



**MINISTRY OF SOCIAL
DEVELOPMENT**
TE MANATŪ WHAKAHIATO ORA

27 JUL 2017

Dear

On 30 June 2017 you emailed the Ministry requesting, under the Official Information Act 1982, the following information:

- *Copies of any reports or reviews from MSD to the Minister (in the last 3 years) on the NZ Superannuation and Retirement Income (Pro Rata Entitlement) Amendment Bill.*
- *Copies of any reports/ responses from MSD to the UN Human Rights Committee (in the last 3 years) regarding the direct deduction of overseas pensions under Section 70 of the Social Security Act.*

New Zealand Superannuation is available to individuals aged 65 years or over, who are a New Zealand Citizen or a permanent resident. To meet the residency requirements for New Zealand Superannuation, an individual must be physically in New Zealand, lawfully and ordinarily reside in New Zealand and have spent some time living in New Zealand (a period of residence).

The direct deduction provisions of section 70 of the Social Security Act 1964 apply to every person who applies for a benefit or pension. New Zealand citizens who have lived and worked overseas are required to apply for their overseas entitlements when they apply for a New Zealand benefit or pension. More information on Social Security Agreements can be found at: www.workandincome.govt.nz/individuals/how-we-can-help-you/travelling-or-migrating/social-security-agreements/

Please find enclosed a copy of the report titled '*New Zealand Superannuation and Retirement Income (Pro Rata Entitlement) Amendment Bill*', dated 4 August 2015. This report provided the Minister for Social Development, Hon Anne Tolley, with the Ministry's advice regarding the New Zealand Superannuation and Retirement Income (Pro Rata Entitlement) Amendment Bill.

Additionally, I have enclosed a copy of '*The New Zealand Government Information and Observations on the Admissibility and Merits of Communication No. G/SO 215/1 NZL 217*' which the New Zealand Government submitted to the United Nations Human Rights Council through the Permanent Mission of New Zealand to the United Nations in Geneva. This document was submitted in response to the complaint of pension discrimination made to the United Nations Human Rights Council (UNHRC) on 10 February 2014.

You will note that any information relating to individuals has been withheld under section 9(2)(a) of the Official Information Act 1982, in order to protect the privacy of natural persons. The need to protect the privacy of these individuals outweighs any public interest in this information.

The principles and purposes of the Official Information Act 1982 under which you made your request are:

- to create greater openness and transparency about the plans, work and activities of the Government,
- to increase the ability of the public to participate in the making and administration of our laws and policies and
- to lead to greater accountability in the conduct of public affairs.

This Ministry fully supports those principles and purposes. The Ministry therefore intends to make the information contained in this letter and any attached documents available to the wider public shortly. The Ministry will do this by publishing this letter and attachments on the Ministry of Social Development's website. Your personal details will be deleted and the Ministry will not publish any information that would identify you as the person who requested the information.

If you wish to discuss this response with us, please feel free to contact OIA_Requests@msd.govt.nz.

If you are not satisfied with this response regarding New Zealand Superannuation, you have the right to seek an investigation and review by the Ombudsman. Information about how to make a complaint is available at www.ombudsman.parliament.nz or 0800 802 602.

Yours sincerely



Justine Cornwall

General Manager, Seniors, International and Disability



Report

Date: 4 August 2015 **Security Level:** IN CONFIDENCE

To: Hon Anne Tolley, Minister for Social Development

New Zealand Superannuation and Retirement Income (Pro Rata Entitlement) Amendment Bill

Purpose of the report

- 1 This report provides you with advice on the New Zealand Superannuation and Retirement Income (Pro Rata Entitlement) Amendment Bill.

Recommended actions

It is recommended that you:

- 1 **note** that the New Zealand Superannuation and Retirement Income (Pro Rata Entitlement) Amendment Bill (the bill) has been drawn in the members' bills ballot
AT noted
- 2 **note** that the bill would have some advantages:
 - 2.1 it would repeal the contentious direct deduction policy
 - 2.2 it would increase the combined New Zealand Superannuation and foreign pension amount received by some superannuitants
AT noted
- 3 **note** that the advantages would be outweighed by significant disadvantages because the bill:
 - 3.1 is inconsistent with the New Zealand Superannuation principles of fairness and simplicity
 - 3.2 is inconsistent with Government's priorities
 - 3.3 would disadvantage a large number of superannuitants
 - 3.4 would have significant client compliance and service delivery implications
AT noted
- 4 **note** that the bill would also have significant transition costs as all superannuitants would need to have their New Zealand Superannuation entitlement reassessed
AT noted
- 5 **note** that the Attorney-General has reported to the House that the bill is inconsistent with the Bill of Rights Act
AT noted

6 **note** that in our 2014 Briefing to Incoming Ministers we noted that despite its unpopularity with other countries and those affected by it, the principles behind the direct deduction policy are sound, although here are policy and technical issues with the policy that could be addressed

AT noted

7 **agree** to not support the bill

AT agree/disagree

8 **agree** to provide a copy of this report to the Minister for Senior Citizens.

AT agree/disagree



Sacha O'Dea
General Manager
Ageing Disability and International

4/8/15

Date



Hon Anne Tolley
Minister for Social Development

12-8-15.

Date

RELEASED UNDER THE OFFICIAL INFORMATION ACT

The bill has been drawn in the ballot and is awaiting first reading

- 2 The New Zealand Superannuation and Retirement Income (Pro Rata Entitlement) Amendment Bill has been drawn in the members' bills ballot and was introduced on 26 June 2015. The bill is now awaiting first reading, which we expect will occur in late August 2015. The bill is in the name of Denis O'Rourke of New Zealand First.

What does the bill propose?

- 3 The bill proposes to remove the current residence requirement for New Zealand Superannuation of 10 years residence in New Zealand from the age of 20, with five of those years after age 50. This would be replaced by a requirement of 10 years residence between the ages of 20 and 65. The proposed change would mean that no New Zealand residence could be accrued after age 65.
- 4 The rate of payment would be based on the number of months a person has resided in New Zealand between the ages of 20 and 65. The bill allows up to two months overseas travel per year. The bill also exempts an aggregate of five years absence, but this exemption only applies to people born in New Zealand.
- 5 The bill would also repeal section 70 of the Social Security Act 1964 (the direct deduction policy). Under this policy, overseas pensions are deducted from New Zealand Superannuation or other benefits on a dollar-for-dollar basis.

The bill would have some advantages...

Some superannuitants would support repeal of the direct deduction policy

- 6 The direct deduction policy can be a contentious issue for some recipients of overseas pensions and for the overseas governments that pay the pensions. For some overseas pensioners, whether migrants or returning expatriates, it comes as a surprise that they will not receive a full New Zealand Superannuation entitlement on top of their overseas state pension.
- 7 Some other governments consider that New Zealand is using their pensions simply to reduce its own pension liabilities. As a result the policy can make conclusion of social security agreements with some countries difficult or impossible.

Some superannuitants would be advantaged

- 8 A small number of superannuitants would be advantaged by the bill. Superannuitants who have large foreign pensions would be advantaged because they would be able to add their foreign pension to their pro rata New Zealand entitlement and receive a combined pension which is more than the rate of New Zealand Superannuation.

...but the advantages would be outweighed by significant disadvantages

The bill would make New Zealand Superannuation less fair and more complex

- 9 New Zealand Superannuation is based on principles of fairness and simplicity. These principles result in universal provision to those who are eligible, regardless of individual levels of tax paid. New Zealand Superannuation is designed to ensure that all New Zealanders who have met the basic residence requirements receive an equitable and adequate pension income when they reach the age of 65. New Zealand Superannuation's simple 'all or nothing' entitlement rules make it easy for people to understand their entitlements.
- 10 The direct deduction policy carries the fairness and simplicity principles through to treatment of overseas pensions. The direct deduction ensures that everyone receives an amount of state pension that is at least equivalent to the full rate of New Zealand Superannuation, regardless of whether this amount is fully funded by New Zealand, partially funded by New Zealand and another country or fully funded by another country.

- 11 The bill would be a fundamental change from current New Zealand Superannuation principles because it would remove universal provision and result in many varying rates of New Zealand Superannuation. Overall, New Zealand Superannuation would become a more complex pension system.

The bill is not consistent with government priorities

- 12 The Government has made it clear that it will not consider changes to New Zealand Superannuation which change superannuitants' entitlements. The Government is committed to maintaining the current settings for New Zealand Superannuation, in particular the link to the average wage and the entitlement age of 65.

The bill would impact on superannuitants' incomes

- 13 In 2012, the Ministry advised the Social Services Committee that we estimate that up to 90 percent of superannuitants who have overseas pensions could be disadvantaged by a pro rata system.
- 14 People who have spent time overseas between the ages of 20 and 65 and have no foreign pension, or only a small foreign pension that does not sufficiently cover their years outside New Zealand, would have a reduction in overall pension income. For example, a superannuitant with 20 years residence in New Zealand and a small foreign pension of \$80 per week would receive a combined pension of just over half the current New Zealand Superannuation rate.
- 15 People who migrated to New Zealand after the age of 55 would never be entitled to New Zealand Superannuation as they would not be able to accrue the required 10 years New Zealand residence prior to the age of 65.
- 16 There would be a particular problem for migrants from the United Kingdom because the United Kingdom does not index link (increase by the Consumers Price Index) pensions it pays into New Zealand. Consequently United Kingdom pensioners would have a gradually diminishing combined United Kingdom and New Zealand pension income as inflation gradually reduced their real United Kingdom pension amount. Around 70 percent of overseas pensioners are from the United Kingdom.

New Zealand born people would be advantaged over foreign born

- 17 The provision exempting an aggregate of five years absence would result in New Zealand born people receiving up to 11 percent more New Zealand Superannuation than people who are born overseas, even though they may both have spent exactly the same amount of time outside New Zealand between the ages of 20 and 65.
- 18 The bill makes no allowance for refugees, who are unlikely to have any entitlement to a foreign pension, and would never be able to receive New Zealand Superannuation if they arrived in New Zealand after age 55.

The bill would have significant client compliance and service delivery implications

- 19 The pro rata model would require the Ministry to verify all New Zealand Superannuation applicants' actual residence in New Zealand. This would be resource intensive and would place an additional compliance burden on New Zealand Superannuation applicants. There would be significant IT costs to set up a new system which calculates varying New Zealand Superannuation rates based on length of residence in New Zealand.
- 20 There are no 'grandparenting' or transitional provisions in the bill. Therefore all 680,000 superannuitants would need to have their New Zealand Superannuation reassessed when the bill is passed. Those superannuitants who have lived overseas between the ages of 20 and 65 would have their New Zealand Superannuation entitlements adjusted.
- 21 Superannuitants with insufficient income from New Zealand Superannuation would need to apply for supplementary assistance, which would create significant additional interaction with Work and Income for these people. There are no supplementary payments currently available which could top-up superannuitants' incomes to address

hardship on an on-going basis. Therefore new provisions would need to be developed to ensure that superannuitants have a minimum income.

The Special Banking Option would need to be repealed

- 22 The Special Banking Option is a facility that allows overseas pensioners to have their overseas pension paid into a special Westpac bank account which is administered by the Ministry. The pensions are paid directly into the special bank account by the government of the country paying the pension (the Special Banking Option is only available to countries with which we have a social security agreement). The advantage for the superannuitant is that their payments are not affected by exchange rates, the applicable tax is paid for them, and they receive their full rate of New Zealand Superannuation.
- 23 Repeal of the direct deduction policy would also require the repeal of the Special Banking Option. There would then need to be an unbundling process with overseas agreement countries and Westpac. For example, approximately 48,000 United Kingdom pensioners use the Special Banking Option. The United Kingdom government would need to contact these pensioners to find out where they want their pensions paid. Superannuitants would need to arrange payment of the tax on their United Kingdom pensions.

The Attorney-General has reported that the bill is inconsistent with the Bill of Rights Act

- 24 The Attorney-General has reported to the House on the bill and has concluded that "the Bill limits the right to be free from discrimination and the right to freedom of movement affirmed in ss 19(1) and 18 of the Bill of Rights Act respectively, and that the limits cannot be justified under s 5 of the Bill of Rights Act."
- 25 The Attorney-General states that the bill discriminates on the basis of national origin and age and neither of these limitations are justified and proportionate under section 5 of the Bill of Rights Act because:
- there is no rational connection between conferring additional entitlement to New Zealand Superannuation to those born in New Zealand and the stated objective of the bill
 - the age restriction on attaining eligibility is not rationally connected to the objective (the Attorney-General notes the increasing number of 65 year olds who are continuing to contribute to the New Zealand economy).

We have provided previous advice on international aspects of New Zealand Superannuation

- 26 In our 2014 Briefing to Incoming Ministers, we advised that despite its unpopularity with other countries and those affected by it, the principles behind the direct deduction policy are sound. We also noted that there are policy and technical issues related to this policy that could be addressed. For example, one of the most unpopular aspects of the policy is that, where one partner of a couple has an overseas state pension that is more than their New Zealand Superannuation, the excess amount is deducted from the New Zealand Superannuation entitlement of the other partner.
- 27 In May 2015 we reported to you on portability of New Zealand Superannuation. In that report we noted that:
- New Zealand Superannuation, with its simple residency rules and flat rate entitlement, is easy to understand, efficient to administer and ensures there is a low level of material hardship
 - New Zealand Superannuation is not well suited to situations where people move between countries because the flat rate payment does not easily facilitate the sharing of pension costs between New Zealand and other countries

- superannuitants resident overseas generally receive a pro rata payment of New Zealand Superannuation which depends on their length residence in New Zealand between the ages of 20 and 65 – pro rata payments overseas are not subject to direct deduction.
- 28 The fact that pro rata payments are made to people resident overseas raises the question of why this is acceptable, when we do not recommend it for New Zealand residents. New Zealand Superannuation was never designed to be portable - it was designed to cater for New Zealand residents. Some portability provisions have been bolted onto the system, but they do not sit comfortably with the fundamental principles of New Zealand Superannuation. While pragmatic decisions have been made to adapt New Zealand Superannuation so that it can provide some level of portability, this does not mean that those decisions should or could be applied to domestic New Zealand Superannuation.

File ref: A8254062

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

THE NEW ZEALAND GOVERNMENT
INFORMATION AND OBSERVATIONS

ON

THE ADMISSIBILITY AND MERITS OF
COMMUNICATION NO. G/SO 215/1 NZL 217.

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

CONTENTS

INTRODUCTION	3
SUMMARY OF COMMUNICATION AND GOVERNMENT RESPONSE.....	3
Summary of the communication.....	3
Category 1	4
Challenges to application of Social Security Act 1964, s 70(1).....	5
Challenge to application of New Zealand Superannuation and Retirement Income Act 2001, ss 21 and 26B.....	6
Category 2	6
Category 3	7
Summary of the Government's response	7
BACKGROUND: NEW ZEALAND DOMESTIC LAW	10
General entitlement to New Zealand superannuation.....	10
Direct deduction due to overseas pension entitlement	10
The public policy behind the direct deduction rule.....	12
Interpretation and application of the direct deduction rule by the New Zealand courts	14
NEW ZEALAND SUPERANNUATION AND KIWISAVER CONTRASTED	18
PREVIOUS COMMUNICATIONS CONCERNING THE SAME ISSUE.....	20
The S.B. case	20
THE COMMUNICATION	21
Category 1	21
Complaint by 9(2)(a)	21
Complaints by	21
Complaint by	23
Complaint by	24
Complaint by	25
Complaint by	26
Category 2	27
Category 3	27
OBSERVATIONS AS TO ADMISSIBILITY	28
The communication as a whole.....	28
Inadmissible under article 1.....	28
Category 1 authors are not commonly affected.....	28
Other complaints are in the nature of an actio popularis.....	29
Opportunity for the New Zealand Government to provide further information if communication found to be admissible	30
Inadmissible under article 2.....	30
Not substantiated in law	30
Not substantiated in fact	32
Inadmissible under articles 2 and 5(2)	32
Inadmissible under article 3.....	35
Observations as to the admissibility of specific individual complaints	36
9(2)(a)	36
.....	36
OBSERVATIONS AS TO MERITS	38

No violation of article 26 38
No violation of article 12 40
APPENDIX A: RELEVANT NEW ZEALAND LEGISLATION..... 41
New Zealand Superannuation and Retirement Income Act 2001 41
Social Security Act 1964..... 43
APPENDIX B: RELEVANT NEW ZEALAND SOCIAL SECURITY
AGREEMENTS..... 48

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

INTRODUCTION

1. The Permanent Mission of New Zealand to the United Nations in Geneva presents its compliments to the secretariat of the complaint procedure of the Human Rights Council and has the honour to refer to the latter's Note of 7 October 2014, transmitting a copy of communications dated 10 February 2014 concerning New Zealand.
2. The Permanent Mission of New Zealand has the further honour to submit the enclosed information and observations of the New Zealand Government concerning the admissibility and merits of communication No. G/SO 215/1 NZL 217 to the Human Rights Council under the First Optional Protocol (Protocol) to the International Covenant on Civil and Political Rights (Covenant).

SUMMARY OF COMMUNICATION AND GOVERNMENT RESPONSE

Summary of the communication

3. The New Zealand Government wishes to emphasise that the communication as a whole is characterised by a significant lack of substantiating information. This has made it difficult for the Government to understand the scope of the complaint and the allegations made against it.
4. The communication consists of a preamble and supporting information. The preamble refers to fifteen individuals who are listed as "submitting the complaints". It appears that further individuals were initially named as "submitting the complaints" but their names were removed before the communication was submitted, to protect their confidentiality. The New Zealand Government does not know how many individuals fall into this category.
5. The supporting information is collectively submitted by nine of the fifteen individuals named in the preamble. The remaining six individuals, as well as those who were initially named in the preamble but whose names were then removed before submission, have not submitted any supporting information.
6. There is one exception. The supporting information includes a complaint from one individual who does not give his or her name. It is not clear whether he or she was

one of the individuals initially named in the preamble. The author of the complaint acknowledges that he or she 9(2)(a) but purports to be making a complaint 9(2)(a)

7. The New Zealand Government has proceeded on the understanding that there are sixteen different authors who have submitted sixteen different complaints, with varying amounts of substantiating information provided. The Government has not treated the communication as one generic complaint, because the situation of each author (at least insofar as their personal circumstances can be understood from the supporting information) is very different.

8. For the purposes of identifying and responding to the sixteen complaints, the Government has divided them into three categories:

8.1 Category 1: The nine individuals who are named in the preamble and who have submitted supporting information in relation to their complaints;

8.2 Category 2: The six individuals who are named in the preamble but who have not submitted any supporting information in relation to their complaints. The additional individuals who were named in the preamble but who have since had their names removed also fall into this category; and

8.3 Category 3: The one individual who does not appear to have been named in the preamble and who acknowledges he or she is not a pensioner but is complaining "on behalf of 65,000 New Zealand retirees".

9. The following is a brief summary of each of the complaints, organised by category.

Category 1

10. The nine individuals who have submitted supporting information in relation to their complaints are 9(2)(a)

9(2)(a)

Challenges to application of Social Security Act 1964, s 70(1)

11. Eight of these complaints (that is, all but that of [9(2)(a)]) appear to be challenges to the application of section 70(1) of the Social Security Act 1964 to the authors' particular circumstances.
12. Section 70(1) applies to all persons who are entitled to receive New Zealand superannuation. It provides that, if such a person (or their spouse, partner or dependents) is entitled to receive or receives a pension from a country other than New Zealand, and that overseas pension is, in the opinion of the Chief Executive of the Ministry of Social Development, part of a programme providing pensions for any of the contingencies for which pensions are provided under the Act or related Acts, then the amount of New Zealand superannuation or other New Zealand benefits payable under the Act or related Acts may be reduced by the amount, or part of the amount, of the overseas pension, as determined by the Chief Executive in accordance with regulations made under the Act.
13. The complaints relating to this section challenge
- 13.1 in the cases of [9(2)(a)] and [9(2)(a)] decisions by the Ministry of Social Development to classify several different overseas pensions as pensions to which s 70(1) applies and to make deductions from the authors' entitlements to New Zealand superannuation accordingly; and
- 13.2 in the case of [9(2)(a)] a decision by the Ministry to classify [9(2)(a)] pension an overseas pension to which s 70(1) applies and to reduce [9(2)(a)] own entitlement to New Zealand superannuation accordingly.
14. It is not clear from the preamble to the communication as a whole or the supporting information which articles of the Covenant the New Zealand Government is alleged to have violated. While the preamble describes the enclosed individual complaints as relating to "pension discrimination", none of the eight complaints challenging the application of s 70(1) refers to article 26 of the Covenant. [9(2)(a)] refers to article 17(2) of the Universal Declaration of Human Rights (UDHR), which relates to deprivation of property and has no equivalent in the Covenant.

Challenge to application of New Zealand Superannuation and Retirement Income Act 2001, ss 21 and 26B

15. [9(2)(a)] complaint challenges the Ministry's decision to stop paying New Zealand superannuation to him after he left [9(2)(a)] for [9(2)(a)]

This appears to be a challenge to ss 21 and 26B of the New Zealand Superannuation and Retirement Income Act 2001, although those sections are not expressly referred to in [9(2)(a)] supporting information.

16. Under s 21, a person who is "absent from New Zealand" is not entitled to receive New Zealand superannuation except in accordance with the Act or any social security agreement agreed between the New Zealand government and a foreign government. Under 26 of the Act, a person intending to move to a country with which New Zealand does not have a social security agreement is entitled to receive a proportion of New Zealand superannuation while living there. However, under s 26B of the Act, an applicant for payment under s 26 must be resident in New Zealand when making his or her application and must have been eligible to receive New Zealand superannuation either at the time of the application or some time before leaving New Zealand.

17. [9(2)(a)] was entitled to receive New Zealand superannuation in [9(2)(a)] [9(2)(a)] because the New Zealand Government had concluded a social security agreement with [9(2)(a)] which made such provision. However, he was not entitled to receive superannuation while in [9(2)(a)] because he remained "absent from New Zealand" and had not made an application under s 26 of the Act while resident in New Zealand in accordance with s 26B of the Act.

18. [9(2)(a)] complains that payment of New Zealand superannuation to him in [9(2)(a)] but not in [9(2)(a)] violates his right to freedom of movement under article 12 of the Covenant.¹

Category 2

19. This Category includes the six individuals who are named in the preamble but who have not provided any supporting information about their personal circumstances, namely: [9(2)(a)]
[9(2)(a)]

¹ [9(2)(a)] letter refers to article 13 of the Covenant but the New Zealand Government assumes this was an inadvertent error.

also includes the individuals who were initially named in the preamble, but whose names were removed before the communication was submitted.

20. The New Zealand Government has not received any supporting information or evidence regarding the personal circumstances of any of the authors in this Category.

Category 3

21. Finally, the communication includes a document from another individual entitled "Complaint against the Government of New Zealand". The author is unknown. The author acknowledges that he or she is [9(2)(a)] but is making a complaint to the Committee [9(2)(a)] about the application of s 70(1) of the Social Security Act 1964 to persons with overseas pension entitlements to which s 70(1) might apply in general. The author does not allege that the New Zealand Government has violated any particular article of the Covenant in this generic complaint.

Summary of the Government's response

22. The New Zealand Government is concerned about the limited amount of information which has been provided to substantiate each of the complaints. It is particularly concerned about the lack of supporting information in relation to the complaints by individuals in "Category 1" and "Category 2".

23. The New Zealand Government submits that the communication as a whole is inadmissible:

23.1 Under article 1 of the Protocol *ratione personae*, because it is not the communication of an "individual". In particular, the authors in Category 1 cannot demonstrate they have all been commonly affected by a Government action or policy, and the complaints in Category 2 and Category 3 are brought on an *actio popularis* basis and are inadmissible for that reason.

23.2 Under article 2 of the Protocol *ratione materiae*, because none of the complaints is sufficiently substantiated. None of the authors has provided sufficient information to enable the Committee to establish there has been any violation of the Covenant. All authors have omitted important

information, such as details of the nature and amounts of overseas pensions received or the amounts by which New Zealand superannuation has been alleged to have been reduced. Very few of the complaints refer to specific provisions of the Covenant.

23.3 Under articles 2 and 5(2) of the Protocol, because none of the authors has provided any information to show they have exhausted all domestic remedies or that application of domestic remedies would be unnecessarily prolonged.

23.4 Under article 3 of the Protocol because the communication is an abuse of the right of submission, as the authors have submitted the complaint despite being aware of the Committee's findings in *S.B. v New Zealand*.² That case is expressly referred to in the preamble to the communication. In *S.B.*, the Committee found that the application of s 70(1) of the Social Security Act 1964 did not violate the rights of *S.B.*, a British pensioner, under article 26 of the Covenant. The communication is essentially an attempt to ask the Committee to reconsider its decision in *S.B.*

24. The New Zealand Government further submits:

24.1 The complaint by [9(2)(a)] is also inadmissible under article 3 of the Protocol *ratione materiae* as it is incompatible with the provisions of the Covenant. In particular, it alleges a breach of article 17(2) of the UDHR, which is not a right contained or replicated in the Covenant.

24.2 The complaint by [9(2)(a)] is also inadmissible under article 1 of the Protocol *ratione loci* because the author was not, and remains not, subject to the jurisdiction of New Zealand. His citizenship status is unknown. He is resident in [9(2)(a)]

25. On the merits, the New Zealand Government submits that, in relation to the challenges to the application of s 70(1) of the Social Security Act 1964 to the authors' particular circumstances, there has been no violation of article 26 of the Covenant in any of the eight cases, as:

² *S.B. v New Zealand* Comm. No. 475/1991.

- 25.1 The section applies to all persons entitled to New Zealand superannuation and does not discriminate between persons based on any prohibited ground enumerated in the Covenant; and
- 25.2 Any differentiation of treatment is intended to achieve an aim which is legitimate under the Covenant and the criteria for differentiation are reasonable and objective.
26. For the same reasons, the complaints in Category 2 and the generic complaint in Category 3 do not disclose violations of article 26 of the Covenant.
27. The New Zealand Government further submits:
- 27.1 The complaint by [9(2)(a)] of a violation of article 12 of the Covenant is not established. [9(2)(a)] freedom of movement has not been infringed in any way. Moreover, New Zealand legislation already provides for the general portability of entitlements to New Zealand superannuation to countries with which the Government has not yet concluded social security agreements, including [9(2)(a)] and
- 27.2 The complaint by [9(2)(a)] of breach of article 17(2) of the UDHR, while outside the Covenant, is also not established. The effect of s.70(1) is not to deprive any person of any overseas pension entitlement or "property".

BACKGROUND: NEW ZEALAND DOMESTIC LAW

General entitlement to New Zealand superannuation

28. New Zealand offers one tier of superannuation. Entitlements are funded from general taxation.
29. The basic eligibility criteria are set out in ss 7 and 8 of the **New Zealand Superannuation and Retirement Income Act 2001** (reproduced in Appendix A). The criteria are:
- 29.1 the applicant has attained the age of 65 years;
 - 29.2 the applicant is ordinarily resident in New Zealand at the date of the application; and
 - 29.3 the applicant has been resident and present in New Zealand for an aggregate period of at least 10 years since attaining the age of 20 years, of which at least 5 years must have been while the applicant was aged 50 years or over.
30. New Zealand superannuation is universal. That is to say, if an applicant meets the three eligibility criteria, he or she is entitled to receive payments. There is no means testing.

Direct deduction due to overseas pension entitlement

31. However, entitlements may be reduced where an applicant is also entitled to receive a materially similar overseas pension. This rule, referred to as the direct deduction rule, is contained in section 70(1) of the **Social Security Act 1964**. Most of the individual complaints in the communication, as well as the generic complaint, appear to be challenges to the application of this rule.

32. Section 70(1) applies equally to all applicants who are eligible for **New Zealand Superannuation**. It provides:

70 Rate of benefits if overseas pension payable

(1) For the purposes of this Act, if—

- (a) any person qualified to receive a benefit under this Part of this Act or under the **Social Welfare (Transitional Provisions) Act 1990** or

Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001 is entitled to receive or receives, in respect of that person or of that person's spouse or partner or of that person's dependants, or if that person's spouse or partner or any of that person's dependants is entitled to receive or receives, a benefit, pension, or periodical allowance granted elsewhere than in New Zealand;

and

- (b) The benefit, pension, or periodical allowance, or any part of it, is in the nature of a payment which, in the opinion of the chief executive, forms part of a programme providing benefits, pensions, or periodical allowances for any of the contingencies for which benefits, pensions, or allowances may be paid under this Act or under the Social Welfare (Transitional Provisions) Act 1990 or under the New Zealand Superannuation and Retirement Income Act 2001 or under the War Pensions Act 1954 which is administered by or on behalf of the Government of the country from which the benefit, pension, or periodical allowance is received—

the rate of the benefit or benefits that would otherwise be payable under this Act or under the Social Welfare (Transitional Provisions) Act 1990 or Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001 shall, subject to subsection (3) of this section, be reduced by the amount of such overseas benefit, pension, or periodical allowance, or part thereof, as the case may be, being an amount determined by the chief executive in accordance with regulations made under this Act: ...

33. The effect of the subsection is that:

33.1 if a person "is entitled to receive or receives, in respect of that person or of that person's spouse or partner or of that person's dependants, or if that person's spouse or partner or any of that person's dependants is entitled to receive or receives, a benefit, pension, or periodical allowance granted elsewhere than in New Zealand"; and

33.2 that benefit, pension or periodical allowance is "in the opinion of the chief executive [of the New Zealand Ministry of Social Development]" in the nature of the payment which "forms part of a programme providing benefits, pensions, or periodical allowances for any of the contingencies for which benefits, pensions, or allowances may be paid under ... the New Zealand Superannuation and Retirement Income Act 2001"; and

- 33.3 the benefit, pension or periodical allowance is administered “by or on behalf of” the overseas Government; then
- 33.4 “... the rate of the benefit ... that would otherwise be payable under this Act or under ... the New Zealand Superannuation and Retirement Income Act 2001 shall, subject to subsection (3) of this section, be reduced by the amount of such overseas benefit, pension, or periodical allowance, or part thereof, as the case may be...”; which is
- 33.5 “an amount determined by the chief executive in accordance with regulations made under this Act.”
34. The relevant regulations are the Social Security (Overseas Pension Deduction) Regulations 2013.
35. The Social Security Act 1964 also imposes procedural obligations on applicants and the State in relation to overseas pension entitlements, namely:
- 35.1 Sections 69G and 69H require all persons who are eligible for New Zealand Superannuation;
- 35.1.1 to take all reasonable steps to obtain any overseas pension to which they are entitled; and
- 35.1.2 when applying for New Zealand Superannuation, to provide information on the rate of any overseas pension they have been granted.
- 35.2 Section 69I requires the Chief Executive of the Ministry of Social Development to assist any applicant to comply with the obligations in ss 69G and 69H.

The public policy behind the direct deduction rule

36. The principle of public policy behind the direct deduction rule is that applicants for New Zealand superannuation who receive a materially similar overseas pension should obtain that benefit first, so that:
- 36.1 countries may share the cost of provision of social security; and

36.2 such persons are not advantaged in their receipt of superannuation over New Zealanders who have lived and worked their entire lives in New Zealand.

37. The justification is clearly set out in the report of the Royal Commission of Inquiry into Social Security in New Zealand, published in 1972. The Royal Commission observed:³

In respect of New Zealand income-tested benefits, we are in no doubt that the present policy is the proper one. If the overseas pension is analogous – as it would be, for example, if it derived from a compulsory State scheme – then only one, the New Zealand benefit or the overseas pension can be received. Otherwise the overseas pensioner would be in a better position than the life-long New Zealander, at the latter's expense.

Nor are we in any doubt in respect of New Zealand superannuation benefit, provided again that the overseas pension is analogous to a New Zealand benefit. It is true that our superannuation benefit is paid irrespective of other income, but it is also true that no-one can receive both the superannuation benefit and an age, widows or invalids, or any other income-tested benefit. The overseas pensioner should not be placed in a better position.

38. The principle is sometimes referred to as the “one pension” rule. It may be illustrated by a comparison between the New Zealand superannuation scheme and state-administered pension schemes in other countries.

39. Many other countries operate proportional pension schemes, under which an applicant's maximum entitlement is reduced to take into account time the applicant has not made contributions to the scheme or has not been present in the country. For example:

39.1 in the Netherlands, the Old Age Pension rate is reduced by 2% for every year the applicant has been absent from the Netherlands between the ages of 15 and 65;

39.2 in Canada, while an applicant need only reside in Canada for 10 years after the age of 18 years to qualify for the minimum Old Age Security Pension, the maximum rate is payable only after the applicant has resided in Canada for 40 years; and

³ REPORT CITATION

39.3 in the United Kingdom, an applicant for a State pension provided by the United Kingdom National Insurance Scheme accrues one-thirtieth of the maximum rate of that pension for every qualifying year spent in the UK, with the result that the maximum rate is paid only to applicants who have contributed to the scheme for 30 or more years.

40. In New Zealand, by contrast, a person can be eligible for the full New Zealand superannuation after having resided in New Zealand for 10 years.

41. Generally, when workers move between countries with proportional payment pension schemes, they cease to be subject to the first country's scheme and begin to be covered by the second country's scheme. Their pension entitlements in the first country will be less than those of workers who have spent their whole working lives in the first country. However, when their pension entitlements from the first and second country's schemes are added together, the applicant will receive what is equivalent to one full pension (hence the "one pension principle").

42. The one pension principle operates easily where people move between countries with proportional payment pension schemes. However, the New Zealand superannuation scheme is not structured this way. To comply with the principle, therefore, there must be some other means of adjustment to ensure those who work within the jurisdiction receive one pension, and no more.

Interpretation and application of the direct deduction rule by the New Zealand courts

43. A person who has had their entitlement to New Zealand superannuation reduced under s 70(1) of the Social Security Act 1964 has several domestic remedies available.

44. First, he or she may appeal the decision by the Chief Executive of the Ministry of Social Development to the Social Security Appeal Authority.⁴ If the Chief Executive's decision was made by an employee acting under delegation, there is a preliminary step: the complainant may apply for a review by a Benefits Review Committee before appealing to the Authority.⁵ If a complainant is dissatisfied with a decision of the Authority, he or she may then appeal on a question of law by way of

⁴ Social Security Act 1964, s 12J.

⁵ Social Security Act 1964, s 10A.

case stated to the High Court.⁶ A complainant may then seek leave to appeal further to the Court of Appeal⁷ and, if still unsuccessful, to the Supreme Court.⁸

45. Separately, anyone who alleges the an action, policy or practice of the New Zealand Government is discriminatory may, after making a complaint to the New Zealand Human Rights Commission, initiate civil proceedings against the Government for breach of s 19 of the New Zealand Bill of Rights Act 1990 (non-discrimination) in the Human Rights Review Tribunal. Anyone who challenges New Zealand legislation as discriminatory may similarly apply to the Tribunal for a declaration of inconsistency with s 19 of the Bill of Rights Act.⁹
46. The New Zealand courts have considered the application of the direct deduction rule in s 70(1) of the Social Security Act 1964 on approximately nine appeals.¹⁰ In eight of these cases, the appellant was unsuccessful at first instance in the High Court. However, of these eight cases, only one plaintiff appealed further to the Court of Appeal. No appellant has ever pursued his or her case to the Supreme Court. Nor has any individual initiated civil proceedings in the Human Rights Review Tribunal for a declaration that s 70(1) is inconsistent with the right to freedom from discrimination in s 19 of the New Zealand Bill of Rights Act 1990.¹¹
47. The cases decided to date (December 2014) have held that:

⁶ Social Security Act 1964, s 12Q.

⁷ Social Security Act 1964, s 12R.

⁸ Social Security Act 1964, s 12S.

⁹ Human Rights Act 1993, s 92B.

¹⁰ See *Roe v Social Security Commission* HC Wellington M270/86, 10 April 1987 per Davison CJ, *Ruifrok v Attorney-General* HC Wellington AP499/97, 27 October 1999 per W Gendall and Durie JJ, *Hogan v Chief Executive of the Department of Work and Income New Zealand* HC Wellington AP49/02, 26 August 2002 per Ellen France J, *Rai v Chief Executive of the Ministry of Social Development* HC Auckland CIV 2003-485-002615, 2 September 2004 per Doogue J; *Tetley-Jones v Chief Executive of the Department of Work and Income* HC Auckland CIV2004-485-1005, 3 December 2004 per Winkelmann J; *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZAR 267 (HC) affirmed in *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZCA 436, [2009] NZAR 94; *Horn v Chief Executive of the Ministry of Social Development* HC Wellington CIV-2010-485-1589, 15 November 2010 per Mallon J; *Boljevic v Chief Executive of the Ministry of Social Development* [2012] NZAR 280 (HC) per Kos J; and *Malster v Chief Executive of the Ministry of Social Development* [2014] NZHC 1368 per Gilbert J. One further case has been decided under the terms of a social security agreement between New Zealand and Australia: see *Bredmeyer v Chief Executive of the Ministry of Social Development* HC Wellington CIV-2007-485-105, 20 September 2007 per Gendall J, affirmed in *Bredmeyer v Chief Executive of the Ministry of Social Development* [2008] NZCA 557, leave to appeal to the Supreme Court refused in *Bredmeyer v Chief Executive of the Ministry of Social Development* [2009] NZSC 28.

¹¹ Under s 92B of the Human Rights Act 1993, if a complaint about alleged discrimination has first been made with the New Zealand Human Rights Commission, an aggrieved person can bring civil proceedings in the Human Rights Review Tribunal alleging a public body has breached the obligations in ss 19 and 5 of the New Zealand Bill of Rights Act 1990, and may claim a declaration, damages and other remedies (if the allegation relates to a discriminatory action, policy or practice) or a declaration requiring a response from the Government (if the allegation relates to discriminatory legislation).

- 47.1 The Chief Executive of the Ministry of Social Development has a discretion when determining under s 70(1) whether an overseas pension falls within the scope of the section.
- 47.2 The first key question is whether the overseas pension, benefit or periodic allowance is in the nature of a payment for “any of the same contingencies” for which New Zealand Superannuation is paid.
- 47.3 Answering this question requires a comparison between the contingencies for which New Zealand Superannuation and the overseas pension, benefit or periodic allowance are paid. There is no requirement that the overseas pension, benefit or periodic allowance be paid for all the contingencies for which New Zealand Superannuation is paid; it is sufficient the pension, benefit or periodic allowance be paid for any of the contingencies for which New Zealand Superannuation is paid.
- 47.4 The way in which the overseas pension programme is funded is not relevant; there is no difference in substance between a programme funded by general taxation and a programme funded by employee and employer contributions where the latter is administered by the State, the difference is one of public accounting only.¹²
- 47.5 The main contingency for which New Zealand superannuation is paid is to provide assistance to age-related beneficiaries.
- 47.6 The second key question is whether the overseas pension payments form part of a programme which is administered “by or on behalf of” the overseas government.
- 47.7 This includes programmes which are administered by state or provincial governments, but truly private savings schemes will not be caught.

¹² *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZCA 436, [2009] NZAR 94 at [8], affirming *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 (HL) at [21] per Lord Hoffmann. See also *Hogan v Chief Executive of the Department of Work and Income New Zealand* HC Wellington AP49/02, 26 August 2002 at [22] and [47] per Ellen France J.

48. While some general rules can be stated, however, each application of s 70(1) falls to be decided on its own particular facts. The outcome will turn on the nature of the particular overseas pension at issue.
49. To the New Zealand Government's knowledge, no applicant has ever brought civil proceedings against it in the Human Rights Review Tribunal alleging a breach of s 19 of the New Zealand Bill of Rights Act 1990, either in respect of actions, policies or practices or legislation relating to overseas pensions.

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

NEW ZEALAND SUPERANNUATION AND KIWISAVER CONTRASTED

50. Kiwisaver is a voluntary savings scheme which complements the New Zealand superannuation scheme.
51. The Kiwisaver scheme is separate from, and has no impact on a person's eligibility for, New Zealand superannuation. The key characteristics of the Kiwisaver scheme are:
- 51.1 The Kiwisaver scheme is not a benefit or pension that is administered "by or on behalf of the New Zealand Government" (as required of overseas pensions to qualify for deduction under s 70(4)). On the contrary, the Kiwisaver scheme is a private savings scheme. A member selects an investment scheme and the member's investment is administered by the investment company selected. The investment scheme remains personal to the member throughout its term.
- 51.2 It is a voluntary scheme, and individuals may choose to opt out or suspend contributions at any time.
- 51.3 While there is a minimum contribution when contributing from employed earnings, this is not the case for the non-employed member. Individuals are also free to determine the level of any contributions beyond the minimum.
- 51.4 Employers may be required to contribute to Kiwisaver depending on the member's situation. Kiwisaver is commonly initiated in the work place but the scheme also extends to minors and adults who are not in paid employment.
- 51.5 When Kiwisaver contributions are being paid from employment earnings, it is correct that the funds are collected from the employer by the Department of Inland Revenue, being the Government agency responsible for the administration of revenue. However, the funds are immediately passed to the investment companies charged with the member's investment.

51.6 Unlike state administered contributory pension schemes, the individual assumes the risk of their personal investment. Individuals choose where they will place their funds and the schemes are not guaranteed by the state.

52. In short, the contributory pension schemes identified in these complaints have no equivalent in New Zealand because New Zealand operates a single level superannuation scheme, chooses to fund its superannuation through the mechanism of general taxation, and determines entitlement based on age and residency criteria.

53. What New Zealand superannuation and the contributory pension schemes identified in these complaints do have in common is that they all provide for the contingencies of old age and are administered by the state. To that extent, any overseas pension entitlements derived from compulsory, government administered contributory schemes will be captured by s 70.

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

PREVIOUS COMMUNICATIONS CONCERNING THE SAME ISSUE

The S.B. case

54. While no individual in New Zealand has appealed his or her case to the Supreme Court, one author has previously filed a communication relating to the application of s 70(1) with the Committee.
55. In 1991, "S.B.", a British pensioner, submitted communication No. 475/1991 to the Committee challenging the application of s 70(1) (which was in the same terms as today). S.B. was born in 1911 and had participated in a contributory United Kingdom pension scheme from the age of 18. In 1971, he moved to Jersey where he had found employment. From 1976, while residing in Jersey, he received the full, inflation-adjusted United Kingdom pension as well as 18 per cent of the full Jersey pension.
56. In September 1987, S.B. moved to New Zealand to live with his children. He requested and was granted New Zealand superannuation. Under the New Zealand-United Kingdom mutual agreement, his New Zealand superannuation was reduced to take into account his United Kingdom pension. His New Zealand superannuation was not initially adjusted to take into account his Jersey pension. In March 1988, however, New Zealand authorities realised S.B. had been receiving a Jersey pension and deducted this pension from his New Zealand superannuation also.
57. S.B. appealed the authorities' decision to the Social Security Appeal Authority, who dismissed his appeal. S.B. did not appeal to the High Court. Instead, he submitted a communication to the Committee.
58. The Committee decided the communication was inadmissible under article 2 of the Optional Protocol: S.B. v New Zealand 475/1991. It observed:

The Committee notes that section 70(1) of the New Zealand Social Security Act applies to all persons receiving benefits pursuant to the Act, that the Act does not distinguish between New Zealand citizens and foreigners and that a deduction takes place in all cases where a beneficiary also receives a benefit of the kind characterised in the section from abroad. The Committee finds that the author has failed to substantiate, for the purposes of admissibility, that he is a victim of discrimination, and that the author does not, therefore, have a claim

THE COMMUNICATION

59. As summarised above, the complaints in the communication can be divided into three categories.

Category 1

60. The first category includes complaints by nine individuals who have provided some supporting information about their circumstances.

Complaint by [9(2)(a)]

61. The first individual complaint is by [9(2)(a)]. He lives in New Zealand. The only information provided to substantiate the complaint is two letters from the author to various New Zealand Ministers for Senior Citizens.

62. These letters suggest that:

62.1 [9(2)(a)] wife has a pension entitlement from an overseas country; and

62.2 [9(2)(a)] entitlement to New Zealand superannuation has been reduced to take into account the nature and amount of his wife's overseas pension.

63. There is no further substantiation of the complaint. In particular, the letters do not provide details about the nature and amount of his wife's overseas pension entitlement, or any information about the decision to reduce [9(2)(a)] entitlement to New Zealand superannuation.

64. There is no reference in the complaint to any exhaustion of domestic remedies. In particular, there is no reference to any appeal to the Social Security Appeal Authority or to the High Court.

65. There is no reference in the complaint to any article of the Covenant or the Protocol.

Complaints by [9(2)(a)]

66. The second and third individual complaints are by [9(2)(a)]. [9(2)(a)] are married and live in New Zealand. [9(2)(g)(i)] is an [9(2)(a)] citizen while [9(2)(a)] is a New Zealander.

67. Between [9(2)(a)] worked in [9(2)(a)]. During this time, each made contributions to the [9(2)(a)] pension scheme. This is

a contributory scheme, administered by the State. Both workers and employers make contributions. The [9(2)(a)] State also contributes in the event an employee takes an extended period of sick or maternity leave.

68. In [9(2)(a)] came to New Zealand. They worked in New Zealand between [9(2)(a)], before leaving to travel between [9(2)(a)]

69. Both [9(2)(a)] now qualify for both the [9(2)(a)] pension and New Zealand superannuation.

70. The supporting information establishes that [9(2)(a)] became entitled to the [9(2)(a)] pension on [9(2)(a)] payable at [9(2)(a)] per month (gross). On [9(2)(a)] the New Zealand Ministry of Social Development advised [9(2)(a)] that her entitlement to New Zealand superannuation would be reduced to take into account the [9(2)(a)] pension, to an amount of NZ [9(2)(a)] per week (net). On [9(2)(a)] wrote to the Ministry to provide further information about her [9(2)(a)] pension.

71. The supporting information does not confirm how [9(2)(a)] entitlement to the [9(2)(a)] pension has affected his entitlement to New Zealand superannuation. It simply notes [9(2)(a)] is currently “not receiving New Zealand superannuation”

72. Regarding the exhaustion of domestic remedies, [9(2)(a)] refers to her letter dated [9(2)(a)] as an “appeal” by her against the Ministry’s decision to reduce her entitlement to New Zealand superannuation. She also says she has written to MPs within the New Zealand Government and has requested a hearing for an explanation as to why her [9(2)(a)] pension is being deducted from her New Zealand superannuation entitlement. However, she says she believes [9(2)(a)]

73. There is no supporting information to suggest [9(2)(a)] has formally appealed the decision to reduce her entitlement to New Zealand superannuation to the Social Security Appeal Authority, or to the High Court. Rather, she states:

9(2)(a)

74. There is also no supporting information to suggest 9(2)(a) has appealed any decision by the Ministry to reduce his entitlement to New Zealand superannuation to the Social Security Appeal Authority, or to the High Court.

75. The authors state they believe they 9(2)(a)

9(2)(a)

The authors claim the 9(2)(a) pension scheme is different from New Zealand superannuation. They also claim New Zealanders who contribute to the "Kiwisaver" scheme do not have their entitlements to New Zealand superannuation reduced to take into account savings accrued through that scheme.

76. However, there is no reference in the complaint to any article of the Covenant or the Protocol.

Complaint by 9(2)(a)

77. The fourth individual complaint is by 9(2)(a). The only information submitted to substantiate the complaint is one letter from the author to the Office of the United Nations High Commissioner for Human Rights.

78. The letter suggests that:

78.1 9(2)(a) is currently a resident of the 9(2)(a) and no longer subject to the jurisdiction of New Zealand;

78.2 He and his partner lived in New Zealand for 9(2)(a)

78.3 He and his partner became entitled to New Zealand superannuation;

78.4 He and his partner then returned to 9(2)(a)

9(2)(a)

78.5 He and his partner then moved to 9(2)(a) at which point each stopped receiving New Zealand superannuation.

79. The letter provides no specific information about 9(2)(a) entitlement to New Zealand superannuation, such as how much was paid or when payments

stopped. It also provides no information about the nature and extent of any other pension entitlements [9(2)(a)] may have (if any).

80. [9(2)(a)] submits that the cessation of his and his partner's entitlement to New Zealand superannuation while in [9(2)(a)] is a breach of article 13¹³ of the Covenant because, without that entitlement, he cannot exercise his freedom of movement to travel and live outside [9(2)(a)]. In particular, he says he cannot live in places other than Great Britain, Canada, Belgium¹⁴ or Greece (that is, countries with whom New Zealand has agreed social security agreements).

81. There is no reference in the complaint to any exhaustion of domestic remedies by [9(2)(a)].

Complaint by [9(2)(a)]

82. The fifth and sixth individual complaints are by [9(2)(a)]. Both live in New Zealand. The only information submitted to substantiate the complaints is letters to New Zealand Government Ministers, Members of Parliament and the New Zealand Human Rights Commission.

83. It appears from these letters that:

83.1 [9(2)(a)] is entitled to a [9(2)(a)] pension of some kind;

83.2 [9(2)(a)] is also entitled to New Zealand superannuation; and

83.3 The latter entitlement is being reduced to take into account the fact [9(2)(a)] is receiving a [9(2)(a)] pension.

84. The letters provide no information about the nature or amount of [9(2)(a)] [9(2)(a)] pension, the nature of his entitlement to New Zealand superannuation or the decisions taken around the reduction of this entitlement. The letters also provide no information to substantiate the position of [9(2)(a)].

85. There no reference in the complaint to exhaustion of any domestic remedies by either [9(2)(a)].

¹³ This appears to be an error; the New Zealand Government assumes [9(2)(a)] was referring to article 12 of the Covenant.

¹⁴ In fact, the New Zealand Government has not concluded a social security agreement with Belgium.

86. There is no reference in the complaint to any article of the Covenant or the Protocol.

Complaint by [9(2)(a)]

87. The seventh individual complaint is by [9(2)(a)]. He is a citizen of both New Zealand and the [9(2)(a)] and lives in New Zealand.

88. [9(2)(a)] was born in the [9(2)(a)]. He previously worked in [9(2)(a)] [9(2)(a)] and the [9(2)(a)] [9(2)(a)] before moving to New Zealand in [9(2)(a)]. After working for a time in New Zealand for approximately [9(2)(a)] he spent further time in [9(2)(a)] [9(2)(a)] before returning to New Zealand.

89. [9(2)(a)] time working overseas has entitled him to one pension from the [9(2)(a)] [9(2)(a)] and two pensions from [9(2)(a)] [9(2)(a)]. His time working in New Zealand has also entitled him to New Zealand superannuation.

90. In his complaint, [9(2)(a)] says:

[9(2)(a)]

91. However, the supporting documentation (in particular his correspondence with the Ministry of Social Development and subsequent applications for review and appeal of the Ministry's decisions) reveals [9(2)(a)] core complaint is with the specific deduction of his [9(2)(a)] Pension. [9(2)(a)] was advised of this decision on [9(2)(a)].

92. [9(2)(a)] applied for a review of the decision. The review proceeded to a hearing before the Benefits Review Committee, which dismissed the application by decision dated [9(2)(a)]. [9(2)(a)] appealed the Committee's decision to the Social Security Appeal Authority, but the Authority dismissed the appeal by decision dated [9(2)(a)].

93. [9(2)(a)] did not appeal the decision further, to the High Court.

94. [9(2)(a)] says his [9(2)(a)] pension is [9(2)(a)] and [9(2)(a)] and his entitlement to New Zealand superannuation should not be reduced to take it into account. He claims there has been [9(2)(a)] [9(2)(a)]

95. There is no reference in the complaint to any article of the Covenant or the Protocol.

Complaint by [9(2)(a)]

96. The eighth and ninth individual complaints for which supporting information has been provided are by [9(2)(a)] was born in [9(2)(a)] and worked there between [9(2)(a)]. During that time, he contributed to the [9(2)(a)] Pension scheme.

97. He moved to [9(2)(a)] and worked there until [9(2)(a)]. His residence and contributions through employment entitled him later to apply for a [9(2)(a)] [9(2)(a)] and a [9(2)(a)] pension.

98. In [9(2)(a)] moved to New Zealand, where he continued to work. He qualified for New Zealand superannuation.

99. It is unclear from the supporting information provided from when [9(2)(a)] began receiving his [9(2)(a)] and New Zealand superannuation. It appears from the "Information for the Overseas Pensions Forum" document dated [9(2)(a)] [9(2)(a)] that his entitlement to New Zealand superannuation for [9(2)(a)] recognised by the Ministry of Social Development [9(2)(a)] but was reduced to take into account the [9(2)(a)] pensions. The same year, the Ministry advised [9(2)(a)] that, once his [9(2)(a)] Pension was taken into account, his entitlement to New Zealand superannuation was reduced to nil.

100. [9(2)(a)] applied for review of the Ministry's decision. The review proceeded to a hearing before the Benefits Review Committee, which dismissed the application by decision dated [9(2)(a)]. [9(2)(a)] did not appeal the Committee's decision to the Social Security Appeal Authority within time. He says this was because he thought the New Zealand Parliament would change the law regarding reduction of

New Zealand superannuation due to overseas pension entitlements. He later applied for leave to appeal against the Benefit Review Committee's decision out of time, but leave was refused by the Social Security Appeal Authority by decision dated

- 101. There is no reference in the complaint to any article of the Covenant or the Optional Protocol.

Category 2

- 102. The complaints in Category 2 include those by the six authors who are listed in the preamble to the communication as "submitting the complaints", but from whom no supporting information is included in the communication. These authors 9(2)(a)

9(2)(a)
9(2)(a)

The complaints also include those unknown individuals who were initially named as "submitting the complaint" but whose names were removed before the communication was submitted.

- 103. The New Zealand Government has not received any information to substantiate the complaints in this Category. It has no knowledge of whether any of the authors in this Category have been personally affected by any action or decision taken under the Social Security Act 1964 or any other statute.

Category 3

- 104. Finally, the communication also includes information which is purported to be

9(2)(a) The author of the complaint

acknowledges he or she is 9(2)(a) The only information given to

substantiate the complaint is a letter to the Office of the United National High Commissioner for Human Rights dated 9(2)(a) The letter does not allege

a violation of any article of the Covenant. It briefly alleges that s 70(1) of the Social Security Act 1964 is discriminatory on the grounds of family status. However, it does not purport to be a complaint on behalf of any individual who has been subject to discrimination on this ground or any ground enumerated in the Covenant.

OBSERVATIONS AS TO ADMISSIBILITY

The communication as a whole

105. The New Zealand Government submits the communication as a whole is inadmissible for four separate reasons.

Inadmissible under article 1

106. First, the communication as a whole is not brought by an “individual” and so is inadmissible *ratione personae* under article 1 of the Protocol. In particular:

106.1 The authors in Category 1 have not shown they are commonly affected by a Government action or policy; and

106.2 The authors in Category 2 and Category 3 are complaining on an *actio popularis* basis.

Category 1 authors are not commonly affected

107. It is acknowledged that a group of individuals may bring a communication where each claims to be commonly affected by a government action or policy.¹⁵ However, the New Zealand Government submits that the authors of the communication have not provided evidence to show they are commonly affected, and have not otherwise provided sufficient information to substantiate their complaints or to demonstrate that they exhausted all domestic remedies.¹⁶ Rather, the complaints by the authors in Category 1 are all very different:

107.1 Each relates to a different type of overseas pension;

107.2 Some authors are complaining about the application of s 70(1) of the Social Security Act 1964, while another is complaining about ss 21 and 26B of the Superannuation and Retirement Income Act 2001.

107.3 Very few authors have alleged any violation of any article of the Covenant, and those who have done so have alleged violations of different rights; for example, [9(2)(a)] has alleged a violation of his right not to be deprived of property under article 17 of the UDHR, while [9(2)(a)]

¹⁵ *Mahuika v New Zealand* Comm. No. 547/1993.

¹⁶ As in *Shergill v Canada* Comm. No. 1506/2006, argued at [4.1], accepted by the Committee at [7.3].

9(2)(a) has alleged a violation of the right to freedom of movement under article 12 of the Covenant.

Other complaints are in the nature of an actio popularis

108. The complaints in Category 2 and Category 3 have also been brought on an actio popularis basis. The Committee's constant jurisprudence is that complaints brought on this basis are inadmissible. The authors must demonstrate how they have been affected by a Government action or policy specifically, rather than in the abstract.¹⁷

In *AWP v Denmark*, the Committee recently observed:¹⁸

The Committee observes that no person may, in theoretical terms and by actio popularis, object to a law or practice which he holds to be at variance with the Covenant. Any person claiming to be a victim of a violation of a right protected by the Covenant must demonstrate either that a State party has by an act or omission already impaired the exercise of his right or that such impairment is imminent, basing his argument for example on legislation in force or on a judicial or administrative decision or practice

109. The actio popularis nature of the complaints in these Categories is shown by:

109.1 The absence of any supporting information relating to the particular circumstances of those in Category 2; and

109.2 The author of the general complaint in Category 3 acknowledges that he or she has not been personally affected by any action of the New Zealand Government, stating 9(2)(a) He or

she purports to bring a complaint on behalf of 9(2)(a)

9(2)(a) but does not provide substantiating information in relation to the complaints of any of these retirees. In the words of the Committee, he or she has not demonstrated any "sufficient link" with any retiree in order to bring a claim on their behalf.¹⁹

¹⁷ *Colchúin v Ireland* Comm. No. 1083/2001.

¹⁸ *AWP v Denmark* Comm. No. 1897/2009 at [6.4]. See also the *Aumeeruddy-Cziffra v Mauritius* Comm. No. 35/1978.

¹⁹ *Massera v Uruguay* Comm. No. 5/1977.

Opportunity for the New Zealand Government to provide further information if communication found to be admissible

110. As requested by the State party in *Shergill v Canada*,²⁰ the New Zealand Government asks the Committee that, if it finds this communication admissible, it requests all authors to submit further and full particulars and evidence, including on how they have been commonly affected, so that the New Zealand Government may respond appropriately on the admissibility and merits of their allegations.

Inadmissible under article 2

111. Second, the communication as a whole is also inadmissible under article 2 of the Protocol because no complaint in any Category has been sufficiently substantiated, either in law or fact. Both the Committee's Rules of Procedure and its constant jurisprudence require that complaints be sufficiently substantiated to be admissible.²¹

Not substantiated in law

112. The New Zealand Government has referred to the case of *S.B. v New Zealand*. It recalls that, in that case, the Committee observed:

The Committee notes that section 70(1) of the New Zealand Social Security Act applies to all persons receiving benefits pursuant to the Act, that the Act does not distinguish between New Zealand citizens and foreigners and that a deduction takes place in all cases where a beneficiary also receives a benefit of the kind characterised in the section from abroad. The Committee finds that the author has failed to substantiate, for the purposes of admissibility, that he is a victim of discrimination, and that the author does not, therefore, have a claim.

113. Similarly in *Shergill v Canada*, the Committee found the communication brought by immigrants from Southeast Asia who were not entitled under Canadian law to receive State pensions because they did not meet the 10-year minimum residency requirement, was inadmissible because the residency rule did not discriminate based upon any ground enumerated in article 26 of the Covenant.²²

114. The Committee's conclusions in the *S.B.* and *Shergill* cases apply equally to the complaints in this communication. Section 70(1) of the Social Security Act 1964 applies without distinction to all persons entitled to receive New Zealand superannuation. It does not differentiate between persons who are eligible for

²⁰ *Shergill v Canada* Comm. No. 1506/2006.

²¹ See in particular the Rules of Procedure of the Human Rights Committee, r 96(b).

²² *Shergill v Canada* Comm. No. 1506/2006.

entitlements based on any prohibited ground of discrimination enumerated in article 26 of the Covenant. Any differentiation is based upon entitlement to a materially similar overseas pension, which does not confer any "status" on the authors.

115. The position is no different for [9(2)(a)] From the point of view of substantive equality, he is not treated any differently from an applicant for New Zealand superannuation who is not married to a person who is entitled to receive a pension from a country other than New Zealand. In both cases, the applicants and their spouses are entitled to receive an aggregate of two New Zealand pensions; it is only the manner in which the amounts are apportioned (ie. partly from an overseas pension or exclusively from New Zealand superannuation entitlements) which differs. The outcomes for both groups in terms of entitlements received are the same.
116. In any event, to the extent any differentiation on an enumerated ground is found to exist, it is for purposes which are legitimate under the Covenant, namely sharing the cost of provision of social security between nations and ensuring that New Zealanders who live and work their entire lives in New Zealand are not disadvantaged as against those who are entitled to receive overseas pensions. The measure is also reasonable in that it requires the overseas pension to be state-administered and for the same contingencies as the New Zealand superannuation scheme before it is deducted; purely private pension schemes or schemes for other contingencies are not included.
117. The one claim which is not based on s 70(1) of the Social Security Act 1964, from [9(2)(a)] is also not substantiated in law because the right to freedom of movement in article 12 of the Covenant is not engaged. The New Zealand Government's decision to cease [9(2)(a)] superannuation payments due to his absence from New Zealand did not inhibit [9(2)(a)] ability to move freely between [9(2)(a)] or elsewhere in any way.
118. Moreover, the New Zealand Superannuation and Retirement Income Act 2001 expressly provides for general portability of entitlements to New Zealand superannuation to all countries other than New Zealand. Any individual intending to move to a country with which New Zealand does not have a social security agreement may apply under s 26 of the Act to have New Zealand superannuation

paid on a proportionate basis to him or her, provided he or she is resident in New Zealand at the time of the application.

Not substantiated in fact

119. As well, as already discussed, none of the complaints are substantiated in fact. Each of the authors complaints lacks:

119.1 full supporting information identifying the particulars of the Government decision or action complained of;

119.2 evidence of any differential treatment based upon a ground enumerated in article 26 of the Covenant; and

119.3 evidence that the author has exhausted all domestic remedies or that application of such remedies would be unduly prolonged.

Inadmissible under articles 2 and 5(2)

120. Third, the communication as a whole is also inadmissible as none of the authors has exhausted all domestic remedies. The available remedies are discussed at paragraphs 42-43 above. In relation to each author:

120.1 [9(2)(a)] has provided no substantiating information as to any decision by the Chief Executive, or any application for review, or any appeal to the Social Security Appeal Authority or to the courts, nor has he provided any explanation.

120.2 [9(2)(a)] claim they have [9(2)(a)] but have provided no substantiating information to show they have formally appealed to the Social Security Appeal Authority, or if so, that they have appealed further to the High Court. [9(2)(a)] suggest that they cannot pursue appeals to the High Court because [9(2)(a)]

[9(2)(a)] However, the Committee has previously held that having doubts about the effectiveness of pursuing an appeal cannot absolve an author from compliance with articles 2 and 5(2) of the Protocol.²³ Moreover, on the information provided by the authors and given appeals against similar decisions have

been successful in the past, it cannot be said any appeal by [9(2)(a)]
[9(2)(a)] would have had no reasonable prospect of success.²⁴

120.3 [9(2)(a)] has provided no substantiating information as to any appeal to any judicial authority in New Zealand. In any event, he is outside the jurisdiction of New Zealand.

120.4 [9(2)(a)] have provided no substantiating information as to any decision by the Chief Executive, let alone any application for review, any appeal to the Social Security Appeal Authority or to the higher courts.

120.5 [9(2)(a)] has exhausted one, but nowhere near all, domestic remedies. He has pursued an appeal to the Social Security Appeal Authority but has not pursued a further appeal to the High Court. He has said:

[9(2)(a)]

[9(2)(a)] statement is not accurate, it is not correct that all appeals to the courts have failed.²⁵ In any event, the Committee has observed that a belief that litigation will be slow or expensive,²⁶ or doubts about the likelihood of success,²⁷ or a belief that the dispute should be solved in fora other than the courts,²⁸ do not absolve non-compliance with articles 2 and 5(2) of the Protocol. Rather, as the Committee observed in *Fedotova v Russia*, where an applicant has not exhausted all domestic remedies, he or she must show he or she would have no reasonable prospect of success, either because a claim would inevitably be dismissed or because the established jurisprudence of the highest domestic courts would preclude a positive result.²⁹ [9(2)(a)] has not demonstrated this is the case. The New Zealand Supreme Court has never considered the application of s 70(1) of the Social Security Act

²³ *O Sara v Finland* Comm. No. 431/1990.

²⁴ On the basis of the test set out by the Committee in *Fedotova v Russia* Comm. No. 1932/2010.

²⁵ For example, an appellant was successful in *Chief Executive of the Ministry of Social Development v Rai* HC Auckland CIV-2003-485-2615, 2 September 2004.

²⁶ *JRC v Costa Rica* Comm. No. 296/1998 and *A & SN v Norway* Comm. No. 224/1987.

²⁷ *Sara v Finland* Comm. No. 431/1990.

²⁸ *A & SN v Norway* Comm. No. 224/1987.

²⁹ *Fedotova v Russia* Comm. No. 1932/2010.

1964, and the Court of Appeal has only done so on one occasion on one narrow issue of law, applied to a very different set of facts (relating to a United Kingdom, not a [9(2)(a)] pension), in a very short judgment (eight paragraphs). To the New Zealand Government's knowledge, no applicant has ever initiated proceedings against the Government in the Human Rights Review Tribunal challenging decisions related to overseas pension entitlements and the direct deduction rule.

120.6 [9(2)(a)] attempted to appeal to the Social Security Appeal Authority out of time, but were refused leave to appeal because of their delay. In *JRT and the WG Party v Canada*, the Committee observed that non-compliance with statutory timeframes for filing appeals will usually indicate the author has not taken reasonable steps to exhaust all domestic remedies.³⁰ In [9(2)(a)] case, the time limits for appealing decisions to the Social Security Appeal Authority were clearly set out in s 12K of the Social Security Act 1964. The authors have provided no evidence to show they had a good reason for not appealing within time. Moreover, [9(2)(a)] disagreed with the Authority's decision not to accept their application for leave to appeal out of time, they were entitled to institute judicial review proceedings to challenge that decision in the High Court. They did not do so.

121. None of the authors in Category 2 or Category 3 has provided any substantiating information about a Government decision, action or policy which has been applied to them or will imminently be applied to them, let alone any information to show they have appealed to the Authority or to the courts against a decision they disagree with.

122. Finally, the New Zealand Government notes that in *E.H.P. v Canada*, the Committee observed that:³¹

Whether in a given case proceedings would be unduly prolonged is a question of fact, not speculation. Only after having examined the particular

³⁰ *J.R.T. and the W.T. Party v Canada* Comm. No. 104/1981. The failure of the author in that case to appeal within time was not considered to be fatal because there were "conflicting time-limits laid down in the laws in question". That is not the case in this communication.

³¹ *E.H.P. v Canada* Comm. No. 67/1980.

circumstances of a case should the committee pronounce itself on whether or not the application of domestic remedies has been unduly prolonged.

123. In this case, none of the authors has provided sufficient evidence to enable the Committee to determine whether the application of domestic remedies would be unduly prolonged. As such, the complaints are inadmissible under articles 2 and 5(2) of the Protocol.

Inadmissible under article 3

124. Finally, the communication as a whole is inadmissible under article 3 of the Protocol as an abuse of the right of submission, because the authors have made the communication cognisant of the Committee's decision in *S.B. v New Zealand* but have made no attempt to explain why they consider that decision is wrong or does not apply to them.
125. Article 3 of the Protocol may be invoked to find inadmissible communications which, in substance, have been considered more than once.³²
126. The *S.B.* case is discussed at paragraphs 52-56 above. The New Zealand Government recalls that, in the *S.B.* case, the Committee:
- 126.1 made a general finding that s 70(1) of the Social Security Act 1964 does not discriminate under article 26 of the Covenant because its application does not differentiate between persons on a ground prohibited under the Covenant; and
- 126.2 made a specific finding that the author's individual case was therefore inadmissible under article 2 of the Protocol.
127. The present communication is, in substance, the same as the communication ruled inadmissible in *S.B.*. Many of the individual complaints, as well as the *actio popularis* complaints in Category 2 and 3, are challenges to the same section of the Social Security Act 1964. The preamble to the communication acknowledges that the *S.B.* communication was dismissed, but goes on to state:

³² *Conde v Spain* Comm. 1527/2006.

We cannot understand how the Council could not differentiate between the two types of pensions even then, after all one is contributory and the other non contributory.

128. Nowhere in the preamble to the communication or in the supporting information of any of the individual complaints do the authors address the Committee's decision in S.B, or attempt to explain why the conclusions reached were wrong or do not apply to the authors' circumstances.

129. It is respectfully submitted that, for these reasons, the communication is simply another attempt to litigate the same issue considered and dismissed in S.B. and is accordingly an abuse of the right to submission.

Observations as to the admissibility of specific individual complaints

9(2)(a)

130. 9(2)(a) alleges that his rights under article 17(2) of the UDHR have been violated. The Committee has no jurisdiction to recognise violations of the UDHR. There is no equivalent right to that in article 17(2) in the Covenant. In O.J. v Finland, the Committee observed that since there is no right to property in the Covenant, claims which allege violations of that right are inadmissible *ratione materiae* under article 3 of the Protocol.³³ 9(2)(a) complaint is therefore inadmissible under that article as incompatible with the provisions of the Covenant.

9(2)(a)

131. 9(2)(a) is resident in 9(2)(a). To the best of the New Zealand Government's knowledge, he was resident in 9(2)(a) at the time the communication was submitted. His citizenship is unknown.

132. The New Zealand Government submits that 9(2)(a) complaint is inadmissible *ratione loci* under article 1 of the Protocol because he was not, and remains not, subject to the jurisdiction of New Zealand.

133. The New Zealand Government notes the Committee's observations in *Dixit v Australia* that an author does not have to be physically present within a country in order to be subject to its jurisdiction.³⁴ However, the author must still demonstrate

³³ O.J. v Finland Comm. No. 419/1990.

³⁴ *Dixit v Australia* Comm. No. 978/2001.

his “rights and duties are subject to the State party’s legislation.” In this case, the author has not done this. The legislation relevant to 9(2)(a) complaint, and the superannuation entitlements they relate to, apply to individuals within the jurisdiction of New Zealand only. It does not operate extraterritorially. Section 21 of the New Zealand Superannuation and Retirement Income Act 2001 does not confer any decision-making power on the New Zealand Government. Similarly s26B of the Act provides that applicants for general portability of New Zealand superannuation entitlements to other countries must be ordinarily resident and present in New Zealand at the time of the application. This case is very different from the visa laws challenged in *Dixit v Australia*, which applied to all overseas persons wishing to enter Australia.

RELEASED UNDER THE OFFICIAL INFORMATION ACT

OBSERVATIONS AS TO MERITS

134. The New Zealand Government recalls that very few of the individual complaints in Category 1, and none of the complaints in Category 2 or the generic complaint in Category 3, allege a violation of any provision of the Covenant. In any event, the New Zealand Government has attempted to identify and respond to those allegations of violations, to the extent it can understand them.

No violation of article 26

135. The individual complaints in Category 1, as well as the generic complaint in Category 3, complain in general terms that the authors' rights to non-discrimination have been violated by the application of s 70(1) of the Social Security Act. The New Zealand Government has proceeded on the understanding that these complaints are alleging violations of article 26 of the Covenant.

136. The Committee has interpreted the term "discrimination" in article 26 to mean:³⁵

Any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.

137. The Committee has further held that not all differential treatment is discrimination, where the differential treatment is for a purpose which is legitimate under the Covenant and based on criteria which are reasonable and objective.³⁶

138. In *S.B. v New Zealand* and *Shergill v Canada*, the Committee found that s 70(1) of the Social Security Act 1964 (NZ) and the 10-year residency requirement in the equivalent Canadian pension legislation applied to all persons otherwise entitled to receive superannuation without distinction. The provisions therefore did not treat people differently based on a prohibited ground enumerated in article 26 of the Covenant.

139. The Committee has also found in *Van Oord v Netherlands*³⁷ and *Diaz v Spain*³⁸ that differential treatment between persons living in countries with which a pension-

³⁵ General Comment 18 (1994) UN Doc. HRI/GEN/1/Rev.1 at 7.

³⁶ General Comment 18 (1994) UN Doc. HRI/GEN/1/Rev.1 at 13 and *Springer v Netherlands* Comm. No. 395/1990.

³⁷ *Van Oord v Netherlands* Comm. No. 658/1995 at [8.5].

paying country has concluded a social security agreement, and persons living in countries with which a pension-paying country has not concluded such an agreement, are not treated differently on a ground enumerated in article 26 of the Covenant.

140. The New Zealand Government submits those decisions should be followed in this case. Section 70(1) of the Social Security Act 1964 does not treat the authors differently based on any ground enumerated in article 26.
141. Again, the position is no different for 9(2)(a) From the point of view of substantive equality, he is not treated any differently from an applicant for New Zealand superannuation who is not married to a person who is entitled to receive a pension from a country other than New Zealand. In both cases, the applicants and their spouses are entitled to receive a maximum of two New Zealand pensions; it is only the manner in which the amounts are apportioned (ie. partly from an overseas pension or exclusively from New Zealand superannuation entitlements) which differs. The substantive outcome for both groups is the same: both groups receive an aggregate of two entitlements to New Zealand superannuation.
142. The New Zealand Government further submits that, if the relevant legislation is found to differentiate between persons on a ground enumerated in the Covenant, that differentiation is for purposes which are legitimate under the Covenant and effected by criteria which are reasonable and objective.
143. The purposes of the direct deduction rule in s 70(1) are that:
- 143.1 countries may share the cost of provision of social security; and
- 143.2 applicants for New Zealand superannuation who have overseas pension entitlements are not advantaged over New Zealanders who have lived and worked their entire lives in New Zealand.
144. In *Oulajin and Kaiss v Netherlands*, the Committee observed that:³⁹

³⁸ *Diaz v Spain* Comm. No. 988/2001 at [7.3].

³⁹ *Oulajin v Kaiss v Netherlands* Comm No. 426/1990.

With regard to the application of article 26 of the Covenant in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socioeconomic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to re-evaluate the complex socio-economic data and substitute its judgments for that of the legislature of States parties”.

145. It is objectively reasonable for the New Zealand Government to co-manage its provision of social security with foreign countries through the mechanism in s 70(1) of the Social Security Act 1964. As discussed at paragraph 41 above, the section is the New Zealand Government's mechanism for achieving the “one pension principle” in the light of the fact its pension system is structured differently from many states. Following *Oulajin and Kaiss v Netherlands*, this was a complex socio-economic decision made by the New Zealand legislature which was reasonable.

No violation of article 12

146. [9(2)(a)] complaint alleges that the cessation of payment of New Zealand superannuation to him after he began to reside in [9(2)(a)] was a violation of his right to freedom of movement in article 12 of the Covenant.
147. The short answer to this complaint is that [9(2)(a)] right was not infringed. He was (and remains) free to reside [9(2)(a)] if he chooses. He has provided no evidence to substantiate how his freedom has been infringed. He is free to enter and leave [9(2)(a)] is effectively asserting a right to residency in [9(2)(a)] which is not guaranteed under the Covenant.
148. In any event, New Zealand law already guarantees the general portability of New Zealand superannuation entitlements to countries with which New Zealand does not have a social security agreement, such as [9(2)(a)]. Under s 26 of the New Zealand Superannuation and Retirement Income Act 2001, provided the applicant applies for general portability while resident and present in New Zealand, he or she may be permitted to receive a proportionate entitlement to New Zealand superannuation while resident in such countries.

APPENDIX A: RELEVANT NEW ZEALAND LEGISLATION

New Zealand Superannuation and Retirement Income Act 2001

7 Age qualification for New Zealand superannuation

- (1) Every person is entitled to receive New Zealand superannuation who attains the age of 65 years.
- (2) However, a person is not entitled to receive New Zealand superannuation in respect of any period for which he or she has made an election under any of clause 52 or clause 68 or clause 72 of Schedule 1 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 to be entitled to weekly compensation under that Act rather than to New Zealand superannuation.
- (3) Subsection (1) applies subject to the provisions of this Part and of the Social Security Act 1964.

8 Residential qualification for New Zealand superannuation

No person is entitled to New Zealand superannuation unless the person—

- (a) is ordinarily resident in New Zealand on the date of application for New Zealand superannuation; and
- (b) has been both resident and present in New Zealand for a period or periods aggregating not less than 10 years since attaining the age of 20 years; and
- (c) has also been both resident and present in New Zealand for a period or periods aggregating not less than 5 years since attaining the age of 50 years.

11 Commencement of New Zealand superannuation

- (1) New Zealand superannuation commences on the date on which the applicant becomes entitled to receive it or the date on which the application for it is received by the department, whichever is the later date.
- (2) This section is subject to section 80AA of the Social Security Act 1964.

21 Effect of absence from New Zealand on New Zealand superannuation

A person is not entitled to New Zealand superannuation while that person is absent from New Zealand except as provided in sections 22 to 35 or in any agreement or convention adopted under section 19 of the Social Welfare (Reciprocity Agreements, and New Zealand Artificial Limb Service) Act 1990.

26 Payment overseas of New Zealand superannuation

- (1) This subsection—
 - (a) applies to a country if it is not a country with whose government New Zealand has a reciprocal agreement or convention, in force under section 19 of the Social Welfare (Reciprocity Agreements, and New Zealand Artificial Limb Service) Act 1990, that relates to New Zealand superannuation; and
 - (b) applies to a person if he or she has left New Zealand at a time when he or she was—
 - (i) intending to reside for a period longer than 26 weeks in a country (or any 2 or more countries) to which this subsection applies, but not intending to reside for a period longer than 52 weeks in a specified Pacific country (within the meaning of section 30(1)); or

- (ii) intending to travel for a period longer than 26 weeks, but not intending to reside in any country other than **New Zealand**.
- (2) A person to whom subsection (1) applies is entitled to be paid **New Zealand superannuation** at the appropriate rate specified in subsection (6)—
 - (a) in the case of a person who has left **New Zealand** at a time when he or she was intending to reside for a period longer than 26 weeks in a country (or any 2 or more countries) to which subsection (1) applies, but not intending to reside for a period longer than 52 weeks in a specified Pacific country (within the meaning of section 30(1)), until he or she—
 - (i) begins to reside in a country that is not a country to which subsection (1) applies; or
 - (ii) begins to reside in **New Zealand** again; or
 - (iii) begins to receive **New Zealand superannuation** otherwise than under this section; and
 - (b) in the case of a person who has left **New Zealand** at a time when he or she was intending to travel for a period longer than 26 weeks, but not intending to reside in any country other than **New Zealand**, until he or she—
 - (i) begins to reside in a country that is not a country to which subsection (1) applies; or
 - (ii) returns to **New Zealand**.
- (3) For the purposes only of subsection (2)(b)(ii), a person does not return to **New Zealand** if—
 - (a) he or she—
 - (i) interrupts his or her overseas travel, and travels to and stays briefly in **New Zealand**, in order to attend an event (for example, a wedding or funeral) or to visit a person (for example, a sick or injured family member); and then
 - (ii) resumes his or her overseas travel; and
 - (b) he or she does not while in **New Zealand** begin to receive **New Zealand superannuation** otherwise than under this section.
- (4) Except to the extent provided by paragraphs (a)(i) and (b)(i) of subsection (2), a person does not cease to be entitled to be paid **New Zealand superannuation** under that subsection by reason only of changing his or her intentions after leaving **New Zealand**.
- (5) Subsection (4) is for the avoidance of doubt.
- (6) The rates referred to in subsection (2) are,—
 - (a) for a single person, a rate that is a proportion (calculated under section 26A(1)) of the amount stated in clause 1(b) of Schedule 1;
 - (b) for a person who is married or in a civil union or in a de facto relationship, a rate that is a proportion (calculated under subsection 26A(1)) of the amount stated in clause 1(c) of that schedule.
- (7) This section is subject to section 26B.

26A Calculation of amount of **New Zealand superannuation** payable overseas

- (1) The proportion referred to in section 26(6) is to be calculated by—
 - (a) treating each period during which the person concerned has resided in **New Zealand** while aged 20 or more and less than 65 as whole calendar months and (where applicable) additional days; and
 - (b) adding the number of additional days (if any), dividing the total by 30, and disregarding any remainder; and

- (c) adding the number of calendar months and the quotient calculated under paragraph (b); and
 - (d) dividing by 540 the total calculated under paragraph (c).
- (2) In the determination for the purposes of subsection (1) of the periods during which a person has resided in New Zealand, no account is to be taken of—
- (a) any period of absence from New Zealand of a kind described in section 9(1); or
 - (b) any period of absence from New Zealand—
 - (i) while the person was engaged in missionary work as a member of, or on behalf of, any religious body; or
 - (ii) while the person's spouse or partner was engaged in missionary work as a member of, or on behalf of, any religious body, and the person was with his or her spouse or partner; or
 - (c) any period of absence from New Zealand while the person was (by virtue of section 79(1)(a) of the Social Security Act 1964) deemed to have been resident in New Zealand; or
 - (d) any period of absence from New Zealand while, as the spouse or partner of a person deemed by section 79(1)(a) of the Social Security Act 1964 to have been resident in New Zealand, the person was also (by virtue of section 79(1)(b) of the Social Security Act 1964) deemed to have been resident in New Zealand.
- (3) Subsection (2) applies to a period of absence only if the chief executive is satisfied that during it the person concerned remained ordinarily resident in New Zealand.
- (4) Subsection (2)(b) applies to a period of absence only if the chief executive is satisfied that the person concerned either was born in New Zealand or—
- (a) in the case of a person to whom subsection (2)(b)(i) applies, was ordinarily resident in New Zealand immediately before leaving New Zealand to engage in the missionary work concerned;
 - (b) in the case of a person to whom subsection (2)(b)(ii) applies, was ordinarily resident in New Zealand immediately before leaving New Zealand to accompany or join his or her spouse or partner.

26B Entitlement

A person is not entitled to be paid New Zealand superannuation under section 26 unless he or she—

- (a) has made an application for the payment of New Zealand superannuation under that section stating either (as the case may be)—
 - (i) the country or countries in which he or she intends to reside and the period for which he or she intends to reside there; or
 - (ii) the country or countries to and in which he or she intends to travel; and
- (b) is ordinarily resident and present in New Zealand on the day he or she makes the application, and—
 - (i) is entitled to receive New Zealand superannuation on that day; or
 - (ii) will become entitled to receive New Zealand superannuation before he or she leaves New Zealand

Social Security Act 1964

69G Reasonable steps to be taken to obtain overseas pension

- (1) Every applicant for a benefit under this Act or under Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001 shall provide to the chief executive information establishing, to the satisfaction of the chief executive,—
- (a) that the applicant and the spouse or partner of the applicant have taken all reasonable steps to obtain any overseas pension to which either or both of them may be entitled or that may be granted to either or both of them; and
 - (b) that the applicant has taken all reasonable steps to obtain any overseas pension to which any dependant of the applicant may be entitled or that may be granted to any dependant of the applicant.
- (2) The chief executive may give to—
- (a) an applicant for a benefit under this Act or under Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001; or
 - (b) a beneficiary under this Act or under Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001; or
 - (c) the spouse or partner of an applicant for a benefit under this Act or under Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001; or
 - (d) the spouse or partner of a beneficiary under this Act or under Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001—
- a written notice requiring that person to take all reasonable steps, within a period specified by the chief executive, to obtain any overseas pension to which that person may be entitled or that may be granted to that person.
- (3) The chief executive may give to—
- (a) an applicant for a benefit under this Act or under Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001; or
 - (b) a beneficiary under this Act or under Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001—
- a written notice requiring that person to take all reasonable steps, within a period specified by the chief executive, to obtain any overseas pension to which any dependant of that person may be entitled or that may be granted to any dependant of that person.
- (4) Where a person does not comply with a notice given by the chief executive under subsection (2) or subsection (3), the chief executive may—
- (a) refuse to grant the benefit applied for by the applicant;
 - (b) suspend, from such date as the chief executive determines, the benefit granted to the beneficiary until either—
 - (i) the beneficiary provides information establishing, to the satisfaction of the chief executive, that the beneficiary and the spouse or partner of the beneficiary have taken all reasonable steps to obtain any overseas pension to which either or both of them may be entitled or that may be granted to either or both of them or, as the case requires, that the beneficiary has taken all reasonable steps to obtain any overseas pension to which any dependant of the beneficiary may be entitled or that may be granted to any dependant of the beneficiary; or
 - (ii) the benefit is terminated under subsection (5),—

whichever occurs first.

- (5) Where a benefit has been suspended under subsection (4), the chief executive may, not less than 40 working days after the suspension, terminate the benefit from such date as the chief executive determines

69H Information on rate of overseas pension to be provided

- (1) Every applicant for a benefit under this Act or Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001 shall provide to the chief executive information establishing, to the satisfaction of the chief executive, the rate of any overseas pension granted to any of the following persons:
- the applicant;
 - the applicant's spouse or partner;
 - any dependant of the applicant.
- (2) Where an applicant does not comply with subsection (1) within 10 working days after applying for the benefit, the chief executive may refuse to grant the benefit applied for.
- (3) Every beneficiary under this Act or Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001 shall provide to the chief executive, as requested from time to time in a written notice given to that person by the chief executive, information establishing, to the satisfaction of the chief executive, the rate of any overseas pension granted to any of the following persons:
- the beneficiary;
 - the beneficiary's spouse or partner;
 - any dependant of the beneficiary.
- (4) Where a beneficiary does not comply with subsection (3) within 10 working days after the notice has been given, the chief executive may suspend, from such date as the chief executive determines, the benefit granted to the beneficiary until either—
- the beneficiary provides information establishing, to the satisfaction of the chief executive, the rate of any overseas pension granted to the beneficiary or the beneficiary's spouse or partner or any dependant of the beneficiary;
 - or
 - the benefit is terminated under subsection (5),—
whichever occurs first.
- (5) Where a benefit has been suspended under subsection (4), the chief executive may, not less than 40 working days after the suspension, terminate the benefit from such date as the chief executive determines.
- (6) In this section, the term rate, in relation to an overseas pension, means the rate of that pension in the currency of the country paying that pension

69I Duty of chief executive to assist

It is the duty of the chief executive to take all reasonable steps to assist any person to comply with any obligation imposed on that person by or under section 69G(1) to (3) or section 69H(1) or (3).

70 Rate of benefits if overseas pension payable

- (1) For the purposes of this Act, if—
- any person qualified to receive a benefit under this Act or Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and

Retirement Income Act 2001 is entitled to receive or receives, in respect of that person or of that person's spouse or partner or of that person's dependants, or if that person's spouse or partner or any of that person's dependants is entitled to receive or receives, a benefit, pension, or periodical allowance granted elsewhere than in New Zealand; and

- (b) the benefit, pension, or periodical allowance, or any part of it, is in the nature of a payment which, in the opinion of the chief executive, forms part of a programme providing benefits, pensions, or periodical allowances for any of the contingencies for which benefits, pensions, or allowances may be paid under this Act or under the New Zealand Superannuation and Retirement Income Act 2001 or under the War Pensions Act 1954 which is administered by or on behalf of the Government of the country from which the benefit, pension, or periodical allowance is received—

the rate of the benefit or benefits that would otherwise be payable under this Act or Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001 shall, subject to subsection (3), be reduced by the amount of such overseas benefit, pension, or periodical allowance, or part thereof, as the case may be, being an amount determined by the chief executive in accordance with regulations made under this Act.

provided that if the chief executive determines that the overseas benefit, pension, or periodical allowance, or any part of it, is in the nature of, and is paid for similar purposes as,—

- (a) compensation for injury or death for which payment could be made under the Accident Compensation Act 2001 if the injury or death had occurred in New Zealand after the commencement of that Act; or
- (b) a war pension or allowance granted under the War Pensions Act 1954 of a type which would not affect any recipient's entitlement to a benefit in accordance with section 72 unless the pension or allowance is a pension or payment granted under Part 6 of the War Pensions Act 1954; or
- (c) a disability allowance granted under this Act—
- such overseas benefit, pension, or periodical allowance, or part of it, as the case may be, shall be treated as if it were in fact such compensation, war pension or allowance, or disability allowance.

(1A) Subsection (1) does not apply to New Zealand superannuation payable overseas under section 26 of the New Zealand Superannuation and Retirement Income Act 2001.

(1B) Subsection (1) does not apply to a veteran's pension payable overseas under section 74J of the War Pensions Act 1954.

(2) Nothing in subsection (1) shall preclude the chief executive from deciding the date on which the chief executive's determination under paragraph (b) of, or the proviso to, the said subsection (1) shall take effect, which date may be a date before, on, or after the date of such determination.

(3) In any case where paragraph (a) and paragraph (b) of subsection (1) apply and the proviso to subsection (1) does not apply, the chief executive may—

- (a) make an arrangement with an overseas pensioner, in accordance with any regulations made under section 132C, to pay to the overseas pensioner the rate of the benefit or benefits that is payable under this Act or Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001 and to receive from the overseas pensioner an amount equivalent to the amount of the overseas pension that the overseas pensioner receives, if—

- (i) the overseas pensioner agrees to make such an arrangement; and
 - (ii) the overseas pensioner has not previously made such an arrangement and voluntarily terminated it; and
 - (iii) the chief executive has not previously ceased to make payments under paragraph (b) because of the overseas pensioner's failure to comply with such an arrangement; and
- (b) pay to the overseas pensioner, in accordance with an arrangement made under paragraph (a), the rate of the benefit or benefits that is payable under this Act or Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001, if the chief executive receives from the overseas pensioner, in accordance with the arrangement, an amount equivalent to the amount of the overseas pension that the overseas pensioner receives.
- (3A) The chief executive may from time to time, on behalf of the Crown, enter into contracts with 1 or more registered banks for the purpose of implementing arrangements under subsection (3)(a).
- (3B) No money in a bank account maintained, in accordance with regulations made under section 132C, to implement an arrangement under subsection (3)(a) can—
- (a) be attached or taken in execution under any order or process of any court;
 - (b) be made the subject of any set-off, charge, or assignment;
 - (c) be claimed or deducted under any notice or other instrument issued under any enactment (other than under regulations made under section 132C).
- (3C) If the benefit referred to in an arrangement made under subsection (3)(a) is New Zealand superannuation, the chief executive must pay any amount received from the overseas pensioner under the arrangement into the New Zealand Superannuation Fund established under the New Zealand Superannuation and Retirement Income Act 2001, in accordance with arrangements made from time to time by the chief executive with the Guardians of New Zealand Superannuation.
- (4) For the purposes of this Act, a payment under subsection (3)(b) shall, in respect of the period to which the payment relates, be deemed to be payment of—
- (a) the benefit or benefits that are payable to that overseas pensioner in that period under this Act or Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation and Retirement Income Act 2001, at the rate at which that benefit or those benefits are so payable but reduced in accordance with subsection (1); and
 - (b) the amount of the overseas pension that that overseas pensioner is entitled to receive or has received in that period.
- (5) Subsections (3) and (4) shall come into force on a date to be appointed by the Governor-General by Order in Council.

APPENDIX B: RELEVANT NEW ZEALAND SOCIAL SECURITY AGREEMENTS

1. Under s 21 of the New Zealand Superannuation and Retirement Income Act 2001, a person who is “absent from New Zealand” is not entitled to receive New Zealand superannuation except as provided in the Act or “in any agreement or convention adopted under section 19 of the Social Welfare (Reciprocity Agreements, and New Zealand Artificial Limb Service) Act 1990.”

2. Section 19 of the Social Welfare (Transitional Provisions) Act 1990 provides:
 - 19 Adoption of reciprocity agreement with other countries
 - (1) For the purpose of giving effect to any agreement or Convention with the government of another country providing for reciprocity in respect of matters relating to social security, monetary benefits, or to any alteration thereto, the Governor-General may, by Order in Council,—
 - (a) Declare that the provisions contained in any agreement or Convention or alteration thereto set out in a Schedule to the Order in Council shall have force and effect so far as they relate to New Zealand;
 - (b) Declare that the provisions of this Act and of the Social Security Act 1964 [and Part 6 of the War Pensions Act 1954] [and of Part 1 of the [[New Zealand Superannuation and Retirement Income Act 2001]]] and of the regulations and orders in force under those Acts shall have effect subject to such modifications as may be required for the purpose of giving effect to the agreement or Convention or alteration thereto:

3. New Zealand has concluded reciprocal social security agreements with the United Kingdom, Canada, Ireland, Malta, Australia, Jersey/Guernsey, Denmark, Greece and the Netherlands. Of these, only the agreements with the United Kingdom and Denmark prescribe different requirements for residents who are entitled to New Zealand superannuation than are set out in s 70(1) of the Social Security Act 1964, and the amendments to the effect of s 70(1) in those agreements are only for the purpose of giving effect to the agreements.