

## DR TONY ELLIS

BARRISTER  
LL.B, LL.M, M.PHIL, SJD, FCIS

Blackstone Chambers  
3<sup>rd</sup> Floor  
82 Willis Street  
PO Box 24347  
Wellington 6142

Telephone (04) 473 1952  
Email [ellist@tonyellis.co.nz](mailto:ellist@tonyellis.co.nz)  
<http://www.tonyellis.co.nz>  
Appointments available at Vulcan Building  
Chambers, Vulcan Lane, Auckland

30 March 2020

The Chairperson and Members of the Epidemic Response Committee<sup>1</sup>  
Parliament Buildings  
Wellington 6160

Dear All

### Illegal of Suspension of Statutory Visits to Prisons

1. I write in connection with the notification of 27 March 2020, [Annexed] sent by Jeremy Lightfoot, Chief Executive, Department of Corrections to Tina Epati, President of the New Zealand Law Society, and Les Andersen President of the Criminal Bar Association which contained this paragraph:

From midnight Wednesday 25 March 2020, all prison sites suspended visits by legal advisors, specified visitors and statutory visitors. Some other non-essential activities have also had to be temporarily stopped including face-to-face programmes and some industries (i.e. textiles and carpentry).

2. In my opinion the suspension of visits by statutory officers, including MP's, all District Courts Judges (visiting justices) the Chief Executive himself, the Minister, an Ombudsman, Human Rights Commissioners, and others is unwise, unnecessary, draconian, and unlawful. It is contrary to the Crimes of Torture Act, and international

---

<sup>1</sup>

Chairperson	Hon. Simon Bridges	<a href="mailto:simon.bridges@parliament.govt.nz">simon.bridges@parliament.govt.nz</a>
Member	Kiritapu Allan	<a href="mailto:office.kiriallan@parliament.govt.nz">office.kiriallan@parliament.govt.nz</a>
Member	Hon. Paula Bennett	<a href="mailto:paula.bennett@parliament.govt.nz">paula.bennett@parliament.govt.nz</a>
Member	Marama Davidson	<a href="mailto:marama.davidson@parliament.govt.nz">marama.davidson@parliament.govt.nz</a>
Member	Hon. Ruth Dyson	<a href="mailto:ruth.dyson@parliament.govt.nz">ruth.dyson@parliament.govt.nz</a>
Member	Hon. Paul Goldsmith	<a href="mailto:paul.goldsmith@parliament.govt.nz">paul.goldsmith@parliament.govt.nz</a>
Member	Dr Shane Reti	<a href="mailto:shane.reti@parliament.govt.nz">shane.reti@parliament.govt.nz</a>
Member	David Seymour	<a href="mailto:david.seymour@parliament.govt.nz">david.seymour@parliament.govt.nz</a>
Member	Fletcher Tabuteau	<a href="mailto:fletcher.tabuteau@parliament.govt.nz">fletcher.tabuteau@parliament.govt.nz</a>
Member	Michael Wood	<a href="mailto:michael.wood@parliament.govt.nz">michael.wood@parliament.govt.nz</a>
Member	Michael Woodhouse	<a href="mailto:michael.woodhouse@parliament.govt.nz">michael.woodhouse@parliament.govt.nz</a>

human rights law, as well as a suspension of the law in the mode of *Fitzgerald v Muldoon* suspending an Act of Parliament.

3. Statutory Visitors are defined as:<sup>2</sup>

**statutory visitor**

- (a) an inspector of corrections; or
- (b) a Visiting Justice; or
- (c) a monitor; or(d)a security monitor; or
- (e) the Minister; or
- (f) the chief executive; or
- (g) an Ombudsman; or
- (h) a member of the Human Rights Commission; or
- (i) a member of Parliament exercising the right conferred by section 161; or
- (j) a Justice of the Peace exercising the right conferred by section 162; or
- (k) a commanding officer of a prisoner who is a service prisoner, or a representative of that commanding officer; or
- (l) a service authority nominated by the commanding officer of a prisoner who is a service prisoner for the purpose of visiting that prisoner; or
- (m) a consular representative; or
- (n) an investigating officer

4. I start from the premise that all 10 Chairpersons of the UN treaties Bodies<sup>3</sup> including the Human Rights Committee, and Crimes Against

---

<sup>2</sup> Corrections Act 2004, s 3.

<sup>3</sup> The ten United Nations human rights treaties are legally binding treaties, adopted by the UN General Assembly and ratified by States. The ten treaty bodies, or Committees, are the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of Persons with Disabilities, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women, the Committee Against Torture and its Subcommittee on Prevention of Torture, the Committee on Enforced Disappearances and the Committee on Migrant Workers.

Torture Committee, issued a media release calling for a respect for human rights during the current COVID 19 crisis.<sup>4</sup>

GENEVA (24 March 2020) – The Chairpersons of the 10 UN Treaty Bodies\* on Tuesday urged global leaders to ensure that human rights are respected in government measures to tackle the public health threat posed by the COVID-19 pandemic.

... A growing number of States have imposed strict controls that affect human rights, such as limitations on freedom of movement and restrictions on peaceful assemblies and privacy.

“These controls must be undertaken pursuant to a valid legal framework. In countries that declare a state of emergency, such a declaration must be exceptional and temporary, strictly necessary and justified due to a threat to the life of the nation,” Gbedemah said.

“A state of emergency, or any other security measures, should be guided by human rights principles and should not, in any circumstances, be an excuse to quash dissent,” she added.

5. Under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, to which New Zealand was prominent internationally in supporting, and has ratified, Article 14 provides an objection to visits may be made to the UN Subcommittee on Prevention, (but not for reasons of a state of emergency):

2. Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

6. This is reflected in the Crimes of Torture Act 1989, whilst seemingly not being in compliance with the Optional Protocol says:

## **22 Objection to visit by Subcommittee**

(1) The Minister may, by notice in writing to the Subcommittee, object to the Subcommittee having access to any place of detention for a temporary period if the Minister believes—

- (a) there is an urgent and compelling reason on 1 of the following grounds:

---

<sup>4</sup> <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25742&LangID=E>

- (i) national defence; or
  - (ii) public safety; or
  - (iii) natural disaster; or
  - (iv) serious disorder in the place of detention; and
- (b) that ground temporarily prevents access to the place of detention.

(2) On receiving a notice under subsection (1), the Subcommittee must delay its visit to the place of detention to a later date.

7. This approach is quite clearly not reflected in the approach to visits by National Preventive Mechanisms (including Human Rights Commissioners and Ombudsmen who quite rightly have unrestricted access, as they should especially in times of emergency).

**29 National Preventive Mechanism's access to places of detention and persons detained**

For the purposes of this Act, every person must permit a National Preventive Mechanism to have **unrestricted** access to—

- (a) any place of detention for which it is designated, and to every part of that place:
- (b) any person in a place of detention for which it is designated.

[**Bold** added except to heading]

8. In a human rights approach to such actions, the access to prisons by the watchdog statutory officers, during a state of emergency is essential to ensure no abuse by prison officers of inmates. That every statutory officer is now banned is over the top.
9. Statutory Officers could of course be supplied with as full as possible medical equipment, and testing to prevent the spread of the virus during any visits.
10. The UN High Commissioner for Human Rights said on 25 March 2020:<sup>5</sup>

Measures taken amid a health crisis should not undermine the fundamental rights of detained people, including their rights to

---

<sup>5</sup> <https://www.ohchr.org/EN/NewsEvents/Pages/media.aspx?IsMediaPage=true>

adequate food and water. Safeguards against ill-treatment of people in custody, including access to a lawyer and doctor, should also be fully respected.

“Restrictions on visits to closed institutions may be required to help prevent COVID-19 outbreaks, but such steps need to be introduced in a transparent way and communicated clearly to those affected. Suddenly halting contact with the outside world risks aggravating what may be tense, difficult and potentially dangerous situations,” Bachelet said. She noted examples of alternative measures taken in some countries, such as setting up expanded videoconferencing, allowing increased phone calls with family members and permitting email.

11. I invite each recipient of this letter to take whatever action they can after considering the contents of this letter, with a view to having the prohibition reversed.
12. The Select Committee is naturally well placed to consider this action as an abuse of power, and report accordingly to the House.
13. Individuals MP's, as human rights defenders, may have views beyond that of the Select Committee.
14. The Attorney-General, and the Commissioner of Police, should consider whether there is a criminal breach of the Crimes of Torture Act. The Attorney-General particularly in respect of the entire District Court bench having their visiting rights ousted by prompt and ill-advised executive action should consider a declaration along the lines of *Fitzgerald v Muldoon*.
15. The Human Rights Commission, and Ombudsman should consider how this affects their functionality as National Preventive Mechanisms, as well as the wider Constitutional position.
16. The Minister will hopefully call for a briefing and discuss the matter with his Chief Executive.
17. The Law Society, and Criminal Bar Association are included in this letter as they may adopt a human rights approach to this issue.
18. As I was unable to find a Clerk to the recently created Select Committee on the parliamentary website, I have sent a copy to all members for its urgent attention.

Yours faithfully



**DR TONY ELLIS**  
**BARRISTER**

**Copies to:**

Hon David Parker  
Attorney-General  
PO Box 18888  
Parliament Buildings  
Wellington 6160  
[d.parker@ministers.govt.nz](mailto:d.parker@ministers.govt.nz)

Hon Kelvin Davis  
Minister of Corrections  
[k.davis@ministers.govt.nz](mailto:k.davis@ministers.govt.nz)

Jeremy Lightfoot  
Chief Executive  
Department of Corrections  
[Jeremy.Lightfoot@corrections.govt.nz](mailto:Jeremy.Lightfoot@corrections.govt.nz)

Paul Hunt  
The Chief Human Rights  
Commissioner  
[paulh@hrc.co.nz](mailto:paulh@hrc.co.nz)

Mike Bush  
The Commissioner of Police  
[Mike.Bush@police.govt.nz](mailto:Mike.Bush@police.govt.nz)

Peter Boshier  
Chief Ombudsman  
[pfboshier@ombudsman.parliament.nz](mailto:pfboshier@ombudsman.parliament.nz)

Cc Austin Powell  
Crown Counsel  
[Austin.Powell@crownlaw.govt.nz](mailto:Austin.Powell@crownlaw.govt.nz)

President New Zealand Law  
Society  
[president@lawsociety.org.nz](mailto:president@lawsociety.org.nz)

President Criminal Bar Association  
[president@criminalbar.org.nz](mailto:president@criminalbar.org.nz)