18 February 2015

Civil Law and Human Rights,
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Re: New Zealand Government Draft Report on International Covenant on Civil and Political Rights (ICCPR).

Thank you for the opportunity to report on the Draft Government report on the ICCPR. We note the list of issues prior to reporting (LOIPR) that the Secretary of the Human Rights Committee had sent to the Government prior to submission of the sixth periodic report of New Zealand.

The New Zealand Council of Trade unions represents 325,000 workers in 36 affiliated unions and is the New Zealand member of the International Trade Union Confederation (ITUC).

This responds to questions in the LOIPR that the Government report comments on. It also identifies other issues which should be included in the Government ICCPR report.

1) **Promotion of rights under ICCPR**

There is no mention in the draft report of any work undertaken to promote the ICCPR since the last report by the New Zealand Government. Generally the awareness of the ICCPR remains very low and there is both inadequate attention and funding for its promotion. This impacts on the ability of civil society to make use of the ICCPR in their work and engage in processes to consider and make reports on the ICCPR as well as other core international treaties and covenants.

Paragraph 36 notes that the Human Rights Commission is undertaking a second Human Rights Action Plan and has sought greater engagement from Government agencies, business and civil society. Structural changes, upcoming legislative changes and cuts to base line funding at the HRC have had an impact on the capacity and ability of the HRC to facilitate the necessary engagement on both the draft ICCPR report and the HRC National Action Plan.

2) Reservations to the Covenant:

As is stated in para 52 of the draft Government report, New Zealand has a reservation to article 22 of the ICCPR and reserves the right not to apply article 22. The draft Government report states "that New Zealand is not in a position to withdraw this reservation but will continue to monitor ILO jurisprudence".

Article 22 of the ICCPR substantially restates the protections in the Universal Declaration of Human Rights and recognises the primacy of ILO Convention C87 concerning Freedom of Association and the Right to Organise.

On ratification, the New Zealand Government placed and has maintained identically worded reservations on art 22 of the ICCPR and art 8 of the International Covenant on Economic Social and Cultural Right as follows:

> *The Government of New Zealand reserves the right not [to] apply article [8 or 22] to the extent that existing legislative measures, enacted to ensure effective trade union*

representation and encourage orderly industrial relations, may not be fully compatible with that article.

It is important to note the limited nature of the reservation. It did not constitute a blanket 'opt out' of the trade unions rights within the ICCPR and ICESCR, but only a restriction to 'ensure effective trade union representation' or 'to encourage orderly industrial relations.'[1]

The reservation applied to "existing legislative measures" in 1978. The changes to the employment law framework have removed these restrictions. As Gault J noted in *Eketone v Alliance Textiles (NZ) Ltd* [2] with the passage of the Employment Contracts Act 1991 "there no longer appears disconformity between these international instruments and New Zealand's domestic law."

In 2012 the Economic and Social Council considering the report on Economic, Social and Cultural Rights recommended that "the State party adopt such legislative measures so as to enable it to withdraw its reservation to Article 8 of the Covenant."[3]

Similarly, the Human Rights Committee in its examination of New Zealand's fifth periodic report on ICCPR, in 2010, concluded that the State party should consider withdrawing all reservations to the Covenant.[4]

The Government's position is inconsistent with the plain wording of the reservation and is acting as a fig leaf for new breaches of the right to freedom of association. We call on the Government to revoke the reservation as the reasons for it no longer apply.

Given our view that the reservation on article 22 does not provide a shield from abuses of freedom of association we comment briefly below on breaches of article 22.

3) Key Judgments on Covenant and Covenant Related Cases

The draft report does not include the landmark decision in *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157 and its appeal *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516 collectively known as 'the Equal Pay case.'

The 2012 Human Rights Commission Report into the aged care sector ('Caring Counts') was the catalyst for the case taken by the Service and Food Workers Union arguing that the wage of Kristine Bartlett at $14.46 an hour was substantially lower than the wage that would be paid had the plaintiff been a male with the same or substantially similar skills service and effort, and that the employees' collective agreement breached sec 6 (8) of the Equal Pay Act.

On 22 August 2013, the Employment Court released its judgement [2013] NZEmpC157 ARC 63/12) ruling that for work done exclusively or predominantly by women, wider comparisons than just to male employees in the same exclusively or predominantly female workplace, sector or industry might need to be made if that male pay was also likely to be affected by gender discrimination. On 19 September 2013 Terranova lodged an appeal against the judgment. The appeal was heard from 3-4 February 2014 in Wellington. On 22 December 2014, the Supreme Court announced that it found no

[1] The reservation originally related to compulsory industry-based union membership for the purposes of award coverage and to restrictions on minimum union size along with restrictions on the right to strike. The first two of these were expressed as reasons for the original non-ratification of ILO C87 and C98.See (1995) NZPD 49 (6 April 1995).
[2][1993] 2 ERNZ 783, 794-795 (CA).
[3] Economic and Social Council 2012 Concluding observations of the Committee on Economic, Social and Cultural Rights E/C.12/NZL/CO/3
[4] Concluding observations of the Human Rights Committee 2010 CCPR/C/NZL/CO/5

grounds for an appeal at this stage. The case has now returned to the Employment Court to determine a set of principles for the implementation of equal pay in the aged care sector to be compliant with section 9 of the Equal Pay Act 1972.

The Terranova v Kristine Bartlett case has profound implications for human rights in New Zealand and human right legislation. It is of great public interest. It is essential to include this case in the Government report given the Employment Court and Court of Appeal judgments.

4) Gender Equality (Article 3)

The Committee asks the New Zealand Government to report on the measures taken to ensure equality in employment by closing the existing gender pay gaps between men's and women's wages. This section of the draft Government report is particularly weak.

The draft report states that since the late 1990s the gender pay gap has been steadily reducing. The picture is far more mixed. There is no overall and consistent gender gap reduction or trend in the improvement of women's wages, especially in the wages of low-paid women. A fuller picture, examining the gender pay gap using a number of different measures and examining different sectors should be provided.

We note the pattern of Government Ministers and Government reports in recent years to only use median hourly earnings to report on the gender pay gap. Reporting on the gender pay gap only using median hourly earnings is insufficient. It is also misleading in that it presents a more positive picture that than if looked at using other measures such as average hourly earnings and more than the one survey results.

For example, in June 2014 the median hourly pay rate for women was 90.1% of the median hourly rate for men, compared with 86% for the average. For several years women's average ordinary time hourly pay rate has hovered around 85-86% of men's pay. There was an improvement from 85.9% in June 2011 to 87.3% in June 2012 – but this is thought to have been partly due to stagnation in average wages for Pacific and Asian men in that year. The 2014 Annual Income survey showed New Zealand women earn $24.70 an hour compared with $28.70 an hour on average for men. That is, women earn 86.1% of men's earnings, a gap of 14%. This is down from 87.3% in June 2013.

It is also necessary to look at other gender pay gap measures such as weekly earning and ethnic gender pay gaps. For example: the 2014 Income Survey showed women's average weekly earnings from wages and salaries were 74.9% those of men - $820.77 a week for women, $1,029.11 a week for men. The reason for the bigger gender pay gap in weekly wages is low wages in part-time jobs done mainly by women.

There are significant gaps in average hourly earnings between New Zealand's main ethnic groups. Māori and Pacific women earn least on average. In 2014 the ratios were 76% for Māori women and 69.9% for Pacifica women compared to all men. In 2013 this ratio to average male wages was 79.4% for Māori women and 72.4% for Pacific women.

At the very least, the Government report should identify that there are a number of measures used to calculate the gender pay gap including both average and median as measures and refer to the Quarterly Employment Survey as well as the annual New Zealand Income Survey – an equally valid and trusted gender pay gap measure.

The State Services Commission's Annual Human Capability Survey report provides information on the gender pay gap in core public services and agencies. Overall, the ratio of women's to men's average annual salaries at June 2013 was 85.6% - a difference of $10,624. This was slightly down on 2012 (86.3%), against the trend since 2006 (83.9%). In the year to June 2013 male salaries increased by 2.5% but female salaries by just 2.0%.

There has been an explicit Government policy to hold back wages and salaries in the state sector which is having an impact on the gender pay gap given the female-dominated nature of the public service. Increases in the average wage over the year have been only 1.0 percent for the public sector compared to 2.9 percent for the private sector.

The Committee asked the Government to provide information on the measures taken to identify and address the underlying causes of the wider pay gap in the public sector. This question is left unanswered in the draft Government report. We note the Public Service Association (PSA) have made comments on this and endorse their concerns about the lack of any plan to address the wider pay gap in the public service.

There must be mention of the Equal Pay case, (see above) which has demonstrated the extent of the under valuation of women's work, the impact of occupational segregation and revealed the very low wages in employment sectors which are publicly funded.

While para 66 of the draft Government report, which states that differences in pay between men and women are the result of a number of factors is true, it also needs to be said that there are currently no targeted measures in places by Government to reduce the gender pay gap. This lack of any systematic processes and the cessation of pay equity programmes has led to unions working with low-paid women workers and taking legal cases to challenge the under payment and undervaluation of women's work.

One positive agreement and exception to the overall picture for low-paid care workers is the progress that has been made in addressing some of the underpayment and pay inequalities for home support workers – a predominantly female workforce. The unions in this sector (Public Service Association and the Service and Food Workers Union), the employers, the Ministry of Health and District Health Boards have agreed that there should be payment for travel time for workers who travel between clients. The parties have met regularly in the last year to establish a process for paying travel time and mileage, a transition to guaranteed hours of work and additional payments qualifications. This proposed settlement is currently out for ratification.

5) Freedom of Association (Article 22).

We note that the Government has recently enacted laws fundamentally at odds with its obligations to guarantee rights of freedom of association.

The events leading to the passing of the Employment Relations (Film Production Work) Amendment Bill 2010 ('the Hobbit amendment') are by now well known.[5] Suffice to say on 28 October 2010, following talks with Warner Brothers, the Government amended the Employment Relations Act 2000 under urgency.

The effect of the changes was to exclude from the definition of employee: "a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer,

[5] For Helen Kelly's detailed timeline see: http://www.scoop.co.nz/stories/HL1104/S00081/helen-kelly-the-hobbit-dispute.htm

musician, dancer, or entertainer" or "a person engaged in film production work in any other capacity" [6] unless that person has a written employment agreement providing that they are, in fact, an employee. This excludes these workers from the protections of employment legislation.

No regulatory impact statement was prepared for the Hobbit amendment and neither were public submissions heard as it went through all three readings consecutively under urgency.

The consequences of effectively excluding an entire industry from standard employment rights are wide ranging.

The CTU believes that dependent contractors are permitted to negotiate standard terms despite the restrictions in the Commerce Act 1986. However, if the position of Warner Brothers and their legal advisors is correct, and this is prohibited by the Commerce Act 1986 on price fixing grounds, then film workers have lost their right to collectively bargain altogether.

It is also clear that:

- Even if able to collectively bargain, contractors do not have a right to take industrial action in pursuit of a collective agreement or access to the various mechanisms intended to help the parties resolve their differences and come to an agreement;
- Contractors lose protections against unfair disadvantage and unjustified dismissal along with several other protections implied by law into employment agreements (these include rights of good faith dealings and many minimum entitlements such as minimum wages and leave provisions). Many (though not all) will be placed in a very weak negotiating position with increased job insecurity and reduced terms as a result.

This change is a clear breach of film, television and video game workers' freedom of association.

In late 2014, the Government also passed the Employment Relations Amendment Act 2014. The Bill constitutes a strong assault on the rights to collectively bargain and to strike that the Human Rights Committee and the International Labour Organisation have long held to be necessary for the exercise of freedom of association. We have provided detailed submissions on this legislation[7] but in brief we believe that all of the following constitute breaches of the Government's obligations regarding freedom of association.

- Weakening of the duty to conclude undermines the duty of parties to bargain in good faith and make every effort to voluntarily conclude a collective agreement;
- A sixty-day 'free hit' period where parties cannot commence bargaining without agreement constitutes an unacceptable restriction on the right to strike and will create undue delay in negotiations;
- Effective removal of the right to strike in support of multi-employer bargaining is a breach of collective bargaining rights. New Zealand was heavily criticised by the ILO for similar laws in the 1990s; and
- Unnecessary obstacles to and disproportionate deductions for taking strike action are a breach of the right to strike.

[6] What is now section 6(1)(d) of the Employment Relations Act 2000.
[7] Available at http://union.org.nz/policy/nzctu-submission-employment-relations-amendment-bill-2013

The CTU is considering a complaint to the ILO Committee on Freedom of Association regarding these breaches.

Others, including the New Zealand Human Rights Commission ('the HRC') highlighted the breaches of freedom of association in Employment Relations Amendment Act 2014. The HRC noted in its submission on the Bill[8] at 11:

> The Commission's view is that this Bill if passed without amendment takes a step backward from compliance with the international human rights instruments in relation to freedom of association and collective bargaining.
>
> Compliance with ILO principles require the active promotion and encouragement of collective bargaining and have stated that[9]:
>
> - Collective bargaining mechanisms must be clear and easy to operate so that they do not restrict the right of representative unions to bargain
> - The provisions on the relationship between collective and individual employment contracts must reflect the overall principle that collective bargaining should be promoted
> - The provisions of good faith must reflect the overall principle that collective bargaining should be promoted.

A number of the proposed amendments not only fail to promote collective bargaining but undermine it. We ask the Government to bring these breaches to the attention of the Human Rights Committee. We also ask that the Government repeal these regressive laws to meet its guarantee of freedom of association under article 22.

6) Elimination of Slavery and Servitude (Article 10)

The Committee asks in Question 19 for information on the measures taken to ensure that the state party continues to monitor the respect for human rights in privatised prisons.

Figures that were released in November 2014 showing that New Zealand's only private prison, Mt Eden prison, had had the highest number of prisoner assaults and prison guard assaults in the last three years are very concerning and should be further investigated. Prison officers' unions have raised concerns about increased safety risks and lower staffing levels in private prisons.

7) Equality and Non-Discrimination (Article 26)

The Committee asks the Government for information on measures taken to address the continuing inequalities faced by Māori and particularly Pacific Island people (in the education system) and the labour market. The draft Government report only comments, in para 160, on the Government policy of paid work being the best way to address socio economic disparities.

Māori and Pasifika unemployment rates remain higher than European rates of unemployment reflecting the greater inequality faced in the labour market for Māori and Pasifika. The 2014

[8] http://www.hrc.co.nz/2013/09/05/employment-bill-inconsistent-with-international-human-rights-obligations/

[9] ILO (1993) response of the Committee on Freedom of Association to the complaint taken by the CTU regarding the Employment contract Act

December quarter Household Labour Force Survey reported European unemployment rates at 4.5%, Maori at 12.0% and Pasifika at 11.2%.The Child Poverty Monitor Report states that and these ethnic differences appear to have increased since the recession of 2008–2009[10].

Neither is there any mention in the draft Government report about New Zealand's high levels of income inequality and the extent of low wages in New Zealand. A Treasury report in 2013 found that about 30 percent of households with dependants were earning wages below $18.40 - the then Living Wage figure[11]. It also reported that for 25 percent of households with two adults and dependants, the principal earner in the household was on a wage rate below the then Living Wage.

Government reports are ignoring the importance of the role of adequate wages and salaries in providing an adequate income to New Zealand workers and their households which enable the fulfilment of a basic human right – access to an adequate standard of living. This draft government report follows the same pattern. We urge the inclusion of information and analysis of child poverty and income inequality, and an outline of Government policies and intentions to address high child poverty levels and high levels of income inequality.

The CTU will report further on our concerns in the ICCPR shadow report but for now we note that the changes to the Employment Relations Act due to take effect on 1 April 2015 will worsen many workers' employment vulnerability by removing protective employment protections for workers caught up in a transfer situation such as when a contract for cleaning services is transferred to a new employer. Māori and Pasifika workers are disproportionally affected by these changes.

Part 6a of the ERA provides protection for workers who are particularly vulnerable to exploitation - those in cleaning and food services plus some caretaking, orderly and laundry services. Under Part 6A, if these services were contracted out the workers could choose to transfer to the new employer with the same terms and conditions of employment. The protections in part 6A were introduced in 2004 when a review found certain employers were forcing vulnerable workers to either accept worse terms and conditions when they took over a business or lose their jobs. 65% of these vulnerable workers were women, and Māori and Pasifika were over-represented. Many workers were the minimum wage or close to it.

The enactment of the law changes to the ERA and Part 6a will mean that incoming employers with less than 20 employees (Small to Medium Enterprises or SMEs) will be exempt from all of the Part 6A requirements. SMEs will have a significant incentive to undercut other tenderers by cutting employees terms and conditions. This is a 'race to the bottom' that mistreats some of our most vulnerable workers. It is a retrograde step and there are significant concerns about this change. It should be closely monitored.

We are more than willing to engage with you on any issues raised in this CTU response. Please contact either Eileen Brown: (eileenb@nzctu.org.nz) or Jeff Sissons (jeffs@nzctu.org.nz) at the New Zealand Council of Trade Unions, Wellington.

c.c David Rutherford, Chief Commissioner, Human Rights Commission.

[10] Statistics New Zealand. 2013. Introducing ethnic labour force statistics by age: http://www.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/ethnic-labour-force-stats-by-age.aspx

[11] Galt,M. Palmer C.(2013) Analysis of the proposed $18.40 living wage" report, Wellington, Treasury.