

## **NEW ZEALAND GOVERNMENT RESPONSE TO OPINION NO. 21/2015 (NEW ZEALAND) OF THE WORKING GROUP ON ARBITRARY DETENTION CONCERNING MR A**

### **INTRODUCTION**

1. The New Zealand Government submits the following information and observations concerning Opinion No. 21/2015 (New Zealand), dated 17 June 2015, adopted by the Working Group on Arbitrary Detention on 29 April 2015 and brought to the attention of the New Zealand Government on 9 July 2015.
2. The New Zealand Government did not become aware of the Opinion, or of a precursor communication outlining the substance of the complaint and asking for a Government response, until after the Opinion had been adopted and provided to the source. The Government therefore has not commented on the substance of the communication or Opinion until now. The Government requests that this response be referenced in any public discussion by the Working Group on the Opinion, including in the Working Group's Annual Report.

### **SUMMARY OF OPINION AND RESPONSE**

3. Mr A, a New Zealand citizen sentenced to preventive detention, alleged his detention is arbitrary. He alleged his ongoing detention has not been justified by compelling reasons and regular periodic reviews by an independent body. He also alleged that conditions of his detention are neither distinct from the treatment of convicted prisoners serving a punitive sentence nor "aimed at his rehabilitation and reintegration into society".
4. The Working Group rendered its opinion that the deprivation of liberty of Mr A is arbitrary and in contravention of Article 9 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights. The Working Group's view is that it is "clearly impossible to invoke any legal basis justifying the deprivation of liberty" of Mr A, and that this "constitutes a violation of international law for reasons of discrimination."
5. The Government of New Zealand respectfully submits that Mr A is not subject to arbitrary detention. Mr A is lawfully detained under a sentence of preventive detention imposed in the High Court on 20 April 1994, following his conviction for a sexual offence against a minor. He became eligible for parole after serving ten years of that sentence and his ongoing detention is reviewed regularly by the New Zealand Parole Board, an independent body which has determined that Mr A continues to pose an undue risk to public safety and cannot be released. Two applications have been made under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 ("IDCCR Act") for Mr A to be subject to a Compulsory Care Order, which would allow him to reside outside the prison environment. Both applications have been declined on the basis that Mr A remains an undue risk to public safety and because Mr A's ability to engage in rehabilitation was demonstrated to be very limited.
6. The Government of New Zealand respectfully submits that New Zealand is not in contravention of Article 9 of the International Covenant on Civil and Political Rights or Article 9 of the Universal Declaration of Human Rights. The Government of New Zealand continues to arrange the necessary assistance that allows offenders who have received a sentence of preventive detention to be released on parole once they are no longer a danger to the community. Mr A poses a high risk of violent sexual offending against young children, and the protection of children from such serious harm is a compelling reason for his continued detention.

### **JUSTIFICATION FOR ONGOING DETENTION**

7. Mr A was sentenced to preventive detention on 20 April 1994, having been convicted of a qualifying offence. This sentence required the High Court to be satisfied that there was a substantial risk that Mr A

would commit a specified offence upon release. In May 1995 the Court of Appeal upheld the sentence imposed on Mr A. Under the law as it then was, Mr A became eligible for parole after serving ten years of his sentence. Mr A has remained in custody because the NZ Parole Board, which is required to consider him for parole at least once in every 24 months, has found that he poses an undue risk to public safety.

## **TREATMENT OF THE INTELLECTUALLY DISABLED IN NEW ZEALAND**

8. Prior to 1992, individuals with an intellectual disability came within the scope of the Mental Health Act 1969 and could be made subject to orders under that Act. In 1992, the Mental Health (Compulsory Assessment and Treatment) Act 1992 (“MHCAT Act”) replaced the 1969 Act. One of the most significant aspects of the MHCAT Act was the introduction of a new definition of the term “mental disorder”. This definition excluded from the mental health legislation those individuals who had an intellectual disability, unless they also had a mental illness. This legislative gap was addressed by the IDCCR Act.
9. Any person in New Zealand will be treated as intellectually disabled if they are found to have a permanent impairment that results in significantly sub-average general intelligence; and results in significant deficits in adaptive functioning, as measured by tests generally used by clinicians, in at least two of nine listed basic living skills and which became apparent during the developmental period of the person.
10. The emphasis in the IDCCR Act is on the provision of care and rehabilitation to the intellectually disabled subject to a guiding principle set out in s 11 of the Act that they should be treated so as to protect their rights, their health and safety and the health and safety of others.
11. Where an assessment of an intellectual disability is made, a designated care co-ordinator must arrange for a needs assessment to be made for the intellectually disabled person and a care and rehabilitation plan prepared. A care recipient under the Act must accept the care given to them by the person managing that care, and comply with lawful directions. The Act specifically preserves their basic rights and they have access to the Health and Disability Services Commissioner, for the purpose of complaints about their treatment.

## **INTELLECTUALLY DISABLED PERSONS AND THE NEW ZEALAND CRIMINAL JUSTICE SYSTEM**

### **Fitness to stand trial**

12. An intellectual disability may be taken into account in determining whether an accused person is fit to stand trial. Under the Criminal Procedure (Mentally Impaired Persons) Act 2003, if the court is satisfied that they participated in the offence but on the evidence of appointed health assessors they are unable to conduct a defence or instruct counsel, the Court may find them unfit to stand trial. If they are found to be unfit to stand trial by reason of an intellectual disability, the trial Court must make a compulsory care order for their detention in a secure facility under the IDCCR Act.

### **Sentencing**

13. If a person with an intellectual disability is fit to stand trial and is convicted of an offence, the principles of sentencing codified in the Sentencing Act 2002 s 8 require the Court to “take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and “take into account the offender’s personal, family, whanau (wider family), community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative

purpose.” An intellectual disability can be accommodated in sentencing by proper recognition being given to these sentencing principles.

### **The sentence of preventive detention**

14. The sentence of preventive detention is imposed infrequently in New Zealand. An average of 11 offenders were sentenced to preventive detention per year, between 2010 – 2014. A person with an intellectual disability is not immune to the imposition of a sentence of preventive detention, if the stringent requirements for that sentence are met.
15. The sentence may only be imposed by the High Court and only if the offender has committed a qualifying sexual or violent offence, is over 18, and the Court is satisfied they are likely to commit a further qualifying sexual or violent offence if released at the end of any finite sentence the Court could impose. The Court must consider the pattern of offending, its apparent causes, and the seriousness of harm to the community caused by the offending. The offender must be notified the sentence is to be sought and reports from qualified professionals must be placed before the Court. An intellectual disability would be a relevant consideration for the purpose of determining whether a sentence of preventive detention was appropriate.
16. If the sentence is imposed, the prisoner may appeal against it to the Court of Appeal and then the Supreme Court. If the sentence is confirmed, they will, like all other sentenced prisoners, be considered by the Parole Board for release after serving any non-parole period the Court has imposed. The difference for those prisoners serving preventive detention is that, like the sentence of life imprisonment, it has no end date and release will not occur until the Parole Board is satisfied they no longer pose an undue risk to the safety of the community.

### **Compulsory Care Orders**

17. A prisoner who has an intellectual disability may be the subject of a referral by their prison manager under s 29 of the IDCCR Act. That written referral will trigger an assessment of the prisoner’s intellectual functioning and if they are found to be intellectually disabled, the same needs assessment and care planning afforded to other intellectually disabled persons will follow.
18. Before an intellectually disabled prisoner can be released from prison for the purpose of receiving care under the IDCCR Act, the care co-ordinator must exercise their discretion to make an application to the Family Court for an order for their compulsory care and the Family Court must exercise its discretion to make the order. If the application is withdrawn or the Court declines to make the order, the prisoner must be returned to the custody of the prison manager.

### **MR A’S BACKGROUND CIRCUMSTANCES**

19. Mr A was born in Auckland in 1956: the second of six children. His earliest engagement with the authorities was in 1964 as a result of anti-social behaviour and minor offending. In 1966 he and his siblings were placed under the care of the then Department of Social Welfare, because they were not subject to proper control at home. Mr A was placed in a residential school, returning home briefly in 1968.
20. In May 1969 following sexual interference with a six year old girl, Mr A was committed under the Mental Health Act 1911 and was detained as a patient at Kingseat Hospital. In June that year he was later transferred for security reasons, following another incident of sexual interference, to the more secure facility at Oakley Hospital where he remained until 1984. Following a further serious sexual assault on a four year old boy, he was transferred to Lake Alice Hospital as a special patient under the Mental Health Act 1969. Apart from the serious sexual assaults, Mr A’s time in secure mental health care was punctuated by

numerous escapes or attempts to escape, and manifestation of a deviant sexual interest in young children. He was transferred to Carrington Hospital in 1987 and then back to Kingseat Hospital in May 1989.

21. In 1993, following the introduction of the MHCAT Act, Mr A was reassessed and his status changed to that of an informal patient. Since 1989 he had had a series of successful weekend leaves with his mother. He was released from Kingseat hospital in late 1993. Shortly afterwards he committed the two offences of sexually assaulting young boys that resulted in his current sentence of imprisonment.

#### **Administration of Mr A's sentence**

22. Mr A is currently detained as a sentenced prisoner at the Spring Hill Corrections Facility where he is still serving a sentence of preventive detention imposed by the High Court in 1994 for serious sexual offending against young children. Mr A became eligible for parole after 10 years and he was first seen by the New Zealand Parole Board on 10 August 2004. The Parole Board may direct his release on parole if satisfied that he no longer poses an undue risk to the safety of the community. The Board was not satisfied in respect of Mr A and parole was declined. The Parole Board may decide to postpone further consideration for parole for up to 3 years if satisfied that without a substantial change in circumstances the offender will not be suitable for release within that period. On 13 October 2004, the Parole Board made such a postponement order for Mr A without any opposition from Mr A, who was represented by counsel.
23. In January 2003, Mr A was transferred to the Te Piriti Adapted Program for child sexual offenders with limited cognitive abilities at Auckland Prison. Following his completion of that program in December 2005 the prison manager made the first referral of Mr A under s 29 of the IDCCR Act.
24. Specialist assessments found Mr A to be intellectually disabled for the purpose of the IDCCR Act, but there was concern by the specialists as to whether his particular needs could be matched in secure hospital detention under that Act.
25. On 7 March 2006 the Parole Board was made aware of the possibility Mr A could be suitable for a compulsory care order under the IDCCR Act and, as this was a potentially significant change in his circumstances, the Board saw him again on 27 June 2006. At that time the Board observed that there was a possibility a compulsory care order would be made by the Family Court, but observed that it could not release him until such an order had been made.
26. Following the Parole Board hearing in March 2006 a decision was made to take an alternative pathway, which was to refer Mr A under s 46 of the MHCAT Act to the Mason Clinic in Auckland (a secure facility run by the Waitemata District Health Board authorised to house and treat persons with mental illness) where the opportunities for him to participate in helpful programs and more individualised treatment were greater. That referral required his consent.
27. On 4 September 2006 the Board observed that "considerable efforts were being made for Mr A to be assessed under special provisions of legislation relating to persons who have an intellectual disability", and the most recent of these was the plan to have him transferred to the Mason Clinic. His parole was deferred for consideration to the following year.
28. On 19 June 2007 the Parole Board was due to see Mr A, but he was still at the Mason Clinic at that time. At his request consideration for parole was deferred until September 2007. The Parole Board observed that an attempt was to be made to have Mr A assessed again for a compulsory care order under the IDCCR Act and consideration of parole was deferred to enable that process to be commenced again.

29. Mr A had withdrawn his consent to be at the Mason Clinic and he was returned to prison, where a further application was made under s 29 of the IDCCR Act. The second application was made on 12 December 2007.
30. On 4 February 2008 the Care Co-ordinator acknowledged Mr A was intellectually disabled, but declined to take any further action under the IDCCR Act due to his significant risk of re-offending.
31. Parole Board hearings for Mr A were deferred during 2008 while progress was made by Mr A's counsel to advance his consideration for a compulsory care order. On 20 November 2008 the Board saw Mr A and noted the following.

“Today we see [Mr A] for release on parole. He is assessed at being at a very high risk of reoffending. There is nothing which he has done which mitigates that risk. He must be regarded by us as an undue risk to the safety of the community and parole will be declined.”

Further the Parole Board noted

“We are concerned about [Mr A's] position. He is a very vulnerable man. We are going to see him again for parole to be reconsidered in March. Largely this will be so that we can keep some sort of account of the process which is going on under scrutiny and help if we can.”

32. In 2008 counsel acting for Mr A commenced a legal challenge to the decision of the care co-ordinator in February 2008.
33. On 27 March 2009 the Parole Board again saw Mr A, this time noting that the application for a compulsory care order had stalled, in a manner that Mr A's counsel was to challenge by judicial review. In the meantime the Board recorded

“There is no question of [Mr A] being released on parole before these proceedings are determined. Everyone agrees that given his high risk of reoffending, his low intellectual functioning and his limited ability to manage his own risk, he must remain in a structured environment under close supervision. The issue is whether he should remain in prison or whether he is more appropriately cared for under the provisions of the IDCC & R Act.”

34. The judicial review proceeding ended on 13 November 2009 with orders made by consent that the referral under s 29 on 12 December 2007 would be reconsidered, by the completion of a needs assessment and a care and rehabilitation plan, leading, if it was considered appropriate, to a referral by the care co-ordinator to the Family Court under s 39 of the IDCCR Act for a compulsory care order. On 5 March 2010 the Care Co-ordinator notified his decision not to seek such an order.
35. The Parole Board has continued to see Mr A on an annual basis, but on each review, he continues to pose the same high risk of reoffending if released, other than if transferred to another “structured environment under close supervision”, and at each review parole has therefore been declined.

#### **Summary on the administration of the sentence**

36. Following the expiry of the minimum term of imprisonment imposed by the Court, Mr A's detention has been subject to regular periodic review by the New Zealand Parole Board, an independent body, which has determined that Mr A continues to pose an undue risk to public safety and therefore cannot be released on parole. The particular offending he is at a high risk of committing is violent sexual offending against young children. The protection of vulnerable children from such a high risk of serious harm represents a compelling reason for his continued detention.

### **Rehabilitation and care of Mr A in prison**

37. The Corrections Act 2004 provides that the purpose of the corrections system is “to improve public safety and contribute to the maintenance of a just society” by, in part, ensuring that all sentences are to be administered in a safe, secure, humane, and effective manner. Further, the system shall achieve those goals throughout a sentence by “assisting in the rehabilitation of offenders and their integration into the community, where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available, through the provision of programmes and other interventions”. The provision of rehabilitation and reintegration programmes is subject to resource availability and issues of public safety.
38. The Department is required under legislation to provide health care that is reasonably equivalent to that available in the community (s 75 of the Corrections Act 2004). In some cases, the care provided will exceed that available in the community. For example, the Department provides access to free dental care.
39. When Mr A is accommodated in a prison he is able to access health care as needed. Department staff will be aware of his health needs (as advised by health services staff) and will take care to ensure he is referred for health care if they observe any deterioration in his condition and he does not self-refer. If he is on any medication, nursing staff will see him for every medication administration round and ensure he is well. He will be provided with three meals a day that meet his nutritional needs and, again, custodial staff will be aware if for any reason he does not eat the food provided and can refer him to health staff for appropriate assessments. He will be referred by health services staff to external providers as needed, for example specialist care, and he will be able to access those services on the same basis as someone in the community.
40. On two occasions the Prison Manager responsible for Mr A has initiated the process for his consideration for a compulsory care order under the IDCCR Act. On each occasion, the application has failed to produce a compulsory care order for reasons explained elsewhere in this response. Further applications will be made if the circumstances are such that it is in the interests of Mr A for this to be pursued again.
41. The Prison Manager and staff involved in the detention of Mr A continue to treat him in a humane and careful manner, affording him such opportunities for rehabilitation that are appropriate to a prisoner with his intellectual disability.
42. The decisions made under the IDCCR Act were made for appropriate clinical reasons. Mr A has previously had opportunities to participate in care and rehabilitation at the Mason Clinic, New Zealand’s leading secure facility for care of persons with intellectual disabilities. On those occasions, Mr A has declined to participate in programmes available for care and rehabilitation. In February 2010, a further application was made for Mr A to become a care recipient. The specialist assessor provided a further report indicating that Mr A was not an appropriate candidate for rehabilitation.
43. The assessor noted that there was no evidence that Mr A would be subject to or benefit from the treatment/rehabilitation offered; noting the extensive interventions offered previously had been unsuccessful. Mr A was assessed as a poor candidate for further intervention aimed at his risk of sexual reoffending. For this reason the referral for Mr A was declined. There is no indication that the circumstances and risk relating to Mr A have changed to support another referral.

### **CONCLUSION**

44. For the aforementioned reasons, the Government of New Zealand respectfully submits that Mr A’s detention is not in contravention of Article 9 of the International Covenant on Civil and Political Rights or Article 9 of the Universal Declaration of Human Rights. New Zealand’s domestic law ensures due process for all

individuals subject to preventive detention, and requires the Government to ensure detention is only maintained where an individual remains at high risk of reoffending.