

Open letter to Hon Murray McCully

Dear Minister

We write as a group of concerned New Zealanders, each of whom holds expertise in the areas of constitutional law, international law and/or human rights law.

As you know, since the 2013 election in Nauru, there has been a series of disturbing developments on the island that indicate a severe deterioration in the state of its parliamentary democracy and in the rule of law. We are particularly concerned about the impact of these developments on the Wellington family of Nauruan opposition MP Roland Kun. We wish to express our dismay in relation to these developments and to urge you to take more decisive action.

You will remember that these issues first came to a head in early 2014 when, in response to court decisions it did not like, the government of Nauru forced the island's resident magistrate and its non-resident Chief Justice out of office.

The protection of judicial tenure is a fundamental cornerstone of the rule of law. It enables judges to rule in legal cases without fear or favour and ensures that government officials, like all others, are bound by the law as interpreted by independent courts. Since these events occurred in Nauru, the Nauruan justice system has not displayed this hallmark of independence. When deciding legal cases, judges and magistrates in the Nauruan justice system must necessarily have in mind the possibility that a decision contrary to the government's perceived interests could result in the judge or magistrate being forced out of office.

As you are aware, New Zealand is a development partner of the Government of Nauru and the principal funder of Nauru's Department of Justice and Border Control. When these events occurred, you were urged to reconsider this aid arrangement but decided not to do so on the basis of assurances from the Nauruan government as to the future protection of the rule of law in Nauru.

Since that time, however, the situation has degenerated further. As you know, in May and June 2014, five members of the Nauruan parliamentary opposition were suspended indefinitely from Parliament. For more than a year, five out of seven opposition MPs (in a 19 member Parliament) have received no funding or resources and have been unable to participate in parliamentary proceedings. The suspension of five MPs leaves a significant proportion of Nauru's population without political representation. As importantly, it leaves Nauru without an effective opposition to scrutinise government action and hold the executive to account. An effective opposition is a fundamental prerequisite of any functioning system of parliamentary responsible government.

The purported reason given for the suspensions of three of these MPs (including Mr Roland Kun, to whose circumstances we will return) was that they had criticised the government to international media – in short, that they had exercised their right as citizens (and duty as parliamentarians) to free speech. During the course of 2014 and 2015, there have been a number of other significant incursions into the free speech of Nauruan citizens, including a 2014 direction from government to local media not to speak to members of the opposition, a May 2015 government directive to Nauru's only internet service provider to block Nauruan citizens' access to Facebook, and a May 2015 amendment to Nauru's Criminal Code introducing a vaguely worded offence that punishes speech which has the "intent to stir up ... political hatred". As well, the government has increased the visa fees for foreign journalists from \$200 to \$8000, further shutting down scrutiny from international media.

The dismantling of an effective judicature together with the silencing of the media, opposition and even ordinary citizens on Facebook means that the government of Nauru is now virtually immune from scrutiny of its actions.

This series of concerning developments form the backdrop for the events of the last fortnight, of which you are aware. Following a political protest outside Parliament, three of the suspended opposition MPs have been arrested and charged with criminal offences relating to the protest. Two of them are being denied bail – a significant intrusion on the right to liberty that is ordinarily reserved for those who pose a serious danger to the public. It seems the Nauruan government may also be obstructing the right to legal counsel – another fundamental tenet of the rule of law. As there are no trained lawyers on the island other than those employed for the government, the exercise of the right to counsel is dependent on the government granting visas to counsel from other jurisdictions to enter Nauru. The Minister of Justice has already declined a visa application

by an Australian lawyer retained by one of the suspended MPs, and the concern is that other such declines may follow.

We understand that a number of ordinary Nauruan citizens have been forced out of their civil service jobs as a result of their participation in the protest.

The five suspended MPs have also had their passports cancelled so that they cannot travel outside of Nauru – a denial of the right to freedom of movement recognised at international law. This has had drastic implications for one of the five suspended MPs in particular – Mr Roland Kun, the MP for Buada. Mr Kun's wife, Dr Katy Le Roy (an Australian citizen) was one of a number of senior government officials on Nauru to be sacked following the 2013 change of government and to have her visa revoked. This meant that the Kun/Le Roy family had to leave their home on the island. The family have resettled in Wellington and made it their home. Dr Le Roy – a talented and highly respected constitutional lawyer and legislative draftsman – has taken up a permanent position in the New Zealand civil service. The couple have three children, the youngest of whom is only 18 months old. Since their move to New Zealand, Mr Kun has been acting as the primary caregiver.

By cancelling Mr Kun's passport while he was visiting Nauru, the Nauruan government have forced the separation of Mr Kun from his Wellington family and left the young children without their primary caregiver. Dr Le Roy is forbidden from returning to the island; Mr Kun from leaving it. Mr Kun did not attend the political protest outside Parliament and has not, to date, been arrested or charged with any criminal offence. It is difficult not to reach the conclusion that Mr Kun and his family are being further punished for Mr Kun's preparedness to talk to international media about the deteriorating situation in Nauru.

Over the past 18 months, you have expressed publicly on several occasions your concern about these developments and have undertaken to raise various issues with the Nauruan government. Nothing has come of this "softly softly" approach and the time for a more forceful approach has arrived. As you have previously acknowledged in relation to Nauru, there is a close connection between democracy and the rule of law, and the effective operation of the justice system. It is not tenable for New Zealand to continue in its role of principal funder of Nauru's justice sector while democracy and the rule of law are in such disarray and while so many basic human rights are being denied. As well, given our historical ties to Nauru and our position as a Pacific neighbour, New Zealand owes it to the citizens of Nauru to do everything it can to encourage its government to restore democracy and the rule of law.

We therefore urge you to:

1. Make urgent representations to the government of Nauru in respect of its persistent breaches of human rights and its disregard for the rule of law and parliamentary democracy;
2. Persuade the government of Nauru to:
 - revoke its decision to cancel the passports of opposition MPs;
 - lift the suspension of opposition MPs;
 - restore freedom of expression and other civil and political rights; and
 - refrain from further interferences with the operation of the justice system;
3. If Nauru does not move swiftly to take remedial action, withdraw New Zealand funding from Nauru's Department of Justice and Border Control.

Signed:

Professor Tony Angelo, Faculty of Law, Victoria University of Wellington

Natalie Baird, School of Law, University of Canterbury

Dr Mark Bennett, Faculty of Law, Victoria University of Wellington

Dr Claire Charters, Faculty of Law, University of Auckland

Eddie Clark, Faculty of Law, Victoria University of Wellington

Dr Joel Colon-Rios, Faculty of Law, Victoria University of Wellington

Alberto Costi, Faculty of Law, Victoria University of Wellington

Treasa Dunworth, Faculty of Law, University of Auckland
Dr Caroline Foster, Faculty of Law, University of Auckland
Professor Andrew Geddis, Faculty of Law, University of Otago
Professor Claudia Geiringer, Faculty of Law, Victoria University of Wellington
Marcelo Rodriguez Ferrere, Faculty of Law, University of Otago
Kris Gledhill, Faculty of Law, University of Auckland
Professor Mark Henaghan, Dean, Faculty of Law University of Otago
Dr John Hopkins, School of Law, University of Canterbury
Dr Dean Knight, Faculty of Law, Victoria University of Wellington
Catherine Iorns, Faculty of Law, Victoria University of Wellington
Professor Campbell McLachlan, Faculty of Law, Victoria University of Wellington
Professor Janet McLean, Faculty of Law, University of Auckland
Joanna Mossop, Faculty of Law, Victoria University of Wellington
Sascha Mueller, School of Law, University of Canterbury
Sir Geoffrey Palmer, Distinguished Fellow, Faculty of Law, Victoria University of Wellington
Dr Rhonda Powell, School of Law, University of Canterbury
Dr Guy Powles, Honorary Fellow, Monash University
Dr Jacinta Ruru, Faculty of Law, University of Otago
Mamari Stephens, Faculty of Law, Victoria University of Wellington
Professor ATH Smith, Faculty of Law, Victoria University of Wellington
Hanna Wilberg, Faculty of Law, University of Auckland
Professor Margaret Wilson, Faculty of Law, University of Waikato