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Dear Secretariat,

SENTENCING AND PAROLE REFORM BILL 2009

Please find enclosed our submission on the Sentencing and Parole Reform Bill 2009. We do not wish to make an oral submission to the Committee.

Yours sincerely,

Patrick Holmes
Chief Executive Officer



Amnesty International Aotearoa New Zealand:

Submission to the Law and Order Select Committee
on the Sentencing and Parole Reform Bill 2009

24 April 2009

Amnesty International is an independent movement of over 2.2 million people in more than 150 countries who contribute their time, money and expertise to the promotion human rights and international campaigning to prevent some of the most serious violations.

Amnesty International, recognising that human rights are indivisible and interdependent, also works to promote all the human rights enshrined in the Universal Declaration of Human Rights and other international standards, through human rights education programs and campaigning for ratification of human rights treaties.

Amnesty International's New Zealand section has approximately 8,100 members and regular donors, and active members in some 30 local community groups, specialist groups and various action networks. At any one time its members are working on cases and issues in approximately 90 countries. The work of Amnesty International's New Zealand members is supported by paid staff and volunteers based in Auckland, and the movement's International Secretariat based in London.

Amnesty International is impartial. It is independent of any government, political persuasion or religious creed. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect

Amnesty International's policies and plans are discussed and decided at general meetings of the membership and meetings of their elected representatives held every two years (International Councils). In New Zealand their implementation is managed by the Chief Executive Officer overseen by an elected Governance Team. Between International Councils the international affairs of Amnesty International are managed by the Secretary General, who reports to an elected International Executive Committee of members from at least seven different countries.

Amnesty International is financed by its worldwide membership and the public. Strict guidelines exist to safeguard its independence of the organisation; AI does not accept government funds for its campaigning work or organisation.

Amnesty International has formal relations with the United Nations Economic and Social Council (ECOSOC), UNESCO, the Council of Europe, the Organization of American States, the Organisation of African Unity, and the Inter-Parliamentary Union.

Amnesty International was awarded the United Nations Human Rights Prize for "outstanding achievements in the field of human rights" on the 30th anniversary of the Universal Declaration of Human Rights. The movement received the Nobel Peace Prize in 1977 for its contribution to "securing the ground for freedom, for justice, and thereby also for peace in the world".

SUMMARY

- 1.0 Amnesty International Aotearoa New Zealand (AIANZ) welcomes the opportunity to make a submission on the Sentencing and Parole Reform Bill. AIANZ considers that the provisions in the Bill, which outline a three stage regime of increasing consequences for the worst repeat violent offenders which lead to a life sentence on the third offence, constitute a disproportionate form of punishment and in violation of human rights law.

'DISPROPORTIONATELY SEVERE TREATMENT OR PUNISHMENT'

- 2.0 The Bill creates a three stage regime for repeat offenders of "serious violence offences" (as defined in the interpretation section of the Bill (clause 86B(3)) and includes a range of sexual offences, and offences associated with assault and robbery.

The three stage regime is as follows;

1. When an offender receives a sentence of five years or more (a qualifying sentence) for a serious violent offence he or she is given a first warning;
 2. When an offender who has been given a first warning receives a qualifying sentence for a subsequent serious violent offence he or she is given a final warning;
 3. When an offender who was been given a final warning commits another serious violent offence for which the court would have imposed a qualifying sentence, the court must instead impose a sentence of life. The court must also impose a minimum non-parole period of 25 years unless satisfied that it would be 'manifestly unjust' to do so (clauses 86D(2) and 86E).
- 3.0 The current sentencing regime which allows for a nuanced response to serious offending that recognises the circumstances of the crime and the offender is significantly curtailed.
- 4.0 Amnesty International believes that clauses 86D and 86E are in contravention of section 9 of the New Zealand Bill of Rights Act 1990 (NZBORA) which provides, 'Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.' The mandatory imposition of a life sentence and/or non-parole period of 25 years without allowing for reference to the particular circumstances of the offending constitutes 'disproportionately severe punishment.'
- 5.0 The NZBORA gives effect to the International Covenant on Civil and Political Rights (ICCPR) which New Zealand has been a Party to since 1979. Section 9 gives effect to Article 7 of the ICCPR, but its wording differs slightly. Article 7 of the ICCPR provides 'No one shall be subjected to cruel, inhuman or degrading treatment or punishment [...].' The term 'disproportionately severe' in Section 9 NZBOR has no equivalent counterpart in international or foreign instruments.

- 6.0 The term ‘disproportionately severe treatment or punishment’ was dealt with in the *Taunoa* case by the Supreme Court of New Zealand.¹ In considering what constitutes ‘disproportionately severe’ conduct in terms of the NZBORA, the majority in *Taunoa* held that:
1. conduct characterised as disproportionately severe can, in New Zealand, be fairly called ‘inhuman’;
 2. section 9 fulfils the same role as treatment characterised as ‘inhuman’ under Article 7 of the ICCPR;²
 3. the term ‘disproportionately severe’ takes its colour from the rest of section 9 NZBORA and jurisprudence from overseas instruments, including the ICCPR, section 12 of the Canadian Charter of Rights and Freedoms, article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the United States Eighth Amendment.
- 7.0 The majority held that under section 9 the treatment or punishment in question must reach the very high threshold of outrageousness, and, in regard to the length of prison sentencing ‘disproportionately severe’ is intended to capture treatment or punishment which is ‘grossly disproportionate to the circumstances.’³ Furthermore Justices Blanchard and McGrath held in their individual opinions that the term ‘disproportionately severe’ catches behaviour which does not inflict suffering in a manner or degree which could be described as cruel or/and degrading, but which New Zealanders would nevertheless regard as so out of proportion to the particular circumstances as to cause shock and revulsion (following the Supreme Court of Canada’s test in *Miller v R* [1977] 2 SCR 680).
- 8.0 The proposed law as outlined in the Bill breaches this right because, in some circumstances, the court will be constrained to impose a sentence that is not proportionate with the offending.

EVERYONE DEPRIVED OF LIBERTY MUST BE TREATED WITH DIGNITY AND RESPECT

- 9.0 Section 9 of the NZBORA provides universal protection against any form of treatment by the State which is incompatible with the dignity and worth of the human person. This is the cornerstone of international human rights law, as enshrined in Article 1 of the Universal Declaration of Human Rights which states, ‘All human beings are born free and equal in dignity and rights. Furthermore, section 23(5) of the NZBORA requires that everyone deprived of liberty must be “treated with humanity and respect for the inherent dignity of the person,” giving effect to Article 10(1) of the ICCPR.
- 10.0 The proposed law as outlined in the Bill breaches this right because it does not allow for recognition of the individual human circumstances of each offender.

1 *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC)

2 *Taunoa*, paras 176, 288

3 *Taunoa*, paras 172, 176, 340

COMMON LAW ON LENGTH OF DETENTION

- 11.0 The problem of length of detention was considered by the Court of Appeal last year in *Chief Executive of the Department of Labour v Yadegary*.⁴ That case concerned potentially indefinite detention in the case of an Iranian immigrant who refused to sign travel documents that would allow him to be returned to Iran. By a majority, the Court found that in those circumstances the period of over three years imprisonment was unreasonable. It was noted that there was a common law right that detention should not be arbitrary.⁵ In *van Alphen v The Netherlands* Comm 305/1988 23 July 1990 (UNHRC)⁶ it was accepted that “arbitrary” included not merely concepts of unlawfulness, but also “inappropriateness, injustice and lack of predictability.” In a similar vein, Thorp J in *Clarke v Police*⁷ defined arbitrary as “unreasonable, unnecessary or unprincipled.” Lord Cooke of Thorndon in *Higgs v Minister of National Security*⁸ suggested that the right to be free from disproportionate punishment is a self evident right “inherent in the concept of civilisation.”
- 12.0 The proposed law as outlined in the Bill breaches this common law right because it does not respond to the circumstances of the offending. The sentence handed down may therefore be inappropriate or unnecessary. Arguably sentences imposed under the proposed law will also be unprincipled because they cannot respond to the particular offence or the circumstances of the offending.

SENTENCING

- 13.0 The Bill removes the court’s ability to tailor the sentence to the particular circumstances of the offence and the offender where the offender has been given a final warning.
- 14.0 Under the Sentencing Act 2002, the court decides on a sentence by first deciding on a starting point based on the core aspects of the crime committed, and then increasing or decreasing the sentence from that point based on a range of aggravating and mitigating factors. Section 9(j) provides that the court must take into account: the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time.
- 15.0 In the *Taunoa* case the Court adopted the Canadian Supreme Court’s approach. This was that the length of sentences is a matter of broad legislative judgment, and that it is not for the court to ‘pass on the wisdom of Parliament with respect to the gravity of various offences,’ but that it is within the function of the Court to interfere if the punishment prescribed is ‘so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.’⁹ The practical effect of the proposed law in clause 86 is that any one of the listed offences (except murder) can range from only 5 years to life imprisonment. Amnesty International believes that this will lead to punishments that are ‘grossly disproportionate and in violation of Section 9 of the NZBORA.

4 [2008] NZCA 295

5 Baragwanath J at [35] – [38]

6 cited in *R v Goodwin (No 2)* [1993] 2 NZLR 390 at 393 (CA)

7 HC AK AP208/95 11 October 1995 at 8

⁸ [2000] 2 AC 228 at 260

⁹ *R v Smith* [1987] 1 SCR 1045

NZBORA: SUBJECT TO 'REASONABLE LIMITS'

- 16.0 Article 5 of the NZBORA states that 'the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'
- 17.0 AIANZ believes that the proposed legislative changes which limit the rights and freedoms in the NZBORA are not demonstrably justified. Indeed, as noted in the Explanatory Note, most research has found that imprisonment has little if any specific deterrent effect and offenders who commit serious violent offences do not necessarily have previous sentences for serious violent offences.
- 18.0 Demonstration of a higher standard of justification would be necessary to justify the breaches of human rights outlined above.

RECOMMENDATIONS FOR CHANGES TO THE BILL

- 19.0 The changes would result in fundamental human rights prescribed in international and national law being violated, namely Sections 9 and 23(5) of the NZBORA, and their corresponding Articles in the ICCPR (Articles 7 and 10(1)) .
- 20.0 We urge the Committee to amend the Bill so that:
1. The current law is retained in relation to sentencing and parole, as this strikes a more reasonable and appropriate balance;
 2. In relation to offenders who have been given a final warning, the Bill keeps the current law so that a minimum period of imprisonment may not exceed the lesser of two-thirds of the final sentence or ten years;
 3. Legislation enables the Courts to maintain its ability to tailor the sentence to the particular circumstances of the offence and the offender where the offender has been given a final warning;
 4. The current law which states that if a life sentence is imposed there must be a minimum non-parole period of at least ten years (s 103) is upheld;
 5. If certain aggravating factors (for example, home invasion) are present the minimum non-parole period must be at least 17 years (s 104).