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Submission on New Zealand's draft 5th Periodic Report under International Covenant on Civil and Political Rights

Background information

1. I am a lawyer currently working as an independent legal and policy consultant
2. I have a particular interest in issues involving children and young people. I worked as a solicitor with the Children's Legal Centre in London in 1985/86, I founded Youth Law Project (now YouthLaw) a child and youth advocacy organisation and community law centre in Auckland in 1987 and worked as senior solicitor there until 1993. I was appointed the inaugural director of Australian National Children's and Youth Law Centre in Sydney and worked there 1993/1996. I worked for the New Zealand Commissioner for Children, Laurie O'Reilly, in 1996/97 and for the New South Wales Commissioner for Children 2000/01. I was employed by the New Zealand Law Commission in 2004/05.
3. I have a special interest in human rights and have assisted the New Zealand Human Rights Commission in various capacities including working with former Commissioner Rae Julian on a survey of children in institutions *Who Cares for the Kids* (1992) and more recently being on an advisory committee in relation to children's rights established as part of the development of the *New Zealand Action Plan for Human Rights* (2004/05)..I have just completed a project for the current Children's Commissioner involving a review of all New Zealand laws, regulations, policies and practices to assess any areas of non compliance with UNCROC. I have written or contributed to various publications on Human Rights including a chapter in *New Zealand Civil Rights Handbook* (2001) which I have revised for the forthcoming new edition of the Handbook. I am the author of a booklet *Human Rights* (1990) published

by GP Books and am the author and updater of the chapters in Brookers Family Law Child Law I – III on Care of Children, Youth Justice and Adoption.

4. I contributed to New Zealand's first and second periodical reports under the UN Convention on the Rights of the Child and also to Australia's 2nd report under UNCROC.

Comments on draft 5th Periodic Report under ICCPR

5. My comments will deal mainly with issues affecting children and young people (ie persons under the age of 18 years) as this is my area of special expertise. In the short time available to me I cannot document all of the comments I make in this submission but I am happy to provide further information and documentation if requested. My comments refer to the relevant numbered paragraphs in the copy draft dated 30 October 2007.

6. Para 19: Art 2 Consistency 2000 and Compliance 2001

The HRC had done a great deal of work under Consistency 2000 at the time it was aborted and replaced with Compliance 2001. The Commission was most unhappy with the decision to prevent it completing its task and suggested that the reason for aborting the exercise was that the government did not want to be embarrassed by having its failings to comply with anti-discrimination legislation brought to light. However that may be, the stark fact is that there has been no move on the part of government to remedy the instances of non-compliance identified by HRC in its partial report. I can give examples if necessary. Government has relied on individual government departments to make its own inquiries and these have been far from robust. Examples will be given later in this submission.

7..Para 21: Art 2 Human Rights Amendment Act 2001

I acknowledge that this Act removed unjustifiable discrimination in some respects but it failed to remove glaring examples of discrimination experienced by children and young people on the grounds of their age. Admittedly Art 2 ICCPR does not refer to discrimination on the grounds of age as a specific ground, but I would submit that 'age' falls within the ambit of the term 'birth or other status'. The fact that s21(1)(i)(ii) defines 'age' to exclude all persons under the age of 16 years is to discriminate against the smallest and most vulnerable age group on the grounds of their young age. Because s19 NZ Bill of Rights Act only applies to grounds in HRA, under-16s miss out again. Age discrimination laws in all states and territories of Australia and in Commonwealth legislation apply to all age groups without exception.

No reference to the discriminatory nature of s21(1)(i)(ii) is made in the draft report. Successive New Zealand governments have failed to address the issue. It is an embarrassment that our age discrimination legislation itself discriminates against a group in society that is most susceptible to discrimination. Until recently they were the

only group in society who could be assaulted without it being a criminal offence. Persons aged 16 and 17 years currently are entitled only to a lower minimum wage than persons aged 18 years or older and there is no minimum wage for under-16s. The 2006 *Caritas* report *Delivering the Goods* shows that a number of workers under 16 years are being paid less than \$2 per hour for work sometimes at asocial hours and in unpleasant conditions. Delivery work and other work undertaken by young children carries with it the risk of injury. Children who are contractors are often not covered by Health and Safety legislation as has been acknowledged by the Department of Labour. This is more than discrimination on the grounds of age- it amountss exploitation of a group within society whose rights are not adequately protected.

8. Para 22: Art 2 Ability of HRC to make a declaration of inconsistency

The power given to the Human Rights Commission to make a declaration of inconsistency under Part 1A is presented in the draft as an enhancement of the rights of individuals who are suffering discrimination. While this is theoretically correct, the right is of very limited value to individuals. Firstly, a declaration of inconsistency does not change anything: it is a bare declaration. Secondly, the relevant provisions are badly drafted and difficult for a lawyer, let alone a lay person, to understand. Thirdly, the experience of the Child Poverty Action Group complaint, initiated in 2002, which has been defended by the government on technical grounds at every stage in the process, hardly encourages individuals or community groups to resort to this procedure. A hearing of the CPAG case on its merits is unlikely until mid-2008. If the complaint is upheld there are likely to be further appeals. As a practical remedy against institutionalised discrimination it is of little use and has been rarely used. No hint of this is given in the draft report.

9. Paras 39 – 46 National Plan of Action on Human Rights

A huge amount of effort went into the development of the *National Plan of Action on Human Rights*. The HRC did a great job in consulting with experts in various areas covered and in consulting with the community. I personally gave a lot of time and effort to assisting in its development. The HRC is to be commended in consulting with children and young people both through a youth reference group and by the holding of a conference attended by large numbers of young people. The first report *Human Rights in New Zealand Today* (September 2004) identified a number of human rights issues of importance and the *NZ Action Plan on Human Rights* (February 2005) set out specific priorities for action required to remove or alleviate discrimination being experienced by various groups in society. Two years and nine months later the government has not responded to the HRC Action Plan. In section 2 *Getting it Right for Children and Young People* only one of the 41 'Priorities for Action' has been fully implemented. That is the important issue of repeal of s59 Crimes Act to abolish physical punishment of children by parents. The Bill to bring this about was introduced not by the government but by Green MP Sue Bradford (although the government to its credit gave its support for the Bill). A cynic would say that the fiasco over Consistency

2000, the legal tactics to delay a decision under Part 1A in the CPAG case and the failure to respond to the recommendations of NZAPHR taken together indicate that the government is using delay and obfuscation as a strategy to resist attempts by the HRC and the community to eliminate the remaining pockets of discrimination in New Zealand. Many of the priorities for action identified in NZAPHR reflect recommendations of the UN Committee on the Rights of the Child and successive governments have displayed a similar disinclination to act on those recommendations: see *Kids Missing Out: New Zealand's Slow Progress on UNCROC*, Action for Children and Youth Aotearoa, June 2007 (available on www.acya.org.nz) for a detailed assessment of NZ's dilatory response to UN Committee's recommendations.

The indication in para 45 that the government is planning a 'range of responses tailored to the different operating environment and policy priorities of departments' is bureaucratise and a recipe for inaction: the antithesis of a plan of action.

10. **para 81: Art 6 Right to life**

This para fails to give disaggregated life expectancy figures for Maori. While the life expectancy of Maori is increasing it remains significantly lower than for pakeha New Zealanders. If an accurate picture is to be given this information should be given. The information is available from the 2007 Social Report pp24,25.

11. **paras 81: Art 6 Right to life generally**

New Zealand has an abysmal record in relation to intentional homicide and injury of babies and children. It is close to the bottom of the League Table of Child Maltreatment in Rich Countries. Innocenti Report Card 2003. The right to life is the most important of all human rights. While there has been a series of reports and inquiries into child deaths and huge community concern, one glaringly obvious factor is that child protection services in this country are (and have been for years) overstretched, undertrained, underfunded and suffering from low morale and high staff turnover. It is less than frank to discuss the right to life in New Zealand without mention of these matters. High profile anti-violence campaigns have their place but providing skilled, committed and effective child protection services should be the greatest priority.

Another issue that seems to have escaped consideration is the very broad definition of the defence (and separate crime) of infanticide in s178 Crimes Act 1961. Infanticide is committed where a woman causes the death of a child of hers under the age of ten years while the balance of her mind was disturbed by reason of childbirth or lactation so that she cannot be held fully responsible. In England, the position is regulated by the Infanticide Act 1938 and the lesser crime applies only where a mother kills the child to which she had recently given birth. The English Law Commission in its report *Murder, Manslaughter and Infanticide* (November 2006) did not recommend extending the defence of infanticide to children other than the child to which she had given birth and did not support extending to two years (currently 12 months) the age of

the child whose death has been caused. In NZ, the maximum sentence for infanticide is three years. While I support the idea of having a separate offence of infanticide it should be restricted to situations where the mother kills the child to which she has given birth within one year of the child's birth. The English Law Commission accepted scientific evidence that (a) any disturbance to the mother's mind by reason of childbirth is likely to have resolved itself within a year of the birth, and (b) there is no evidence that breastfeeding increases the likelihood of post-puerperal mental illness.

Another concern is that the Child Mortality Review Panel reports on once every eighteen months. It has inadequate legislation and staffing to carry out its responsibilities effectively. It is a pale shadow of the New South Wales Child Death Review Team which has had a significant impact on non-accidental deaths of children.

12. Para 86: Art 7 Immigration Bill (see also para 128)

This para outlines some of the positives in the Immigration Bill but hides most of the negatives. New Zealand has been criticised by the UN Committee Against Torture for its detention of asylum seekers and has been urged to reduce the time and improve the conditions under which asylum seekers can be held in solitary confinement CAR/C/CR/32/4 19 May 2004 paras 6(b), 6(d). The Bill will give immigration officials the power to detain persons for up to four hours and to arrest and detain a person without warrant for a maximum period of 96 hours (currently 72 hours). Currently overstayers and non-residents are often held in police cells or prisons pending deportation. While it is policy that children with parents or family members are housed at Mangere Centre and that unaccompanied children are released into the community there is nothing in the current law or in the Bill that requires such placements and there is anecdotal evidence that children are sometimes placed in detention or in police cells. The Immigration Bill in a number of other respects curtails or limits the rights of asylum seekers including their rights of appeal. The provisions in the Bill in respect of asylum seeking children do not comply with UNCROC and fail to give them adequate protection. The account of the Bill in para 86 is not balanced in that emphasises the positive features of the Bill but is silent about the negative aspects.

13 General: Art 7 Cruel, inhuman or degrading treatment or punishment

Under s238(1)(e) Children, Young Persons and their Families Act a child or young person can be placed in police custody pending a further hearing of their case if (a) s/he is likely to abscond and (b) suitable facilities are not available in a Child, Youth and Family residence.

A child or young person remanded in police custody will be detained in a cell at a police station. Such cells are intended for short term confinement of prisoners. Adults cannot usually be held in a police cell for more than 48 hours pending

appearance in court. The practice of holding under-17s in police cells has been condemned by three Commissioners of Children, by Youth Court and District Court judges, by the Human Rights Commission and by the UN Committee on the Rights of the Child. Children in police cells lack basic amenities such as showering, washing of clothes, exercise, recreation, education, visiting facilities. They are likely to be held in solitary confinement or share a cell with adult prisoners. There are not usually food preparation facilities and they are fed on takeaway or bought food. Despite the barrage of criticism, more children and young people are spending more nights in police cells (I can provide figures). The government has been aware of these concerns for more than a decade but has failed to rectify the problem. There are strong grounds for believing that these children are experiencing cruel, inhuman or degrading treatment or punishment. The HRC in NZAPHR identified the provision of more beds in residences and increase in supported bail as key priorities for action with a view to keeping children out of police cells. The UN Committee on the Rights of the Child (2003) expressed concern at the detention of under-18s in police cells: CRC/C15/Add216 paras 49, 50. It is surprising that there is no mention of this deplorable situation in the draft report.

14. Paras 95 – 97 Art 8 Human Trafficking

New Zealand has not yet ratified the Optional Protocol to UNCROC on the Sale of Children and Child Prostitution despite indicating its intention to do so and publishing an excellent Plan of Action in February 2002. There have been identified cases of trafficking of people in New Zealand (ECPAT can give you details) although admittedly such trafficking is uncommon. The government has identified that changes to the Adoption Act should be made to close loopholes which would allow trafficking of children for adoption purposes but proposed changes to the Adoption Act have not been made.

15. Paras 159 – 162 Art 10 Mixing of juveniles with adults in detention

Cabinet agreed in principle in Nov 2001 to the withdrawal of its reservation allowing the mixing of under-18s with adult prisoners but it still has not withdrawn the reservation nor a similar reservation entered in respect of UNCROC in 1993. No reason is given for the failure in the intervening six years to lift the reservation. There have been for some time specialist youth units in prisons. The 'test of best interests' which is relied upon by the Department of Corrections as evidence of compliance with the age-mixing requirements of ICCPR and UNCROC is not adequate because in deciding whether under-18s can be mixed with young adults aged 18 and 20 years, the test considers the best interests of the *adult* prisoners as well as the best interests of the under-18 prisoners. In all facilities under-18s are as a matter of routine mixed with 19 and 20 year olds. This is not compliant with NZ's international obligations. There have been serious riots this year in Rimutaka Youth Unit which is evidence that the mix of children with young adults can be an explosive one.

Under-18s are mixed with adults in police cells (see below) and in psychiatric units and military detention facilities. They have until recently been mixed with adults in transport vehicles and they are seemingly still mixed with adults in court cells. This has been admitted by government. The comforting picture painted by the draft report is incomplete and inaccurate. The contracting out of transport services (like the privatisation of prisons) is undesirable and had tragic consequences in the case of the death of Liam Ashley.

16. General: Art 13.4 Juveniles and criminal procedure

This article states that in the case of juveniles, criminal procedures shall be such as will take account of their age of children and the desirability of promoting their rehabilitation. The definition of 'young person' in s2 Children, Young Persons and their Families Act encompasses children between the ages of 14 and 16 years inclusive. Seventeen year olds are treated as adults in the criminal law system and are dealt with in adult courts. There has been judicial disagreement whether the youth justice principles in the CYPF apply to under-18s who are sentenced in the District Court or High Court but the better view is that the youth justice principles are not binding on adult courts, although under the Sentencing Act the age of an offender is one of a number of matters that the court must take into account in sentencing. Thus all 17 year olds and under-17s who are dealt with in the District Court or High Court are not dealt with in a manner which takes account of their age and promotes their rehabilitation. This is a serious breach of ICCPR.

17. Para 289: Art 23: Relationship (Statutory References) Act

This para fails to mention that the Statutory References Act failed to make amendments to the Adoption Act to allow couples in a de facto relationship and same-sex couples to apply to adopt a child. This should be referred to in the draft and the reasons for this omission explained.

18. Para 290: Art 23 Working for Families

The *Working for Families* package certainly benefits working families but does nothing to relieve poverty suffered by those families whose only source of income is a social security benefit. There is evidence in the MSD Social Reports and elsewhere that such families are the most likely to live below the poverty line. Especially hard hit are benefit-dependent families with young children. Evidence of this has been provided by Child Poverty Action Group in support of its Part 1A complaint..

19. General Art 24 & Art 26 : HRA discriminates against children aged under 16 years

Section 21(1)(i)(ii) Human Rights Act discriminates against under-16s in denying them the same protection against discrimination as is afforded to all other persons. Because s19 NZ Bill of Rights Act confers the right to freedom from discrimination only on the

grounds set out in HRA, under-16s are denied the fundamental right to protection from discrimination enjoyed by all other New Zealanders.

20. General: Art 25 Right to vote and to take part in the conduct of public affairs

Under-18s have no right to vote nor to stand for election in local or national elections. They are not able to be elected to Community Boards. Because elections are held every three years the average young person does not get to vote until he or she is 19 years and six months. Persons under this age have the capacity to make political judgments. Children at 16 years can work full time, can leave home, can drive a car, can marry or enter a civil union or de facto relationship. Voting is a risk-free activity and the voice of young people should be able to be heard through democratic processes. Imagine the uproar if the vote was removed from persons over the age of 70 years because some people in this age group because of the effects of old age might lack political judgment. It is anomalous and discriminatory that no one under 18 years can vote or be elected to Parliament, local authorities or community boards.

The Royal Commission the Electoral System in its 1984 report could see no reason why under-18s should not be able to vote. It referred to evidence as to children's developmental maturity which suggested that at age 14 or 15 children were able to make decisions on public issues. Art 25 extends the right to vote and to take part in public affairs to all citizens 'without unreasonable exceptions'. If children have the capacity to vote then their exclusion from voting and participation in public affairs is an unreasonable restriction. The Electoral Commission have been asked to consider the issue from time to time but dismisses the idea out of hand.

This is a fundamental human right and should be discussed in the draft report.

21. I appreciate being given the opportunity to make a submission on the draft report. I am happy to provide further information to back up any of the points made in this submission.

Robert Ludbrook
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