and section 12(a) of the New Zealand Bill of Rights Act, New Zealand has the obligation to ensure that a person has a right to take part in a free and equal election.

New Zealand does not allow prisoners the right to vote. Since the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, all those sentenced to imprisonment have lost their right to vote under section 80(1)(d) of the Electoral Act 1993. Before Parliament brought in the 2010 amendment, prisoner disenfranchisement was limited to persons serving a prison sentence of three years or longer. Since the 2010 amendment, New Zealand has had a blanket ban on prisoner voting.

Section 80(1)(d) provides that 'a person who is detained in a prison pursuant to a sentence of imprisonment' is disqualified for registration.

Considering the effect that elections have on prison policy and a prisoner's everyday life, and the high rate of incarceration in New Zealand, this law is undemocratic. It deprives a sector of society the right to be represented.

The application of this law can also be somewhat arbitrary. It allows the right to vote for a person serving a two-and-a-half year term in-between elections, but takes away the right to vote from a person serving a three month term that coincides with the election.

Recommendations

a) Abolish the 2010 amendments to the Electoral Act and allow all people in prison the right to vote.