Fault lines:

Human rights in New Zealand

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Summary of recommendations

Institutional Mechanisms

- The Justice and Electoral Select Committee be re-designated as the Justice, Electoral and Human Rights Select Committee and given responsibility for oversight of New Zealand's human rights treaty commitments.
- The New Zealand Bill of Rights (NZBORA) reporting mechanism is amended to require section 7 vets by the Attorney General to be directly considered by the new select committee. Section 7 vets should apply to bills at their third reading and Supplementary Order Papers and the Attorney General should not be required to vote in favour of legislation that is inconsistent with the NZBORA.
- The Māori Affairs Select Committee takes responsibility for developing indicators to monitor human rights treaty recommendations relating to Māori and reports to the Justice and Electoral Select Committee and to Parliament on their realisation.
- The Ministry of Justice becomes the co-ordinating Ministry to ensure consistency of all New Zealand government reports to treaty bodies and to provide a national archive of all treaty body information that is freely accessible to civil society and individuals.

Legislation

- New Zealand lifts the reservations relating to inciting racial disharmony in International Covenant on Civil and Political Rights (ICCPR); age mixing in prisons in both ICCPR and Convention on the Rights of the Child (CRC), and the reservations in both the ICCPR and International Covenant on Economic Social and Cultural Rights (ICESCR) on collective bargaining and trade unions.
- New Zealand ratifies the Optional Protocols to ICESCR and Convention on the Rights of Persons with Disabilities (CRPD) to comply with international commitments and to ensure that individuals have a remedy for the abuse of executive power.
- New Zealand urgently repeals the Public Health and Disability Act to reinstate the jurisdiction of the New Zealand Human Rights Commission and Human Rights Review Tribunal for all New Zealanders.
- A comprehensive review is undertaken of the Human Rights Act 1993 that covers the incorporation of the principle of equality, the appointments process, independence, the status and functions of Commissioners and resourcing.

Policy

- New Zealand pro-actively nominates candidates for the United Nations Human Rights Council, the Human Rights Committee, treaty body committees and special procedures, and institutes a cross party mechanism on UN representation.

- An accurate, well-reasoned and comprehensively researched explanation of New Zealand's unique constitutional arrangements is prepared with help from human rights academics to accompany all country reports to human rights treaty bodies.

Practice

- The Ministry of Justice establishes a formal process for publicising, considering and responding to Concluding Observations, and takes concrete, targeted steps to improve knowledge of international human rights domestically.
- An autonomous forum of non-governmental organisations (NGOs) funded by the Ministry of Justice be held in association with mid-cycle reporting of the Universal Periodic Review to enhance the co-ordination, capacity and capability of civil society.
- Journalists and media organisation, led by the Journalist Educators' Association of New Zealand (JEANZ) and with help from the New Zealand Human Rights Commission, sponsor the development of a practical toolkit for journalists on the reporting of human rights and the international treaty body system.

Chapter One Human Rights

1 Introduction to human rights

In his call for human rights to come down to earth, Richard Thompson Ford states that:[1]

> *Today we are in the midst of something new: not only a belief that all human beings have certain rights as a matter of theology or moral philosophy but also the belief that they have them as a matter of law and practical politics.*

This three year research project evaluates whether New Zealand's ratification of the six major international human rights treaties and engagement in the Universal Periodic Review process has increased the implementation of human rights in New Zealand. In other words what does the fact that New Zealand is a signatory to international human rights treaties and regularly reports to the United Nations on its progress in implementing them mean for ordinary New Zealanders? Has it improved their situation?

Through a systematic analysis of the State's response to the standards in the treaties and its degree of receptivity to subsequent treaty body recommendations, the research assessed whether ratification has enhanced the human rights agenda in New Zealand. The six major international human rights treaties - the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of All Persons with Disabilities (CRPD) are examined. In addition the research includes the first assessment of New Zealand's involvement in the Universal Periodic Review (UPR) process and compares the first and second cycles.

The six major treaties and the UPR are broadly assessed both individually and collectively in relation to the following five areas.[2]

- the introduction of legislation in relation to ratification,
- the incorporation of human rights norms in policy and practice,
- the use of the international treaties by the courts,
- the engagement of civil society in reporting processes and outcomes,
- the role of the New Zealand Human Rights Commission (NZHRC) in parallel reporting and country examination.

The researchers conducted a series of interviews with individuals who had participated in the treaty body processes. The interviewees included politicians with direct human rights treaty body experience and a number of domestic and international experts with legal and constitutional expertise. The data was evaluated to analyse the impact of ratification of the international human rights treaties on New Zealand's progress in fulfilling its obligations.

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[1] Richard Thompson Ford, (2011) *Universal Rights Down to Earth.* Amnesty International Global Ethics Series, New York, W.W. Norton & Co.

[2] The assessment differs in each treaty as a result of its history and progress in implementing it.

The research makes a unique contribution to scholarship on the impact of human rights because it focuses on implementation at a domestic level;[3] it does not focus on one treaty but examines six of the major treaties; it encapsulates both the views and perceptions of prominent stakeholders as well as findings and voices of researchers; and it uses both qualitative and quantitative evaluation methodologies where appropriate. In conclusion, the research advances a series of recommendations as an opportunity for political, legislative and social change to further the human rights agenda.

Research on human rights has particular salience for New Zealanders because of the role that New Zealand played in the United Nations Conference on International Organisation in San Francisco in 1945 and the development and the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Although not as well-known as its early adoption of women's suffrage, the role New Zealand played in the development of the UDHR marked the start of the nation's perception of itself as a human rights leader. More than 65 years later, there is still a belief (expressed in New Zealand's opening of the National Report to the second cycle of UPR in 2014) that, *"New Zealand has a proud tradition of promoting and protecting human rights at home and overseas"* – a role that was reinforced by the part it played in the development of the CRPD

The question that this research asks is, how good are we in practice? In historian Samuel Moyn's view human rights implies an agenda for improving the world in which the dignity and rights of each individual will enjoy secure international protection.[4]

> *Human rights in this sense have come to define the most elevated aspirations of both social movements and political entities- state and interstate. They evoke hope and provoke action.*

The research provides an insight into the promise and the reality of New Zealand's human rights record following ratification of the major international human rights treaties and conventions. While the research was carried out over a three year period and in part offers an historical narrative from the archival material used, we acknowledge the risks of a mono-causal interpretation of the full complexity of human rights. For this reason we have provided some context of the evolution and development of human rights in New Zealand and a bibliographic resource at Appendix 1 relating to scholarship on the impact of human rights treaties ratification

1.1 A short history of the evolution and development of human rights in New Zealand.

The reception of international human rights treaties into New Zealand can be divided into three phases:

- 1948 to 1968, a period that was characterised by the approach that 'there is no need to formally ratify treaties because there is no human rights problem';
- 1968 to 1990 which reflected the growing recognition of the need to formally incorporate human rights treaties into domestic law and led to the ratification of CERD in 1972, ICCPR and ICESCR in 1978 and CEDAW in 1985, as well as the enactment of the New Zealand Bill of Rights Act 1990 (NZBORA) and establishment of the Ministry of Women's Affairs 1985;[5]

[3] Cristof Heyns and Frans Viljoen, F. (2001) "The impact of human rights treaties on the domestic level". *Human Rights Quarterly 23,* 483-535.

[4] Samuel Moyn (2010) *The Last Utopia.* Cambridge: The Belknap Press of Harvard University Press at 1.

[5] The Ministry of Women's Affairs became the Ministry for Women in 2015

- 1990 to 2014 which was characterised by the acceptance of human rights treaties as an integral part of New Zealand law and practice, leading to the extension of the Human Rights Act to a greater number of grounds of discrimination and the power of the Human Rights Tribunal to make a declaration of inconsistency, together with an increase in litigation under the NZBORA.[6]

1.1.1 1948 to 1968 – Period of inaction

Although the concept of human rights can be traced back through history and cultures,[7] it was not until the formation of the United Nations and the adoption of the UDHR that there was an attempt to formally incorporate the notion of human rights into an agreed statement of principles that applied to all peoples and nations. The horror of the Second World War provided the impetus for countries to come together to try to prevent a recurrence of such a tragedy. The allied nations met at Dumbarton Oaks in 1944 to discuss the establishment of an institution which became the United Nations, and a Charter of Rights which became the UDHR, to ensure that individual rights were recognised as separate from that of the State, and to ensure world peace and security could be advanced by negotiations amongst nations instead of through war.

Although one of the smaller countries involved in the discussions, New Zealand "...exercised an influence far out of proportion to the size or strength of their country..."[8]The Labour government of the day was concerned to ensure there was an international organisation that would keep the peace by treating nations as equals, practicing collective security against aggression, and developing a system of trusteeship for colonial possessions that advanced the "well-being and development of native peoples" and self-determination. Two issues preoccupied New Zealand. The first was the enforceability of human rights obligations, and the second was the advancement of social and economic interests in the human rights context. These reflected the socialist principles of the Labour government. Its commitment to the process can be seen in the fact that Prime Minister, Peter Fraser, led the New Zealand Delegation to the San Francisco Conference. It was Fraser who introduced a reference to human rights at the San Francisco conference[9]seeking to introduce a paragraph in the Principles Chapter that read:

> *All members of the Organisation undertake to preserve, protect and promote human rights and fundamental freedoms, and in particular the rights of freedom from want, freedom from fear, freedom of speech and freedom of worship.*

While the adoption of the UDHR was a major achievement, its practical implementation depended on the development of a variety of international human rights treaties and their adoption and translation into domestic law by individual countries. But it was not until 1968 - a year noted for a generational challenge to the existing order - that human rights started to be promoted internationally. The United Nations declared 1968 to be International Human Rights Year

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[6] Helen Greatrex in her PhD thesis *Complementarity: Towards Robust Human Rights Governance in the New Zealand State Sector*, (2010) Victoria University of Wellington identifies five phases – growth of international architecture 1940s; growth of domestic architecture late 1970s ongoing; stock take initiatives 1994-2005; more effective implementation 2000 ongoing; and robust human rights governance ongoing. She also uses 20 criteria to assess effectiveness of robust human rights governance.

[7]Moyn, above n 4

[8]Paul Gordon Lauren (1998). *The evolution of international human rights*. University of Pennsylvania Press: Philadelphia at 167.

[9]Colin Aikman (1999) "New Zealand and the Origins of the Universal Declaration" *Victoria University of Wellington Law Review*. 29 (1) 1-11.

providing encouragement to those non-governmental organisations (NGOs) that were struggling to translate human rights from aspiration to an organising concept and movement. Within a decade Moyn noted that"…*human rights would begin to be invoked across the developed world and by many more ordinary people than ever before. …human rights most often meant individual protection against the state*."[10]

Although Moyn's observation has some application to the New Zealand experience, the reality was that from the outset there was a recognition domestically within state institutions that the government had a responsibility to protect and further human rights. To characterise human rights issues as individuals against the state is to miscast the facilitative role of the State in the realisation of human rights for individuals. In the New Zealand context it is difficult to conceive of a human rights culture in public policy without the support of the state.

The need to give effect to human rights in New Zealand grew through the 1950s and 1960s. During this period, however, New Zealand was complacent about the need to formally recognise human rights. There seemed to be an assumption that it did not need to do so because there were few human rights problems in New Zealand. For example, the Minister of Justice, the Hon Ralph Hanan, wrote in an essay entitled "Human Rights: The Prospect" as part of a series of lectures to celebrate the 20th anniversary of the adoption of the Universal Declaration of Human Rights:[11]

> *We in New Zealand have inherited from the United Kingdom a tradition of attaching no great importance to positive laws to guarantee or enforce human rights.... The idea of a Bill of Rights has been alien to our temper and we prefer to rely on the negative effect of common law, supported ultimately, as all rights must be supported if they are to be effective, by public opinion. Although this has disadvantages as well as benefits it suits us well enough.*
>
> *Nor do we look with much favour even on statutes that set out to prohibit discrimination. .... To some extent it is true we do not have it because we do not think we need it.*

In 1960 National Party policy included the commitment that a national government would pass a Bill of Rights similar to that recently adopted by the Canadian Parliament.[12]A petition to Parliament by the Constitutional Society for the Promotion of Economic Freedom and Justice in New Zealand (Inc) praying for a written constitution and including a draft constitution was presented to the Public Petitions Committee which did not recommend its adoption. On 15 August 1963 Justice Minister Hanan introduced a Bill of Rights designed to give statutory recognition to the fundamental rights and freedoms that existed in New Zealand. The Constitutional Reform Committee reported back in 1964 recommending the Bill not proceed, and it was dropped. Although Hanan's initiative was defeated he remained optimistic that New Zealand would come to accept the need to incorporate human rights obligations in its legal system because of the innate fairness of New Zealanders and the need to retain international credibility.[13]

The aspiration to be a good international citizen has been important for New Zealand and is often cited as a reason for adoption of international human rights treaties. However, while Hanan identified a growing awareness of, and support for, the incorporation of international human rights

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[10] Moyn, above n 4 at 4 – 5.

[11] Ken Keith, (ed) (1968). *Essays on Human Rights*, Sweet & Maxwell (NZ) Ltd, Wellington at 187.

[12] Geoffrey Palmer, G"A Bill of Rights for New Zealand?" in Keith K J at 107.

[13] Ralph Hanan, in Keith above n 11 at 187 – 188.

treaties amongst some politicians and officials he also recognised the tendency of New Zealand to favour gradual pragmatic law reform.[14]

The human rights issue of the time was racial discrimination. This reflected the growing awareness internationally of the evils of the apartheid system in South Africa and domestically of discrimination suffered by Māori and that the Crown had not fulfilled the obligations under the Treaty of Waitangi. Hanan's advocacy for reception of the CERD into New Zealand law together with support from key public officials accounts for this treaty being the first to be incorporated in New Zealand law in the Race Relations Act in 1971. The title of the Act explicitly refers to the treaty, the long title describing it as "An Act to affirm and promote racial equality in New Zealand and to implement the International Convention on the Elimination of All Forms of Racial Discrimination".

The importance of individuals in key political, public service, and community organisations has often been under estimated and misunderstood. Hanan's influence was important during this period because he provided political leadership for the increasing awareness and demand for human rights treaties that would enable people to assert their right to be treated in a non-discriminatory manner by both the Government and individuals. For Hanan the importance of the Universal Declaration was that: *"[It] has helped to mould public opinion and public attitudes, and it will go on doing so to an increasing degree*."[15]

1.1.2 1968 – 1990 – Reception of human rights treaties

The publication of *Essays on Human Rights* in 1968 to mark the 20th anniversary of the adoption of the UDHR represented a watershed in the recognition of New Zealand's international human rights treaty obligations and the beginning of a public debate on the formal reception of the treaties into New Zealand.

The emphasis of some of those contributing to the 20th Anniversary event was on race relations, providing the impetus for the ratification of CERD in 1972 and the enactment of the Race Relations Act 1971. The Race Relations Act established a pattern for New Zealand's method of compliance with its international obligations. Citizens were given a negative right not to be discriminated against on specified grounds and (with the introduction of the Human Rights Act in 1978) a process for enforcement through a special institution. The ordinary courts were not the preferred method of enforcement. The reason for this approach reflected a concern to ensure an adversarial approach was not taken to complaints. The preferred method of resolution being through conciliation, mediation and negotiation.

The ratification of CERD and enactment of the Race Relations Act was followed by the ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) in 1978 after the enactment of the Human Rights Commission Act 1977. The Human Rights Commission Act 1977 provided the opportunity to address both increasing political pressure for equality of women to be recognised in legislation and the need for international credibility by ratification of international human rights treaties. There was cross party support for the legislation except on issues relating to trade union

[14] Hanan, in Keith, above n 11 at 189.

[15] Hanan, in Keith, above n 11 at 194.

rights which was an ideological issue in the New Zealand context.[16]

There appeared to have been an assumption at the time that the Human Rights Commission Act 1977 was sufficient to incorporate the ICCPR and the ICESCR into New Zealand law and policy. The reality was, however, that the Act did not include all the provisions of the Conventions and was less than comprehensive in terms of guaranteeing citizens' human rights. It did, though, provide an institutional mechanism for the enforcement of those rights that were recognised.

The obligation to report to the United Nations on the implementation of the treaties was observed by New Zealand Governments and provided an opportunity for regular reassessment of the level of compliance. For example, during the 1970s women campaigned for the ratification of CEDAW and the establishment of a Ministry of Women's Affairs to oversee the implementation of the Convention. The election of the Labour Government led to ratification in 1985 and the establishment of the Ministry of Women's Affairs to monitor state human rights performance.

The end of this period was also marked by the most significant legal recognition of human rights domestically with the enactment of the New Zealand Bill of Rights Act 1990 (NZBORA). The legislation represented a campaign by human rights advocates since the 1960s.[17] The story of this campaign has been told elsewhere[18] but there are two points that need to be made - the influence of developments in other jurisdictions, particularly Canada, and the importance of key individuals who drove both the policy formation process through an influential White Paper[19]and a political process which was highly contested and reflected the dominance of the notion of parliamentary sovereignty and reluctance to give decision-making power to the courts.

The White Paper had recommended an entrenched Bill of Rights that gave the courts the power to strike down legislation if it was contrary to provisions of the Bill of Rights Act. The Select Committee[20]that considered the White Paper attracted a number of submissions on this point and eventually recommended against entrenchment as it would have represented a major departure from New Zealand's constitutional arrangements. In addition during the round of consultation the Māori community stated it did not support inclusion of the Treaty of Waitangi in legislation. When enacted in 1990 the NZBORA was not entrenched but did specifically refer to the ICCPR. It also marked the beginning of a new era in human rights in New Zealand.

1.1.3 1990 – 2014 – The practice of human rights in law and policy

The period 1990 to 2014 began with the extension of the grounds of non-discrimination in the Human Rights Act 1993 (HRA). The period is significant for two major developments in the implementation of human rights. The first was the role of courts in interpreting the provisions of the NZBORA, and the second was an attempt to integrate a culture of human rights awareness in the policy-making process. A summary analysis of these developments is found in a paper by Andrew and Petra Butler which assesses 16 years of human rights practice since the enactment of

[16] Aikman, above n 9

[17] Palmer, above n 12 at 107

[18] See Ken Keith, "Concerning Change: The Adoption and Implementation of the New Zealand Bill of Rights 1990" (2000) 3 VULR 721 and Paul Rishworth, "The Birth and Rebirth of the Bill of Rights" in Grant Huscroft and Paul Rishworth, P (eds) *Rights and Freedoms*, Brookers, Wellington (1995) at 9 – 13.

[19] *A Bill of Rights for New Zealand: A White Paper* (1985) AJHR A6.6.

[20] "Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand", (1988) AJHR 1 8A, 2-3.

the NZBORA.[21]They argue that the Courts have had considerable moral influence over the actions of government, citing examples of decisions that have resulted in the adjustment of policy to make it consistent with human rights obligations.

Some commentators do not consider that such a dialogue between the Parliament and the judiciary is possible, and that the courts have not sufficiently challenged the Parliament in supporting human rights.[22] The New Zealand experience is interesting, however, in that while Parliament has not been prepared to legally concede any restraint of its sovereignty, governments have undertaken to incorporate human rights considerations within public policy decision-making in response to specific judicial statements. This can also be seen in amendments to the Cabinet Manual that require all policy papers to contain a statement whether or not the policy is consistent with the NZBORA and the HRA[23]and the section 7 vets under the NZBORA which require the Attorney General to report to Parliament on the introduction of a Bill if it appears inconsistent with the NZBORA.[24]

In 2004 the government undertook to promote human rights in the state sector, the Ministry of Justice issuing a handbook explaining the obligations of policy advisors.[25] This development resulted from a 1999 election commitment by the Labour party to mainstream human rights in public policy and promote better understanding of the importance of human rights in the community. This commitment also led to a Ministerial Inquiry into an evaluation of human rights protections.[26] The Inquiry led in turn to the 2001 Amendment to the HRA and a restructuring of the NZHRC emphasising the Commission's role as a human rights advocate with a focus on education and community involvement. The individual complaints function was transferred to the Human Rights Tribunal along with the ability to pursue an individual complaint to the stage where the court could issue a declaration of inconsistency if the Government was found to have acted contrary to its human rights obligations.[27]

In 2009 David Erdos[28]analysed the legal impact of the NZBORA and the impact of various influences such as the open texted nature of the provisions, the interpretative role of the courts and the lack of remedies. In a case analysis, he notes a judicial culture in the New Zealand courts that appeared to have divergent standards, preferring remedies for personal liberty over cases involving social equality. He attributes this dichotomy to the courts being more comfortable in their traditional common law role of protecting the civil rights on individuals - for example, the reluctance of the courts to intrude on Parliament's role of making policy was clearly evident in the

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[21] Petra Butler and Andrew Butler, "16 Years of the NZ Bill of Rights" (Draft) www.alla.asn.au/conference/2006/docs/A-P_Butler-Bill-of.Rights.pdf

[22]Cluadia Geiringer, "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen"* (2008) 6 *New Zealand Journal of Public and International Law* 59, at73.

[23] Cabinet Office *Step-by-Step Guide to Cabinet and Cabinet Processes* (2001) Wellington, [3.53-3.60]

[24] The Reports since 2003 have been available on the Ministry of Justice website.

[25] Attorney-General Margaret Wilson "Foreword" *The Handbook of the New Zealand Bill of Rights Act 1990* (Wellington, 2004) 5. The Handbook is a shorter version of the *Ministry of Justice Guidelines to the New Zealand Bill of Rights Act* which contain a fuller discussion on the legal application of individual sections of NZBORA see: www.justice.govt.nz (last accessed 1 August 2012). As Attorney General Wilson facilitated face-to-face meetings between the Chief Human Rights Commissioner and the Chief Executives of the most influential Ministries in an effort to reinforce the importance of the government's human right obligations.

[26] *Ministerial Re-evaluation of Human Rights Protections in New Zealand*, at www.justice.govt.nz/publications-archived/2000/re-evaluation-of-the-human-rights-protections-in-new-zealand/.

[27] For an account of the process and issues surrounding the 2001 Amendment see Margaret Wilson, "Mainstreaming human rights in public policy: the New Zealand experience", (2011) Vol. 8, No 1, *Justice Journal*, 8.

[28] David Erdos, "Judicial Culture and the Politico-legal Opportunity Structure: Explaining Bill of Rights Legal Impact in New Zealand" (2009) Vol. 34, Issue 1, *Law & Society Inquiry*, 95 – 127.

Quilter case[29] (the same sex marriage case). Erdos also identified the practical issue of resources as influencing which issues are taken to court for determination and the inter-play between judicial and political remedy in the recognition of human rights.

Since the enactment of the NZBORA in 1990 the litigation of human rights issues has increased greatly, for example a LexisNexis search of the New Zealand Law Reports between 2005 and 2007 found 156 citations of NZBORA.[30] An analysis of significant cases and academic commentary suggests that the courts are increasingly likely to assert the importance of human rights, even on social policy issues. At the same time Governments have grown to accept that human rights issues are political issues that cannot be ignored and need a response. Since the 2001 Amendment to the HRA, the NZHRC has taken a more proactive role both in relation to the formal United Nations reporting on the New Zealand's human rights performance and in the advocacy of human rights though the publication of research on domestic human rights issues and in submissions to government. The Office of Human Rights Proceedings and the Tribunal's role has also developed as it determines individual complaints.[31]

1.2 Emerging themes

Several themes have emerged over this period. A persistent theme - both politically and legally - has been the issue of maintaining domestic sovereignty when ratifying international treaties (including human rights treaties).

Ratification of international treaties by enacting legislation has been the traditional means by which the State accepts responsibility for implementation of international obligations. However statutory recognition of the international obligations varies in nature and content. There is no example of direct incorporation of the articles of international treaties into New Zealand legislation. The NZBORA closely reflects the ICCPR articles but there is no equivalent legislation incorporating ICESCR Articles, yet New Zealand has ratified both Covenants. How and by what means the State fulfils its international obligations is seen as a matter of not only parliamentary sovereignty but of executive sovereignty.

While there is a tension between the notion of parliamentary sovereignty and independence of the judiciary, the relationship is more complex than a simple adversarial one. Petra Butler in a recent paper on the relationship between the Supreme Court and Parliament in human rights cases notes that while parliamentary sovereignty remains intact, the Courts through their judgements have an impact on legislation and policy.[32] The enforcement of international obligations is not only a matter for the State and state institutions. The Courts have from time to time been required to decide the nature of such obligations in specific cases and have taken the position that if the New Zealand Government has ratified an international treaty legislation a matter will be interpreted consistently with those obligations unless there is an express prohibition to do so. As State obligations increase, so do the times the issue comes before the Courts. While treaty making is the prerogative of the executive, it is Parliament that incorporates the international obligations and rights into domestic law. The courts nonetheless have played a significant role in ensuring that New Zealand acts

[29] *Quilter v Attorney-General* [1998] 1 NZLR 523.
[30] Erdos, above n. 28 at 100.
[31] *New Zealand Human Rights Commission Annual Report 2011* www.hrc.co.nz/wp-content/uploads/2011/11/annual-report-2011.pdf.
[32] Petra Butler, "It Takes Two to Tango", *Victoria University of Wellington Legal Research papers* (2014)

consistently with its international obligations whether or not they have been incorporated into domestic legislation. The implementation of the NZBORA and the HRA have highlighted this tension. Petra Butler has concluded that the constitutional reality is that parliament makes the law but that Parliament has:[33]

> *…given up some of its moral power by allowing itself to be criticised by the courts either through declarations of inconsistency or when interpreting statutes by assuming Parliament intended to be consistent with the Bill of Rights Act.*

Claudia Geiringer came to a similar conclusion in an article published in the Otago Law Review commenting that:[34]

> *This article has tried to take a strong account of the role of the Bill of Rights in the legislative process seriously and to lay bare its constitutional and practical implications. Ultimately, however, no matter how attractive the strong account may seem as a means of energising New Zealand's somewhat fragile parliamentary bill of rights, it is questionable whether it can be sustained. The account is fundamentally at odds with the policy of continuing legislative supremacy...*

New Zealand's lack of institutional clarity and its preference for pragmatism in constitutional matters have created space for conflict. While it has not undermined the commitment to human rights obligations, it has provided a fertile debate as to whose primary responsibility it is to implement human rights - the courts or the legislature. In reality an iterative process between the legislature and the courts that has been characterised as a dialogue appears to be emerging - though a dialogue at long range with much miscommunication.

The impact on New Zealand courts and legislators of how international human rights obligations have been enforced in overseas jurisdictions is also relevant. The Canadian Charter of Rights for example, has had a significant impact on interpretation of the NZBORA and European Court decisions are increasingly influencing United Kingdom case law and, by extension, New Zealand case law.

A further theme that has emerged since the enactment of the NZBORA is the notion of a hierarchy of rights with civil and political rights being considered superior to economic, social and cultural rights, and the rights of population groups such as women, children and people with disability. This reluctance to accord equal status to economic, social and cultural rights was already evident in 1948 and the discussions leading to the UDHR.

The reluctance by government to recognise social and economic rights is also reflected in the NZBORA which only refers to civil and political rights. There was little support for the Courts to address social and economic rights, the principal reasons being that such rights were not justiciable and the prohibitive costs if legal obligations were placed on government. This attitude was also evident in early research on social and economic human rights in New Zealand commissioned by the Human Rights Commission as part of the development of the first National Plan of Action.[35]

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[33] Petra Butler, "Human Rights and Parliamentary Sovereignty in New Zealand" (2004) 35 VUWLR 341 at 366

[34] Claudia Geiringer, "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act a Substantive Legal Constraint on Parliament's Power to Legislate" *Otago Law Review* (2007) Vol.11 No. 3 389 at 415

[35] Claudia Geiringer and Matthew Palmer,"Human Rights and Social Policy in New Zealand" (2007) 30 *Social Policy Journal in New Zealand*, 12.

While human rights have become institutionalised within the New Zealand legal system, in terms of public policy and government response to human rights, the position is not as clear. Despite existing institutional mechanisms and machinery for policy formation that is rights based, the ebb and flow of executive and administrative commitment continue to bedevil the implementation of human rights in New Zealand.

The final theme that is apparent when looking across the three different periods of New Zealand's human rights history is the influence of intellectual leadership which is often, but not always, combined with political, judicial, executive or civil society leadership. A feature of human rights progress is the power, influence and persistence of individual champions around human rights issues, causes or movements.

The rest of this chapter now looks at the measurement of human rights and describes the methodology used in the research.

1.3 Why measure human rights?

Human rights treaty impact assessment is attracting increasing attention from researchers[36]and is a significant sub-field in the social sciences.[37] It is important because it allows for priority setting by those working on human rights problems. Strong motivation for assessment comes from the belief that measurement stimulates the sense of accountability of States for the implementation of human rights treaty promises. For example, one researcher noted that '*rigorously tracking human rights progress holds duty-bearers responsible for their duties to protect and promote human rights'*.[38] Scholars also persistently note the continuing difference between the ideal standard of human rights protection formalised in the international law of human rights and the accompanying rhetorical commitment of State parties, and their actual human rights practice. It is suggested that the disparity could be addressed by valid, authoritative and effective assessment that compels greater accountability for fulfilment.

Quantitative and qualitative methodologies, sometimes a mixture of both, have been used to explore factors that influence domestic and international change following the ratification of human rights treaties. The political science literature, in particular, offers insights from quantitative studies[39] about whether treaty ratification leads to effective implementation and which approach is best used to measure effects.[40] Debate about the merits of different forms of measurement[41] has intensified, some of those advocating the need for high quality information being particularly interested in monitoring and analysing human rights protection with a focus on violations.[42]Theoretical and conceptual scholarship is complemented by United Nations agencies,

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[36] Todd Landman, (2004). "Measuring human rights: principle, practice and policy". *Human Rights Quarterly.* 26(4) 906-931.

[37] Andrew Byrnes and Marsha Freeman,(2011) "The impact of the CEDAW Convention: paths to equality". *World Development Report 2012. Gender Equality and Development.* Background paper accessed on 2 April 2014. www.ssm.com.

[38] Andrew Hines, (2005) "What human rights indicators should measure." In *Measurement and human rights: tracking progress, assessing impact.* A Carr Center for Human Rights Policy Project Report. Working Paper Summaries 11-13. Accessed on 2 April 2014. http://www.hks.harvard.edu/cchrp/pdf/Measurement 2005 report.pdf

[39] Oona Hathway (2002). "Do human rights treaties make a difference?" *Yale Law Journal.* 111(8) 1935-2042.

[40] Ryan Goodman and Derek Jinks (2003) "Measuring the effects of human rights treaties". *European Journal of International Law.* 14 (1) 171-183

[41] Michael Ignatieff and Kate Desormeau (2005). *Measurement and human rights: Introduction*. A Carr Center for Human Rights Policy Project Report. Working Paper Summaries 1-8.

[42] Ford, above n 1

civil society organisations and academics offering practical advice in measurement techniques with an emphasis on indicator development[43] or benchmarking[44] or monitoring toolkits.[45]

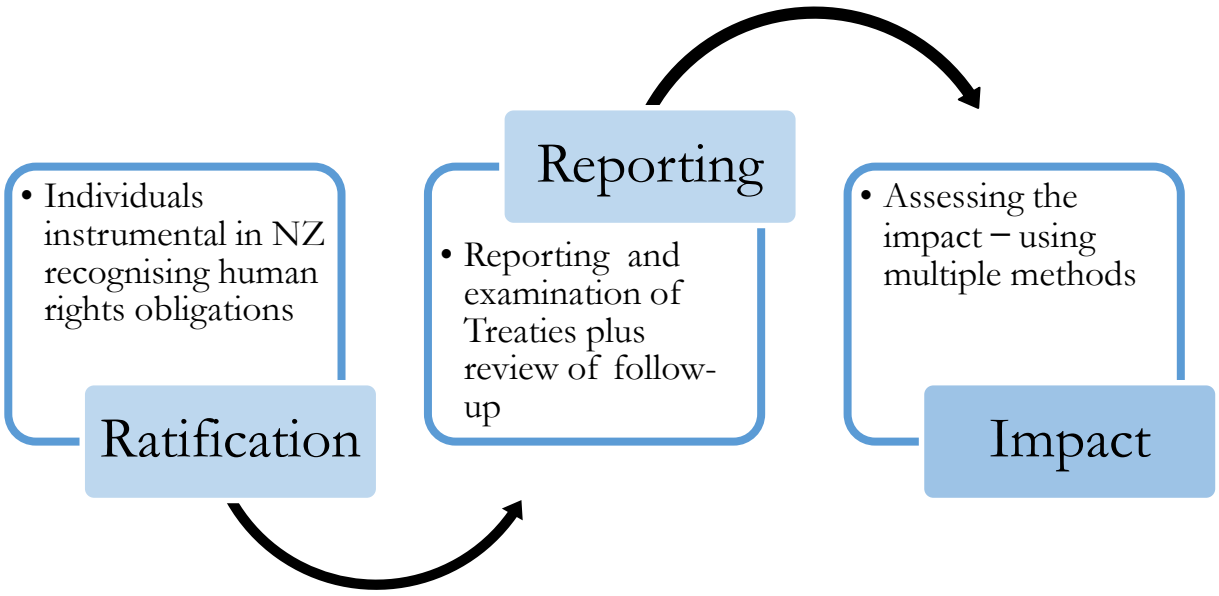
Both quantitative and qualitative methodologies have their critics. One scholar notes problems of definition and of obtaining reliable data in relation to the use of quantitative data,[46] while others are critical of the human rights community's tendency to focus on the 'individual story, the illuminating testimonial'.[47] However, as participants noted at the Carr Center's 2005 conference on measurement and human rights, what is really required is rigour in reporting data, rather than false distinctions or claims made for either methodology. One scholar notes that while more and better evaluation is needed, the real question is how it can be done.[48]

In a bid to answer this question the researchers undertook a literature review of the measurement of human rights and developed a bibliographic resources in the first year of the project which was made available to other interested researchers and civil society on the New Zealand Human Rights Commission website. The resource is attached at Appendix 1.

1.4 Evaluative frameworks

The following evaluative framework was developed for the research. It encompassed three levels of activity relating to ratification, reporting and impact assessment. (Figure 1).

Figure 1. Evaluative framework methodology



[43] United Nations (2013) *Human Rights Indicators: A guide to measurement and implementation*. Office of the High Commissioner for Human Rights.

[44] Purna Sen (2011). *Universal Periodic Review: Lessons, hopes and expectations*. Commonwealth Secretariat. London. www.thecommonwealth.org/publications.

[45] Eitan Felner (2009). "Closing the escape hatch: a toolkit to monitor the progressive realisation of economic, social and cultural rights". *Journal of Human Rights Practice*. 1 (3) 402-435.

[46] Robert Goldstein (1986) "The limitations of using quantitative data in studying human rights abuses". *Human Rights Quarterly*. 8(4) 607-627.

[47] Ignatieff and Desormeau above n 41 at 4.

[48] Paul Gready (2009) "Reasons to be cautious about evidence and evaluation: rights based approaches to development and the emerging culture of evaluation". *Journal of Human Rights Practice*. 1(3) 380-401.

The six treaties were assessed against five areas:

Table 1. Areas of analysis

Areas to be looked at	Treaty	What will we do?	How will we do it?
• Legislative change	ICCPR, ICESCR,CERD,CEDAW,CRC, CRPD	• Examine status of reservations • Identify domestic legislation introduced	• Legislative audit • Review of Treaty body recommendations
• Human rights norms in policy and practice	ICCPR, ICESCR,CERD, CEDAW,CRC, CRPD	• Select examples identified by participants/stakeholders	• Review of Treaty body recommendations • Write case studies • Conduct interviews
• Use by courts	ICCPR, ICESCR,CERD, CEDAW,CRC, CRPD	• Review judgments for Treaty body citations	• Desk search • Conduct interviews where appropriate
• Engagement of civil society	ICCPR, ICESCR,CERD, CEDAW,CRC, CRPD	• Identify, locate and review shadow reporting by CSOs	• Desk/archival search • Conduct interviews • Participant observation
• Role of the New Zealand Human Rights Commission (NZHRC)	ICCPR, ICESCR,CERD, CEDAW,CRC, CRPD	• Review NZHRC role in parallel reporting and country examination processes	• Desk/archival search • Conduct interviews • Reports of direct experience (CEDAW 7th report, ICCPR 5th report)

Analysis of the UPR involved different evaluative frameworks including a refinement of the process used by the Commonwealth Secretariat who analysed the first cycle of UPR involving Commonwealth countries. The assessment of New Zealand's UPR involvement in this research also refines the ranking methodology developed by Professor Edward McMahon of the University of Vermont and UPR Info, and reported on by the Commonwealth Secretariat.[49]

1.5 Methods of data collection

A variety of methods were used over three years to capture data and to analyse it.

[49] Sen, above n 44

The methods of data capture included:

- Archival analysis of treaty body reporting
- Case law analysis
- Stakeholder interviews
- Participant observation.

1.5.1 Archival analysis of treaty body reporting.

New Zealand has been a conscientious participant and stakeholder in international treaty body reporting. It has submitted a total of 28 (7 for CEDAW, 1 for CRPD, 9 for CERD, 5 for ICCPR, 3 for ICESCR, 3 for UNCROC) national or country reports on the six major international human rights treaties since they were ratified.[50] Many of these reports were accompanied by shadow reports from civil society or parallel reports from the NZHRC and involved questions from other UN member states as well as concluding observations and recommendations made back to New Zealand as the state party under examination.

This represents a major source of and a large quantity of paper documentation available to researchers. For this reason the researchers identified some significant articles and concepts in each treaty to analyse in greater depth in order to move beyond a purely descriptive account of treaty body reporting. The following articles were noted in the individual treaties:

- ICCPR – Articles 2 relating to the adequacy of the constitutional framework and 20 relating to advocacy of racial hatred
- ICESCR – Article 2 on justiciability and progressive realisation
- CERD - Article 4 in relation to racial disharmony and Article 14, the communication process
- CEDAW- Article 11 (1)(d) in relation to equal pay
- CRC – Article 27 in relation to a child's right to an adequate standard of living
- CRPD - Articles 12 which related to legal capacity and 33 in relation to national implementation and monitoring as well as the concept of reasonable accommodation and involuntary treatment.

1.5.2 Case law analysis

A search of Lexis-Nexis was used to identify references to the relevant international treaties in Court decisions. Analysis of the extent to which the international treaties were relied on was limited to decisions of the higher courts which had precedent value.

Individual chapters highlight salient decisions. The ICCPR search yielded over 300 references - principally because of the referral to the Covenant in the long title of the NZBORA. The analysis of the ICCPR was therefore limited to those decisions which illustrated the application of different aspects of the Covenant.

The question of whether New Zealand can be described as having a dualist or monist approach and, if so, whether the international treaties are enforceable by the courts, is left open. Although some preliminary research was carried out, it appears that the issue is not clear cut and far from conclusive in determining how the judiciary has responded to the treaties.

[50] Some reports are combined

1.5.3 Stakeholder interviews

Semi-structured interviews were used to evaluate treaty body processes. The interviews related mainly to stakeholder involvement with or observations of the following treaties: ICCPR, ICESCR, CERD, and CRPD. Interviews were conducted with a selection of current and former participants (politicians, public servants, civil society and academic/experts). A number of the interviews were conducted with politicians, officials and civil society representatives who attended New Zealand's reporting on CEDAW in 2012.

The interviews were designed to develop from actor/participants an accurate and reliable description of how treaty body reporting was planned, executed and followed up. The interviews also explored attitudes to human rights; the subjects' knowledge of and motivation relating to treaty body reporting; what actions they were involved with or followed treaty body committee recommendations made to the New Zealand government; the effects and effectiveness of treaty body reporting process and outcomes both in general and with specific examples. A semi-structured interview format allowed for follow-up questions, the addition of supplementary questions and for probes (Appendix 1). As other researchers note, "interviews provide a valuable opportunity to test tentative theories developed from the public record against the experiences of those who worked within the system".[51] The interviews were valuable to understand how previously undocumented factors and influences affected New Zealand's capacity and capability with regard to treaty body reporting.

1.5.4 Participant observation

Participant observation was undertaken by several of the researchers in relation to New Zealand's fifth report on the ICCPR in New York in 2010, the seventh periodic examination by the Committee on the Elimination of Discrimination Against Women at the United Nations in New York in 2012, and at the UPR Info session held in Geneva for New Zealand second cycle of UPR in 2013. In addition to their research function, the researchers were involved in the first two as members of the NZHRC (as Commissioner and senior legal and policy analyst) and at UPR in Geneva in the role of a representative of civil society.

Participant observation was a valid and useful way to collect data for the research because it allowed the collection of a wider range of information that outsiders simply would not see, do or know.[52] It allowed direct experience of the United Nations treaty body institutions, mechanism, personnel and processes in terms of social milieu and phenomena which would not have been available from other data gathering exercises. It also allowed the researchers to "learn by doing" and it also provided insider access to interviewees who would otherwise have been inaccessible or even wary of sharing their insights at a later point in data gathering. Engaged research is a valid and legitimate complement to other data gathering methods.[53]

1.5.5 Status of researchers

The status of the research team's direct and practical involvement with human rights development and implementation in New Zealand is a feature of this project. It is both a strength and weakness and needs to be explicit and appropriately identified. Professor Margaret Wilson was Associate

[51] Carolyn Evans and Simon Evans (2006). Evaluating the human rights performance of legislatures. *Human Rights Law Review* 6(3), 545-569.

[52] H. Russell Bernard, (2006). *Research methods in anthropology*. Lanham, MP: Altamira Press.

[53] Judy McGregor (2013). An insider's perspective of a national human rights institution inquiry into employment in the aged care sector in New Zealand. *Australian Journal of Human Rights,* 19(2), 93-114.

Minister of Justice with responsibility for Human Rights between 1999 and 2005 and was the sponsoring minister of the Human Rights Amendment Act 2001, Professor Judy McGregor was the first Equal Employment Opportunities Commissioner in the New Zealand Human Rights Commission between 2002 and 2012, and Sylvia Bell was the principal legal and policy analyst in the Commission from 2005 to 2014. Before the amendment to the HRA, she was the Senior Legal Advisor at the Office of the Race Relations Conciliator. The research team were therefore both 'insiders' and 'outsiders' with the attendant benefits and limitations. Chapter Seven was compiled by Frances Joychild QC an acknowledged children's rights expert and lawyer.

1.5.6 Presentation of report

The report's presentation has been designed so that it can be used in its entirety or chapters can be used separately by different stakeholders. The recommendations provide an agenda for change to improve the fulfilment of human rights in New Zealand. The background material includes a certain amount of repetition as a result of the design and the chapters differ in length. There was less material on the earlier treaties but as the reporting process itself matured, more information became available for analysis.

1.5.7 Conclusion

Ford's analysis found that human rights reflect a profound advance in both moral thinking and political action: [54]

> *…but, at the same time, rights suffer from some of the weaknesses of religious thinking: unjustified conviction and blind faith, dogmatism, a priori reasoning….and an impatience with or inattention to practical complexities.*

Systematic research into the impact of the domestic ratification and implementation of the major international human rights treaties is one way of addressing such weaknesses. The research considers each of the treaties by analysing political institutions, cultural norms, and policy considerations as well as the activities of civil society and of the national human rights institution and the role of the courts. It attempts to take the pulse of the human rights agenda in a country with a strong self-perception that it is a good international citizen. An inevitable conclusion that emerges from sustained scrutiny of our implementation of the treaties and our domestic performance in the fulfilment of human rights in practice, is that New Zealand needs to come down to earth about the fault lines in its realisation of treaty body obligations.

[54] Ford above n 1 at 122.

Chapter Two The International Covenant on Civil and Political Rights (ICCPR)

2 Background

The international human rights framework has its origins in the UDHR. The Declaration is made up of a number of agreed humanitarian principles designed to provide the foundation for international peace and security. To make it legally binding, two mutually reinforcing treaties were developed - the International Covenant on Civil and Political Rights (ICCPR) which dealt with civil and political rights, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which addressed economic, social and cultural rights.

Drafting of the treaties began in 1951 but it was 1966 before agreement was reached on the texts and, although the treaties were adopted by the UN General Assembly and opened for signature in 1966, it was another decade before they came into force. New Zealand signed both Covenants in 1968 and ratified them in 1978.[55] Together with the UDHR they make up the International Bill of Rights.

The Human Rights Commission Act 1977 (the HRCA), which was enacted before New Zealand ratified the Covenants, was primarily an anti-discrimination statute that provided a mechanism for dealing with complaints of discrimination in certain areas on a limited number of grounds. Its introduction was timed to ensure that New Zealand had the necessary legislation in place to give effect to the rights in the treaties and provide an effective remedy if those rights were violated.[56] The HRCA, together with the Race Relations Act 1971 (which prohibited incitement of racial hatred), was considered to provide adequate protection for the rights in the ICCPR.[57] This was debateable. A number of the rights in the ICCPR were not reflected in domestic law until the introduction of the NZBORA in 1990 and even now not all the civil and political rights in the Covenant are available domestically[58]. It is also not entrenched – and therefore does not have the constitutional status that many consider such legislation should[59] - and lacks a remedies provision.[60]

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[55] The Conventions have a preamble in common. Articles 1, 3 and 5 are the same and article 2 guarantees the rights in the Covenants to everybody equally although article 26 ICCPR refers specifically to non-discrimination

[56] This was a precursor to what was to become best practice for ratifying a treaty. In 1997 the Foreign Affairs and Trade & Defence Select Committee reported to Parliament recommending that all treaties subject to ratification should be tabled in the house for approval and a National Interest Analysis (NIA) prepared which addresses the reasons for New Zealand becoming party to the treaty, the implications for New Zealand of becoming party, and the means of implementing the treaty. This is now reflected in the Standing Orders.

[57] Plus the 4 reservations

[58] While not all the rights in the ICCPR are reflected in the NZBORA – for example, the right to property; protection of the privacy of family, home and correspondence; the right to liberty and security of the person and a general right to equality are not included– there is a qualification in section 28 which states that "an existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part" – potentially enlarging the scope of the legislation. The permissible derogations in the Covenant are addressed through the s.5 process which allows restriction of the rights in the NZBORA if the restriction can be justified in a free and democratic society.

[59] See for example, Geoffrey Palmer *Bridled Power: New Zealand Government under MMP* (3d.) OUP, Auckland (1997) 282-283

[60] The Courts have developed a remedial jurisdiction in part by reliance on the reference to the ICCPR in the long title - for more on this see Rodney Harrison "The Remedial Jurisdiction for Breach of the Bill of Rights" in *Rights and Freedoms,* Huscroft & Rishworth, above at 405. Although the Courts have further developed *Baigent* style remedies, it is a moot point whether this is congruent with the treaty provision: Conte, A. *From Treaty to Translation: the Use of International Instruments in the Application and Enforcement of Civil and Political rights in New Zealand.* See also Elizabeth Evatt

2.1 Reservations

New Zealand entered four reservations to the ICCPR.

Reservation one: Age mixing

It reserved the right not to apply Article 10(2)(b) or Article 10(3) which require juveniles to be kept separate from adults in prison facilities where the shortage of suitable facilities makes it unavoidable; or where the interests of other juveniles require the removal of a particular juvenile offender or mixing is considered of benefit to the person concerned.

Reservation two: Ex gratia payments

The government reserved the right not to apply Article 14(6) to the extent that it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice.

Reservation three: Exciting hostility on the ground of race or national origin

Having legislated in the areas of advocacy of national and racial hatred and the exciting of hostility or ill will against any group or persons, and having regard to the right to freedom of speech, the government reserved the right not to introduce further legislation with regard to Article 20.

Reservation four: Trade union representation

New Zealand also reserved the right not to apply Article 22 relating to trade unions as it considered that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, were not fully compatible with that Article.

The existence of the reservations continues to concern not just the Human Rights Committee (the Committee) but other treaty bodies. For example, the CRC Committee has recommended that New Zealand should finalise its position on age mixing in prisons with a view to withdrawing the reservation. Although the Government's response has been positive and there are indications that adequate facilities are available, financial constraints continue to be cited as reasons for not being able to comply totally and remove the reservation.

In relation to the second reservation, the Government has stated that it is part way to removing the reservation by recognising the right to award compensation to torture victims. An award is at the discretion of the Attorney-General. Tony Ellis, a barrister who has taken a number of cases to the Committee – of which two have been successful, at least in part – considers that the need to obtain agreement of the Attorney-General is at odds with the government's most recent report in which it suggests that New Zealand complies for the most part with Art.14. He considers the State's position is further undermined by the way in which the Courts calculate the level of compensation for cruel and unusual treatment[61] and the Prisoners' and Victims' Claims Act 2005 which allows a prisoner's compensation for ill treatment to be awarded to his or her victim rather than the prisoner personally – a position defended by the State as consistent with the right to an effective remedy.

"The Impact of International Rights in Domestic Law" in *Litigating Rights: Perspectives from Domestic and International Law* (2002) Hart Publishing at 284

[61] *Taunoa v Attorney-General* [2006] 2 NZLR 457 (CA)

In relation to recommendations by the CERD Committee and the Committee for New Zealand to take steps towards removing the reservation on compliance with Article 20, the government has repeatedly asserted that the existing legislation is adequate because of ss.61 and 131.[62]

Finally the reservation relating to trade union membership has been an issue both under the ICCPR and ICESCR but the government appears to have little incentive to remove the reservation despite changes to the law introduced with the enactment and subsequent repeal of the Employment Contracts Act.

At the time of writing, none of the reservations have been removed despite recommendations by the Committee responsible for monitoring the ICCPR as well as by the CRC and CERD Committees. The Government continues to state that they are working towards removal. The list of issues identified by the Committee for answer in the sixth periodic report again asks whether the State envisages withdrawing its reservations and, if not, to provide detailed reasons why it does not intend to do so.[63]

2.2 The Optional Protocols

The two Optional Protocols to the ICCPR have both been ratified by New Zealand.

New Zealand acceded to the **First Optional Protocol** on 26 May 1989.The Optional Protocol allows citizens of countries that have acceded to it to submit complaints to the Human Rights Committee requesting a determination that they have been the victims of a violation by the State Party of any of the rights in the Covenant. The Optional Protocol can only be invoked when domestic remedies have been exhausted.

The Committee has released General Comment 33 on the obligations of State parties to the First Optional Protocol to the ICCPR.[64]In the General Comment the Committee emphasises the importance of the Committee's concluding Views in communications made to it under the Protocol and that "parties must use whatever means lie within their power in order to give effect to the Views issued by the Committee." Although the Committee has asserted that its Views are legally binding, this remains questionable.[65]A finding that there has been a violation does not mean that the relevant State party concerned is obliged to address it although it may be hard to reject, particularly if the State values the opinion of its international peers and the international

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[62] To some extent the position adopted by the Committee is validated by the fact that very few complaints relating to exciting racial disharmony are successful under the HRA as they rarely reach the threshold required when the right to freedom of expression is factored into the mix.

[63] CCPR/C/NZL/QPR/6 at [4]

[64] CCPR/C/GC/33

[65] Scott Davidson "Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee*"* [2001] NZ Law Review at 140. But see Geoffrey Palmer in "Human Rights and the New Zealand Government's Treaty Obligations*"* (1999) 29 VUWLR at 68 quoting Cooke, P in *Tavita v The Minister of Immigration* [1994] 2 NZLR 257 in which His Honour was considering the Optional Protocol and the right to submit a communication to the Committee and observed it was "in substance a judicial body of high standing" and that it was "in a sense part of this county's judicial structure ... A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them". He does, however, go on to say that this approach did not enjoy "enthusiastic endorsement" by Ministers or their advisers. In *Tangiora v Wellington District Legal Services Committee* (1999) 5 HRNZ 201 the Privy Council stated (albeit obiter) that there is much force in the argument that the UN Human Rights Committee has an adjudicative function "...when the Committee reaches a decision that a party is in breach of its obligations under the ICCPR, it has made a definitive and final ruling which is determinative of the issues concerned."

opprobrium or censure that could result from non-compliance by a country that boasts of its human rights record. Self-evidently, compliance is necessary to render the Optional Protocol effective.

In an article written in 2001 (and before the Committee had found any violations in relation to New Zealand), Scott Davidson speculated on the government's response in the face of an adverse ruling and noted that unless the Committee was manifestly wrong or had acted in bad faith: [66]

> *…it would seem politically unwise to argue that such views are not technically legally binding on the state, especially since the State is able to muster all of its legal resources to contest any communication.*

Since ratifying the Optional Protocol, 23 complaints against New Zealand have been considered by the Committee.[67] Most have been dismissed as inadmissible or no violation has been found, although at least one of these was considered to have made a significant contribution to the Committee's jurisprudence.[68]

Three communications have found violations of the Covenant:

In ***Rameka et al v New Zealand***[69] the authors had been sentenced to preventive detention for serious sexual offences. They argued that the principles directing the sentencing were vague and arbitrary because they imposed a discretionary sentence on the basis of evidence of future dangerousness which was difficult to predict. They also claimed that there was insufficient regular review of their condition and detaining them on the basis of future offending violated the presumption of innocence – two factors that had concerned the Committee when considering New Zealand's third periodic report on compatibility of the preventive detention regime and Arts. 9 and 14 of the Covenant.

The Committee dismissed the claims of two of the authors that their detention was arbitrary but found that the inability of the remaining complainant to challenge the existence of substantive justification for his continued detention for preventive reasons amounted to a violation of his right under Art. 9(4). It required the New Zealand Government to provide him with an effective remedy including the ability to challenge the justification for his continued detention once his actual sentence had been served and to ensure that the situation did not arise in the future. The Government was asked to provide evidence within 90 days about the measures taken to give effect to its Views.[70]

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[66] Davison above at 144. The author also suggests that if New Zealand has concerns about the way in which the Committee operates (see Don MacKay, "The UN Covenants and the Human Rights Committee" (1999) 29 VUWLR 11) it should promote vigorous debate about human rights within New Zealand, and for every area of government, especially the Executive, to take its responsibilities seriously.

[67] See appendix 3 which lists the communications from New Zealand and provides some indication of the length of time it takes for the Committee to hear a case.

[68] *Drake v New Zealand* Communication no. 601/1994 (1997) was a claim of violation by New Zealand of Arts. 2(3) & 26 The authors had been detained by the Japanese in prisoner of war camps and alleged that, by entering into a peace treaty with Japan releasing the Japanese from further reparation obligations, NZ had violated the ICCPR because it had failed to provide appropriate compensation for the disabilities and incapacities suffered by the authors.

[69] CCPT/C/79/D/1090/2002 (views adopted 6 November 2003)

[70] The Committee's response has been criticised as having major deficiencies because of its lack of understanding of the complexities of the sentencing regime in New Zealand. Claudia Geiringer *Case Note: Rameka v New Zealand* (2005) 2

The government's response was to amend s.25(3) of the Parole Act which allowed the Minister of Justice to designate certain classes of offenders who had not reached the date at which they were eligible for parole for early consideration by the Parole Board. This led to review of the justification for continued detention for preventive purposes. The designation under section 25(3) would ensure that the author had the ability to challenge his continued detention when the notional finite sentence period mentioned in the Court of Appeal judgment had expired. In relation to future violation, the designation under s.25(3) of the Parole Act would ensure that there was no violation in relation to other offenders in a similar position to the author. The government also advised that the law on preventive detention had been amended since the author was sentenced. Under the Sentencing Act 2002 the Court is required to make an order at the time a sentence of preventive detention is imposed as to the minimum period of detention, which must be for a period of not less than five years. The offender becomes eligible for regular review of their sentence once the minimum period of detention has expired.

In ***EB v New Zealand***[71], the Committee found there had been a violation of Art.14 of the ICCPR. EB had brought a claim alleging that New Zealand had violated arts. 2,14,17,23, 24, and 25 of the Covenant by denying him access to his children after prolonged proceedings in the Family Court. In its decision, the Committee said that New Zealand had an onus to ensure prompt resolution of such proceedings and concluded the State had not demonstrated justification for the protracted delay in the resolution of the access proceedings.

The Committee concluded that the Family Court's decision not to grant EB access to two of his children did not violate his rights as a father under arts. 17 and 23 of the Covenant. One of the Committee dissented from the views of the majority on Art.14. The Committee member considered that the Committee had given insufficient weight to the wider factual context relating to the dispute including allegations of sexual assault and the gravity of potential harm to the child was a factor weighing in favour of lengthier proceedings. It had also failed to take into account the difficulties in case management where there are parallel criminal and civil proceedings. She concluded that it was not appropriate for the Committee to "deride the conscientious attempt of the state party to reach a just result in this case."

The government did not accept the Committee's View that there had been a breach of art.14 but that of the dissenting member of the Committee. It noted that the Family Court was running a pilot scheme aimed at resolving cases in a less adversarial manner and reducing delay by shortening families' involvement in litigation. It repeated this position at the country examination in 2010. Among the list of issues to be answered in the sixth report, the Committee has asked for information about the case flow management system and, again, what had been done to implement the Committee's views (including the provision of reparation).[72]

Dean v New Zealand[73]also involved a sentence of preventive detention and alleged violation of Art. 9(4). The author had been convicted of a serious sexual offence carrying a maximum penalty of seven years imprisonment. However, because of his demonstrated and substantial risk of reoffending, he was sentenced to preventive detention. As a result he was not eligible for

NZYIL 185. She attributed this in part to limited resources and the fact that treaty body members are not paid for their services

[71] CCPR/C/89/D/1368/2005 (views adopted 16 March 2007)

[72] Which the Committee appears to equate with the provision of an effective remedy

[73] CCPR/C/95/D/1512/2006 (views adopted 17 March 2009)

consideration for release on parole at the time the applicable sentence would have expired. Following its decision in *Rameka,* the Committee concluded that the ineligibility for parole was contrary to Article 9(4), confirming however that the sentence of preventive detention does not in itself amount to a violation of the Covenant.

The Government reaffirmed its position in *Rameka*, noting that the measures taken to remedy the situation in that case applied to Mr Dean's situation although also observing that the Committee had misunderstood the period after which he was eligible for parole consideration. Dean's situation was reviewed on numerous occasions but parole was declined on each occasion on the basis that he continued to pose an undue risk to the community and had chosen not to undertake necessary rehabilitation plans. Given this the Government considered that the violation of Article 9(4) did not amount to arbitrary detention and compensation or some other additional remedy was unnecessary. Further the systemic measures introduced in 2004 (as a result of *Rameka*) ensured the violation would not be repeated.

The **Second Optional Protocol** relates to the abolition of the death penalty. The Optional Protocol was adopted by the UN General Assembly in 1989 and came into force in July 1991. New Zealand ratified the Optional Protocol on 22 February 1990.

2.3 Reporting

New Zealand has reported on the Covenant five times. As with the other treaties, the country reporting has tended to focus on descriptions of what has been done, or plans for doing it, rather than actual achievements, even though the obligations of the Covenant at international law are *obligations of result, not conduct; of ends, not means.*[74]

The Committee itself has consistently emphasised structural matters (i.e. *de jure* compliance) over *deacto* compliance. The lack of emphasis on outcomes and the failure to follow up on the Government's response in particular situations is most obvious in issues such as the impact on labour relations following the introduction of the Employment Contracts Act. The Committee was content to accept the answers provided by the government at face value rather than questioning how it impacted on affected employees.[75] This highlights the important role that Civil Society and National Human Rights Institutions can play in ensuring the Committee is adequately informed. It also reflects the Committee's increasing concern about an adequate mechanism for disseminating the concluding comments, given that such comments can help NGOs, in particular, hold the government accountable for commitments they have made internationally.

2.4 Government response to committee's concluding recommendations

The Concluding Observations and Recommendations have been criticised as reflecting a poor understanding of the New Zealand context and legislative framework, particularly where it is obvious the Committee members cannot identify with the substance of the matters before them.

However, New Zealand is not the only country which this applies to. There have been difficulties with the concluding comments generally, causing Navanethem Pillay, the UN High Commissioner for Human Rights, to suggest that they could better fit the particular situation of the State they are

[74] Ken Keith "The New Zealand Bill of Rights Act 1990 – An account of its preparation" (2013) 11 NZJPL 3 at 11

addressing,[76] focus more on priority concerns and be more user-friendly for State parties, as well as for stake holders that might monitor implementation of the process.[77]

The country reports themselves also inevitably influence the final recommendations.[78] In the earlier reports it was clear from the questions asked that the Committee did not have sufficient understanding of the domestic context. This has been addressed to some extent in MFAT's Core document, but the reports can still misrepresent the actual situation or provide selective material.[79] While reporting has become increasingly more sophisticated it still focuses principally on what is being done or planned, rather than providing a realistic description of the situation on the ground. As Sir Geoffrey Palmer commented to one of the authors "*we spoke a good game but we did not observe a good game".*

The following examples provide an indication of how New Zealand has responded to specific requests by the Committee.

2.4.1 New Zealand Bill of Rights Act (NBZORA) – Entrenchment and provision of a remedy

Appropriate reflection of the rights in the ICCPR in domestic legislation is a constant theme in the Committee's Concluding Observations. Beginning with the earlier reports calling for a Bill of Rights to set the constitutional framework,[80] the Committee has refined its questions in relation to Art.2, seeking clarification on the vetting of inconsistent legislation, the ability of the Courts to issue formal declarations of incompatibility and the absence of remedies in the NZBORA.[81] In response the Government has variously reported that there was public resistance to entrenchment, further consultation was necessary and that the vetting role under s.7 NZBORA was adequate.

In relation to the question of introducing statutory provision for a declaration of incompatibility, the government has relied on the approach of the Court of Appeal to ss.4, 5 and 6 NZBORA in *Moonen v Film and Literature Board of Review*[82]as a valid remedy. The Court in *Moonen* observed that if a provision in an enactment conflicted with the NZBORA and could not be interpreted consistently with the Act or justified under s.5 (i.e. amounts to a reasonable limitation in a free and

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[76] Navanethem Pillay (2010) *Strengthening the United Nations Human Rights Treaty Body System: A report by the United Nations High Commissioner for Human Rights* (2010) at 4.2.6

[77] The current UPR process (discussed at chapter 8) is seen as a way of better monitoring the realisation of human rights on the ground.

[78] Jasper Krommendijk "Can Mr Zaoui Freely Cross the Foreshore and Seabed? The Effectiveness of UN Human Rights Monitoring Mechanisms in New Zealand" (2012) 43 VUWLR at 601; McKay, above n 66 at.12

[79] Other issues that have been identified as affecting the quality of the recommendations include inadequate funding of the treaty bodies; insufficient engagement by individual States despite formal commitments to a treaty; failure to implement treaty body recommendations; fragmentation of treaty body system with the result that concluding observations can be inconsistent between different treaties even though dealing with the same subject matter and lack of visibility of and accessibility of the system itself: Amrei Muller & Lisa Seidensticker, *The Role of National Human Rights Institution in the United Nations Treaty Body Process*, (2007) German Institute for Human Rights, at 30: accessible at www.institut-fuer-menschenrechte.de

[80] Janet MacLean considers there are three reasons for the Committee adopting the view that it does: first, it is possible to pass laws in New Zealand that are inconsistent with rights protected by international conventions; second, remedies for individuals are linked to or depend on the ability to invalidate primary legislation; and that courts are considered to provide better human rights protection than legislatures: "Legislative Invalidity, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] *NZ Law Rev* at 424

[81] For example, the lack of a remedy was the subject of criticism by the Committee to New Zealand's third report. In response the fourth report simply outlined the legislation which protected human rights in New Zealand rather than addressing the lack of a remedy in the NZBORA

[82] [2000] 2 NZLR 9

democratic society), then it must be given effect to irrespective of the inconsistency but the Court is able to issue a declaration advising that, although the enactment must be given effect, it is inconsistent with the right(s) or freedoms(s) contained in the NZBORA. Whether this is what the Committee considers an effective remedy is contestable and even local academics and commentators are divided on whether this is a valid power.[83]

The inadequacy of the responses is reflected in the most recent list of issues for the sixth periodic report[84]which has again asked the Government to identify what measures had been taken to strengthen the NZBORA to revise laws that have been enacted but are inconsistent with that Act.[85]

2.4.2 Article 20 – advocacy of racial hatred

The reservation relating to Article 20 involves the incitement of racial hatred. Article 20(2) of the ICCPR establishes that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law'. Advocacy of national, racial or religious hatred itself is not a breach of Art.20 of the ICCPR. It only becomes an offence when it amounts to incitement. That is, when the speaker seeks to provoke reactions on the part of the audience and there is a close link between the expression and the resulting risk of discrimination, hostility or violence.[86]

Under Article 4 of CERD State Parties are required to make an offence punishable by law of (i) disseminating ideas based on racial superiority or hatred, (ii) inciting racial discrimination, (iii) inciting acts of violence against any race or group of person of another colour or ethnic origin, and (iv) participating in organisations and propaganda activities which promote and incite racial discrimination. Before New Zealand ratified CERD it introduced the Race Relations Act 1971 and a provision which criminalised incitement of racial disharmony.

General Comment 11[87]stipulates that to be fully compliant with the Convention States need to have a law making it clear that propaganda and advocacy as described in the Covenant are contrary to public policy and that an appropriate sanction in case of violation of the Article is available. On ratifying the Convention the New Zealand Government reserved the right not to legislate further in relation to advocating racial or religious hatred because it had done so under Art.4 of CERD with the introduction of section 131 of the Human Rights Act 1993 (or more accurately its predecessor).

In the context of the third report the Committee expressed concern about the non-inclusion of advocacy of religious hatred in the HRA. The Government's response in the fourth report suggested that the NZHRC had advised that such an amendment was unnecessary as New Zealand was not experiencing difficulties and the Commission had not received any significant complaints. Despite this, the fifth report noted the Government Administration Select Committee's inquiry

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[83]Claudia Geiringer, "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" VUWLR (2008) cf. Andrew Butler, "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" NZ Law Rev [2000] at 43. Since *Moonen* the Court has not only faced argument from Crown counsel that such a remedy does not exist, but has also refused to confirm the existence of such a remedy: Andrew Butler & Petra Butler, *The New Zealand Bill of Rights Act: A Commentary (*2005) LexisNexis at 1111

[84] CCPR/C/NZL/QPR/6

[85] at [6]

[86] Special Rapporteur on Freedom of Expression at [28]

[87] *www.ohchr.org/Documents/Issues/.../CCPRGeneralCommentNo11.pdf*

into the laws on hate speech and whether or not further legislation was warranted. The Inquiry was discontinued with the incoming Government, a fact that went unremarked by the Committee when it was omitted in the following report.

The list of issues for the next report on the Covenant again includes questions on whether the Government envisages withdrawing its reservations to the Covenant and if not, asking for detailed reasons why not, along with information on how the reservations are compatible with the object and purpose of the Covenant and, more specifically, whether measures were being taken to address the problem of incitement to racial hatred on the internet.[88]

2.4.3 Lack of enjoyment of Covenant rights by Māori

Concern at the status of Māori as a disadvantaged group is also relatively consistent.

How compliance with articles which apply across different treaties is assessed - particularly articles such as Arts.2 and 26 in ICCPR which relate to non-discrimination - inevitably raises questions about Māori and Pacific inequalities in relation to social and economic rights such as education and health. Conceptually, there are problems in such cases given the nature of the treaties (e.g. the notion of progressive realisation in ICESCR compared to immediate realisation of civil and political rights in ICCPR). In theory it is easier for the State to answer questions about compliance with ICESCR because it can always argue that it recognises there is an issue but is attempting to deal with it. Identifying programmes and policies designed to address an issue are often considered sufficient to demonstrate that the State is realising the right but as one commentator noted, "*The enjoyment of the right is less important than the fact that means had been identified to effect that enjoyment.*"[89]

At New Zealand's most recent examination the Committee asked the Government very specific questions on this point. For example, what measures had been taken to address the high level of incarceration of Māori, in particular women? Had the State fixed specific targets and timelines for reducing the high number of Māori in prisons? What measures had been taken to reduce levels of reoffending by Māori? The response again was to describe various programmes without answering the specific questions, leading the Committee to conclude that New Zealand should strengthen its efforts to reduce the over-representation of Māori, in particular Māori women, in prisons and continue addressing the root causes of this phenomenon. The Committee also suggested it should increase its efforts to prevent discrimination against Māori in the administration of justice, and law enforcement officials and the judiciary should receive adequate human rights training, in particular on the principle of equality and non-discrimination.

For the next report the Committee has asked New Zealand to provide an update on achievements of various initiatives aimed at reducing the disproportionately high incarceration rate of Māori, particularly Māori women, and information on whether there has been an improvement in the underlying social causes and concerns regarding discrimination in the administration of justice that is responsible for the high proportion of Māori among accused persons and the victims of crime.

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[88] CCPR/C/NZL/QPR/6 at [12]

[89] Ann Janette Rosga & Margaret L Satterthwaite, "The Trust in Indicators: Measuring Human Rights", Berkley Journal of International Law, Vol.27:2 [2009] at 266

2.4.4 Role of NHRISs in the treaty body process[90]

NHRIs play a significant role in the treaty reporting as they can highlight issues of concern thereby allowing States to be held to account for matters that may otherwise not be raised before the Committee.[91]They provide a vitally important contribution that complements and widens the policy discourse, resulting in better and more legitimate decisions clarifying the realities of the domestic situation.

The role of NHRIs and their relationship to the international human rights mechanisms is outlined in the Paris Principles.[92]A NHRI's contribution to the reporting process can include providing information for preparation of the list of issues and in the follow up to the Concluding Observations. Receiving information from NHRIs at an early stage is considered critical as it provides the Committee with an evaluation of how well the State is complying with implementing the committee's recommendations. NHRIs are encouraged to submit shadow reports and NGOs to submit their own reports. To help them carry out these roles the Committee secretariat has undertaken to inform NHRIs in a timely manner when there are opportunities for them to contribute.[93]

The NZHRC has only engaged with the treaty reporting process (including the ICCPR) in any meaningful manner over the past decade. The Commission provided its own report to the 2010 examination and has commented on drafts of the country reports. It also met with representatives of the Ministry of Justice to discuss the response to the list of issues for consideration at the fifth periodic report in 2010. As part of its role in promoting the Concluding Comments, the Commission refers to the Recommendations and concluding comments of the Treaty bodies in submissions to Select Committees and in its own publications such the 2004 and 2010 reports on the state of human rights in New Zealand.[94]

2.4.5 Involvement of civil society

NGOs play a critical role in the monitoring of state compliance as they can provide the Committee with valuable information about the situation on the ground and lobby the State to ensure follow up to the recommendations. The increasing number of NGOs that have become involved in the treaty body reporting is a comparatively recent phenomenon and many are still on a learning curve. As an NGO attendee at the recent CEDAW examination commented:[95]

> *The take home lesson I learnt (from attending) was the need for absolute rigour in shadow reporting. Anecdotal and unsubstantiated comments just don't cut it and anything you have to say has to really be supported and demonstrated with a rigorous evidence base. That's a real*

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[90]The mode of interaction differs between treaty bodies, for example, the CERD Committee involves NHRIs in their official sessions. Other committees involve NHRIs and NGOs in a more informal way, engaging with them outside the official meetings. An NHRI will generally have speaking rights if it is accredited by the International Co-ordinating Committee of NHRIs.

[91] NGOs can also overemphasise particular issues and mislead the Committee, e.g. the CEDAW Committee's most recent comments on forced marriage following a report by Shakti which led to recommendations about reform of the Marriage Act in New Zealand

[92] OHCHR *Information Note: National Human Rights Institutions (NHRIs) interaction with the UN Treaty Body System*, 5 April 2011 at 3

[93] CCPR/C/106/3: *Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session (15 October – 2 November 2012)*

[94] NZHRC: *Human Rights in New Zealand: Nga Tika Tangata O Te Motu* (2004); *Human Rights in New Zealand 2010: Nga Tika Tangata O Aotearoa*

[95] Christy Parker an NGO attendee at the CEDAW examination in an interview with the author

challenge when a lot of the issues that we're trying to report on feel a bit amorphous or emergent and we don't always have the evidence to support them ... you also need to select your issues. The thinner you spread yourself over a range of issues, the less traction you get from the Committees. It is incredibly difficult to get consensus from the NGO community but you could use the treaty body process more strategically to get greater traction.

As part of the initial consideration of the fifth report on the Covenant, four local NGOs submitted reports to the Committee, as well as one international NGO (Amnesty International) and one private individual (Tony Ellis).

The input of both NHRIs and NGOs is considered essential if the treaty bodies are to be fully informed about the true nature of the human rights situation in New Zealand. The UPR system (which is discussed later) reinforces the roles of both NHRIs and NGOs by creating a specific mechanism for their participation. The impact that NHRIs and NGOS can have on the Committee's deliberations can be seen in the following chart which identifies the most recent list of issues and the recommendations made by the Human Rights Commission and different NGOs.

Table 2. List of issues for sixth periodic report and those identified by HRC and NGOs

Issue	HRC	NGOs
Info on significant legal developments including case law		
Significant policy measures		
Measures to disseminate recs.		
Withdrawal of reservations		☒
NPA	☒	
Strengthen & ensure consistency with BORA	☒	☒
Update on compliance with Views under OP		
Designations under Terrorism legislation		
GCSB & privacy	☒	
National security & telecommunications Act	☒	
Closing equal pay gaps & women in managerial positions	☒	
Racial stereotypes /racial hatred on internet/ inequalities of Māori in employment & education	☒	
Elimination of violence against women		
Use of tasers	☒	☒
Prosecution under Op 8	☒	
Non-refoulement & detention of mass arrivals	☒	☒
Combating trafficking		☒
Drug possession & presumption of innocence	☒	
Privatisation of prisons	☒	☒
Resourcing of Waitangi tribunal		
Reduction of Māori women in prison	☒	
Measures to combat child abuse		☒
Underage & forced marriage in immigrant communities		☒
Extinguishing of Māori rights in Marine & Coastal Area legislation		☒
Use of TOW in domestic law		☒
Equal participation of Māori in local govt.	☒	☒
Effective decision making involving Māori		☒

2.5 Domestic application of the Covenant by the courts[96]

The use of the international treaties by the courts in interpreting legislation is a reflection of their acceptance and impact domestically.

As a matter of international law New Zealand is required to give effect to the standards in the Covenant, however the fact that international treaties are usually not incorporated into New Zealand law means - on one view - that they are not directly enforceable by local Courts.[97]Most of the human rights treaties are not specifically referenced in domestic legislation. The exceptions are the Commissioner for Children Act 2003 which refers to the Convention on the Rights of the Child in the purpose statement, the Immigration Act 2009, of which Part 5 refers to codification of New Zealand's obligations under the ICCPR, and the long title of the NZBORA which was enacted to "affirm New Zealand's commitment to the ICCPR" – even though (as noted earlier) not all of the rights in the Covenant are found in the NZBORA and there is no provision for a remedy – an essential requirement of the Covenant.

The use of the international instruments as interpretative aids by the Courts has changed significantly since the days of *Ashby v Minister of Immigration*[98]when Richardson J stated that "if the terms of domestic legislation are clear and unambiguous they must be given effect in our Courts whether or not they carry out New Zealand's international obligations." Although Courts were referring to the Covenant before the NZBORA was enacted,[99] it has been increasingly referenced in the years since[100]and it is now accepted practice for the judiciary to strive to interpret legislation consistently with New Zealand's treaty obligations if possible.[101]

Over the past decade the Courts have been more willing to accept that international treaty law can be used to supplement interpretation of domestic statutes – particularly in the case of human rights treaties which are considered to have a special status because of the nature of the rights that they protect. Cartwright J, for example, observed on a number of occasions that the long title of the NZBORA is quite transparent in acknowledging its genesis in the ICCPR and the intention of encapsulating the principles in the Covenant.[102] Some decisions (notably *R v Goodwin*[103]*, Simpson v*

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[96]The cases examined were limited to those reported in the NZLR and HRNZ.

[97]This situation also highlights the distinction between the theory of dualist and monist approaches although in the author's view this is far from conclusive in how the judiciary has responded to international treaties. See also the comments by Sir Geoffrey Palmer in "Human Rights and the New Zealand Government's treaty obligations" (1999) 29 VUWLR 57 at 60

[98] [1981] 1 NZLR 222, 229 (CA)

[99] See, for example, *Broadcasting Corporation of New Zealand v A-G* [1982] 1 NZLR 120; *R v Uljee* [1982] 1 NZLR 561

[100] Of all the treaties the ICCPR has been cited most frequently in New Zealand courts. At the time of the fifth report, there were 156 judgments of the superior courts that mentioned the ICCPR: *Replies to the List of Issues to be taken up in Connection with the Consideration of the fifth Periodic Report of New Zealand*

[101] This is consistent with the New Zealand Law Commission's prediction in *Report 34: A New Zealand Guide to International Law and its Sources* (1996) at para [71] that in future Courts may be willing to have regard to a treaty in interpreting legislation, even if the treaty has not been incorporated into national law or the treaty did not exist when the statute was enacted. For a discussion on this latter point see *Smith v Air New Zealand Ltd* [2011] NZCA 20; [2011] 2 NZLR 171 at [25] where the Court was required to construe the reasonable accommodation provisions in the Human Rights Act in accordance with the recently ratified Convention on the Rights of Persons with Disability.

[102] *Bailey v Whangarei District Court* (1995) 2 HRNZ 275, 287; *NRHA v Human Rights Commission* (1997) 4 HRNZ 37(HC)

[103] [1993] 2 NZLR 153 (exclusion of evidence/rights of persons detained)

A-G[104], *R v Poumako*[105], *Hosking v Runting*[106], *Taunoa v A-G*[107], *R v Mist*[108]and *Ministry of Health v Atkinson*[109]) have made a significant contribution to the development of the law. Apart from this, a review of cases where the ICCPR has been referred to suggests that in many cases its use remains relatively superficial.[110]

The majority of references to the Covenant have been in relation to criminal matters rather than the more substantive rights[111]and where such rights have been invoked, the Courts' approach has been relatively conservative. An example of this is *Shortland v Northern Health Ltd*[112]which involved a decision not to provide access to life saving dialysis treatment. Although the decision complied with medical and ethical guidelines, Mr Shortland sought unsuccessfully to argue that the denial amounted to a breach of the right not to be deprived of life under s.8 NZBORA. In interpreting s.8 the Court of Appeal invoked Article 6(1) of the ICCPR which states:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be ***arbitrarily*** *deprived of his life* (emphasis added by the Court).

The right to life in Art.6 (and by extension s.8 NZBORA) was also relied on in a case involving the impact of the housing restructuring in the 1990s on low income tenants. Although *Lawson v Housing New Zealand*[113]was more properly classified as an economic and social issue, Mrs Lawson argued the ICCPR was relevant because civil and political rights could only be enjoyed if conditions (such as adequate affordable housing) were created for their enjoyment. The High Court found that "*it was unduly strained to construe the right not to be deprived of life under s.8 as including the right not to be charged market rent ...*"[114]but even if it was wrong about this, the Court considered that the policy could be justified under s.5. The Court went on to elaborate on the implications of the international instruments for the formulation of policy and the role of the court in assessing compliance with the resulting obligations, noting that "*Whether New Zealand has fulfilled its international obligations is a matter on which it may be judged in international forums but not in this Court*".[115]

By contrast, in *R v Bain, application by Television New Zealand*[116] a question arose about lifting a suppression order in the interests of open justice and freedom of expression. In examining the issue, Keith J noted that the openness of the justice system was mandated by both s.25(a)

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[104] [1994] 3 NZLR 667(unreasonable search and seizure/ right to an effective remedy)

[105] [2000] 2 NZLR 695 (retrospective penalties)

[106] [2005] 1 NZLR 1 (right to privacy /omission in NZBORA)

[107] [2008] 1 NZLR 429 (cruel and unusual punishment /right to be treated with humanity and dignity/appropriate remedy)

[108] [2006] 3 NZLR 145 (retrospective penalty)

[109] [2012] 3 NZLR 456 (equality rights)

[110] See Andrew Butler and Petra Butler "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173

[111] There have been 13 references to liberty and security of the person (art.9) and 31 to rights of persons charged with an offence (art.14) compared to Art.6 (right to life) which was only invoked 6 times

[112] [1998] 1 NZLR 443. See also *CPAG v A-G* [2013] 3 NZLR 729 in which CPAG argued that the lack of consideration of New Zealand's international commitments should result in less deference to the government's choice of a measure to alleviate child poverty. The Court noted that while that was important, the key focus was whether the right to discrimination was minimally impaired

[113] [1997] 2 NZLR 474

[114] at [50]

[115] at [40]

[116] 22/7/96 (CA 255/95)

NZBORA and art.14(1) of the ICCPR and relied on them to allow the removal of the order following conclusion of the criminal trial process. He subsequently commented that *"... in this case the provisions of the Bill of Rights, the Covenant and indeed basic common law principles were aligned"*.[117]

As noted already, David Erdos has suggested that the dichotomy which results in civil liberties being considered as more legitimately falling in the domain of the judiciary than public law anti-discrimination claims relating to social policy, is probably predictable, reflecting as it does "*a British-descended judicial culture that prioritises, first, those civil liberty values already cognizable by the common law and, second, rights connected with the policing of parliamentary and legal processes"*.[118] If this is indeed the case, then it may also explain to some extent the significantly greater number of references to the ICCPR than the ICESCR in judicial proceedings.

The ICCPR has also shaped other legislation which does not directly refer to the Covenant such as the Mental Health (Compulsory Assessment and Treatment Act) (MHCAT Act) the long title of which refers to defining the rights of people who fall within the MHCAT Act and is designed to afford better protection for those rights. Part 6 of the Act is dedicated to the rights of patients and must be interpreted consistently with the NZBORA.[119] Again Cartwright J in an early decision under the MHCAT Act held that the legislation should be interpreted consistently with the standards in the international instruments, particularly the right to be treated with dignity and respect if detained[120]and to comply with procedural requirements to prevent allegations of arbitrary detention.[121]

2.6 Use of General Comments

General Comments are statements issued by the Treaty Bodies on a specific article or general issue which are designed to clarify the scope and meaning of the provisions in a particular treaty and help States in implementing it. They are considered the definitive legal interpretation of the application of the treaties and can be a useful tool for the Courts in deciding the meaning of statutory provisions which have their origins in the international treaties.[122]

Possibly the most extensive discussion on the application of a General Comment is found in *Quilter*[123]where the Court referred to General Comment 18[124]in an effort to define the meaning of discrimination in relation to same sex marriage. Three of the five judges referred to the Covenant and General Comment, albeit arriving at different conclusions. Thomas J, in particular, relied on the international material for assistance to identify the underlying nature of discrimination. In doing so he explicitly endorsed a "progressive" and modern interpretative approach to discrimination[125]that required s.19 of the NZBORA to be interpreted consistently with the "*principles of equality before the law, the equal protection of the law and the prohibition of discrimination underlying*

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[117] Ken Keith, *Application of International human rights Law in New Zealand*: paper given at the Judicial Colloquium on the Domestic Application of International Human Rights Norms in Guyana, September 1996 at 13

[118] Erdos, above n 28, 95-127

[119] *PS v North Shore Family Court [Mental Health: examination by judge]* [2011] NZFLR 647

[120] *Innes v Wong* [1996] 3 NZLR 238

[121] *PS* [2011] NZFLR 647

[122] Butler & Butler, above n 83, note that while there have been a large number of references to the ICCPR itself in decisions rendered by the New Zealand Courts, reference to the General Comments and jurisprudence of the HRC has been significantly less frequent: 3.6.21

[123] *Quilter v Attorney-General* [1998] 1 NZLR 523

[124] Human Rights Committee *General Comment No.18: Non-Discrimination,* 37th Session, 9 November 1989

[125] *Quilter* above n125 at [35]

art.26 and confirmed by the Human Rights Committee".[126] A similar approach was also adopted by Tipping J who noted that the committee's approach to the concept of discrimination was of direct relevance to New Zealand jurisprudence on the subject.[127]

The same General Comment was also used to interpret discrimination in a more recent case. *Ministry of Health v Atkinson*[128] involved a Ministry policy that prevented family members from being paid to care for their adult disabled children. The policy was found to discriminate on the grounds of family status, the Court of Appeal citing with approval the General Comment. In *Shortland*[129] the Court of Appeal referred to General Comment No. 6[130] to explain the duty imposed by s.8 of the NZBORA - possibly because it is more explicit about the ability to limit the right than the balancing exercise in s.5 NZBORA - and the High Court in *Martin v Tauranga District Court*[131] referred to a General Comment of the Committee (in this case, General Comment 13) as instructive on how similar matters had been treated in international forums.

A number of decisions by the Human Rights Review Tribunal have also invoked the General Comments to explore the meaning and extent of ICCPR rights.[132] Three recent cases - *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland*[133], *Nakarawa v AFFCO New Zealand Ltd*[134] and *Meulenbroek v Vision Antenna Systems Ltd*[135] - required the Tribunal to consider accommodation of the right to manifest one's religion and the right to freedom of thought, conscience and religion (one of the few non-derogable rights in the Covenant). Reference to the international comments was considered by the Tribunal to be compatible with the purpose of protecting human rights in New Zealand consistently with the long title to the HRA.

2.7 Intervention in legal proceedings by the NZHRC

The NZHRC's litigation powers were increased with the 2001 Amendment to the HRA as a way of complementing the tools available for use in its human rights advocacy and educative functions.[136] It was given the power to join litigation as a party as well as appear as intervener or amicus where complaints were of particular public importance. This is consistent with - and in some sense anticipatory of - developments in other common law jurisdictions where there have been moves to accommodate third party interventions in human rights litigation in the public interest.[137]

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[126] At [40]

[127] At [20]

[128] [2012] 3 NZLR 456

[129] *Shortland* above n 114 at [57]

[130] Human Rights Committee *General Comment No.6: Article 6 (the right to life)* HRI/GEN/1/Rev.9 (Vol.1)

[131] [1995] 1 NZLR 490

[132] This is a marked change from the previous Tribunal which in at least one case dismissed international references stating the reality is that the tribunal had to work with the legislation as enacted in New Zealand: *Trevethick v Ministry of Health (No. 2)* HRRT 13/2006 citing *BHP New Zealand Steel Ltd & Anor v O'Dea* [1997] ERNZ 667 although this was arguably because the decision focused on the wording of disability in the HRA. The Tribunal noted that in another case "argument about how the legislation ought to be interpreted might very well be assisted by reference to all the material and conventions canvassed in argument": at [35]

[133] [2013] NZHRRT 36

[134] [2014] NZHRRT 9

[135] [2014] NZHRRT 51

[136] Confidential draft to cabinet: *The Human Rights Commission's Litigation Powers*

[137] Sangeeta Shah, Thomas Poole & Michael Blackwell, "Rights, Interveners and the Law Lords" Oxford Journal of Legal Studies, Vol.34, No.2 (2014) 295-324 at 297

Over the past decade the Commission has increasingly intervened in cases where human rights issues have been raised. Consistent with its role in the long title, the Commission raises the international standards where relevant in its submissions. This has given greater prominence to the international treaties and in some cases dictated or contributed to a "rights consistent" outcome. For example, in *Atkinson*[138]the Court of Appeal endorsed the approach to discrimination adopted by the Commission and the respondents which was consistent with that in the ICCPR and the General Comment; and in *Service & Food Workers Union Nga Ringa Tota Inc v Terranova Homes & Care Ltd*[139]the Employment Court, having been asked to decide what criteria dictate whether an element of differentiation in the remuneration of men and women based on sex exists as a preliminary issue, unequivocally accepted the approach in the relevant international instruments and the concern to eliminate all forms of discrimination in payment based on gender. It specifically endorsed the NZHRC's view that the principles they espoused extended to the prohibition of such discrimination.[140]

2.8 NZBORA vets

Any analysis of the impact of the ICCPR would be incomplete without a mention of section 7 NZBORA. Section 7 requires the Attorney-General to report to Parliament if he or she considers a provision of a proposed bill is inconsistent with any of the rights or freedoms in the Bill of Rights. The process is designed to minimise the chances of infringing legislation being passed either unwittingly or deliberately. The opinions (called "vets") are provided by the MOJ team or Crown Law - in the case of bills introduced by Justice itself. At the time of writing there had been 59 s.7 reports.

The Attorney-General's obligation to report on inconsistent provisions arises only on introduction of the Bill. This means that when inconsistent provisions are added at committee stages or by way of Supplementary Order Papers there is no express requirement for a report by the Attorney-General. There have been repeated calls for a reform of the process to ensure that s. 7 reports are made in these situations, but so far the Attorney-General has not been receptive.

Despite the fact that interpretation of the NZBORA may reflect the rights in the ICCPR, the Covenant has been referenced relatively infrequently in the vets. Although most engage with the subject matter of the treaty, few have mentioned it specifically.[141] Those vets that have include the vet of the Criminal Procedure Bill and the rule against double jeopardy and, in particular, the circumstances when it is permissible and the application of s.5; the Criminal Justice (Parole Offenders) Amendment Bill which sought to impose penalties for people subject to certain sentences who offended while on parole and whether the penalties could be considered proportionate for the purpose of s.5; and the proposal to extend the Prisoner and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill in 2011 to prevent the payment of compensation to prisoners for breaches of the NZBORA by the Crown. The vet specifically referred to New Zealand's obligations under the ICCPR and the obligation to provide a remedy. It also referred to the fifth report and the Committee's concerns about the impact of the existing

[138] *Ministry of Health v Atkinson* at [133]

[139] [2013] NZEmpC 157

[140] At [66]. Although on appeal the Court of Appeal, while recognising the importance of the international standards as useful interpretative devices declined to apply them in interpreting the meaning of equal pay in the Equal Pay Act: *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc.* CA631/2013 [2014] NZCA 516

[141]9 referred to the UNHRC and the ICCPR

Act on the right to an effective remedy, commenting that if enacted the proposal could "attract further negative attention".

The number of NZBORA vets and the limited use of the ICCPR, suggest that the international standards have had little impact on the development of policy and legislation particularly since a negative NZBORA vet does not stand in the way of subsequent enactment of the legislation.

The Committee has criticised New Zealand on a number of occasions[142]for passing legislation that is inconsistent with the NZBORA (and by extension the ICCPR) because the s.7 vets can be disregarded although one commentator has suggested that a negative s.7 vet is not necessarily determinative of inconsistency with the ICCPR or the NZBORA since Courts are not bound by them and can (in fact, must) give a NZBORA consistent interpretation if possible.[143]

2.9 Conclusion

The impact of New Zealand's ratification of the ICCPR has not been as significant as might have been expected. Arguably the most important effect has been the reference to the Covenant in the long title of the New Zealand Bill of Rights Act.

In a key note speech delivered in 2006 when he was president of the Law Commission, Sir Geoffrey Palmer observed that while New Zealand had prided itself on respecting fundamental human rights before the enactment of the NZBORA, there was a tendency for politicians to claim that New Zealand always honoured fundamental human rights without looking to see whether the claim was valid and, too often, it was not. However, he went to note that:[144]

> *New Zealand is now a highly pluralist society with many diverse sets of values shared among its inhabitants which places pressures on fundamental rights but also provides the essential need for their protection. It is not too much to say that the Bill of Rights has changed New Zealand's legal culture and widened its horizons. Analysis has replaced rhetoric.*

The provenance of the NZBORA suggests that it was primarily designed to give statutory recognition to fundamental rights and freedoms that already existed at common law in New Zealand rather than the ICCPR as it is now referenced.[145]The original version of the Bill in the White Paper did not refer to the ICCPR in the long title (although it did in the preamble and accompanying commentary)[146]and the paper suggested that, had the Bill been entrenched, it would have ensured a greater guarantee of compliance with New Zealand's important international obligations.[147] However, despite the fact that it does not have superior status and the Courts cannot strike down inconsistent legislation, the ICCPR via the NZBORA has had an effect on the development of jurisprudence in the criminal area, although its role in relation to more substantive rights is less significant. Earlier this year, an interview with one of the members of this project, Sir Geoffrey stated that he considered the courts were "gutless" in enforcing international obligations.

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[142] Third periodic report CCPR/C/64/Add 10; Fourth periodic report CCPR/CO/75/NZL; Fifth periodic report CCPR/C/NZL/Q/5/Add.1

[143] Paul Rishworth et al. *The New Zealand Bill of Rights* (2003) OUP at 201

[144] Sir Geoffrey Palmer, "The Bill of Rights fifteen years on", *Keynote Speech Ministry of Justice Symposium: The New Zealand Bill of Rights Act 1990* (2006)

[145]Above n19 at 5

[146] at 30

[147] at 31

The s.7 vets of prospective legislation which require identification of issues that are inconsistent with the NZBORA has also led to an increased understanding of aspects of the ICCPR – even if a negative report can be subsequently ignored.

The reference to the international human rights treaties in the long title of the HRA has provided opportunities for the NZHRC to reference the Covenant in its legal interventions and submissions on legislation. While it is difficult to state how successful this has been generally, in at least one case - the legislation on the Electoral Finance Bill - the Commission's reliance on aspects of the Covenant resulted in a significant reversal of what was proposed. The ICCPR and the Committee's General Comments have also been influential in shaping the interpretation of discrimination in cases such as *Atkinson* and *CPAG*.

In relation to the impact of the Human Rights Committee and the reporting process, the Concluding Observations and Recommendations are necessarily limited by the information the council is provided with. As Dr Niklas Bruun (the Rapporteur on New Zealand for the CEDAW process) observed, "*... some sort of concrete guidance is necessary so the country doesn't dismiss the recommendations as ridiculous*".[148] The tendency to simply describe policy measures in country reports without elaboration of their efficacy or whether they have achieved what they set out to, results in encouragement of de jure rather than de facto compliance. This is further complicated by the lack of knowledge of Committee members of the domestic situation although this can be redressed to some extent by informed participation of those attending the examination. The importance of portfolio Ministers leading country delegations to the UN has been cited as a way of informing the dialogue.[149]

A further contributory factor is the issue of allowing an international body to interfere in New Zealand's domestic affairs which can lead to the government simply ignoring or dismissing the Recommendations or Concluding Observations. As the Hon Jim McLay observed in relation to compliance with international treaty obligations:[150]

> *You're subjecting yourself to rules set internationally – you may have agreed to them but at the end of the day it's a set of rules that you may not necessarily have written in that way if you were writing it yourself*

The fact that not much is known about the substance of human rights among the population generally is also an issue. This, together with the lack of publicity given to the Concluding Observations, can mean that NGOs and civil society who could most logically agitate for compliance are often largely unaware of what has been suggested.

While it is reasonable to conclude that the Covenant has not realised its potential domestically, it is also the case that the complacency that this seems to reflect can easily be upset by issues impacting on the rights in the ICCPR that New Zealanders feel strongly about such as recent events relating to freedom of expression indicate.

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[148] Interview with the author, New York, 18/7/2012

[149] Interview with author, New York, 19/7/2012

[150] See also Krommendijk above n 78 who echoes the concerns of Matthew Palmer relating to the tendency of New Zealanders to trust a democratically elected government to do the right thing without unwarranted external intrusion.

Chapter Three International Covenant on Economic, Social and Cultural Rights (ICESCR)

3 Background

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted and open for signature, ratification and accession by General Assembly resolution 2200A (XXI) on 16 December 1966. New Zealand ratified ICESCR on 28 December 1978.

At the time of ratification New Zealand made the following two reservations:

The Government of New Zealand reserves the right not {to} apply Article to the extent that existing legislative measures, enacted to ensure effective trade union representative and encourage orderly industrial relations may not be fully compatible with that Article.

This reservation remains in force.

The Government of New Zealand reserves the right to postpone in the economic circumstances foreseeable at the present time, the implementation of Article 10(2) as it relates to paid maternity leave or leave with adequate social security benefits.

On 5 September 2003 the Government of New Zealand withdrew this reservation.

The Covenant is designed to ensure the protection of people as full persons, through the pursuit of economic, social and cultural activities and development. It includes the right to work, to an adequate standard of living, to the highest attainable standard of physical and mental health, and to education and culture. The rights differ from those set out in the International Covenant on Civil and Political Rights (ICCPR) which New Zealand ratified at the same time, as they are progressive rather than absolute. The ICCPR imposes an obligation on States to extend its rights and freedoms to all individuals on ratification, while the ICESCR only imposes an obligation on States to take steps with a view to achieving progressively the full realisation of the rights in the Covenant to the maximum of their available resources.[151]

The Optional Protocol to ICESCR was adopted by General Assembly resolution A/RES/63/117 on 10 December 2008. New Zealand has not ratified the Optional Protocol which establishes a complaints mechanism that confers the right on individuals or groups to submit matters to the Committee on Economic, Social and Cultural Rights (CESCR) concerning non-compliance with the Covenant. The New Zealand Government's concern with the Optional Protocol appears to centre on the progressive nature of ICESCR and its subsequent lack of justiciability. Article 2 of the ICESCR states that "each State party …undertakes to take steps…to the maximum of available resources, with a view to achieving progressively the full realisation of the rights recognised…"[152] The lack of justiciability of ESCR has consistently been given as a reason for not incorporating these rights within a legal framework, in particular the NZBORA. During the debate on the enactment of the NZBORA it was argued that economic, social and cultural rights are not value free and impose specific obligations that may change from time to time and therefore were

[151] MacKay above n 66 at 5

[152] Ministry of Foreign Affairs and Trade, *Draft Optional Protocol to ICESCR: NZ Position* (5 August 2003) HRD/ESC/2/1.

uncertain and not justiciable and better implemented through legislative and administrative means.[153]

3.1 Progressive realisation

The lack of specificity of the State's obligation and the reality that individual or group complaints, if justified, can have an extensive impact socially and financially are legitimate concerns for a State attempting to fulfil its Treaty obligations. The importance attached to the concept of progressive realisation was emphasised by the UN Committee monitoring ICESCR when it noted that it *'is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions. It describes the nature of the general legal obligations undertaken by State Parties to the Covenant.'* [154]

It has been noted by Felner,[155]however, that Governments may use the notion of progressive realisation as an 'escape hatch' to avoid complying with their human rights obligations, claiming, for instance, that the lack of progress is due to insufficient resources when in fact, the problem is often not the *availability* but rather the *distribution* of resources. He also notes that the obligation of progressive realisation reflects the fact that adequate resources are a crucial condition for the realisation of ESCR and the contingent nature of a State's obligations, implying that they may vary from one State to another depending on the State's economic development.

Although States are not obliged to incorporate ESCR in domestic law, the CESCR has stated 'in many instances legislation is highly desirable and in some cases may even be indispensable' and that 'whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.'[156]The arguments of uncertainty and cost are therefore not sufficient justification for a blanket denial of legal recognition. The CESCR states that:[157]

> *A failure to remove differential treatment on the basis of lack of available funds is not an objective and reasonable justification unless every effort has been made to use all resources that are at a State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.*

Mary Robinson has noted that[158]

> *A timely and significant debate has begun on how nongovernmental organizations (NGOs) and other civil society actors can most effectively influence states and third party actors to progressively implement their economic, social and cultural (ESC) rights obligations. The debate is timely because too little attention has been paid in the past to this important area of human rights work.*

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[153] Above n 19 at 112.

[154] Committee on Economic Social and Cultural Rights, *General Comment No. 3 -The nature of States parties obligations (Art. 2, par.1) 14/12/90*

[155] Eitan Felner (2009) "Closing the Escape Hatch: A Toolkit to Monitor the Progressive Realisation of Economic, Social and Cultural Rights," *Journal of Human Rights Practice*. 1(3) 402-435

[156] Committee on Economic Social and Cultural Rights, *General Comment* No 3 1990, 3 and 9

[157] Committee on Economic Social and Cultural Rights, *General Comment* No 20, 1990, 13

[158] Mary Robinson, "Advancing Economic, Social and Cultural Rights: The Way Forward" *Human Rights Quarterly* 26 (2004) 866, John Hopkins University Press.

This debate also appears to be happening in New Zealand. In the forward to a recent book examining aspects of ESCR in New Zealand,[159] Dame Silvia Cartwright stated:

> *The International Covenant on Economic, Social and Cultural Rights may not enjoy public recognition of other instruments, yet the rights it contains are of vital importance to every New Zealander, and will become more critical as the allocation of resources comes to the fore locally and internationally.*

The debate is evident in the response of the CESCR (the Committee), to the periodic reports of the Government. It is also apparent in the increasing number of cases in which attempts have been made to litigate what are essentially ESCR. It is apparent from both the recommendations and the case law that the traditional approach to legislative and administrative implementation is being challenged as insufficient to meet the compliance requirements under ICESCR.

3.2 Treaty body reporting

Under Articles 16 and 17 of ICESCR, New Zealand as a state party that has ratified the Covenant is required to submit reports to the Economic and Social Committee of the United Nations (the Committee) on the measures that have been adopted and progress made in achieving compliance with the rights in the Covenant. New Zealand has submitted reports in 1990, 2001, and 2008. It is apparent from the three reports that consistent themes emerge in the CESCR's Recommendations. A summary of the Concluding Observations and Recommendations in these reports are set out below to demonstrate the scope and nature of the concerns about New Zealand's implementation of its obligations under the Covenant. The Recommendations have increased in number and have become more specific and directive in their identification of the expectations of the CESCR for compliance by the Government.

All three reports identify the need for inclusion of ESCR within a specific statutory framework - in particular the NZBORA. Related to this is the recommendation that the Optional Protocol is ratified to provide an individual complaints mechanism. The latest Universal Periodic Review report on New Zealand contains several Recommendations relating to the inclusion of ESCR in the NZBORA or a Human Rights Charter.[160] The Government rejected the Recommendations to include ICESR in a Bill of Rights, ratify the Optional Protocol to the ICESCR and to continue the conversation on ESCR recommended by the Constitutional Advisory Panel.[161,162]

New Zealand Governments have made detailed descriptive responses to the issues raised, and in that sense have been conscientious. They have also consistently relied on progressive realisation of the ICESCR obligations through legislative and administrative measures. This position was made clear in the Government's response to the Third Periodic Report in the following terms:[163]

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[159] *Law Into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand*, Margaret Bedggood and Kris Gledhill (eds) (2011) Human Rights Foundation of Aotearoa New Zealand/Thomson Reuters, Wellington, vi.

[160] *Draft report of the Working Group on the Universal Periodic Review: New Zealand* 2014, 128.30, 128.31. 128.32, 128.33, 128.34, 128.35

[161] The Constitutional Advisory Panel was established as the result of a Coalition Agreement between the National Party and the Māori Party at the 2008 election to engage with the public on constitutional change. The Panel recommended a further constitutional conversation on several issues including ESCR.

[162] *Report of the Working Group on the Universal Periodic Review: New Zealand*, (2014) A/HRC/26/3

[163] *Implementation of the International Covenant on Economic, Social and Cultural Rights Consideration of reports submitted by States parties in accordance with articles 16 and 17 of the Covenant: New Zealand Addendum Replies by the Government of New Zealand to*

> *Targeted legislation specifically implements numerous rights in the Covenant, such as rights relating to education, conditions of employment, equal pay, parental leave, environment, family law, health, housing, copyright protection and social security. The scope and range of the rights covered by such legislation is extensive, as are the types of action available to enforce these rights…*

The Government also noted that the Covenant can be invoked directly through the established domestic law and that, wherever possible, national legislation is interpreted and applied consistently with international obligations. Reference is also made to the Courts' broad powers of judicial review and cites examples of two cases where judicial review by the Court of Appeal dealt with housing issues.[164]The response also refers to cases dealing with reasonable accommodation, immigration and injury rehabilitation as evidence of access to legal redress for alleged breaches of the ESCR obligations.[165]

Throughout the three Reports, the Committee has raised issues relating to cultural rights and economic and social obligations to Māori. The Government response makes extensive references to measures being taken to progress the ESCR of Māori in education, health, employment, as well as measures to protect and respect cultural rights such as the Māori Reserved Land Amendment Act 1997, Te Ture Whenuā Act 1993, Marine and Coastal Area (Takutai Moana) Act 2011, Māori Commercial Aquaculture Claims Settlement Act 2004, Ngāi Tahu (Pounamu Vesting) Act 1997, as well as the Treaty settlement process.[166]

The Committee's concluding observations and conclusions are set out in detail to illustrate the range of issues examined by the Committee, as well as the issues that are consistently identified for consideration by the Government.

3.3 First Periodic Report – Concluding Observations[167]

3.3.1 Positive aspects

The Committee welcomed the adoption of the HRA and appreciated the renewal of the mandate, the enlargement of the scope of the Act and the innovative recognition of age as a ground of unlawful discrimination.

The Committee noted with satisfaction the enactment of the Health and Safety in Employment Act 1993; the renewed efforts to strictly implement the Equal Pay Act 1972; repeal of the Labour Relations Act 1987; the increase in the age to 16 for compulsory education and the efforts to increase participation of youth in vocational and skills training.

The Committee also noted the measures to improve employment and educational opportunities for Māori and Pacific Islands people.

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the list of issues (E/C.12/NZL/Q3) to be taken up in connection with the consideration of the third periodic report of New Zealand (E/C.12/NZL/Q/3)[11 November 2011]

[164] *Winther v Housing New Zealand Corporation* [2011] 1 NZLR 825; and *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460.

[165] Above n 66 at 4.

[166] At 7, 8, 18, 19, 25-30.

[167] *Committee on Economic Social and Cultural Rights* (1994) E/C. 12/1993/13.

Finally the Committee noted with regret the balance of payments situation that has impeded the full realisation of economic, social and cultural rights.

3.3.2 Principal areas of concern

The Committee expressed concern that the recently enacted NZBORA makes no reference to economic, social and cultural rights and that it is an ordinary statute that can be overridden by other legislation.

The Committee also expressed concern that the extensive reforms in social security and labour legislation in particular the Employment Contracts Act, could negatively affect ESCR, raising questions in relations to Articles 7 and 8 of the Covenant.

The Committee noted with concern that Māori and Pacific Island people continue to figure disproportionately in employment, low salary levels and poor educational and technical qualifications.

Finally the Committee expressed regret that the State did not keep statistical information on malnutrition, hunger and homelessness.

3.3.3 Suggestions and recommendations

The Committee strongly recommended the reinforcement of the work of the NZHRC and in particular that it had translated the Covenant into all principal languages, and asked that the Covenant be widely disseminated and the subject of community education.

The Committee encouraged the Government to strengthen equity for Māori and Pacific peoples in access to education, training and employment.

The Committee urged the State to carefully monitor the effects of unemployment and reduction in welfare services.

The Committee recommended a review of the impact of the Employment Contracts Act and related legislation.

The Committee expressed the hope that the State party would ratify ILO Conventions Nos. 87 and 98

The Committee urged the collection and publication of statistics to provide information to the Committee in the next Report, in particular statistics on school drop-out rates disaggregated according to race.

Finally the Committee expressed the hope the State party would consider withdrawing its reservations to the Covenant.

The Government's response to the recommendations was reflected in the Second Periodic Report.

3.4 Second Periodic Report – Concluding Observations[168]

3.4.1 Positive aspects

The Committee appreciated the continuing efforts to comply with the Covenant's obligations and welcomed the Human Rights Amendment Act 2001 with the broader mandate and developing a plan of action for human rights.

The Committee also appreciated the efforts to ensure Māori enjoyed their rights under the Covenant.

The Committee further appreciated the introduction of the Employment Relations Act 2000; the imminent ratification of ILO Convention No 98; the introduction of paid parental leave legislation, the intention to withdraw the reservation under article 10(2); and the information on the right to water.

3.4.2 Principal subjects of concern

The Committee noted with regret the view expressed by the State party that ESCR are not necessarily justiciable.

The Committee noted with concern the high level of young people that were unemployed

The Committee noted with regret the non-ratification of ILO Conventions 87, 117 and 118.

The Committee was concerned with the persistence of a gap between wages of women and men in contradiction to the principle of equal pay for work of equal value.

The Committee was also concerned with persistence of family violence; the high suicide rate amongst young people; the level of poverty and lack of indicators to assess effectiveness of measures to combat it: the general health of Māori; the lack of provision for health services in rural areas; and finally persistent inequalities for Māori in access to education.

3.4.3 Suggestions and recommendations

The Committee pointed out the State party remained under an obligation to give full effect to the Covenant in its domestic legal order, providing for judicial and other remedies for violations of economic, social and cultural rights.

The Committee invited the State party to submit in the next Report its views and comments on the Optional Protocol to the Covenant to be examined by the open-ended working group established by the Human Rights Committee in 2003.

The Committee recommended the NZHRC take up ESCR as a comprehensive topic and ensure they were reflected in the National Plan of Action for Human Rights.

The Committee recommended strengthening efforts to reduce youth unemployment and requested further information in the next report.

The Committee encouraged ratification of ILO Conventions 87, 117 and 118 and withdrawal of the reservation to Article 8 of the Covenant.

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[168] *Committee on Economic, Social and Cultural Rights* (2003) E/C.12/1/Add.88.

The Committee encouraged measures to increase reporting in employment cases.

The Committee recommended intensification of efforts to reduce inequality in the workplace, including ensuring equal pay for work of equal value.

The Committee recommended targeting of social security benefits so as not to lead to decreasing social protection, and wanted accessible information on social protection to be widely disseminated to all members of the community.

The Committee recommended intensification of measures to combat domestic violence, including statistical data.

The Committee recommended effective measures to address the high suicide rate particularly amongst young people, including information in the next Report.

The Committee recommended the adoption of a national plan to combat poverty with clear indicators to assess its impact.

The Committee requested the adoption of effective measures to improve Māori health and access to education; and equal access to health services in rural and remote areas.

The Committee encouraged the provision of human rights education in schools at all levels and raising the level of awareness of ESCR amongst State officials and the judiciary.

Finally the Committee requested the dissemination of its recommendations amongst State officials and the judiciary and that the State consult NGOs and other civil society institutions when preparing the third periodic report.

The Government's response to these recommendations was reflected in the Third Periodic Report.

3.5 Third Periodic Report – Concluding Observations[169]

3.5.1 Positive aspects

The Committee welcomed the ratification of the Optional Protocol to the Convention against Torture, the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on the Rights of the Child, and the endorsement of the Declaration on the Rights of Indigenous People.

The Committee welcomed a range of measures to ESCR in particular recognition of sign language as an official language; entitlements for refugees and asylum seekers; new education curriculum; adoption of Civil Union Act 2000; Relationships (Statutory References) Act 2005; the introduction of paid parental leave and adoption of legislation prohibiting corporal punishment by parents.

The Committee noted practical achievements in ESCR in particular, immunisation amongst Māori; low rates of hardship amongst elderly and reduction in unemployment and also the mainstreaming of human rights and the work of the HRC.

[169] *Committee on Economic, Social and Cultural Rights* 2012 E/C.12/NZL/CO/3.

3.5.2 Principal subjects of concern and recommendations

The Committee urged the State party, in the context of the ongoing constitutional review process, to give the Covenant full effect in its domestic legal order and called on the State party to ensure that redress for violations of the Covenant rights could be sought through the State party's varied recourse mechanisms. The Committee also requested information on court cases in the next periodic report.

The Committee urged the State party to incorporate ESCR into the NZBORA. Further the Committee called on the State party to ensure competent authorities reviewed draft laws, regulations and policies to see that they were compatible with the Covenant and that additional efforts were made to raise awareness of ESCR among parliamentarians and policy-makers.

The Committee called on the State party to ensure inalienable rights of Māori were firmly incorporated in legislation and implemented; that measures be taken to guarantee redress for violation of Māori rights; and to strengthen efforts aimed at eliminating disadvantages faced by Māori and Pasifika in the enjoyment of ESCR through specific equality targets.

The Committee called for introduction of incentives and special measures to promote employment of people with disabilities; reasonable accommodation and adequate health care; and recommended the collection of data to monitor enjoyment of ESCR by people with disabilities and asked for the provision of this information in the next report. It further recommended the position of Disability Commissioner be established on a permanent basis.

The Committee called on the State party to promote equal employment opportunities in areas not dominated by one sex; amend legislation on equality in employment to provide for equal pay for work of equal value and apply the Job Evaluation Tool to this effect; and to set a clear timeline to correct the gender wage gap in the public sector.

The Committee recommended a strategy to boost the skills and employment of young people; to introduce a statutory maximum number of work hours and to investigate all allegations of violations of labour laws.

The Committee recommended intensifying measures to combat family violence including a framework for implementing recommendations of the Taskforce for Action on Sexual Violence; and to systematically collect data on violence and bullying in schools and monitor the impact on student well-being of measures to reduce bullying and violence.

The Committee called for specific measures to increase the number of childcare facilities to ensure disadvantaged groups have access.

The Committee recommended the adoption of a human rights approach to housing reconstruction after the earthquake in Christchurch; and to ensure adequate housing for everyone, in particular the need for social housing.

The Committee recommended the right to affordable and safe water remains guaranteed, including in the context of privatised water.

The Committee requested in the next periodic report information on health services and sewage systems in rural and remote communities.

The Committee recommended strengthening measures for access to smoking cessation programmes particularly among Māori and Pasifika.

The Committee recommended the State bore in mind the obligation to protect Māori culture.

The Committee requested in the next periodic report information on ESC measures in the Tokelau.

The Committee encouraged an increase in the level of contribution of official development assistance with a view to attaining the UN target of 0.7% of GNI.

The Committee recommended the adoption of the withdrawal of the reservation to Article 8 of the Covenant.

The Committee encouraged the ratification of the Optional Protocol to ICESCR.

The Committee encouraged the signing and ratification of Convention on Protection of the Rights of all Migrant Workers and Families; the International Convention for the Protection of all Persons from Enforced Disappearance; the Optional Protocol for the Convention on the Rights of Persons with Disabilities, and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

The Committee recommended taking into account these recommendations in the next national human rights action plan and continuing support for the work of the NZHRC, NGOs and members of civil society in the development and implementation of the plan.

The Committee requested the dissemination of the recommendations among all levels of society, particularly state officials, members of judiciary and civil society organisations.

The next Periodic Report is not due until 2017 and it is too early to assess the Government's response to the recommendations. The response to the Universal Periodic Report does, however, indicate a likely Government response on some key issues. For example, the Government continues to interpret its obligation to positive realisation as not including specific incorporation of ESCR in the NZBORA.

3.6 Policy, practice and legislative change

New Zealand has a history of cross party support for international human rights treaties, including ICESCR. During the discussions preceding the adoption of the UDHR, New Zealand's representative argued for the inclusion of social and economic rights. The rationale for the position was described by Dr Aikman as follows:[170]

> *My delegation ... attaches equal importance to all the articles ... At the same time we regard with particular satisfaction the place which is given in the declaration to social and economic rights. Experience in New Zealand has taught us that the assertion of the right of personal freedom is incomplete unless it is related to the social and economic rights of the common man. There can be no difference of opinion as to the tyranny of privation and want. There is no dictator more terrible than hunger. And we have found in New Zealand that only with social security in its widest sense can the individual reach his full stature. Therefore it can be*

[170] Aikman above n 9 at 5

> *understood why we emphasize the right to work, the right to a standard of living adequate for health and wellbeing, and the right to security in the event of unemployment, sickness, widowhood and old age. Also the fact that the common man is a social being requires that he should have the right to education, the right to rest and leisure, and the right to freely participate in the cultural life of the community.*
>
> *These social and economic rights can give the individual the normal conditions of life, which make for the larger freedom. And in New Zealand we accept that it is the function of government to promote their realisation.*

This reflected the policy of the Labour government elected in 1935 to implement a social security system that provided for economic and social wellbeing. The policy framework developed from 1935 to 1984 saw the State as the primary provider of social well-being including the provision of education, health, housing and assistance in time of need, as well as the protector of individual rights and freedoms.

The cross party support for the role of the state in recognizing and protecting individual rights and freedoms was evident in the parliamentary debates on the Human Rights Commission Bill in 1976/77 which paved the way for the Government to ratify ICESCR in 1978. Although the Human Rights Commission Act (HRCA) was considered by some to be sufficient for ratification, in reality the 1977 Act was not human rights legislation. Rather it was a statutory framework to provide individuals with redress for discrimination on limited grounds, namely sex, marital status, religious and ethical belief The Act did not provide the individual with a positive claim to observance of human rights. This was noted during the parliamentary debates and an attempt was made during consideration of the Bill to include the UDHR in a schedule to the Act but this was defeated "on technical grounds", namely that other Covenants had been recognized in addition to the UDHR. As the Chair of the Select Committee noted in debate this would "take many pages of presumably legal jargon, which not many people would understand".[171] As a compromise the Bill was amended to include a long title that included "to promote the advancement of Human Rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights".

Although the parliamentary debate did not mention ICESCR, it reflected the general approach to human rights at that time. Both political parties accepted the role of the State was to protect individual human rights. How this was to be achieved and what exactly a human right was revealed differing approaches. It was clear, however, that ESCR were not to be the subject of individual legal enforcement. Successive governments have argued that New Zealand's commitments under ICESCR have been realised by devising and developing administrative systems, policies and legislation to implement the obligations under the Convention and relied on public policy expressed through general Acts of Parliament such as the Education Act 1989, New Zealand Public Health and Disability Act 2000, Social Security Act 1964 and the Housing Corporation Act 1974 for compliance with ICESCR.

In effect New Zealand has argued the best way to implement ESCR obligations is through the establishment of a legislative and policy framework that sets a standard for all citizens to access ESCR. There is, however, no explicit reference to ESCR in Cabinet policy making or legislation.

[171] (20 July 1977) NZPD 1257.

There is a reference to enact legislation and policy consistent with the NZBORA and the HRA but only the Cabinet Manual makes a reference to compliance with "international obligations".[172]

Although the shift to a neo-liberal policy framework from 1984 has altered the delivery of public policy through greater involvement of the private sector via contracted out mechanisms, there remains cross party opposition to a rights approach to ESCR. A comprehensive assessment of New Zealand's policy and practice was commissioned by the Human Rights Commission in 2003, the report being published in 2007.[173]The authors noted that while there has been increased interest in ESCR, there remains a reluctance to adopt a rights-based approach to ESCR because of the uncertainty over what it would require. The lack of precision in the language of ESCR means the extent of the State's responsibly is contestable and controversial. The authors also referred to the absence of an established judicial tradition or quasi-judicial elaboration of ESC rights.

3.7 The use of ESCR in judicial proceedings[174]

The New Zealand judiciary has traditionally taken a cautious approach to human rights issues. David Erdos[175]argued that both the cultural self-perceptions of the judiciary and the context within which NZBORA has been implemented are relevant to gaining an understanding as to why the judicial response has been relatively conservative and mainly directed at the implementation of civil and political rights. He concludes:[176]

> *Other than judicial culture itself, factors of particular importance within this structure include the nature of the NZBORA enactment and remedies available under it, the attitude of the political branches to the agenda of divergent social actors … and the political and legal resource set of the same actors.*

The importance of the political and policy environment on the construction of ESCR obligations and its influence on the judicial approach to these issues has been explored by Opie in a more recent article.[177]He considered that the changes in public policy since 1984 have detrimentally affected citizens' economic social and cultural rights. In support of this he analyses the case of *Lawson v Housing New Zealand*[178]. Mrs Lawson, a state tenant, sought a judicial review of the Minister of Housing's decision to transfer state houses to a private company that then introduced market rents resulting in a rise of over 100%. Amongst the arguments in support of the judicial review was that the policy was in breach of s.8 of the NZBORA relating to a right to life and the government's obligations under international treaties including ICESCR.

The action was dismissed in the High Court, the judge stating that the facts required an unduly strained interpretation of s.8 and that s.5 applied as the policy and actions were a reasonable limit on the rights of Mrs Lawson. Basically the Judge found that the decision on rents was a purely commercial decision over which the court had no jurisdiction and the action was therefore outside the scope of judicial review. In other words the issue was not justiciable.

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[172] At [5.35] – [5.36]

[173] Geiringer & Palmer above n.35 at 12

[174] A selection of cases in which economic, social and cultural rights are referred is included in Appendix 4.

[175] Erdos, above n 28

[176] Erdos, at 96

[177] Joss Opie, (2012) "A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990" 43 *VUWLR* 471 at 473.

[178] *Lawson v Housing New Zealand* [1997] 2 NZLR 474

Opie considers that the inclusion of ESCR in the NZBORA would have enabled citizens to be educated on the importance of both their CPR and ESCR fundamental rights and freedoms and would have provided an influence on policy makers to uphold those rights and freedoms. He states:[179]

> *All of these reasons providing CPR with a special status in the NZBORA applied with equal force to ESCR (and continue to apply today). …The inclusion of ESCR in the NZBORA could have slowed the pace of the reforms: tempered their severity by contributing to a more cautious approach from the outset; encouraged more robust and evidence-based policy; promoted ESCR through expressly requiring ESCR-consistent interpretations of legislation where such interpretations were open; and led to the identification of conduct that was inconsistent with ESCR (thereby protecting and upholding these rights). Justiciable ESCR could have provided an important and democratic check on the State's power, particularly given the context of democratic failure in which the reforms occurred.*

While there has been a relatively conservative approach to exploring the potential and opportunities for implementing social and economic rights by policy makers and the judiciary, there has recently been a renewal of social activism and litigation in an attempt to give practical meaning to ESCR. This activism has come primarily from the response of the Human Rights Review Tribunal to cases seeking a remedy for discrimination on grounds involved litigants' social or economic well-being. While it would be inaccurate to suggest governments have altered their fundamental objection to the recognition of ESCR, litigants are increasingly resorting to legal avenues to pursue recognition of these rights. There is some evidence of political recognition of serious issues of social and economic inequality that have arisen from the adoption of the current neo-liberal policy framework[180]but no change in approach to incorporation of these rights into the NZBORA.

Legal enforcement of the ESCR statutory obligations has traditionally been through the procedural remedy of judicial review. The limited opportunity to challenge government policy through the judicial review process was illustrated in the case of *Daniels v Attorney-General*[181]which involved the special education policy introduced by the Minister of Education in 1998. The plaintiffs argued their children should have a choice of attending special education facilities where mainstreaming was inappropriate or ineffective. The policy had disestablished special education facilities and the argument was this policy was in breach of s. 3 (right to free primary and secondary education) s. 8 (equal rights to primary and secondary education) and s. 9 (right to provision for special education if qualified) of the Education Act 1989.

Although the High Court held there had been a breach of the children's right to an education, the Court of Appeal overturned the decision on the grounds the legal obligation on the state was to provide regular and systemic education and this obligation was not justiciable, although specific rights may be actionable under the Act. Keith J noting:[182]

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[179] Opie, above 177 at 501-2.

[180] The debate on inequality in New Zealand is reflected in Question Time in Parliament in *3 Inequality, Economic and Social- Rate over Last 30 Years* and *Inequality, Economic and Social-Income Gap*, www.parliament.nz.

[181] *Daniels v Attorney General* [2002] 2 NZLR 742 at 766.

[182] at [83]

> *…while there are rights under the 1989 Act that can be enforced by court process [such as natural justice on suspension and expulsion], these rights do not include generally and abstractly formulated rights of the kind stated by the [High Court] Judge.*

The Court also noted the difficulty of judicial supervision to enforce general standards of education. Justiciability, then, was again an issue in this case, the Court drawing a line between specific individual rights and general rights in the Education Act.

A statutory attempt to reconcile the increasing demand for a rights approach and the government's resistance because of the uncertain financial and social implications of such an approach was made in the 2001 Amendment to the Human Rights Act, Part 1A. Part 1A of the Act gave the Human Rights Review Tribunal the power to issue a declaration that an enactment of a policy is inconsistent with the right to freedom from discrimination provided for in s. 19 of NZBORA. The Minister responsible for the offending enactment is then required to report to Parliament the existence of the declaration and within 120 days of all appeals being exhausted must respond on what action it intended to take. The declaration did not declare the offending enactment invalid or require a change of policy. The right of Parliament to make the law and government policy was preserved under this arrangement but it did provide a transparent process whereby human right breaches could be identified and made public while preserving the constitutional notion of parliamentary sovereignty.[183]The 2001 Amendment procedure was a back door attempt to allow ESCR to be litigated in the Tribunal and Courts by providing a remedy for breach of ESCR through the NZBORA and the right to be free from discrimination in s.19.

The *Atkinson Case*[184]was the first substantive case under the Part 1A procedure that demonstrated how the 2001 Amendment works in practice as well as providing a practical example of the difficulties associated with the current statutory regime. In this case the Tribunal issued a declaration of inconsistency in respect of an allegation of discrimination on the grounds of family status by a group of families who were denied financial support for the care of adult children with disabilities. After the Minister of Health received the declaration an appeal was lodged with the High Court that upheld the Tribunal's decision, as did the Court of Appeal when the Ministry appealed the High Court decision. The Government then decided not to appeal to the Supreme Court but entered negotiations with the families to determine the payments to which they would be entitled.

As a result of the negotiations the Government introduced the New Zealand Public Health and Disability Bill (No.2) 2013. (NZPHDA) The Bill acknowledged the claim of the litigants to some compensation, it also limited the Crown's liability to pay family members who provide support to their disabled family members. It reasserted the right of the Crown and District Health Boards not to pay or fund family members to provide health and disability support and that such a policy was not considered to be unlawful discrimination under the Human Rights Act. The Bill was enacted and is now law regardless of the section 7 NZBORA assessment that the Amendment authorised a breach of the non-discrimination right guaranteed by s. 19(1) of the NZBORA. Further the section 7 vet noted the legislation *appears to limit the right to judicial review because it would prevent a person*

[183] Royden Hindle, *The Human Rights Review Tribunal: Problems and Possibilities,* (2013) www.roydenhindle.co.nz.
[184] *Atkinson v Ministry of Health* [2012] NZCA 184.

from challenging the lawfulness of a decision on the basis that it was inconsistent with s 19(1) of the Bill of Rights Act.[185]

In a subsequent case, *Spencer v Attorney General*[186] which related to the new NZPHDA legislation and the refusal of the Ministry of Health to consider Mrs Spencer's application for payment of disability support for her son, Justice Winkelmann held that the Ministry had acted unlawfully and in breach of Mrs Spencer's rights when it refused to consider her application stating it was acting in accordance with the new policy that was supported by the legislation. The case has been appealed by the Attorney-General who is arguing that the Court erred in its interpretation both of what is meant by a "family care policy" and Part 4A of the Public Health and Disability Act.

Although the ICESCR has not been formally recognised legally this does not mean the Courts cannot rely on the provisions of a treaty if a relevant issue comes before the courts. In *New Zealand Air Line Pilots Association Inc v Attorney-General* the Court of Appeal held that:

> *We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations … That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text … In that type of case national legislation is naturally being considered in the broader international legal context in which it increasingly operates. (269, 293).*

A recent application of this principle is found in *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care ltd* where the judgment of Full Court noted:[187]

> *Statutes should be interpreted in a manner that is consistent with New Zealand's international obligations. While international obligations cannot affect the meaning of statutory words that are clear, they may influence the interpretation adopted where they are open to different meaning.*

In this case the Employment Court had to decide a number of preliminary issues relating to the scope of any subsequent inquiry conducted under s.9 of the Equal Pay Act 1972. In essence the SFWU was bringing a pay equity claim on behalf of care workers. In the course of the judgment the Court referred to the International Labour Organisation's (ILO) *Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value*[188]that had been ratified by New Zealand in 1983. The Court also considered Article 7 of ICESCR relating to fair wages and equal work for equal value, and Article 11 of CEDAW that requires the elimination of all discrimination against women in employment and in particular the right to equal remuneration and equal treatment in respect of work of equal value. The Court decided amongst other matters that it had jurisdiction to state general principles for the implementation of equal pay.

The Employment Court judgment implicitly, if not explicitly, acknowledges progressive realisation of ESCR. The Court said:[189]

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[185] *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the New Zealand Public health and Disability Amendment Bill (No2)* (6 May 2013)

[186] *Spencer v Attorney General* [2013] NZHC 3 October 2013

[187] [2014] NZCA 516 at[56]

[188] ILO 100

[189] At [110]

> *History is redolent with examples of strongly voiced concerns about the implementation of anti-discrimination initiatives on the basis that they will spell financial and social ruin, but which proved to be misplaced or have been acceptable as the short term process of the longer term social good. The abolition of slavery is an old example, and the prohibition on discrimination in employment based on sex is both a recent and particularly apposite example.*

The Employment Court decision was appealed to the Court of Appeal that dismissed the appeal. In the course of the judgment the Court affirmed:[190]

> *It is now settled law that there is an interpretative presumption that Parliament does not intend to legislate contrary to New Zealand's international obligations*

In support the Court of Appeal cited not only the *New Zealand Air Line Pilots Association* but also *Ye v Minister of Immigration*; *Zaoui v Attorney General*; and *Sellers v Maritime Safety Inspector*. This principle would appear to be now firmly established in New Zealand.

The SFWU pay equity case highlights that the fact that ESCR are to be found in ILO conventions as well as the United Nations Human Rights Treaties. The Employment Relations Act 2000 makes specific reference to ILO Conventions 87 and 98. Reference by the courts to ILO conventions has also been observed in recent decisions in the European Court of Human Rights (*Demir and Baykara v Turkey*). New Zealand was a founding member of the ILO and ratified many of the ILO conventions. Although the former industrial conciliation and arbitration system functioned as a closed 'legal' system, since the enactment of the Employment Contracts Act 1991 and the Employment Relations Act 2000 employment rights are subject not only to employment statutes, but also the common law and international conventions in a way that has not happened in the past. The construction of employment rights as human rights has opened a new line of argument in litigation. In 2013 Miller and Sissons[191]argued that both the ICPCR and ICESCR are relevant to the enforcement of employment rights, including the right to collective bargaining. At a recent NZ Law Society Employment Law conference there were two papers illustrating the increasing reliance on human rights arguments in the context of economic rights.[192] Dr Harrison QC issued a warning, however that "*Running human rights arguments in an employment law (or any other) context requires more than enthusiasm. It requires both application and discernment.*"[193]

A similar warning also came from Sir Kenneth Keith in his comments on recommendations made by the Human Rights Committee in 2010 and the Committee on Economic, Social and Cultural Rights in 2012 to the effect that concern was expressed over the fact the NZBORA does not take preference over ordinary law, and that the NZBORA does not incorporate ESCR. He notes in response to these recommendations:[194]

> *Perhaps the question may be asked is whether the committees are giving more weight than is appropriate to form rather than to substance, or in legal terms, to obligations of means rather than of result. … Whatever the answer to the question I have asked may be, the process does*

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[190] At [227]

[191] Edward Miller & Jeff Sissons (2013) "A Human Right to Collective Bargaining?" Paper presented at New Zealand Labour Lawyers Conference, 22 November 2013.

[192] Andrew Butler, "Human Rights in Employment – Discrimination and Privacy Issues", 10th NZLS Employment Law Conference, (2014) 149; Rodney Harrison, "Employment Law and Human Rights - A Crucial Interface", NZLS Employment Law Conference, (2014) 177.

[193] at 191

[194] Sir Ken Keith, (2013) "New Zealand and International Law: 1963-2013" 25 NZULR 718 at 736

> *have the real value to the wider legal and administrative system of emphasising an overall view. In particular, it helps emphasise the link between international law and constitutional law*

Sir Kenneth's comment reflects the traditional judicial reluctance to incorporate ESCR into the NZBORA while acknowledging the constitutional reality that New Zealand is ambivalent in judicial decision making on matters considered political. Sir Geoffrey Palmer more explicitly rejects the incorporation of ESCR into the NZBORA after a consideration of possible reform of the NZBORA, stating:[195]

> *I do not see judicial encroachment into key government activity would be acceptable in New Zealand and neither does it seem to me necessary or desirable. It runs contrary to our traditions and our political culture. Neither do I believe our judges have the background or capacities to make that sort of decision. …These issues are properly the stuff of politics. Politics is about who gets what, when and how. Politics is the language of priorities and priorities should not be set by the courts.*

3.8 The role of civil society

The role of civil society in this context is to hold the state to account. This is recognised in the Committee recommendations that NGOs be able to participate in the preparation of government reports. The consultative role was formally approved by the full committee of the Economic and Social Council of the United Nations (ECOSOC) that decides which NGOs have consultative accreditation. In an analysis of the evolving role of NGOs in realising ESCR including their role in ensuring Governments respect, protect and fulfil those rights, Walters notes the increasing number of NGOs that have embraced rights language in their advocacy work when lobbying for legislative and policy change.[196]Examples of this include submissions to Parliamentary Select Committees, submissions in response to Government's Periodic Reports relating to ICESCR, hosting events on ESCR issues and making public statements. NGO submissions on the Third Periodic Report on ICESRC included submissions from Aotearoa Indigenous Rights Trust, Amnesty International and the Peace Movement Aotearoa, as well submissions from international NGOs Human Rights and Tobacco Control Network, the International Baby Food Action Network and the International Disability Alliance. The NZHRC also made a submission. Submissions to the UPR also included reference to ICESCR.

3.9 The role of the NHRI

In accordance with the Committee recommendations for the NZHRC to take a lead role in the understanding and implementation of ESCR, it has been in the forefront of fulfilling this recommendation. For example, the commissioned research previously referred to[197]provided the basis for an informed discussion of the challenges and opportunities to fulfilling the State's obligation of progressively realizing those rights. The NZHRC has also been active in commenting on the Government Periodic Reports and the respect with which the NZHRC shadow submission was considered by the Committee is evidenced by the fact that the Committee accepted most of its recommendations. The development of the New Zealand Action Plan for Human Rights by the NZHRC was also part of the strategy to pursue ESCR at different levels. The increase in judicial

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[195] Rt Hon Sir Geoffrey Palmer (2013) "The Bill of Rights After Twenty-One Years" 11 NZJPIL 257 at 286

[196] Vanushi Walters, "The Work of NGOs in Advancing Economic, Social and Cultural Rights", in Bedggood & Gledhill Above n 162, 389

[197] Geiringer & Palmer, above n 35

review of ESC issues can be attributed to an activist approach taken by the NZHRC in support of litigants.

3.10 Conclusion

The principal conclusion from this analysis is that unless ESCR are incorporated within a statutory framework, whether that is the NZBORA or some other legislation, it will be difficult for individual litigants to legally enforce the implementation of ICESCR obligations. The primary means for doing so will remain ensuring public policy and legislation reflect the international obligations although explicit reference to ICESCR in the Cabinet Manual would ensure greater attention is given to ESC obligations during the policy making process. Greater information and knowledge of ICESCR amongst NGOs and the community would increase the level of awareness of the ICESCR and expectations that Governments take active steps to implement these obligations.

Chapter Four Convention on the Elimination of all forms of Racial Discrimination (CERD)

4 Background

The International Convention on the Elimination of Racial Discrimination (CERD) was the first thematic treaty in the international human rights framework. CERD came into force in 1969 and requires States Parties to:

- Not engage in any act or practice of racial discrimination against groups or individuals;
- Not sponsor, defend or support racial discrimination by persons or organisations;
- Review government, national and local policies and to amend or repeal laws and regulations which create or perpetuate racial discrimination;
- Encourage organisations and movements to eliminate barriers between races, as well as to discourage anything which tends to strengthen racial division.

New Zealand signed CERD in 1966 and ratified it in 1972.

The Government registered no reservations to CERD although it did to Art.20 of the ICCPR which relates to inciting racial hostility and reads:

> *The Government of New Zealand having legislated in the areas of the advocacy of national and racial hatred and the exciting of hostility and ill will against any group of persons, and having regard to the right to freedom of speech, reserves the right not to introduce further legislation with regard to Article 20.*

The apparent inconsistency – namely, the Government's position that domestic legislation complies with CERD by prohibiting incitement of racial hostility in the Human Rights Act 1993 (HRA) – has led the Human Rights Committee to consistently request New Zealand remove this reservation.

As became the norm with later treaties, an analysis of domestic legislation was first carried out to ensure New Zealand could comply with the obligations in the treaty in good conscience on ratification. CERD requires access to a complaints process to address complaints of racial discrimination in certain areas of public and private life.[198] As there was no existing mechanism, the Race Relations Act 1971 (RRA) was enacted. The RRA created the role of the Race Relations Conciliator and established a conciliation process. The Courts were seen as a last resort and best used as a threat to achieve settlement, the rationale being that:[199]

> *Conciliation and investigation procedures have better chances of reaching solutions of positive redress while sanctions resulting from judicial procedures can be reserved in particular for cases where the former procedures have failed.*

Conciliation and investigation procedures were also considered to be more educational and had the advantage of being more accessible to the interested parties but, despite the almost universal

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[198] Article 6

[199] Ken Keith, "The Race Relations Bill" in *Essays of Race Relations and the Law in New Zealand*, Sweet and Maxwell (1971) referring to Report of the Meeting of Experts on Discrimination in Employment and Accommodation, ILO, 231 October 1966 quoted in *Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres* 23 July 1970 E/CN.4/Sub.2/307at [108]

endorsement of this approach at the time the RRA was enacted, reservations were already being expressed about how efficient conciliation was in achieving societal change in areas such as structural discrimination.

The RRA was amended in 1977 when the Human Rights Commission Act 1977(HRCA) was introduced. The HRCA extended the grounds of unlawful discrimination to sex, marital status and religious or ethical belief in anticipation of New Zealand's ratification of the ICCPR and ICESCR. Some amendments were made to the RRA to ensure the compatibility of the legislation and it RRA was strengthened by providing a new procedure for pursuing complaints that could not be resolved by conciliation, extending the Conciliator's jurisdiction and increasing the penalties for infringement.

The HRCA was primarily an antidiscrimination statute. When the Minister of Justice reviewed the Act after 10 years, the Commission recommended a substantial overhaul including structural, procedural and jurisdictional changes. A Human Rights Amendment Bill was introduced in 1992 and came into effect in 1993. The 1993 Act created a new provision relating to racial harassment and introduced section 61 to replace section 9A of the RRA which had been repealed in 1989.

The HRA has been amended a number of times - in 1994 the status of the Race Relations Conciliator was formalised and in 2001 a major overhaul of the Act merged the Office of the Race Relations Conciliator with the Human Rights Commission and replaced the role of Conciliator with that of the Race Relations Commissioner. A Bill currently before Parliament will do away with the title of Race Relations Commissioner (although substantially retaining the functions) making the incumbent simply another Commissioner.

4.1 Reporting

Successive governments have complied with the requirement to submit periodic reports to the CERD Committee (the Committee), beginning with the first report in 1973 to CERD's ninth session. Since 1986, government reports have been consolidated – for example, the eighth and ninth reports were submitted as one document in 1990. The quality of reporting varies, as do the consistency and quality of the Committee's observations.

The Committee's major concerns which emerge from the Concluding Observations since 1995 are:

- The status of the Treaty of Waitangi and its relationship to the HRA;
- Disparities in terms of health, housing and education between Māori, Pacific people and European New Zealanders;
- The disproportionately high representation of Māori and Pacific people in the prison population;
- Concern about systematic consultation of minorities in decision making processes;
- Unsatisfactory response to the implementation of Article 4, the need for the Attorney-General's consent to institute criminal proceedings in cases of incitement to racial hatred and lack of proscription of racist organisations. (It is worth noting however that this concern is not unique to the CERD Committee. The explanation that the A-Gs consent is a systemic safeguard for a range of offences involving rights or other complex issues and must be exercised consistently with New Zealand's human rights obligations has been accepted by at least some of the treaty bodies);

- Lack of knowledge by the general public of avenues of redress and need to raise public awareness.

Emerging issues related to increased migration flows include:

- Concern about possible interethnic conflict among refugees;
- Immigrants presenting a threat to nationals.

4.2 Implementation of CERD – Article 14

De jure compliance with CERD appears good and indicators demonstrate that over the past 25 years New Zealand has adopted a great number of policies to give effect to the recommendations suggested by the CERD Committee.[200]However, outcome indicators which measure the *defacto* qualitative enjoyment of rights, suggest that the policies need to be strengthened in order to be genuinely effective. As the former Race Relations Commissioner put it, *"It's a lot about what we do, but there's not much of what has changed"*.[201]

One issue that the CERD Committee repeatedly includes as a Recommendation is that the government should make a declaration under Article 14. Article 14 recognizes the competence of the CERD Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by a State Party. The procedure is optional, so States have to explicitly recognise the Committee's competence to receive complaints. New Zealand's omission to do so compares unfavourably with its acceptance of the Human Rights Committee's recommendation to consider complaints about breaches of human rights in relation to their respective Covenants and Conventions where such provisions exist.

There has never been a satisfactory explanation for the Government's position on Article 14. One reason for it may be that the Government simply considers existing domestic and international complaint procedures (including under the ICCPR) are adequate, particularly when coupled with the early warning and urgent action procedures that allow those who are (or are about to be) subjected to racial discrimination by a State party to have their situation considered by the CERD Committee - these procedures were invoked in 2005 when the Committee considered a communication about the Foreshore and Seabed legislation and requested the State to closely monitor the implementation of the Act, its impact on Māori and the developing state of race relations in New Zealand. The CERD Committee invited the government to report on the implementation of the Act in its report to the Committee the following year.

In its first submission to the UPR in 2009, the Government stated that it "recognised the importance of individual complaint procedures, particularly in relation to issues as serious as racial discrimination under Article 14 ..."[202]and while recognition of Article 14 had not been actioned at the time of the second UPR in 2014, the chart on progress towards compliance in 2011 stated that New Zealand had accepted the recommendation and that the Ministry of Justice was considering whether to recognise the competence of the CERD Committee to hear individual communications.

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[200] See Appendix 5: Responses to Committee's recommendations 2011

[201] Interview with Joris de Bres: 18 June 2013

[202] *National report submitted in accordance with paragraph 5 and the annex to Human Rights Council resolution 16/21 – New Zealand* A/HRC/WG.6/18/NZL/1

4.3 Special Procedures

The Special Rapporteurs on the Rights of Indigenous People have twice visited New Zealand.[203] In 2005, Rodolfo Stavenhagen visited to gain a better understanding of the situation of indigenous people and issues such as the treaty settlement process, the implications of the Foreshore and Seabed Act, public policies designed to reduce social inequalities between indigenous people and others, the provision of basic social services such as education, housing and health care and the revitalisation of Māori. His recommendations included building on constitutional debates to ensure constitutional reform that would recognise the right to self-determination, granting the Waitangi Tribunal legally binding enforceable powers and allocating it more resources, entrenching the NZBORA and amending or repealing the Foreshore and Seabed Act. A number – such as the issues relating to the Foreshore and Seabed Act - were also reflected in the recommendations of the CERD Committee.[204]

Rodolfo Stavenhagen's successor, James Anaya, visited in 2010 partly to follow up on the work of his predecessor, but the main purpose of his visit was to examine the process for settling historical and contemporary claims based on the Treaty. In his report he described the Treaty Settlement Process as "*one of the most important examples in the world of an effort to address historical and ongoing grievances of indigenous peoples*." While noting that settlements already achieved had provided significant benefits in several cases[205]he reiterated concerns about the status of the Waitangi Tribunal, the high rates of Māori incarceration and the continuing social and economic disadvantage of Māori.

4.4 The role of NHRIs and civil society

As with the other treaty bodies the CERD Committee considers that NHRIs have an important role to play in the reporting process. They can provide information on issues relating to the consideration of reports of States Parties in both formal and informal meetings outside the Committee's working hours to members of the Committee, as well as respond to requests to clarify or supplement such information. NHRIs are also recognised as fundamental to the dissemination and implementation of the Treaty Body Recommendations on the ground. As one commentator has observed:[206]

> *NHRIs, due to their special status, make their interventions more palatable to governments, therefore facilitating accountability and compliance. This role is intensified and extremely relevant in dire situations where there is a breakdown in communication between governments and civil society.*

Although it is now generally accepted that NHRIs and civil society have a useful contribution to make to the cyclical treaty body reporting processes[207]this was not always the case. NHRIs have only had speaking rights at the UN since 2005 and even now this is limited to those with

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[203] There had also been earlier official visits by UN human rights experts, for example, Erica-Irene Daes, Chairperson-Rapporteur of the Working Group on Indigenous Populations in 1992, and Miguel Alfonso Martínez, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations in 1997.

[204] Although the Foreshore and Seabed legislation was eventually repealed, the former Race Relations Commissioner, Joris de Bres, credits the Maori Party rather than the UN mechanisms with achieving the change - albeit with the added credibility provided by the UN criticism. Interview with Joris de Bres, 18 June 2013

[205] *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of Maori People in New Zealand*, A/HRC/18/XX/Add.Y at para [67]

[206] Frans Viljoen, "Exploring the Theory and Practice of the Relationship between International Human Rights Law and Domestic Actors" *Leiden Journal of International Law*, 22 (2009) at 187

[207] Pillay above n 76 at 4.2.8

appropriate accreditation under the Paris Principles. Following the Durban conference in 2001 the Committee specifically noted that NHRIs can play an important role in combating racism and racial discrimination but needed to be strengthened and provided with greater resources to help them do so.

It was only after the rules of procedure were changed allowing NHRIs to make a statement directly to the Committee that the New Zealand Human Rights Commission (NZHRC) began to consciously engage with the CERD Committee.[208] The NZHRC's involvement increased after 2007 following a direct invitation from the Secretary to become involved, possibly as a way of neutralising the Government's concern at the Committee's comments on the Foreshore and Seabed legislation. It was also intended to ensure greater participation by groups other than Māori.[209]This subsequently translated into a more constructive role with the NZHRC liaising between the Committee, the Rapporteur and the Government. This was particularly important in the case of CERD because there is no obvious public sector agency to take the lead in compiling the report and monitoring implementation of the Convention. Until 2008 the report was prepared by the Ministry of Foreign Affairs which represents the Government but the Ministry did not take an active role in promoting it after it was presented and recommendations made. The most recent report was prepared by the Ministry of Justice and presented by the Minister of Justice, itself an improvement since the Justice Ministry has responsibility for human rights within New Zealand rather than New Zealand's reputation with the UN. From 2008 to 2013 the NZHRC monitored compliance with the Committee's recommendations through the publication of an Annual Race Relations Report which tracked the progress of race relations in New Zealand.

The former Race Relations Commissioner views the relationship between treaty bodies and NHRIs as critical principally because NHRIs act as the eyes and ears of the Treaty body domestically while the treaty body itself provides an external source of support for the NHRI. The significance of the role of NHRIs was also reinforced by one of the Crown Counsel[210]who routinely provides advice on compliance with human rights treaties. He observed that one of the usual requirements by the UN Treaty monitoring body is that publicity to the concluding observations and recommendations of the body be given by the state party. The extent to which New Zealand observes this in practice is low. While publicity may be given to the Concluding Observations and Recommendations by posting them on the relevant Ministry website, the level of comment and the implications for New Zealand appear to be poorly understood. He considered that New Zealand could usefully improve realisation of human rights domestically by an organisation such as the NZHRC that was independent of Government, undertaking an education exercise for relevant media personnel on human rights, including treaty body monitoring.

Civil society organisations can also play a significant role in the treaty body process through the provision of shadow body reports but very few do so in practice whether because of resourcing, time constraints or lack of understanding of the UN system. As Joris de Bres observed:[211]

[208] The Race Relations Conciliator has always been given the opportunity to comment on the Country reports before they were sent to the CERD Committee

[209] Interview with Joris de Bres: 18 June 2013

[210] Interview with Andrew Butler: 8 April 2013

[211] Interview with Joris de Bres: 18 June 2013

> *A weakness of civil society organisations in New Zealand is that they are not well resourced generally and many rely on contracts to deliver certain services that the Government should deliver ... and in race relations in particular there's really not much of anything.*

Although having said this, he considers that they will become more relevant as the treaty bodies make approaches to NGOs and technology improves. A lawyer who has attended a number of country examinations as part of the Government delegation suggested that video link participation would allow a larger group of specialist officials to participate alongside delegation representation which would make the examination of specific issues more efficient and in depth.[212]

The number of NGOs that provided shadow reports to CERD has increased since the perceived success in achieving repeal of the Foreshore and Seabed Act (in 2004). There were no NGO submissions in 2002 but by 2007, in addition to Peace Movement Aotearoa, the Human Rights Foundation and ACYA, Aotearoa Indigenous Rights Trust, the Treaty Tribes Coalition and a collective of four iwi Māori/indigenous peoples Authorities in Tai Tokerau submitted reports to CERD. To some extent the nature of this representation reflects the concerns of the Race Relations Commissioner that there was a disproportionate focus on issues relating to Māori over other ethnicities who, arguably but for the Commissioner's efforts, would have remained invisible.[213]

4.5 The use of CERD in judicial proceedings

Although the Courts play a significant role in promoting and protecting human rights, this is tempered to some extent in New Zealand by the fact that a "duallist" approach to international norms is assumed to apply.[214] The most overt reflection of this position can be found in *Ashby v Ministry of Immigration*[215]in which Cooke J (as he then was) referred to CERD and refused to accept that the treaty obligations created under the Convention were binding domestically since the treaty had not been incorporated into New Zealand law by an Act of Parliament . However, the position in fact is much more nuanced than this comment suggests, Cooke himself (by then President of the Court of Appeal) observing in a later case[216] that inviting the Court to ignore the international instruments was an *"unattractive argument that New Zealand's adherence to the international instruments had been at least partly window dressing*".

In *Northland Regional Health Authority v Human Rights Commission*[217]Cartwright J noted that the Courts in New Zealand have increasingly been prepared to look to international instruments and authorities to gain a better understanding of domestic human rights legislation, going on to state that "*where international principles are the foundation for domestic legislation the logical path to follow is one that*

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[212] Interview with Ben Keith: 8 April 2013. Keith indicated that while the delegation was well prepared and able to answer most of the Committee's questions it would have been helpful to call on subject specialists on points which the reviewing body wished to explore further. Specialists such as the Chief Paediatrician of the Ministry of Health who attended the CRC review can find it difficult to free up the time to travel the necessary distance. We understand that the matter has been raised informally with treaty body staff.

[213] It is worth noting that a survey, conducted annually by UMR Insight Ltd since 2000, showed in 2011 that 77 per cent of New Zealanders consider that Asians are discriminated against more than any other group. This figure is up from 75 per cent in 2009 and 74 per cent in 2008.

[214] That is international norms are only directly enforceable when implemented by national legislation. Under a monist system international norms do not need to be translated into national law. The act of ratifying an international treaty immediately incorporates that international law into national law allowing courts to enforce international law domestically. Neither approach adequately describes the situation in New Zealand

[215] [1981] 1 NZLR 222 at 224

[216] *Tavita v Minister of Immigration* 1 HRNZ 30

[217] (1997) 4 HRNZ 170

provides the international framework and understanding to illuminate and assist local decision-making."[218]Interestingly, although the Judge accepted that CERD had a part to play as the progenitor of the RRA and therefore race discrimination, she opted for the wider definition of discrimination in the ICCPR stating that the definition should not be read down to exclude a group that might not fall within the more limited definition.

In *Quilter v Attorney-General*[219], although all the Judges of the Court of Appeal approached the question of same sex marriage differently, at least three referred to the international framework as a way of clarifying the definition of discrimination. Thomas J in particular addressed the question of influence of the international covenants and conventions as not providing the complete answer but assisting to indicate the underlying nature or essence of discrimination and expressing basic values which the community, in ordering its affairs, is to observe.[220]

CERD was also mentioned, but not developed further, in *Wheen v Real Estate Agents Licensing Board* [221]and *Mendelssohn v Attorney-General.*[222]

However, despite increasing reference to international obligations by the courts which has led some commentators to claim that international human rights obligations have "moved centre-stage",[223] it is still arguable how influential treaties such as CERD are in practice. One reason for this may be the lack of understanding of the international human rights treaty framework and its significance among legal practitioners – something that itself reflects the lack of publicity given to the treaty body reports and their conclusions.

4.6 Conclusion

Despite New Zealand's apparently good record of compliance, it is unclear whether ratification of the Convention has significantly altered its behaviour. It may well be that the most important impact of the Convention was the introduction of the RRA and its subsequent incorporation in the HRA.

As with other treaties the nature of the obligation and how difficult or costly it is to implement will be relevant. A commitment that is comparatively easy to give effect to or which reflects ongoing work will be easily accommodated whereas one which would involve greater disruption will either be the subject of a reservation, or deflected by ambiguous comment about observance. Given this, it is difficult to understand New Zealand's reluctance to accept Article 14 since it would not demand undue resources in practice.

A researcher from the Netherlands who recently carried out a project on domestic compliance with international commitments observed that only two of CERD's Concluding Observations appear to have contributed in any way to bringing about change - the overrepresentation of Māori in

[218] At [4]
[219] [1997] 4 HRNZ at 170
[220] At 182, line 40
[221] [1997] 4 HRNZ at 15
[222] [1999] 5 HRNZ at 1
[223] Andrew Butler & Petra Butler, "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173 at 187

prisons and repeal of the Foreshore and Seabed Act.[224] Even this is contestable, however, given the overrepresentation of Māori in the justice system is an ongoing issue that is resistant to easy resolution, and the repeal of the Foreshore and Seabed Act had an added impetus as a condition of the Confidence and Supply Agreement between National and the Māori Party in 2009.

While the CERD Committee and Special Rapporteurs may not have directly influenced the Government's decision making, the Government has certainly been aware of their criticism and NGOs have relied on the recommendations to inform their advocacy.

[224] Jasper Krommendijk, *The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper Pushing or Policy Prompting?* School of Human Rights Research Series, Vol.63 (2014) at 297

Chapter Five The Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

5 Background

The International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is often described as the international bill of rights for women.

CEDAW was adopted by the United Nations General Assembly on 18 December 1979 by a vote of 130 states in favour, none against and 10 abstentions. It entered into force on 3 September 1981.[225]It was a product of universal participation, drafted by the Commission on the Status of Women, whose members included representatives of Great Britain, United States and Canada, among others. The United Nations General Assembly adopted an Optional Protocol to the Convention, containing a procedure for consideration by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) of individuals' complaints of violations of CEDAW rights, as well as a procedure under which the Committee may undertake an inquiry into serious, 'grave or systematic' violations of the Convention rights by a State party.[226]

CEDAW has sixteen substantive articles which impose obligations on New Zealand to eliminate discrimination against women. Article 1 defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or the purpose of impairing or nullifying the recognition, enjoyment or exercise by women…of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

By the 1990s women's rights had become more significant in United Nations discussions and were recognised as human rights. They were specifically addressed in the 1993 Vienna World Conference on Human Rights, which focused on women's equality with men, and the Fourth World Conference on Women in 1995. Following the conference the Beijing Declaration and Platform for Action went further than merely emphasising equality between men and women and set out a programme of women's empowerment. CEDAW brings together civil and political, economic, social and cultural rights in a framework that identifies the complex meanings of discrimination and offers strategies to overcome it.[227]

New Zealand signed the Convention on 17 July 1980 but by 1983 when the National Council of Women was urging the Government to ratify the Convention, there was both support and opposition for it. Chen reports that the National Government remained undecided about ratification despite the NZHRC reporting to the Prime Minister that it should be ratified.[228]

The Commission said:[229]

> *While there may be a small number of areas where New Zealand law is inconsistent with or runs counter to the requirements of the Convention, it is in the area of practice and attitudes*

[225] United Nations, *Treaty Series,* vol. 1249, 13.

[226] United Nations, *Treaty Series,* vol. 2131, 83.

[227] Andrea Den Boer, (2008) "Evaluating CEDAW's impact on women's empowerment": Paper presented at the International Studies Association Conference, San Francisco, 26-29 March.

[228] Mai Chen (1989). *Women and discrimination: New Zealand and the UN Convention*. Wellington: Victoria University Press for the Institute of Policy Studies.

[229] Pat Downey, (1983). *The International Convention on the Elimination of All Forms of Discrimination against Women. Report to the Prime Minister on Proposed Ratification* at 3 & 8

> *that the greatest actual discrimination against women occurs. Genuine equality cannot be measured absolutely by legislative reform. Attitudinal change is the enduring and crucial hurdle to be overcome before true equality can be achieved. ……It is the Commission's view that there is no fundamental impediment either in law or practice which would prevent this country ratifying the Convention.*

In 1984 a newly elected Labour Government gave an unqualified promise to ratify the Convention.[230] Newspaper reports of the day show letters and petitions for and against ratification were sent to both the Prime Minister and the Governor-General. The domestic implications of the Convention were debated in the media and several protest marches were held for and against ratification. A paper by the NZHRC - "What's It All About?" - identified "anxieties" from some groups and individuals about ratification and invited submissions, and answered questions. The paper noted that New Zealand had ratified every major United Nations instrument that had embodied the principle of equality of men and women and which had sought to remove discrimination against women. If countries like New Zealand with a good human rights record stood aside we would lose the opportunity to influence others internationally.[231]

Also in 1984 the Ministry of Women's Affairs was established. A series of meetings held throughout the country to determine the priorities and work programme of the new Ministry sharpened some of the debate about the Convention. Nonetheless the Government ratified the Convention on January 10, 1985.[232] The ratification was subject to three reservations relating to women working in underground mines, to Article 11(2)b in relation to paid maternity leave, and women's service in armed combat roles in the Defence Forces. The reservations were lifted respectively in 1989, 2003 and 2007.[233]

New Zealand ratified the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women on 7 September 2000. Former Governor General Dame Sylvia Cartwright, a member of the CEDAW Committee from 1992 to 2000, was actively involved in negotiating the final text of the Optional Protocol.

5.1 Treaty body reporting

Reporting on international human rights treaties has an expressive function in and of itself. As a recent Minister of Women's Affairs, Hon. Jo Goodhew, said in an interview for this research:

> *I think the CEDAW process itself helps women's progress. I honestly believe the externality of it, the timeframe of it in that you are working on a date to report, the international nature of it, and there is always pride as nation are motivations…*

New Zealand rates highly for taking its CEDAW reporting seriously. Since New Zealand ratified the Convention it has sent consistently high level delegations to lead the examination.[234]

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[231] Human Rights Commission (1984) *Convention on the Elimination of All Forms of Discrimination against Women: What's It All About?* A Review Paper.

[232] New Zealand Ministry of Foreign Affairs and Trade (2008) *New Zealand Handbook on International Human Rights*. Wellington

[233] Ministry of Justice, *New Zealand. Convention on the Elimination of All Forms of Discrimination against Women*. http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/i accessed on 18/5/2012.

[234] Hon. Katherine O'Regan, Associate Minister (1994); Deborah Morris, Associate Minister (1998); Hon. Ruth Dyson, Minister (2003); Hon Lianne Dalziel, Minister (2007); Hon Jo Goodhew, Minister (2012).

New Zealand has reported seven times since 1988 on its implementation of CEDAW (the third and fourth reports were combined). From the second report in 1993, the CEDAW Committee's Concluding Observations and Recommendations have raised several major concerns about women's inequality including:

- The absence of over-arching equality legislation in New Zealand
- Equal pay and pay equity
- Paid parental leave (1993-2003).
- Women's participation and representation in various areas such as politics, judiciary, public service and the corporate sector
- The disparities for Māori women and structural inequalities
- Violence against women.

This research has paid specific attention to the issue of equal pay and pay equity[235]in treaty body reporting and the influence of CEDAW on legislative change around paid parental leave.

Equal pay is fundamental to gender equality. It was first outlined in Article 23(2) of the UDHR which stated: *Everyone, without any discrimination or distinction of any kind, has the right to equal pay for equal work*. It is referred to in other major treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Articles 3 and 7a). Article 11 of CEDAW reads:

> *State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (d)...the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.*

Various International Labour Organisation (ILO) Conventions such as ILO Cl00, Equal Remuneration Convention and ILO Cl 11, Discrimination (Employment and Occupation) Convention specify equal pay and pay equity obligations. Both the treaties on racial discrimination, the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) and on the rights of disabled people, the Convention on the Rights of Persons with Disabilities (CRPD), also refer to equal pay. New Zealand has ratified all of these treaties. In the case of the most recent convention, the CRPD, it led the international community in the development and acceptance of the treaty, providing further evidence of its positive self-image as a human rights leader.

The following section summarises the relevant equal pay-related comments made by the State party, and the concluding observations and recommendations back from the Committee to New Zealand.

5.1.1 First report, 1986

New Zealand's first report to the CEDAW Committee in 1986 stated that there was no overall differentiation by sex in New Zealand law and that, in employment and in society, women were increasingly taking opportunities (New Zealand's First Report, 1986). The report highlighted the Government Service Equal Pay Act 1960 and the Equal Pay Act 1972 (which applied to the private

[235] Judy McGregor, (2014) "The human rights framework and equal pay for low paid female carers in New Zealand" *New Zealand Journal of Employment Relations,* 38(2) 4-16.

sector). It also referred to s.15 of the Human Rights Commission Act 1977, which covered the prevention of sex discrimination in employment. New Zealand said, while societal attitudes were not static, it could not be said that women and men themselves practice full equality in the workplace. The report stated that women still tended to choose certain types of employment, the majority in clerical/secretarial work and other traditional occupations, such as nursing and garment manufacturing.

The difference between de facto and de jure sex discrimination was noted by the Committee in its concluding comments back to New Zealand.[236] Despite the absence of legal barriers to equality between men and women in New Zealand and even though women had acquired the right to vote in 1893, in practice the barriers created by tradition, history and structures still existed.

The Committee said that job sexual segregation seemed to cause problems with regard to equal pay. It asked how those problems had been dealt with, whether gender-neutral job evaluation schemes had been of use, whether wage differential studies had been carried out, whether cases on wage discrimination based on sex had been raised and, finally, how wages were set and what was the role of the trade unions in wage negotiations.

5.1.2 Second report, 1993

The government reported that, during the reporting period (1986-1992), women had continued to earn significantly less than men.[237] While the pay gap between male and female earnings closed from 72 percent to 79 percent between the passage of the Equal Pay Act 1972 and its final implementation date in 1977, it had risen by only two percentage points to 81 percent in the previous 15 years. The report said that despite the existence of the Equal Pay Act, the distribution of market income in New Zealand was heavily weighted in favour of men. Provisional 1991 census results showed males were still receiving more income than females in all groups over $20,000 a year, and that 60 percent of all people earning $20,000 or less were female.

The report referred to the effectiveness of the Equal Pay Act in light of the breakdown of collective bargaining that began with the Employment Contracts Act 1991. It said the practical application of the Equal Pay Act remained unclear in the case of individual contracts as no cases had been taken.

The introduction and then quick repeal of the Employment Equity Act 1990 was also referred to. It said that, in the 1980s, some test cases under the Equal Pay Act confirmed that the Courts interpreted the provisions of the Act as applying only where men and women were doing the same or substantially the same work. However, many groups recognised the need for wider legislation to cover pay equity or equal pay for work of equal value and to address the differing pay rates of women and men in predominantly single sex occupations such as nursing and police work (which many considered carried equal levels of responsibility but not equal levels of remuneration). The report noted a strengthening of the equal pay campaign by civil society and government initiatives to respond including the Employment Equity Act 1990 which covered both pay equity and equal employment opportunities. The Act was described as legislation constructed within the industrial relations framework prevailing at that time.

[236] Committee on the Elimination of Discrimination against Women, 1988

[237] Committee on the Elimination of Discrimination against Women, 1993a

In its response the Committee noted, as one of several principal areas of concern, that women's annual income was not equal with that of men for many reasons, particularly because of their need to accommodate family responsibilities.[238]Although the Government had taken measures to improve women's income, it had abolished pay equity legislation during the reporting period. More efforts needed to be taken to alleviate the burden on women in that respect.

The Committee urged the Government to take affirmative action measures in cooperation with the private sector to help women cope with family and work responsibilities. It also noted its concern that changes to employment legislation were likely to weaken the trade union movement. Without strong union support, women in paid employment would lack the means to negotiate better work conditions with their employers.

The Committee recommended that in its next report the Government provide more detailed information about the obstacles which still existed and prevented women from achieving full equality.

5.1.3 Third and fourth reports, 1998

In this report the Government informed the Committee that in August 1997the average hourly earnings of women were 81.2 percent of men's.[239]This relativity had remained almost unchanged since the implementation of the Equal Pay Act. Part of the difference was attributed to longer hours of work and more overtime by men. The report noted that the gender pay gap was worse in the public sector at 76.2 percent than the private sector at 80.2 percent.

Research by the New Zealand Institute of Economic Research indicated that the gender pay gap was unlikely to narrow over the next five years if the recent industry trends continued. This reflected the concentration of women in industries, such as business and financial services, where the gender earnings gap was predicted to grow, and above-average wage growth in industries where women were under-represented. Other significant factors affecting earnings were the level of seniority, levels of skills, experience and job-related training, and the duration and continuity of employment but it was difficult to quantify the effects of these factors due to the paucity of data.

The report noted that the Ministry of Women's Affairs was responsible for a research program on the gender pay gap and that the New Zealand Council of Trade Unions was developing a three-year campaign to achieve equal pay to mark the 25th anniversary of the Equal Pay Act 1972.

5.1.4 Fifth report, 2002

In 2002 New Zealand told the Committee that legislation providing for equal pay for work of equal value had been repealed in 1990, and the labour market had been deregulated.[240] It said that after entering office, the new Government had begun to reverse the effects of deregulation by establishing a Pay and Employment Equity Task Force to promote equality in public sector jobs. The Task Force was due to establish a five-year plan of action by 1 December 2003. It was hoped that in demonstrating the value of a policy based on equality the plan of action would also serve as a model for the private sector.

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[238] Committee on the Elimination of Discrimination against Women, 1993b

[239] Committee on the Elimination of Discrimination against Women, 1998

[240] Ministry of Women's Affairs, 2002

Committee members requested additional information on the measures the government had taken to eliminate horizontal and vertical employment barriers and pay gaps.[241] Clarity was also sought on whether cases of pay gaps had been referred to a court and, if so, whether the employer or employee bore the burden of proof. The Committee chairperson ended the dialogue with New Zealand with the comment that the Committee hoped that effective action would be taken to deal with the country's gender segregated labour market and wage disparities between men and women. In its press release after it examined New Zealand's report, the Committee listed the financial repercussions of wage gaps between men and women as an area requiring further attention.[242]

5.1.5 Sixth report, 2006

The Committee expressed concern that, while New Zealand law recognises the principle of equal pay for work of equal value, the mechanisms for implementing this principle in the private sector, such as industry wide job evaluations to ensure equal pay for women performing work of equal value, had been abolished.[243]

It also criticised the fact that the Government lacked the authority to implement and enforce equal employment opportunities policies in the private sector and recommended the enactment of comprehensive laws guaranteeing the substantive equality of women with men in both the public and private sectors, especially in regard to equal pay and equal opportunity in employment.

5.1.6 Seventh Report, 2010

Given that the New Zealand government had dismantled the majority of its equal pay machinery in 2009, it is instructive to note how the State party reported on the gender pay gap to the Committee a year later and the nature of the Committee's latest response.

First, New Zealand acknowledged that the gender pay gap remained stubborn and its causes were complex and there were no simple solutions.[244] The gender pay gap of 11.3 percent was the lowest recorded since the New Zealand Income Survey first measured the pay gap in 1998, but it had changed very little in the last decade.

The Department of Labour's Pay and Employment Equity Unit (PEEU) designed and produced pay and employment equity toolkits and other practical assistance for state sector employers in New Zealand to help them assess pay and employment equity issues within their workplaces. Pay and employment equity reviews in the public sector were conducted between 2005 and 2009. All reviews except one found gender pay gaps, which varied in size between three to 35 percent. PEEU's obituary was consigned to a single sentence in the report: The work of PEEU was discontinued in 2009.

The more explicit urgings and recommendations by the CEDAW Committee in its reports to New Zealand included those relating to equal pay and pay equity. These were:

- Enact appropriate legislation that guarantees the operationalisation and implementation of the principle of equal pay for work of equal value in line with Article 11(d) of the Convention.

[241] Committee on the Elimination of Discrimination against Women, 2003a
[242] Committee on Elimination of Discrimination Against Women, 2003b
[243] Committee on the Elimination of Discrimination against Women, 2007
[244] Committee on the Elimination of Discrimination against Women, 2010

- Effectively enforce the principle of equal pay for work of equal value through establishing specific measures and indicators, identifying time frames to redress pay inequality in different sectors and reviewing the accountabilities of public service chief executives for pay policies.
- Adopt policies and take all necessary measures, including temporary special measures, in accordance with Article 4, paragraph 1, of the Convention and the Committee's general recommendation No 25 with time-bound targets to eliminate occupational segregation both horizontal and vertical.
- Ensure that there is a monitoring institution for gender pay inequity within the State party's administration despite the closure of the Pay and Employment Equity Unit in the Department of Labour.[245]

5.1.7 Analysis of CEDAW reports on equal pay

Analysis of the reports, demonstrates that the Committee noted retrogression in equal pay and pay equity in the second, sixth and seventh reports. In the second report in 1992, it noted the repeal of the Employment Equity Act in 1990, and in the sixth report it was concerned about the abolition of mechanisms, namely the Pay and Employment Equity Unit. The seventh report explicitly urged legislative change relating to equal pay for work of equal value; indicators, timeframes and improved accountabilities in the public service; and the use of affirmative action to eliminate occupational segregation and effective monitoring of the gender pay gap.

Successive New Zealand government reports to the CEDAW Committee have acknowledged equal pay and pay equity to varying degrees as significant, systemic and continuing barriers to gender equality. They also reflect the peaks and troughs of active and passive political commitment to addressing the gender pay gap domestically. In response successive UN committees have sought to increase the tempo on equal pay but what distinguishes the last report in 2010 is the specificity of the recommendations and the move from rhetorical encouragement to active identification of actions that need to be taken.

5.2 Legislative change

New Zealand's ratification of CEDAW was a catalyst for significant legislative change on paid parental leave.

The two other reservations that New Zealand had entered at the time of ratification were less significant and were eventually lifted. New Zealand had opposed the ILO Convention relating to the prohibition of women working in underground mines, even at the time of CEDAW's ratification. The last reservation relating to the ban on women in combat roles was also out-dated by the time it was lifted and legislation merely confirmed an earlier change in Defence Force practice allowing women's participation.

Paid parental leave, though, was in a different category. Analysis of CEDAW treaty body reporting shows a maturing of attitudes over the years towards paid parental leave. The second national report to CEDAW in 1993 stated: *Maternity and parental leave on pay is not part of New Zealand law or practice, and it is not the intention of the Government to introduce this requirement.*[246] The CEDAW Committee asked about the apparent discrepancy between the reservation on paid maternity leave and various

[245] Committee on the Elimination of Discrimination against Women, 2012

[246] Committee on the Elimination of Discrimination against Women (CEDAW), 1993. *Consideration of reports submitted by States Parties under Article 18 of the Convention: Second periodic reports of States parties. New Zealand*. CEDAW/C/NZE/2 at 42.

anti-discrimination measures including the new Human Rights Act. It also asked whether the Ministry of Women's Affairs and the trade unions had raised paid maternity leave. New Zealand's representative said the Government felt paid maternity leave was a contractual arrangement not subject to government direction. In its response the Committee suggested New Zealand review its reservation: *The Committee found it difficult to understand why paid maternity leave had not been implemented in working life.*

The combined third and fourth reports of New Zealand showed the winds were shifting. The report stated that the Ministry of Women's Affairs had published research comparing New Zealand's policies internationally that showed New Zealand had strong job protection and good access to maternity, paternity and extended parental leave, but this was limited for those in casual and seasonal work. The report said the research had showed that "women may be unable to afford to take unpaid leave". It also noted that parental leave payments were being negotiated in some employment contracts, despite the absence of legislative compulsion.[247]

In 2003 the Minister of Women's Affairs, Hon. Ruth Dyson, presenting the fifth periodic report told the Committee that Cabinet had authorised the removal of the reservation to Article 11.2 (b) of the Convention subject to the approval of the appropriate parliamentary committee. The decision had been made because of the introduction of up to 12 weeks of Government-funded paid parental leave, subject to certain prior employment conditions. The leave arrangements were being reviewed and might be expanded if resources permitted.[248]

Former Human Rights Commissioner Joy Liddicoat, who accompanied the Minister as a technical advisor in New Zealand's examination on its fifth CEDAW report, states that after CEDAW, the Minister returned to New Zealand committed to the implementation of paid maternity leave. The Minister said, 'I must, and we've got to, push on it.'[249]

Paid parental leave is an example of where ratification of CEDAW, and the persistent international feedback from CEDAW experts and encouragement of change by a treaty body, have contributed (at least in part) in helping to produce positive legislative change for women and their families.

It is likely that paid parental leave will continue to be a feature of CEDAW treaty body reporting given New Zealand's low rate of payments by OECD countries' standards. Australia, which currently has two weeks more than New Zealand's 16 weeks at 18 weeks,[250] intends to raise the period of paid parental leave to 26 weeks in 2014.[251] The New Zealand Government indicated paid parental leave cover would improve but it has also stated it would veto the Labour Opposition's Parental Leave and Employment Protection (Six Months Paid Leave) Amendment Bill that proposes 26 weeks leave. Of the 3,809 submissions to the select committee looking at this bill, 99.6 per cent favoured 26 weeks and women's civil society has coalesced around increased payments.

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[247] Committee on the Elimination of Discrimination against Women (CEDAW) (1998) *Consideration of reports submitted by States Parties under Article 18 of the Convention: Third and fourth periodic reports of States parties. New Zealand.* CEDAW/C/NZL/3-4 at 47.

[248] Committee on the Elimination of Discrimination against Women (CEDAW) (2003) *Consideration of reports submitted by States Parties under Article 18 of the Convention (continued): Fifth periodic report of. New Zealand.* CEDAW/C/SR.624 at 2 [4]

[249] Interview with Joy Liddicoat for this research.

[250] PPL has increased to 16 weeks from April 1st 2015 and will go to 18 weeks from April 1st 2016.

[251] Issac Davison, (2004) "Paid parental leave to grow, but not to 26 weeks". *NZ Herald*, Saturday, March 1, 2014. http://www.nzherald.co.nz/nz/news/article.cfm?c-id=1&objectid+11211849.

5.3 Use of human rights norms in policy and practice

The ratification of CEDAW by New Zealand and the creation and establishment of the Ministry of Women's Affairs were related. The Ministry of Women's Affairs (now the Ministry for Women) became the machinery by which New Zealand gave effect to implementing CEDAW. To that extent, then, ratification influenced the policy mechanisms available to advance gender equality.

In an interview Dame Ann Hercus states that prior to the 1984 snap election in New Zealand *there was a vigorous community discussion about CEDAW with an enormous amount of misinformation floating around,* prompted by fundamentalist Christian groups. As Opposition spokeswoman on women's affairs she mailed out a press statement trying to counter the misinformation. The creation of the Ministry of Women's Affairs and the ratification of CEDAW came out of the Labour Women's Policy Conference in 1982/3 and were several of the six or seven planks of the party's election policy. Dame Ann held the Minister of Women's Affairs portfolio (along with Police and Social Welfare) and she recalls the financial constraints surrounding the establishment of the Ministry.

> *My first memory of becoming the Government was the Governor of the Reserve Bank walking in saying 'the cupboard is bare. If you think as an incoming government that you can fulfil a whole lot of commitments, think again. There's been a run on the dollar and the economy is in an appalling shape.' For someone who had left a high-paying job as deputy chair of the Commerce Commission to enter politics with six years in Opposition working hard, this came as a cruel blow to me and to everybody.*
>
> *So as new Ministers were sworn in our first jobs, the thought of setting up a new Ministry with no funding was a bit daunting. However, it was clear to me that from a strategic point of view we had made an absolute commitment to the electorate at large and had been elected with a significant women's vote. I believed that it was perfectly reasonable to assess that we were partly government on the backs of women, and therefore had to have the Ministry of Women's Affairs.*

Funding issues were coupled with political and bureaucratic disinterest and public opposition to the establishment of the Ministry. Dame Ann had to fight several battles to overcome this:

> *The first was with some of my colleagues including the former Prime Minister David Lange. Their commitment to equality of women, to feminism and their election commitment turned out to be a tad thin. I do not know to this day whether that was because of the thinness of their own commitment to the equality of women and the place of women in the Party, who some felt threatened by, or it was genuinely because the country could not afford it. The opposition was unhelpful particularly as I had three portfolios and had to negotiate through a number of difficult areas. I did not want the Ministry to be a trade-off.*
>
> *The second battle occurred when I struck a brick wall from the State Services Commission which made it clear in a number of ways that it did not support small standalone Ministries. It tried very hard to persuade some of my less helpful colleagues that what we could do is just tuck into Internal Affairs or be a branch office of some kind. This undermining was absolutely improper on the part of public servants.*

Dame Ann said the third battle was external, from fundamentalist groups who attended meetings about the ratification of CEDAW and the establishment of the Ministry and mounted strong

opposition to the initiatives. In the end she approached the then President of the Labour Party Margaret Wilson to approach the Prime Minister about support and resourcing.[252]

Since its inception the Ministry has weathered highs and lows in resourcing, political and public commitment and public sector leadership. Some of its measures have been effective in terms of process and influential in terms of outcomes. For example, the establishment of a nominations service providing a data bank of women with skills, experience, interest and expertise that can be used in appointment processes to government statutory bodies has been a plus. The nominations service, plus advocacy, contribute to New Zealand's government statutory bodies much higher female representation at 41.5 per cent compared to the internationally low 14.75 percent female representation of the top 100 companies by market capitalisation listed on the NZX (New Zealand Stock Exchange).[253]

Other initiatives have not fulfilled their promise to progress women's equality. The mainstreaming of gender analysis in legislation and government policy is an example of a missed opportunity. For example, Hon. Ruth Dyson told the CEDAW Committee in 2003 that since 2002 the Government had required all papers considered by the Cabinet's Social Development Committee to include gender implications statements supported by a gender analysis. In the same session a CEDAW Committee expert asked the obvious question- why only social policy, rather than economic and immigration policies, for example? The Minister responded that migration issues were also addressed at the Social Development Committee. However, she shared the concern that gender analysis should extend to all ministries.[254]

It is clear, too, from treaty body reporting and involvement in civil society activity, that Māori women's representatives have not seen the Ministry of Women's Affairs as necessarily addressing their issues. At one stage domestically the late Jacqui Te Kani, former president of the Māori Women's Welfare League, publicly advocated for a separate ministry for Māori women.[255] She also told an NGO consultation meeting with CEDAW Committee members at the United Nations when New Zealand was presenting its fifth report that it was *"imperative that we advance equity, opportunity, autonomy and participation for Māori indigenous women of New Zealand/Aoteaora and that we are accorded our rightful status as tangata whenua*", comments echoed by Kitty Bennett, then president, who talked of "our right to represent Māori women" who were greatly discriminated against."[256]

A formal review of the Ministry in 2011 said it faced the usual problems endemic to small organisations including limited depth and breadth of skills and experience and identified a need to strengthen policy capability and capacity.[257] In the examination of New Zealand's fifth report, the Minister of Women's Affairs Hon. Ruth Dyson answered criticism by Committee experts about

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[252] Professor Margaret Wilson, now at the University of Waikato's Law School, is one of three researchers involved in this project.

[253] New Zealand Human Rights Commission (2012) *The New Zealand Census of Women's Participation 2012*. Wellington; Human Rights Commission.

[254] Committee on the Elimination of Discrimination against Women (2003*). Consideration of reports submitted by States parties under article 18 of the Convention (continued). Fifth periodic report of New Zealand.* CEDAW/C/SR.624 at.2 and 5, [8], [27], [34].

[255] Meeting attended by one of the researchers, Professor Judy McGregor.

[256] New Zealand Mission to United Nations Facsimile 7 July 2003, copy retrieved from the Ministry of Women's Affairs library.

[257] Formal review of the Ministry of Women's Affairs (2011) State Services Commission, the Treasury and the Department of the Prime Minister and Cabinet. Retrieved from http:/newzealand.govt.nz.

the absence of gender disaggregated data, by stating the MoWA faced the same problem of other population agencies in that the performance of other ministries had an effect on its own performance and it could not be held solely accountable for the action or inactions of other departments.[258]

The CEDAW Committee in 2012 said that it was concerned that the State party had not taken sufficient measures to ensure that gender was mainstreamed into all national plans and government institutions as requested by the Committee in its previous concluding observations. The Committee noted with concern that the State party had not introduced a national plan of action for women to replace the one that ended in 2009 and that the Ministry of Women's Affairs lacked adequate resources for its many tasks.[259] The same year the Minister of Women's Affairs dropped to being one of four Ministers outside of the Cabinet of 20 ranked Ministers and in 2014 it has slipped to being outside of Cabinet at 25th of 26 ministerial positions.

5.4 The use of CEDAW in judicial proceedings

The following table shows that CEDAW has been referenced in a limited number of cases since the treaty was ratified. The most recent cases (the last two in the table) concern equal pay. A substantive hearing in what has become known as the Kristine Bartlett case will now be heard in the Employment Court.

[258] Committee on the Elimination of Discrimination against Women (2003). *Consideration of reports submitted by States parties under article 18 of the Convention (continued).* Fifth periodic report of New Zealand. CEDAW/C/SR.624 at 8 [54]
[259] Committee on the Elimination of Discrimination against Women (2012). *Concluding observations of the Committee on the Elimination of Discrimination against Women. New Zealand.* CEDAW/C/NZL/CO/7 [16]

Table 3. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CASE	COURT	INTERNATIONAL REFERENCE	STATE REPORT IN WHICH REFERENCED
"People", Re [1993] NZAR 543	Indecent Publications Tribunal	CEDAW	
New Zealand Van Lines Ltd v Proceedings Commissioner [1995] 1 NZLR 100, (1994) 4 NZELC 98,289, [1994] 2 ERNZ 140	High Court	CEDAW	Use of CEDAW to interpret domestic law in case of sexual harassment.
Northern Regional Health Authority v Human Rights Commission [1997] 4 HRNZ 37	High Court	CEDAW	It is said that UN treaties are not legally binding
G v G [1997] NZFLR 49, (1996) 1 BACR 286, (1996) 15 FRNZ 22	High Court	CEDAW	
Quilter v Attorney-General [1998] 1 NZLR 523, [1998] NZFLR 196, (1997) 3 BHRC 461, (1997) 16 FRNZ 298, (1997) 4 HRNZ 170	Court of Appeal	CEDAW	CEDAW is used whether marriage covers same sex marriage. It is said that UN treaties are not legally binding
Mendelssohn v Attorney-General [1999] 2 NZLR 268, (1999) 5 HRNZ 1	Court of Appeal	CEDAW	
Director of Human Rights Proceedings v Cropp (2004) AP7-SW03	High Court	CEDAW	Reference to CEDAW in a sexual harassment case
Bullock v Department of Corrections (2008) 5 NZELR 379	Human Rights Review Tribunal	CEDAW	Discrimination by reason of sex in the department. Reference to CEDAW
Service and Food Workers Union Nga Ringa Toa Inc. v Terranova Homes & Care Ltd [2013] NZ EmpC 157	Employment Court	CEDAW & ILO Conventions	Notes that concern of the international instruments is to eliminate all forms of discrimination in pay on grounds of gender
Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Toa Inc.	Court of Appeal	CEDAW & ILO Conventions	Now settled law that there is an interpretive presumption that Parliament does not intend to legislate contrary to New Zealand's international obligations. However, suggests that the usefulness of Convention 100 as an interpretive aid is limited.

The CEDAW Committee has not received any communications relating to New Zealand under the Optional Protocol to CEDAW which was ratified in 1999.

5.5 Engagement of civil society

Hon. Jim McLay, New Zealand's Permanent Representative in New York at the time of the last periodic examination under CEDAW said in an interview:

> *I am a supporter of civil society. The role of NGOs is to always be pushing the envelope- they'll always be ahead of where governments are prepared to go and they play a very important role. That doesn't mean that I always agree with what they say or even their tactics sometimes but I regard them as being an important ingredient of the total picture.*

Of all the major international human rights treaties that New Zealand has ratified, CEDAW, stands out for the level and intensity of civil society engagement at different levels of the process including

engagement in consultation for the national report; the writing and submission of shadow reports; and NGO representation at the country's periodic examination at the United Nations. As an example of how widespread civil society engagement is with CEDAW, records show that 37 national and local groups and individuals made written submissions on the draft national report which was circulated for public comment from 13 December 2001 to 28 February 2002 before New Zealand's sixth periodic examination.

However, there is varying opinion about the consultation processes, depth of analysis and the writing of shadow reports by civil society, even from women's groups themselves. The CEDAW Committee Rapporteur on New Zealand in its latest examination, Dr Niklas Bruun, in an interview made the general observation that while it was very important to have civil society input, the quality varied. The Finnish academic and only male on the CEDAW committee at the time said:

> *Some make strong recommendations but have no evidence to support them. Others can be vague and reflect strong opinions. Yet others file good reports.*

A former Minister of Women's Affairs Hon. Lianne Dalziel, who led New Zealand's delegation on its sixth periodic report under CEDAW, said in an interview that she felt the shadow reporting involving civil society was inadequate. *"It would have been much better to resource the development of the shadow report in a much more regionally oriented way."* She suggested the NZHRC should hold seminars around the country about input into the shadow report process. The Minister said that when she went around New Zealand on seminars after her return she found a lot of women with a lot to say *"but they didn't necessarily relate to the conduits that were there and they would never get the chance to channel what they had to say through the existing organisations."* If there was one change she could have made to the State party's engagement with CEDAW it would be the resourcing of women's input including the use of social media for younger women:

> *We are just not even connecting with that group. You walk into a school and ask a reasonably intelligent well informed group, or ask first year university students, what CEDAW stands for and they wouldn't know.*

She had consciously strived to increase the involvement of Pacific women in CEDAW. When she travelled to New York for New Zealand's sixth periodic examination:

> *I chose to take a woman from Pasifika because it had never engaged in the civil society component of CEDAW. I wanted to build capacity in the Pacific community and the only way was to get a representative to come was to make sure she was funded.*

Civil society representatives who attended the CEDAW Committee's examination of New Zealand in 2012 in its seventh and most recent periodic examination also see greater opportunities for more effective engagement with committee members. Julie Radford Poupard, of Women's Health Action, in an interview on her return said she knew from being there that:

> *We can improve by cutting down emotive language, avoiding generalisations, working towards a more evidence-based shadow report and working more collectively. I could see why the Committee felt a collaborative and collective shadow report was more powerful.*

She felt the NGOs were reflected very strongly in the Committee's Concluding Observations to New Zealand.

The New Zealand National Council of Women has been one of the most consistent and effective NGOs interacting with CEDAW. For example, Beryl Anderson, an NCW representative at New Zealand's seventh periodic examination at the United Nations, has had the advantage of involvement in three shadow reports (fifth, sixth and seventh) and participated twice as an NGO representative in 2007 and 2012. In an interview she said while there is engagement from women's groups and NGOs there is work to be done on co-ordination:

> *This time with the NCW shadow report we focused on the concluding comments from the previous report. We targeted what we were saying to those recommendations to show whether progress had been achieved or not. NCW also undertook a gap analysis and provided this to the Committee the day after New Zealand's constructive dialogue.*

She said that NCW needed to reflect on why it had slightly less engagement in consultation processes in 2012 than previously.

> *We still haven't got to the point in New Zealand where there is one shadow report, which is the ideal for the Committee. I don't know if we ever will.*

The use by civil society of Concluding Observations and Recommendations from the CEDAW committee is an iterative process of advocacy and for accountability.

> *This is where the NGO community has to be quite active. When NCW has done submissions on legislation and policy it has mentioned the relevant recommendations in its written and oral submissions, in press releases and in other engagement with the Government. They have an important place and provide a platform on which civil society can say, 'you've been told this needs to happen'.*

New Zealand's women's groups have persistently used CEDAW treaty body reporting to progress women's equality domestically. Their effectiveness in New York in 2012, despite a small number of representatives, is apparent in impact on the Concluding Observations. The Minister of Women's Affairs at the time of New Zealand's latest examination in 2012, Hon. Jo Goodhew, believes that civil society is advantaged during the sessions when the examination takes place in the United Nations.

> *Apart from seeing the shadow reports which I did beforehand, the Government doesn't see or hear the dialogue between the NGOs and the Committee. I don't think it would hurt if a representative from the State party was simply an observer and could get a handle on the angle from a questioner. It is not exactly equal.*

5.6 The role of the NHRI

The CEDAW Committee's statement on its relationship with NHRIs suggest the two share common goals in the protection, promotion and fulfilment of the human rights of women and girls. It considers cooperation between the two as critical and the Committee is exploring further linkages and interactions. NHRIs, specifically those established in compliance with the Paris Principles such as New Zealand which has an A accreditation, have a role in monitoring activities, in dissemination of the Concluding Observations and Recommendations and publicising the Optional Protocol. It also suggests that NHRIs may assist State parties with their reports to CEDAW, assist victims of violations in accessing the Optional Protocol and submit reports to pre-session working groups or the Committee. NHRIs may also physically attend a country dialogue and provide information orally in the pre-session.[260]

[260] E/CN.6/2008/CRP.1, Annex II.

While the NZHRC itself was not as involved in the early reporting process as it might have (since CEDAW was seen to be well served by civil society groups in comparison to other treaty reporting processes) two issues are worth noting. One is the extent to which the Commission incorporated gender equality and the human rights of women into its own work programme in terms of activities and initiatives. The second is its involvement in the international treaty body process by providing information for the national reports, submitting its own parallel reports and attending country examinations, as well as following up on Concluding Observations and Recommendations.[261]

First, the NZHRC's role in incorporating rights for women and in promoting and protecting gender equality in its ongoing activities is statutorily-based. The Human Rights Act 1993 which prohibits discrimination on the grounds of sex provides women with access to the legal and policy framework for gender equality. The NZHRC has generally had relatively equal gender representation of its Commissioners, and in recent years more female than male staff. In 2002, in time for New Zealand's fifth report, an Equal Employment Opportunities Commissioner was appointed to the Commission with specific statutory functions to promote, advocate for and monitor equal employment opportunities including equal pay. The EEO Commissioner's role, following the amendment of the Human Rights Amendment Act 2001, resulted in a higher profile for women's equality at work. In 2003 Hon. Ruth Dyson, Minister of Women's Affairs, told the CEDAW Committee the establishment of a dedicated EEO Commissioner was; *"Perhaps one of the most significant developments during the reporting period in terms of the acceleration of equality between women and men…".*[262]

In 2004 the EEO Commissioner was given responsibility to provide guidance to Crown entities to ensure equal employment opportunities across the wider state sector. Between 2002 and 2012, major activities of the EEO Commissioner included a national website NEON developed in partnership with the EEO Trust as an electronic portal for guidance and policy; regular reporting and publication of a two yearly Census report that benchmarked women's progress in public and corporate sector; work on age discrimination; policy papers on equal pay including the provision of a draft Pay Equality Bill; and reports on access of disabled people to paid employment. A major national human rights inquiry that investigated women's work in the aged care sector in New Zealand, entitled *Caring Counts: Report of the Inquiry into the Aged Care Workforce,* was the catalyst for several major policy reforms.[263]These included carers being paid to "work" when they travel between clients, better information for migrant carers and increasing professional recognition through improved access to training. The national inquiry was a precursor to litigation testing the Equal Pay Act 1973 involving aged care workers, a landmark case, that has now been sent back to the Employment Court from the Court of Appeal for a substantive hearing.[264]

However, the Commissioner's statutory focus on women's work left other areas of gender equality under-developed. When the first New Zealand Action Plan for Human Rights was published on March 31 2005, after two years of extensive consultation with the public, a notable omission was a specific section on women's rights although there were priority actions relating to women.[265] It was

[261] Two of the researchers were involved with the NZHRC as this project was undertaken. Judy McGregor was EEO Commissioner 2002-2012 and Sylvia Bell was the principal legal and policy analyst until the end of 2014.

[262] New Zealand Mission of the United Nations (2003) *Committee on the Elimination of Discrimination Against Women, Consideration of the Report submitted by New Zealand, Statement by the Minister of Women's Affairs, the Hon. Ruth Dyson* (Monday,14 July 2003)8 at [29]

[263] New Zealand Human Rights Commission (2012). *Caring Counts: report of the Inquiry into the Aged Care Workforce.* Wellington.

[264] *Terranova Homes and Care Limited v Service and Food Workers Union Nga Ringa Tota Incorporated*. [2014] NZCA 516.

[265] Committee on the Elimination of Discrimination against Women (2006*). Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women. Sixth periodic report of States parties*. New Zealand. CEDAW/C/NZL/6, 10 at [26]

stated by the Government that this was due to the MoWA's existing *Action Plan for New Zealand Women,* but it was a clear oversight that did not sit well with some sectors of civil society, particularly those engaged in violence against women and women's health.

The Commission's role in urging the Government to ratify CEDAW has been discussed. However, it is only more recently at the time of New Zealand's seventh and most recent report, that the Commission has been actively engaged in CEDAW as a submitter, as a presenter at the United Nations in the oral pre-session, in addition to contributing to the national report. The late maturing of the Commission's role in international human rights treaty body reporting is somewhat surprising given its early involvement in ratification. It also reflects greater acknowledgement by the United Nations of the role of national human rights institutions in its own work and the need to ensure full and inclusive participation of NHRIs in all stages of the reporting process.[266]

How effective has the NHRI been in promoting gender equality and protecting human rights in treaty body reporting? The answer probably is that the NHRI's impact has been variable, but of growing influence. When it has engaged in the examination process such as for the seventh periodic report, the Commission was effective in several ways; helping the Government with information; supporting civil society's interaction and providing a balance of viewpoints between civil society and the State party for Committee members. A total of 12 of the NZHRC's 14 recommendations to the CEDAW Committee were taken up in the Concluding Observations. (Appendix 6).

Whether the Commission maintains its momentum remains to be seen. It has, for example, discontinued its regular census report benchmarking women's progress that provided time series data for sector groups and civil society.[267] There is no longer a MoWA *Action Plan for New Zealand Women,* but the NZHRC has an opportunity to fully address gender equality and women's rights in its second national plan of action for human rights. Women's groups, though, are likely to persist in their calls for a separate women's action plan located within a well-resourced and effective Ministry that has measurable targets and accountabilities to progress gender equality. Women's civil society are especially aware of the Government's non-adoption of the first human rights national plan of action. Government departments were directed to consider implementing the priorities as normal business. But the lack of formal adoption of a national plan of action under s. 5 of the Human Rights Act 1993 raised the question of whether it belonged to the Government and the administration of the day had to implement it, or whether it belonged to the NZHRC and could therefore be ignored.

5.7 Conclusion

Richard Thompson Ford suggests that at some point "one must begin to worry that CEDAW has gained widespread universal assent only because its mandate is sufficiently vague and abstract to mean all things to all people." [268]

This analysis suggests that however slow the progress of gender equality, the ratification of CEDAW and the regular reporting under it is of benefit to women in New Zealand. It was a catalyst for the introduction of paid parental leave, and it has more recently been a focus of the revival of activism and litigation around equal pay in the aged care sector. The national human rights inquiry,

[266] Pillay, above n 76 at 66
[267] New Zealand Human Rights Commission (2012) *New Zealand Census of Women's Participation, 2012*. Wellington. New Zealand Human Rights Commission.
[268] Ford, above n 1 at 102

Caring Counts: Inquiry into the Aged Care Workforce, which prompted union-led litigation the unions, was based on CEDAW and ILO Conventions relating to equal pay.[269]

As New Zealand slips in global gender gap reports,[270]and in the absence of strong effective machinery for women's policy or committed, espoused political leadership on women's issues,[271] CEDAW remains a significant benchmark. It gives civil society a voice, a focus of advocacy and power during reporting periods; and it provides through its emphasis on non-discrimination, a minimum threshold of protection for human rights abuses against women. It also provides regularised opportunities for CEDAW gender equality experts to continuously analyse and benchmark of New Zealand's progress internationally. This global comparison is crucial given New Zealand's pronounced self-regard that it is a leader in advancing women's progress pegged to historical firsts, such as women's suffrage, which is partially responsible for the current complacency. International reporting also provides a focused opportunity for debate about gender equality in the absence of any parliamentary mechanism for regular scrutiny of human rights. The worry may not be that CEDAW has gained universal assent, but rather the pace and scale of implementation of measures to ensure gender equality.

[269] Above n 263

[270] New Zealand has slipped to 13th in the World Economic Forum's Global Gender Gap Report 2014 from 5th over the period 2007-2010.

[271] The Minister of Women's Affairs dropped to 25th in a line-up of 26 ministerial appointments and remains a minister outside of Cabinet.

Chapter Six Convention on the Rights of the Child (CRC)

6 Background

In 1948 the United Nations adopted a Declaration on the Rights of the Child based on one endorsed by the League of Nations in 1924. A further Declaration was approved by the General Assembly in 1959 but it was not until 1978 that the idea of an international Convention to protect the rights of children started to take hold. A Working Group on the Question of a Convention on the Rights of the Child[272] was established by the UN Commission on Human Rights in 1979.[273]

The group operated by consensus - there was no formal voting and decisions were reached through debate and compromise which resulted in a protracted process and some proposals that had majority support being abandoned.[274]Conversely, it may also have facilitated the passage of the United Nations Convention on the Rights of the Child (CRC) and the near universal adoption by the UN General Assembly in 1989.

Although all the articles were closely scrutinised, some led to considerable controversy. They included decisions about when a child's age began (and the related question of abortion),[275] issues relating to freedom of religion, disputes over adoption and, perhaps most contentiously, the age at which children should be permitted to take part in armed conflict.

A draft was eventually agreed on and presented to the United Nations Human Rights Commission which sent it to the UN Economic and Social Council, which presented it to the UN assembly. (CRC) was adopted on 20 November 1989 and opened for signature, ratification and accession by General Assembly: Resolution 44/25. It entered into force on 2 September 1990, nine months after its adoption. No other international human rights instrument has entered into force so soon after its adoption or been ratified so widely and so rapidly.

6.1 Key principles

CRC was unique in bringing together commitments for the protection of children that had been scattered through more than 80 international and regional treaties and declarations.

The Convention is made up of 54 articles divided into three parts and consists of the substantive provisions (Articles 1-41), the implementation provisions (Articles 42-45) and the final clauses (Articles 46-54). The following four articles encapsulate the general principles underlying the Convention:

- All children have the right to protection from discrimination on any grounds
- The best interests of the child should be the primary consideration in all matters affecting the child

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[272] The Working Group was open ended allowing NGOs and other non-state actors to participate as non-voting members. New Zealand was a non-voting observer. In 1981 it submitted written comments including calls for provision or children with disabilities, resisting provision relating to the employment of children and supporting gender neutral language.

[273] The over representation of industrialised nations among the membership led to an ideological imbalance that only ended when a number of developing countries – particularly from among the Islamic states - became involved in 1988: Sharon Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Preparatoires* (1992) Martinus Nijhoff Publishers

[274] Detrick at 20

[275] The issue was resolved by stipulating in the preamble that the child "needs special safeguards and care, including appropriate legal protection both before and after birth."

- Children have the right to life, survival and development
- All children have the right to an opinion and for that opinion to be heard in all contexts.

The Convention includes economic, social, cultural, civil and political rights reflecting the interdependence of all human rights and the philosophical values of Western countries which prioritised civil and political rights as a defence against the excesses of the state, and Eastern-bloc nations who prioritised economic, social and cultural rights.[276]

6.2 Reporting process

As with other major treaties, accountability is achieved by a mechanism which involves ratifying States reporting on compliance to a specialist Committee. Article 44(1) of the Convention requires States to submit periodic reports to the Committee on the progress of implementation. A country's first report is due within two years of entry into force for the State party concerned, and thereafter every five years.

The Committee published and adopted guidelines on the form and content of the periodic reports in 1996 and 2005. The process of preparing a report is designed to provide an opportunity for the State to reflect on its progress in implementing the Convention, and lay the basis for a "constructive dialogue" with the Committee on examination. The guidelines require reports to "strike a balance in describing the formal legal situation and the situation in practice".

The reporting guidelines encourage States to group their analysis into sections, or "clusters", beginning with a preliminary section on follow-up from the previous report, an overview of the national implementation mechanisms, budgetary and statistical data related to children and factors and difficulties of implementation. The substantive analysis of the report is then divided into the following eight categories:

- General measures of implementation (arts 4, 42 and 44(6));
- Definition of the child (art 1);
- General principles (arts 2, 3, 6 and 12);
- Civil rights and freedoms (arts 7, 8, 13-17 and 37 (a));
- Family environment and alternative care (arts 5, 9-11, 18(1) and 18(2); arts 19-21, 25, 27(4) and 39);
- Basic health and welfare (arts 6, 18(3), 23, 24, 26, and 27(1)-(3));
- Education, leisure and cultural activities (arts 28, 29 and 31);
- Special protection measures (arts 22, 30, 32-36, 37 (b)-(d), 38, 39 and 40).

The guidelines also provide guidance on how each section should be approached and the type of data the Committee expects from the State party. Article 44(2) allows the Committee to request further information from the State party on any issue. For State parties who have ratified any of the Optional Protocols, a further section is required detailing measures taken in respect of these instruments.

Following the submission of a State party's report and before the hearing, the Committee holds a private "pre-session working group" with UN agencies and bodies, NGOs and other competent

[276] Jonathan Todres, Mark Wojcik, and Cris Revaz, *The United Nations Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of US Ratification* (2006) Transnational Publishers, New York at 13.

bodies such as National Human Rights Institutions and youth organisations. The country report is discussed and a "list of issues" compiled. The list is designed to give the Government an indication of the issues that the Committee is likely to prioritise. It also gives the Committee an opportunity to request further information and assist the Government to prepare for the hearing, which usually follows after three to four months. The government is required to provide the Committee with a response to the list of issues in advance of the hearing.

The State party's report is discussed in public meetings. The dialogue is intended to be constructive, with discussion canvassing progress achieved, difficulties encountered and future priorities for implementation.

After the hearing, the Committee issues Concluding Observations, which include comments on progress, and suggestions and recommendations for future implementation of the Convention. These are made public and form part of the report that is adopted by the Committee at the end of a session. These reports are submitted to the United Nations General Assembly through the Economic and Social Council for its consideration every two years. It is expected that the concerns raised as concluding observations will be addressed in detail in the State party's next report.

6.3 Ratification, reservations and Optional Protocols

New Zealand ratified the Convention on 6 April 1993. In accordance with established practice it did not ratify CRC until it was satisfied it was already compliant with its obligations domestically.[277]

6.3.1 Reservations

At ratification, the government entered the following reservations.

Reservation one: children unlawfully in New Zealand

Nothing in this Convention shall affect the right of the Government of New Zealand to continue to distinguish as it considers appropriate in its law and practice between persons according to the nature of their authority to be in New Zealand including but not limited to their entitlement to benefits and other protections described in the Convention, and the Government of New Zealand reserves the right to interpret and apply the Convention accordingly.

Reservation two: employment protections for children

The Government of New Zealand considers that the rights of the child provided for in article 32 (1) are adequately protected by its existing law. It therefore reserves the right not to legislate further or to take additional measures as may be envisaged in article 32 (2).

Reservation three: age mixing in prison and other custodial units

The Government of New Zealand reserves the right not to apply article 37 (c) in circumstances where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable; and further reserves the right not to apply article 37 (c) where the interests of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned.

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[277] A prominent child advocate claims that the New Zealand government did not undertake the necessary review prior to ratification and that New Zealand did not comply in many areas, particularly the areas identified by the Human Rights Commission in its pre-ratification report to Government which identified corporal punishment in schools and the home, school expulsion procedures, lack of religious freedom for children in prisons and the minimum age for joining the armed forces as all non-compliant: "Victims of tokenism and hypocrisy: New Zealand's failure to implement the UNCROC" by Robert Ludbrook in *Advocating for Children* at 110

6.3.2 Optional Protocols

There are three optional protocols to the Convention:

1) **The Optional Protocol on the sale of children, child prostitution and child pornography** adopted on 25 May 2000, entered into force on 18 January 2002;

2) **The Optional Protocol on the involvement of children in armed conflict** adopted on 25 May 2000, entered into force on 12 February 2002. This Optional protocol regulates the participation of children in armed conflict;

3) **The Optional Protocol on a communications procedure** adopted on 19 December 2011 and entered into force on 14 April 2014. This Optional Protocol allows children to make individual complaints about breaches of their rights under the Convention and the other two Optional Protocols.

The New Zealand government has ratified the first two Optional Protocols.[278]

6.4 New Zealand's reporting

New Zealand has reported to the Committee on three occasions in 1995, 2001 and 2008. The country has also reported twice to the Committee on the implementation of the Optional Protocol on the Involvement of Children in Armed Conflict in 2001 and 2008. Following each report, the numbers of positive observations have increased, suggesting greater attention to compliance.[279]

6.5 Role of NGOs

An informal Ad Hoc NGO Group was established in 1983. The group submitted annual reports to the Working Group and lobbied government delegations on specific proposals. The group was responsible for at least 13 substantive articles, the inclusion of provisions protecting children from exploitation and ensuring the use of gender free language. It also promoted the Convention and imbued the Working Group with a renewed sense of purpose.[280]

Possibly because of the role that NGOs played in the drafting process,[281] Article 45 gives the Committee three unique capabilities which relate to NGOs and promises to provide a new model for constructive action by NGOs at the UN.

i. It allows the Committee to receive information from a wide range of sources, not just governments, contemplating continued monitoring and implementation;
ii. Gives the Committee the capacity to provide technical assistance to States that may need it – for example, on the quality of health services or legal assistance;

[278] The Optional Protocol on the involvement of children in armed conflict was ratified on 12 November 2001. The Optional Protocol on the sale of children, child prostitution and child pornography was ratified on 20 September 2011

[279] In 2003, the number of positives had risen to 12 and the number of concerns had jumped to 31. In 2011, the number of positives had risen to 31, and the number of concerns to 44.

[280] Detrick, above n 273 at 25

[281] Cynthia Cohen. "The United Nations Convention on the Rights of the Child: Involvement of NGOs" *Human Rights Quarterly* Vol. 12, No. 1 (Feb., 1990), 137-147

iii. Empowers the Committee to request the Secretary General to undertake studies on matters of interest to all State parties.[282]

New Zealand NGOs played – and continue to play - a major role in the reporting process. The organisations that have been principally involved have been ACYA, Youth Law, UNICEF and Save the Children. ACYA has co-ordinated the preparation and presentation of a shadow report in the last three of the four government reports, with Youth Law co-presenting on the first report.[283] ACYA also attended the country examinations and presented to the Committee privately, ahead of the Committee meeting with the Government.

6.6 Response to the Committee's concluding comments on specific issues

6.6.1 Removal of reservations

In 1997, the Committee encouraged New Zealand to work towards withdrawal of the reservations. In 2003 it expressed disappointment at the "slow pace" of the withdrawal process, and its continuing concern at the reservations. In 2010 it recognised efforts were being made to remove obstacles to withdrawing one of the reservations, but that the reservation had not been withdrawn.

The following section identifies the government's progress to withdrawing the reservations.

Reservation one: Children unlawfully in New Zealand

The government did not attempt to explain its reservation against children unlawfully in New Zealand until 2008 when it cited "resource implications" and the need for "effective immigration controls" to justify its position. It did, however, indicate that work had been undertaken to ensure that children without lawful authority to be in New Zealand had access to education[284]by repealing the provisions under the Immigration Act 1987 that made an offence of knowingly enrolling a child unlawfully in New Zealand.[285] In relation to access to health services, the Government considered access for children and expectant mothers unlawfully in New Zealand were CRC compliant.[286] Levels of access to social assistance and housing were being considered.[287]

Reservation two: Age mixing

The government's principal justification for the reservation was the "shortage of suitable facilities". In 2001 the Cabinet Social Equity Committee agreed in principle to withdraw the reservation[288]and in 2003, the government announced that it was building new youth units in male prisons, and undertaking research and policy work to determine whether changes would be needed to manage young female inmates. By 2008, the Government reported that youth units had been built and that

[282] The first study was on the role of children in armed conflict. For more on the role of NGOs see Cohen, above

[283] In 2010 Save the Children Fund also submitted a shadow report, *Hear Our Voices*, based on the views of children interviewed for the purpose of the report.

[284] The New Zealand Human Rights Commission played a significant role in ensuring children unlawfully in New Zealand had access to education

[285] NZ CRC 3rd and 4th report at 10, [29]

[286] NZ CRC 3rd and 4th report at 9, [26] ACYA acknowledged that the government had exempted providers of compulsory education from prosecution for providing educational services to children unlawfully in New Zealand. In relation to all other areas, it considered that children unlawfully in New Zealand did not have any positive entitlement to services for health care, welfare, housing and other services

[287] NZ CRC 3rd and 4th report at 9, [26]

[288] CRC work programme 2005-6 report, at 5

it was now "fully compliant" with art 37(c) of the Convention.[289] However the low number of young female prisoners meant separate youth units in female prisons was not viable but young female inmates were still held separately from those aged 18 and over unless it was otherwise in their best interests.[290]

Despite this the reservation not removed. The 2008 CRC Work Programme summary report suggests the reason for this is largely financial.[291]Further work is required in relation to Police transportation and custody for court appearances, before the reservation can be lifted. A report back to Cabinet in July 2008 identified that the work required to be compliant in all Police and court-based situations is more substantial than originally anticipated. Cabinet noted that while work would continue towards the removal of the reservation, it will not be lifted in the short-to-medium term because of the excessive cost of full compliance.

Reservation three: child labour protections

The Government has provided two justifications for this reservation. The first is cultural – that New Zealand has a long-established tradition of children and young people working part-time and during holidays in jobs such as fruit picking or newspaper delivery. This encouraged young people and children to "develop skills and foster an attitude of independence for their own and society's benefit".[292]

The second is that New Zealand's legal framework already provides adequate protection children and youth in employment. The framework includes:[293]

1. **Education Act 1989** – children under 16 cannot be employed during school hours;
2. **Health and Safety in Employment Act 1992** – establishes a variety of obligations including restricting the employment of people under 15 in dangerous work places or being employed in hazardous work, as well as those under 16 from night work;
3. **Prostitution Reform Act 2003** – prohibiting the use of any person under the age of 18 in prostitution, and criminalizing the arranging for or receiving of commercial sexual services from a person under 18; and
4. **Sale of Liquor Act 1989** – prohibiting children under 18 from selling liquor in licensed premises.

The Commissioner for Children does not consider the reservation a concern. The government's position was also supported by research by the Department of Labour in 2002 and 2003 which found that part-time employment among school-age children was "widespread, not harmful, and in the main, well regulated by health and safety regulations and education legislation."[294]

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[289]ACYA has disputed the Government's assessment of its compliance. In its shadow report in 2010, it acknowledged the Department of Corrections had developed a 'test of best interests' for the housing of young male prisoners but that it still resulted in children being held with young adult prisoners.

[290] NZ CRC 3rd and 4th report at 12, [40]

[291] CRC work programme 2008 report, at 6

[292] NZ CRC 2nd report at [35]

[293] 3rd report at 11

[294] 3rd report at [35] In 2008 the government noted that the Minister of Labour had written to the International Labour Organisation (ILO) to explore options for ratification of ILO Convention 138, considered a proxy for Art 32(2) of CRC. Work programme summary paper 2008 at 7 In 2010, ACYA pointed out that ratification of ILO Convention 138 or the removal of the reservation to art 32(2) of CRC seemed unlikely

There appears to be little prospect of the reservation relating to children unlawfully in New Zealand be removed - principally for financial reasons. While there has been a concerted effort to address the issues of mixing of youth and adults in detention the reservation appears unlikely to be removed in the foreseeable future.

6.7 Specific recommendations by the Committee and the Government's response

6.7.1 A National Action Plan for Children

The New Zealand government has been challenged consistently on the lack of a national action plan for children on the implementation of CRC that involves:

- A unified, cross-agency, children-focused plan co-ordinating all child focussed services; and
- A Ministry or coordinating body responsible for the implementation of the CRC in New Zealand.

In its second report, the Government conceded it was an issue, and that *"there has not been a single comprehensive policy statement incorporating the principles of the Convention*".[295] Rather, there had been *"a number of policy statements…issued across a range of sectors"*[296] such as the Children's Policy and Research Agenda (the Agenda), which was designed to provide a framework to inform policy development and research, and the Youth Development Strategy Aotearoa, which promoted a developmental and preventative approach to issues facing young people.

At the time of its release, the Agenda attracted wide support both from the NGO sector and the Committee in its 2003 Concluding Observations. From 2004 onwards, however, it seems to have disappeared from the government's policy programme, notwithstanding that in its third report the government insisted that the Agenda and the Youth Development Strategy Aotearoa continued to *"provide platforms to inform work to place children at the centre of policy-making*".[297]

The nearest thing to a unified national strategy was the CRC Five-Year Work Programme led by the Ministry of Youth Development. As well as providing direction, the programme was a means for monitoring the Government's CRC-related work. The Ministry of Youth Development reported on it to Cabinet four times. It initially contained 28 items,[298] covering the Convention and the Optional Protocols for children in armed conflict and the sale of children. Each item contained smaller progress "milestones", and by the final report in 2008 with two exceptions all the milestones were said to have been achieved.[299] No further work programme has been established. In terms of policy coordination, the Government has never designated a particular agency or Ministry to take responsibility for coordinating and implementing CRC-related work.

In its initial report the government identified four different departments relevant to CRC's implementation: The Ministry of Youth Affairs, the Department of Social Welfare, the Office of the Children's Commissioner and the Crime Prevention Unit of the Department of the Prime

[295] NZ CRC 2nd report at [34]

[296] NZ 2nd CRC report at [34]

[297] NZ 3rd CRC report at [59]. ACYA criticised the Agenda's failure to detail any specific actions or timelines, or allocate any responsibilities for the actions needed and considered that the Agenda was "merely a statement of general principles" that was reflected in its lack of implementation by government agencies

[298] With a further item added in 2007

[299] 2008 progress report at 3

Minister and Cabinet (CPU DPC).[300] In its second report the Government reported that the Department of Social Welfare had ceased to exist and that the Ministry of Youth Affairs had responsibility for co-ordinating New Zealand's reports to the Committee, but did not identify any central focus stating rather that "all agencies are responsible for implementing CRC".[301] In the third report, it noted that the Ministry of Youth Affairs had combined with parts of the Ministry of Social Development to become the Ministry of Youth Development. It, and the Department of Child, Youth and Family Services, had both become service lines of the Ministry of Social Development (MSD), with the MSD assuming responsibility for the Government's CRC reporting obligations. The Government has defended these reforms as necessary to improve coordination, increase capacity and better align resources to improve outcomes for children and young people.[302] However, with government departments being split, reformed and amalgamated right over New Zealand's reporting period, a picture of continuous administrative upheaval emerges. Significantly, in its second report to the Committee the government acknowledged, in relation to James Whakaruru's death in 1999, that "lack of co-operation across levels of government" was a problem in implementing the Convention.[303]

A CRC Advisory Group was established following the second report to facilitate dialogue on the Convention between government and NGOs. In the consolidated 3rd and 4th report, the New Zealand government referred to the Advisory Group's "invaluable" input and feedback on the reporting process as well as assistance with a CRC work programme forum in mid-2006. However, the group had no formal powers or legal status and was discontinued when responsibility for reporting shifted to the Ministry of Social Development in 2009.[304]

In 2011, Dr John Angus, the then Children's Commissioner, convened a meeting of the past members of the Group to discuss how implementation of the Concluding Observations could be monitored. This led to the formation of the CRC Monitoring Group (UMG). The UMG continues to be coordinated by the OCC. It meets regularly and, in liaison with the Deputy Chief Executives Social Sector Form (DCE SSF), has taken a lead role in developing a high level engagement process with the Government on CRC work. The UMG and its process of engagement with the DCE SSF is unique in that it is the first time there has been high level engagement between the Government and civil society on the implementation of CRC. Some progress has been made, including the DCE SSF agreeing to assume the role of the governmental coordinating mechanism, and preparatory work in the development of a CRC Work Programme.

The Office of the Children's Commissioner was created by the Children, Young Person and Their Families Act 1989 (CYPFA), prior to ratification of CRC. It later received its own empowering legislation, the Children's Commissioner's Act 2003, which gave it three functions: monitoring services delivered under the CYPFA, raising awareness and monitoring governmental implementation of CRC, and advocating for children. It also oversees the handling of child and youth related complaints of children in the care of the state.[305] Its work has consistently featured in the New Zealand government's reports to the Committee, and the Commissioner states that it

[300] NZ CRC 1st report at [8]-[11]
[301] NZ CRC 2nd report at [163]
[302] NZ CRC 3rd report at [55]
[303] NZ CRC 2nd report at [151]
[304] ACYA 2010 report at [1.23].
[305] S 12(d) and (f) Children's Commissioner Act 2003

uses the Convention as a "basic standard in considering policy and legislation". However its role largely centres on research, advocacy, and the monitoring and investigation of CYPFA services and complaints.[306] The current Commissioner, Dr Russell Wills, has acknowledged the tension between maintaining a close relationship with the government whilst maintaining an independence from it. He personally preferred working closely with the government, seeing this as more constructive than maintaining a distance.

There still is no consistent long-term policy or national action plan related to children despite the endorsement of the Committee's recommendations in public submissions, the development of the comprehensive, child-based "First Call for Children" policies by the Waitakere and Christchurch City Councils,[307]and the recommendations for greater recognition of child-centred policy-making in central government by the Public Health Advisory Committee to the Minister of Health.[308]

The failure to allocate responsibility for CRC's implementation to a single agency or Ministry may explain the lack of development of an action plan in New Zealand. As a lack of coordination has been identified as a problem, the lack of positive initiative in this regard should be considered a significant deficiency.

6.7.2 Children's health

The dominant issues in the area of healthcare for children are the prevalence of "diseases of poverty" such as pneumonia, tuberculosis, rheumatic fever and meningitis[309]and the disproportionate number of those in lower socio-economic groups and Māori and Pacific communities affected.

In its initial report, the New Zealand government emphasised its commitment to providing "comprehensive, publicly funded child and family health services".[310]A significant part of this was free provision of services or subsidies for primary health services and some secondary health services for children.[311] Education is also seen as a significant component of the Government's health strategy and has involved campaigns about parenting support, injury prevention, smoking and alcohol consumption and immunization.[312]

A number of initiatives have targeted reduction of inequalities in health outcomes for Māori and Pacific communities and families with disabled children including the development of Māori and Pacific Health Action Plans and the nurturing of Māori and Pacific health providers to enhance capacity. Strategies have also been developed for children with disabilities and in the mental health sector. Despite this, inequalities in health outcomes for Māori, Pacific and socio-economically disadvantaged sectors of the community remain and are consistent themes in the government

[306] NZ CRC 1st report at [60]

[307] NZ CRC 2nd report at [32]

[308] ACYA 2010 report at 1.21

[309] Other areas include high rates of Sudden Infant Death Syndrome (SIDS), car accidents and adolescent health issues, such as drug and alcohol abuse, sexual and reproductive health and youth suicide

[310] NZ 1st report at [215]

[311] NZ 1st report at [215]. Pre- and postnatal healthcare for mothers, including screening and preventative care, midwifery and well-child services are also free.

[312] NZ 1st report at [235]

reports, the NGO shadow reports and the Committee's concluding observations.[313] The government's child health policy and strategy development has also been an issue.

New Zealand's initial report did not refer to any specific health policy or strategy, apart from the National Immunization Strategy. In the following report, there was significant comment directed at the Child Health Strategy, the New Zealand Health and Disability Strategies,[314] the Youth Suicide Prevention Strategy and a number of mental health strategies.[315]By the Government's third and fourth report however, the policy and planning framework seems to have changed significantly. There was discussion of the Māori and Pacific Health Action Plans but no indication that children were a primary focus of these plans.[316]

The shortage of services, workforce development and resources in some areas of the health sector has also been a problem, especially relating to Māori and Pacific health, mental health, and alcohol and drug addiction. Workforce shortages in the mental health sector and the under-representation of Māori and Pacific Island people in the health workforce generally were considered serious concerns.[317] Related to this was the impact of the health sector's ongoing restructuring on health outcomes for socio-economically disadvantaged groups. The Government defended this as part of its new drive towards a "population-based approach to improving New Zealand's' health and wellbeing"[318]describing the changes as necessary to "increase[ing] efficiency and consistency"[319]in the health sector.

The rate of diseases affecting New Zealand children has risen dramatically, especially amongst socially disadvantaged segments of the community. Many of these diseases are both preventable and treatable. To suggest that there is a single cause for this is disingenuous. The causes of adverse health outcomes affecting New Zealand children are varied, and not limited to simply the provision or availability of services - although this is a significant factor. Other social determinants, such as family income and quality of housing are significant drivers. Positive aspects of the Government's activities in this area include the extra funding provided to the mental health sector, and the progression of the "one-stop shop" model, a health care service model delivering integrated services targeted at high needs communities.

However, there does not appear to be any direction on the provision of child health care despite calls by the Committee. As a result there are inconsistencies in the adequacy and appropriateness of healthcare available to children throughout New Zealand. Where there have been significant policy or strategies, they have often been under-resourced and poorly executed. There is little evidence of measures to protect the delivery of health services to children in socially disadvantaged communities during reorganisation of the health sector.

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[313] A range of contributing factors were pointed to by ACYA and the government, including policy decision-making, discrimination and poverty Although ACYA noted that the Primary Health Strategy had improved access to primary health care for many New Zealanders, it expressed concern that significant barriers remained and that there was "no overall public health strategy to improve the health of children"

[314] NZ 2nd report at [591]

[315] NZ 2nd report at [293] ACYA's criticised the Government's implementation of these strategies, describing it as "very slow" and lacking funding and support for the Ministry's otherwise "excellent policy documents."

[316] NZ 3rd report at [280]-[282]. The cumulative effect of this appears to inform ACYA's criticism of the government's "lack of consideration of children in policy decision-making" and its "adult-centred" processes

[317] ACYA 2003 report

[318] NZ 2nd report

[319] NZ 2nd report

6.7.3 Corporal punishment

Until it was repealed in June 2007, s 59 of the Crimes Act 1961 allowed parents to use "reasonable force" for the purposes of "correction" as long as the force used was "reasonable in the circumstances". This contravened Art. 37(a) of CRC which states:

> *No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;*

Article 19 also requires that:

> *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

Read together, the UN Committee has interpreted these articles as asserting a right of children to be free from corporal punishment. In the Committee's eighth General Comment, it remarked that:

> *There is no ambiguity: "all forms of physical or mental violence" does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them.*

Although the Commissioner for Children had long sought the repeal of s 59, the government's position initially was ambivalent. The preferred option was promotion and education campaigns on alternatives to physical punishment, such as the 'Alternatives to Smacking' campaign in its 'Breaking the Cycle' programme, and its 'Smack-free Week' initiative. The objectives of such campaigns were to raise awareness of alternatives to smacking. In its second report, the government advanced a further justification for retaining s. 59. Namely, that New Zealand's legislative framework provided children with sufficient protection. It also commented that it was not inconsistent with many other countries on this, a point recognised by the UN Committee itself.[320]

By the time of its third report in 2008, the Government was able to report that s 59 of the Crimes Act had been repealed, bringing its position in line with the Convention's provisions.[321] New Zealand is now one of only 38 countries that have legal protections for children against all corporal punishment as at 2014.[322]

The amendment was the result of a private members bill. In her introductory speech in Parliament its sponsor, Sue Bradford, cited CRC as influencing the change, saying it was "high time" that New Zealand lived up to its commitments as a signatory of the Convention.[323] Tariana Turia (Māori

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[320] The *Global Initiative to End All Corporal Punishment of Children* (http://www.endcorporalpunishment.org./pages /frame.html) indicates that although a large majority of states had prohibited corporal punishment of children in penal institutions and schools, most had not prohibited it in the home. ACYA acknowledged the educational efforts on the part of the government, but expressed disappointment that the repeal of s 59 was not considered a priority, especially given the Government's own documenting of the widespread opposition to the practice by young people in its 2002 Agenda for Children ACYA considered the continued existence of s 59 to be "a saddening illustration of the minimal political status of children in New Zealand"

[321] The amendment also included the discretion under s 59(4) that allowed the police not to prosecute "where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution."

[322] Above n 320

[323] Hansard, Volume 627, 22086 (27/7/2005)

Party) expressed her support for the bill during debate at the third reading, citing the cost to New Zealand's international reputation of being in breach of the Convention.[324] Overall, UNCROC and the concluding observations had a significant influence on the repeal of s.59.

6.8 Article 27 - The child's right to an adequate standard of living.

The child's right to an adequate standard of living is guaranteed under Article 27. This right is a foundational right on which most other rights depend.[325]To be adequate, the standard of living must enable the child's physical, mental, spiritual, moral and social development.

While parents or those responsible for the child have primary responsibility for the conditions necessary for his or her development, State Parties are required to take appropriate measures to assist parents and others to implement the child's right. Where there is need, the State is obligated to provide material assistance and support programs. The level of support should accord with national conditions and be within the means of the state.[326] Benefits should be adequate and monitored regularly to ensure beneficiaries are able to afford what they require to realise their Covenant rights.[327]

The right to an adequate standard of living under CRC is similar to Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee on Economic, Social and Cultural Rights has issued a General Comment emphasising the importance of the right to social security under Article 9 of ICESCR, which states that, through its redistributive character, it plays an important role in poverty reduction and alleviation by preventing social exclusion and promoting social inclusion.[328] It requires that benefits, including cash benefits and social services, be provided to families without discrimination on prohibited grounds, and should cover food, clothing, housing, water and sanitation, or other rights as appropriate.[329]The withdrawal, reduction or suspension of benefits should be circumscribed, only on grounds that are reasonable, subject to due process, and provided for in national law.[330]

Children also have protection against discrimination. In the area of social security, ICESCR stipulates that 'special measures of protection and assistance should be taken on behalf of all children and young persons without discrimination by reason of parentage or other conditions' (Article 10.3). There is also an obligation under CRC for a State to take all appropriate measures to ensure the child is protected against all forms of discrimination on the basis of the status of the child's parents, legal guardians or family members.

6.8.1 Realisation of child's right to an adequate standard of living.

The Children's Commissioner estimates that 285,000 of New Zealand children (or 27%) live in poverty. Ten per cent of children live in severe poverty, and three out of five will remain in poverty

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[324] Two other Members of Parliament, Steve Chadwick (Labour) and Judy Turner (United Future), also referred to the Convention in their addresses: Hansard, Volume 639, Week 44 - Wednesday, 16 May 2007

[325] As Article 27 itself recognises, an adequate standard of living is necessary for the child's physical, mental, spiritual, moral and social development.

[326] Note in furtherance of the right to an adequate standard of living the state must also take all appropriate measures to secure the recovery of maintenance for the child from a responsible parent.

[327] *General Comment No. 19, The Right to Social Security* at [22]

[328] *General Comment No. 19, The Right to Social Security* at [3]

[329] *General Comment No. 19, The Right to Social Security* at [18]

[330] *General Comment No. 19, The Right to Social Security* at [24]

for much of their childhood.[331] Children in families where the parent is in receipt of an income tested benefit are disproportionately represented in child poverty statistics.[332]

New Zealand has not always had such high rates of poverty. The present situation has its origins in the 1992 benefit cuts. Since then child poverty rates have never fallen below 22 per cent. In 2002 the government started work on developing proposals to support children in poverty and their families. The resulting 2004 Working for Families (WFF) budget package prioritised budgetary allocations to address child poverty[333]but only benefitted children whose parents were in paid work. Children whose parents were on income tested benefits mostly received no immediate gains from WFF and their situation worsened over time. Policy documentation subsequently indicated that WFF was developed without any reference to CRC or other human rights commitments.[334] The obligation the government made under CRC to provide social security payments at a level to provide an adequate standard of living was ignored.

In 2010 Cabinet established a Welfare Working Group to provide recommendations on how to 'reduce long term welfare dependency for people of working age' in order to achieve better social and economic outcomes for people on welfare, their families and the wider community". The Group reported in 2011 with a raft of recommendations aimed at moving people off welfare and into work. Legislation was subsequently enacted in the form of the Benefit Categories and Work Focus Amendment Bill 2012 to implement the recommendations.

The terms of reference of the Welfare Working Group and its report were criticized by many as not examining whether long term benefit dependency was, in fact, an issue in New Zealand and whether the benefit levels were adequate.[335]In 2012 the Children's Commissioner established an Expert Advisory Group to address the issue of child poverty. The group reported in December 2012 with 78 recommendations. The Children's Commissioner advised that 26 of the 78 recommendations have been picked up in the 2013 and 2014 government initiatives.

6.9 Judicial consideration of Article 27

Child Poverty Action Group v Attorney-General[336]

In 2006 the Child Poverty Action Group (CPAG) launched proceedings under Part 1A Human Rights Act 1993 against the Attorney General in relation to a provision in the Income Tax Act called the 'off benefit rule' or the In Work Tax Credit. A generous tax credit was available to parents of dependent children but eligibility depended on parents being in full time work. The

[331] Office of Commissioner for Children: *Child Poverty Monitor 2013*. It uses the measure of 60% below median family income moving line, though also measures poverty via the Economic Living Standards Index.

[332] The 2008 Economic Living Standards Survey revealed almost 60% of children in beneficiary families experienced a 'marked degree of hardship' compared to 15% of children whose parents were in paid work. This proportion has not improved since then.

[333] CRC did not explicitly feature in the Minister's speech.

[334] For example Art 10.3 ICESCR which prohibited discrimination against children on the grounds of parentage in the provision of child assistance schemes

[335] See, for example, the Alternate Welfare Working Group Report by Child Poverty Action Group December 2010.

[336] The case was appealed twice, was partially successful at the tribunal, failed at the High Court and though it succeeded on the prima facie discrimination claim at the Court of Appeal ultimately it was unsuccessful under s 5. The Court found the government had justified the discrimination. The following citations refer to the substantive decisions: *CPAG v AG* [2008] HRRT 31/08; *CPAG v AG* CIV -2009-404-273, *CPAG v AG* 25 October 2011 (HC); [2013] 3 NZLR 729 (CA).

government claimed the sole purpose of the benefit was to encourage work and create a gap between those in work and those on benefits

Before the Tribunal, officials were questioned about whether they had taken account of their obligations under CRC in developing the policy. In its decision the Tribunal noted that New Zealand's obligations under CRC were not mentioned in the relevant cabinet paper and it was not unfair to say that this dimension of the package did not appear to have been given any significant consideration.[337]

The High Court described the government commitments to provide an adequate standard of living as expressed 'in aspirational terms' and unless they were reproduced in domestic legislation, they did not create obligations enforceable in judicial proceedings. Although the judge conceded that they could influence interpretation of human rights' provisions in New Zealand statutes, it found, in a case concerning poverty and Article 27 that there was no role for them in the judicial analysis.[338]The Court of Appeal also found that CRC obligations under Article 27 had no role to play in the court's analysis although it acknowledged that the absence of a reference to human rights obligations in the policy process could reduce the deference the court afforded the government. However, even recognizing their 'obvious importance' and that closer attention to them in the policy development process would have been 'beneficial' the Court did not rely on those observations to mitigate the deference to the legislature's decision.

Harlen v Chief Executive of the Ministry of Social Development[339]
Mrs Harlen was convicted of benefit fraud for living in a relationship in the nature of a marriage with a man while receiving the domestic purposes benefit. She was imprisoned for 6 months and the Ministry demanded $117,598.84 in restitution. It started deducting $10 a week from her benefit. Her request for the debt to be waived was rejected by the Ministry and Social Security Appeal Authority. On appeal to the High Court, Article 27 was argued as a relevant consideration in exercising the discretion on whether steps should be taken to recover the debt. The High Court agreed it was relevant and had not been considered. The adequacy of Mrs Harlen and her dependent daughter's standard of living had not been part of the Ministry's consideration.[340]

The government attempted to legislate to address the effect of the decision by introducing a bill which would have removed the domestic obligation on the Chief Executive to consider human rights when exercising its discretion.[341]The Select Committee reported back with amendments that included reinstatement of relevant considerations in the discretionary decision making process

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[337] *CPAG v The Attorney-General* HRRT 31/08, 16 December 2008 at [74], [75]
[338] At [53] the Judge noted: "Although we are mindful of the international commitments made in the various covenants, we have not found it necessary to rely on any of the content that was drawn to our attention, in settling on the appropriate interpretation of the relevant human rights provisions in New Zealand's domestic legislation".
[339] *Harlen v CE MSD [2012] NZAR 185 (HC)* at [62] to [68]
[340] The High Court remitted it back to the Authority which confirmed the original decision. That decision is currently on appeal to the High Court.
[341]See New Zealand Law Society submissions on Social Security (Fraud Measures and Debt Recovery) Amendment Bill, 10/10/13 at para [6]: 'The Law Society is particularly concerned by the proposal that the chief executive be expressly permitted to *disregard* relevant considerations (including New Zealand's international human rights obligations) in determining the rate and method(s) of welfare debt recovery unless such considerations are identified in a Ministerial direction. The Bill's explanatory note singles out the right to an adequate standard of living (protected by article 11 of the International Covenant on Economic, Social and Cultural Rights) as a consideration to which the chief executive is expressly not required to have regard to unless it is so identified. The justification for the proposal is far from apparent'.

(including human rights considerations). The attempt to reverse the court's decision as it related to Article 27 was therefore only partially successful.

Overall the case law suggests that Article 27's role in the judicial process will be determined on a case by case basis. While the door is open for the courts to consider claims of discrimination relating to economic and social rights - including a right to an adequate standard of living - Article 27 is less likely to be influential the greater the macro-economic issues. However there are many situations, such as *Harlen*, where Article 27 may be pivotal and even the *Child Poverty* case includes some positive features for future adjudication.[342]

6.10 Effectiveness of ratification of CRC on realisation of child's rights under Article 27

The success of successive governments in realizing Article 27 and addressing the concluding observations needs to take account of economic circumstances. The Government has continued to resist the development of an official measure of child poverty which would allow progress on alleviating child poverty to be properly monitored. Disaggregated data on budget allocations for children is not available. Governments have resisted developing a National Plan of Action for Children arguing that they had built children's interests into a number of programmes. The recommendation that the Government take appropriate measures to assist parents, especially single parents, to ensure the child's right to an adequate standard of living have been heeded only to a limited extent.

Since ratification all governments have had a strategy of supporting children out of poverty by getting their parents into work. However, such strategies have some significant flaws. For example, there is a lack of quality, affordable and available childcare and out of school care and there will always be parents who, for one reason or another, are unable to work (illness, disabilities, accidents, redundancies, natural disasters, unemployment, sick children, or other caring responsibilities).

Article 27 has not been mentioned in government policy goals for the past 25 years. Successive governments have worked to move societal thinking to a new meaning for 'social security'- namely that the State is not responsible for supporting parents to provide an adequate standard of living to their children, when the parent cannot do so. Rather the government's role is limited to providing some assistance to parents to do so.[343]

6.11 Judicial consideration of CRC

CRC is one of the treaties referred to most frequently by courts and advocates in New Zealand.[344] CRC has been used by counsel in three areas: immigration, particularly in relation to deportation; youth sentencing for criminal offending; and family law cases. These areas are discussed below, largely in relation to Supreme Court and Court of Appeal decisions.

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[342] The Court of Appeal granted leave to hear the case after the High Court had declined leave on the grounds that the issues were not justiciable signalling to the Executive that the Government would need to be able to justify policies of discrimination regardless of whether they involved economic and social policies.

[343] Placing work requirements on social security beneficiaries would not be in breach. However for those who cannot work through circumstances outside their control or cannot find work despite meeting all job seeker obligations, and so are totally reliant on the state, then the state must provide the parent with an dequate standard of living.

[344] It was reported in a ten year period (Dec 1999 to June 2010) that CRC was referred to 163 times in court decisions and ICCPR 164, Krommendik above n 150

6.11.1 Immigration

There has been considerable interaction between the courts, the executive and legislative on the role CRC should play in immigration decisions relating to removal of parents of dependent children. While Parliament has at times intervened in court decisions, neither has the executive removed the requirement that immigration officers take CRC considerations into account in making deportation decisions.[345] The courts too have been mindful not to put too significant a burden on the Executive during the deportation consideration exercise. The high point was *Puli'uvea v Removal Review Authority* where the Court of Appeal held that human rights considerations formed part of the pre-existing humanitarian considerations exercise rather than as an add on.[346]

Tavita v Minister of Immigration [1994] 2 NZLR 257 (CA)

A year after New Zealand ratified CRC the Court of Appeal considered the case of *Tavita v Minister of Immigration.* Mr Tavita was subject to a removal order. He had a 2 year old daughter born in New Zealand and was married to her mother. He appealed the removal order on the grounds that the Minister had not taken account of its obligations under the ICCPR or CRC in enforcing the order.

The Crown accepted that the case had never been considered from that point of view but argued that the Minister was entitled to ignore international instruments. The Court observed that this was an unattractive argument, apparently implying New Zealand's adherence to its international obligations was partly window dressing. It noted that the bearing such documents had on the law is constantly evolving. The Court adjourned the case and stayed the removal order, noting that whatever the merits or demerits of either of her parents, Mr Tavita's daughter was not responsible for them and her future as a New Zealand citizen was inevitably a responsibility of New Zealand. Universal human rights and international obligations were involved.

The Immigration Service responded by changing its procedures to ensure the decision making 'balanced recognition of the rights of New Zealand citizens and residents affected by immigration decisions and New Zealand's right to determine who may lawfully enter and remain within its borders'. Officers were advised they were required to consider government obligations under CRC and other human rights treaties when making removal decisions.

In *Puli'uvea v Attorney-General* 3 of the 4 children were New Zealand residents but neither parent nor the oldest child were. The parents and older child were subject to a deportation order. The Court of Appeal, in an application for judicial review, affirmed that legislation should be interpreted consistently with New Zealand's treaty obligations. Although there was no explicit reference to the obligations in the decision making process, the court was satisfied that officials had considered the Convention obligations in relation to the family. An explicit reference was unnecessary so long as the relevant law had been complied with.

In *Huang v Minister of Immigration*[347] the child was a New Zealand resident but both his parents were over stayers. His mother had given birth to him while she was an over stayer. The parents challenged their removal orders because of the impact on the child. The Court of Appeal indicated

[345] Since July 2014, immigration officers are obliged under statute to consider relevant human rights obligations, including UNCROC: s. 177(3) Immigration Act 1999. For the most recent decision see *LIU v CEMBIE* [2014] NZCA 37 (HC); [2014] 2 NZLR 662 (CA)

[346] *Puli'uvea Removal Review Authority* [1996] 3 NZLR 538 (CA)

[347] *Huang v Attorney-Genera*l [2008]2 NZLR 700 (CA); [2010] 1 NZLR 135 (SC)

that a proper assessment under s 47(3) of the Act[348]satisfied New Zealand's obligations under CRC and ICCPR, as long as it was done close to removal. Immigration officers did not need to carry out a review of everything that had gone before when reviewing the decision to remove. Rather an up to date assessment in which the best interests of the child were taken into account as a primary consideration was required. While CRC was still a requirement it did not need to be recorded on the decision making document, as long as it was included under s 47(3). The following year the Supreme Court remitted two decisions back to the NZIS for reconsideration as the decision makers had not asked the correct question under s 47(3).

Ye v Minister of Immigration[349] involved two couples. While awaiting decisions about their refugee status Mr Ye and Ms Ding had 3 children. The Qui family had two. The Court held that what was contrary to the public interest required something more than a general concern for the integrity of the immigration system. Under article 3 of CRC the child's interest was a primary consideration in the decision making process but not the paramount consideration. This construction effectively suggested that Parliament had legislated consistently with international obligations.

Representing children separately would impose an undue burden on the Immigration Service but it would be inconsistent with article 12 of CRC to say that officers are never obliged to look beyond what parents may advance in the interview process. There may be circumstances where the parents cannot adequately put forward all that could be said on behalf of the child. Children who are capable of expressing views should have those views given 'due weight' in accordance with the child's age and maturity.

With the *Ye* children the decision had failed to account for the effect of China's one-child policy. It had also erred in the question it posed under the assessment of children's rights asking whether it 'would be in the best interests of the children to be removed to China given their mother was to be removed there', rather than 'should their mother should be removed from New Zealand in the light of the best interests of her children'. In the Qui decision the same approach had been adopted on the latter point.

Parliament amended the Immigration Act - officers were no longer obliged to apply the s 47(3) test but were only required to consider cancelling deportation if they were provided with information about an applicant's personal circumstances relevant to New Zealand's international obligations. It became a mandatory consideration to 'have regard' to relevant international obligations where they affected personal circumstances.[350]

In *CEMBIE v Lui,*[351] the Appellant was served with a deportation order towards the end of a prison term he was serving for violent offences against his partner. He claimed his deportation would breach the child's rights under CRC.

The Immigration officer had considered a wide range of CRC articles but not article 9.1. The High Court referred the decision back – saying that while it was laudable that the officer had done a thorough assessment the failure to comply cannot be treated lightly. Not considering article 9

[348] Whether there are 'exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand'.

[349] *Ye v Minister of Immigration* [2009] 2 NZLR 104 596; [2010] 1 NZLR 104 (SC)

[350] Section 177(3) Immigration Act 2009

[351] *CEMBIE v Liu* [2014] 2 NZLR 662 (CA)

(child's right not to be separated from parents) was clearly relevant in this context. Up to that time other decisions had seemed to suggest Article 9 did not apply where the decision was an immigration one. The court rejected this but the Court of Appeal overturned it.

6.11.2 Family Law

Although CRC has been raised in the family law context it has had a lesser role than in the area of immigration, possibly because the Care of Children Act 2005 incorporates the content of the relevant Convention articles.[352]

In *K v B* a mother wanted to relocate with her two children to Australia as she had substantial support there. The father was Algerian.[353] The Supreme Court noted that sections 4 and 5 of the Care of Children Act 2004 were consistent with articles 9.3 and 18.1 of CRC but nothing in the Convention was of assistance in resolving the issue.

The Court adopted a similar approach in *D v S*. The case involved a shared custody application under s 11 of the Guardianship Act.[354] The court observed that s 23 of the Guardianship Act 1968 which required the Court to consider the best interests of the child as the paramount consideration was consistent with the relevant provisions of CRC. In a dissenting decision Glazebrook J would have used CRC to support her position that the child, who was not provided for in a will, should have been treated as a living child at the time of the marriage, under s 3(1) of the Family Protection Act 1955. He had not been born at the time of his parents' marriage. Had he been, he would have had a right to inherit along with his brother.[355] The majority decided without reference to CRC.

In *Hemmes v Young*[356]Mr Young who had been adopted sought a declaration under the Status of Children Act 1999 that his biological father, Mr Hemmes, was his natural father. Section 16(2) of the Adoption Act had severed all legal links between an adopted child and their parents. The Court concluded that CRC (and ICCPR and European Court jurisprudence) does not provide for a right to know one's genetic origins. The Court read down s.16(2) in a rights conscious way, permitting Mr Young to seek a paternity order. The Supreme Court found s10 of the Status of Children Act was determinative and there was no feasible alternative interpretation which would enable Mr Hemmes to access rights under CRC. It emphasised however that this did not prevent an adopted child from seeking to prove that another person was his legal parent if it was necessary for another proceeding.

In a further case a natural mother sought to revoke an interim adoption order. The High Court accepted the irrevocability of consent argument but, relying on CRC, particularly Article 21, considered that the welfare and interests of the child would not be promoted by making a final adoption order. The adoptive parents appealed and the Court of Appeal upheld their appeal. It held CRC was not relevant where the legislation made it clear that revocations should only be made in situation of urgency. Hence something had to have arisen that was so serious that the adoption process should be stopped immediately. CRC did not have an interpretative place unless that threshold was met.

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[352] There is also considerable extraneous material such as the General Comments on the construction of particular articles that can assist interpretation domestically.

[353] *K v B* [2010] NZSC 112

[354] *D v S* [2002] 3 NZLR 233

[355] *Wood-Luxford v Wood* [2013] NZSC 153

[356] *Hemmes v Young*[2005] NZSC 47 [2005] 2 NZLR 755

On the other hand, the decision in *T v S* the Court of Appeal upheld a decision that the child could be made a guardian of the court for the purposes of carrying out DNA testing to determine if the applicant was the father.[357] The birth mother, who had told the applicant he was the father following conception and birth, later named another man and refused to consent to the test. The Court was reluctant to adopt an interpretation of the relevant provisions of the Family Proceedings Act (ss. 54-59) that would be inconsistent with CRC particularly the child's right to know and be cared for by parents (Article 7) and the obligation on the state to provide assistance and protection to a child to re-establish his or her identity (Article 8).

In *Re an Unborn Child* the High Court held, relying upon CRC, that the term 'child' in s.2(1) of the Guardianship Act 1968 included an unborn child and the child could be placed under the guardianship of the High Court to protect its birth being filmed as part of a pornographic film.[358] The Court referred to the preamble to the Convention which stated that a child, by reason of physical and mental immaturity, needs special care before as well as after birth.

UNCROC has had a significant impact on family law both by Parliament enacting legislation that is consistent with CRC and the courts recognising the relevance of CRC in decision making.

6.11.3 Criminal law

CRC has had an impact in the area of criminal law in relation to sentencing. In *R v Titoko*[359] a young man appealed his sentence of four years imprisonment for rape on the grounds that insufficient allowance had been made for his age. The Court of Appeal noted Article 37(b) UNCROC which requires a court to impose the shortest term of imprisonment for a child offender. The decision was affirmed - and the reference to CRC - repeated by the Court in *Churchward v R* which discussed at some length policy issues relating to sentencing young people.[360]

In cases where the seriousness of the offending requires sentencing to be transferred to the District Court from the Youth Court, CRC has had a significant influence. The Court of Appeal has held the CYFS regime is not an exclusive code and a young person transferred to the District Court is subject to the Sentencing Act and its principles subject, however, to the qualifications in CRC.[361] A young person's best interests should be the primary consideration in sentencing. There was no limit to the discount for youth as this would be inconsistent with the Judge's duty to accord the child the rights he or she enjoys under CRC.

The Court followed this approach in *R v M* [362][2011] NZCA 673 and discussed the application of CRC to the appeal against dismissal of a rape charge where both victim and accused were entitled to protection from the Convention. The Court of Appeal upheld the appeal noting that delay that would be unexceptional for an adult may require greater scrutiny in the case of a youth. The youth of the complainant was relevant in bringing her abuser to justice but this had to be balanced against the best interests of the accused child in a prompt trial. *R v Rapira,* suggests that because New

[357] *T v S* CA 249/02
[358] *Re an Unborn Child* [2003] 1 NZLR 115 at [61]
[359] *R v Titoko* CA 144/96
[360] *Churchward v R* [2011] NZCA 531; [2012] NZSC 25
[361] *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 at [82] and [94]
[362] [2011] NZCA 673

Zealand has a relatively favourable law compared to its CRC obligations, the Convention is actually used to downplay the effect of youth on sentencing.[363]

CRC has not protected dependent children from separation from their sole parent even for property crimes. In *R v Harlen,*[364] the Court of Appeal acknowledged that the family situation of a convicted person is relevant to sentencing but CRC did not require the courts to take a different approach to that mandated by existing legislation. Article 9 was read down because it was concerned with children separated as a result of domestic situations and not with the decision to imprison the parent.

In *R v Taki*[365] the court held that CRC was relevant to the administration of a sentence, rather than the sentence itself, and it was unfortunate that many women prison inmates were caring for young children and incarcerated a considerable distance from their family.

6.12 Conclusion

There has been a discernible increase in national awareness about children's rights over the past 25 years, and New Zealand's ratification of CRC appears to have played an influential role in that trend. One example of this is the policy platforms of both major political parties and many of the minor parties in the 2014 elections.

Some of those interviewed noted that the reporting process is an important and effective platform for lobbying and advocacy of children's rights in New Zealand. NGO representatives commented on CRC's effect in providing a forum and framework to meet, share information, and identify and agree on key issues to assist their lobbying of the government both domestically and internationally.[366]The Office of the Commissioner for Children has its own legislation which includes CRC monitoring and advocacy responsibilities. The government has passed the Care of Children Act 2004 and the Vulnerable Children Bill 2014 which are consistent with the principles in CRC and has repealed section 59 of the Crimes Act to prohibit corporal punishment of children, a change consistently called for by the United Nations Committee.

However, there has also been some regression. For example, the age of prosecution in the Youth Court has fallen from 14 to 12 for serious indictable offences and young people are dealt with in the adult criminal justice process for certain offences at 17 rather than 18 as required by CRC. The Office of the Commissioner for Children is poorly funded. The only specialised youth legal centre in the country (Youth Law) has had major funding problems over the past five years and the government has refused to fund any law reform or advocacy work related to its policies.

The government has displayed considerable inertia in progressing children's rights possibly because there has been no specific agency responsible for the implementation of children's rights in New Zealand despite repeated requests by the Committee. The periodic reports show a changing number of entities responsible for aspects of child-related work. Some – such as the UNCROC Advisory Group - were established but have fallen into disuse. Others, like the Office of the Children's Commissioner and the Ministry of Youth Affairs only have an advisory or advocacy

[363] *R v Rapera* [2003] 3 NZLR 794

[364] (2001) 18 CRNZ 582

[365] CRI 0 2010-470-0000 2 July 2010

[366] Alison Cleland of ACYA considers that the process of reporting creates an opportunity to collect and collate invaluable information on children and the formality and the international context emphasises the importance of children's rights at home.

role. However, the recently established CRC Monitoring Group and its link with the Deputy Chief Executives Social Sector Form may result in more high level government policy development in relation to CRC.

The impact of the Committee's Concluding Observations themselves in New Zealand's domestic context has been limited. A typical response of successive governments to matters they do not agree with led to the assertion that New Zealand's human rights record is still well ahead of other countries, particularly those countries represented on the Committee.

The judiciary is aware of the Convention, and at times has taken the initiative to align decisions with it. It has been used in an immigration case involving deportation and is now a regular feature in youth sentencing. Although international human rights treaties have been found to be relevant to the exercise of the government's discretion, an attitude still prevails that human rights treaties are aspirational only. Their potential as aids to interpretation and as relevant considerations in the exercise of discretions has yet to be fully realised.

With child poverty in New Zealand reaching levels of 27% it is tempting to speculate that ratification has not been effective in realising children's right to an adequate standard of living. Without economic rights most other rights of children cannot be realised. The sole focus of consecutive governments since ratification has been on parental work as the means to alleviate child poverty. There have been positive initiatives such as the poverty alleviation aim of the Working for Families package, though the initiatives effectively exclude the poorest children by focusing on supporting working parents. The Commissioner for Children has developed a child poverty monitor, enabling progress to be tracked and recently established an expert advisory group on child poverty which recently made 78 recommendations to government. However to date less than a third have been developed as policy initiatives by government. A new and urgent approach is needed in this area. The damage caused by child poverty both on present and future generations and society as a whole is not properly appreciated in national dialogue.

Until there is an effective CRC co-ordinating body and National Plan of Action for Children, the realisation of children's rights will continue to be ad hoc. The legislature could play a greater role if there were a human rights select committee which had as part of its role the review the Concluding Observations and the ongoing implementation of CRC. Raising awareness and understanding of Members of Parliament would also raise CRC's profile and much more could be done to educate the public, the media and professionals working with children about children's rights and the CRC framework.

Chapter Seven The Convention on the Rights of Persons with Disabilities (CPRD)

7 Background

The Convention on the Rights of Persons with Disabilities (CRPD) is the most modern of the international human rights treaties and the first of the 21st century. It was adopted by the UN General Assembly on 13 December 2006, and is unique in a number of ways. It introduces a "disability narrative into the human rights framework"[367]and provides an "unprecedented opportunity for the United Nations to engage in activities that promote the rights and dignity of persons with disabilities".[368]It marks a turning point for the enjoyment of human rights of persons with disabilities[369] following decades of neglect and marginalisation within the human rights agenda, and is based on the social model of disability rather than on individual and personalised pathology.[370] It is also notable for the unprecedented level of civil society participation and advocacy involved in the drive for a separate treaty. The development of the Convention was described as "ground-breaking advocacy"[371]in the spirit of the international disability slogan of "nothing about us without us". New Zealand signed the CRPD on 30 March 2007.

New Zealand played a significant role in the evolution of the Convention, particularly through the involvement of representatives of disabled peoples' organisations (DPOs) and Ambassador Don MacKay, Permanent Representative of New Zealand to the United Nations in Geneva, who served as Chair of the Ad Hoc Committee on the Rights of Persons with Disabilities during its final two years and the last session of the negotiations.

The United Nations has characterised people with disabilities as the world's largest minority. It is estimated that more than 10 per cent of the world's population, or 650 million people, live with a disability.

The Convention describes the rights of people with disabilities under international law and sets out a code of implementation for governments,[372] similar to other human rights treaties. One commentator describes the CRPD as clarifying the position of people with disabilities in international law.[373] However, another scholar questions whether the Convention is merely making it clear that existing human rights should, and do, apply to people with disabilities, or whether it creates new rights that are specific to people with disabilities.[374] He suggests that the Convention

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[367] Janet Lord, (2013) "Screened out of existence: the Convention on the Rights of Persons with Disabilities and Selective Screening Practices" *International Journal of Disability, Community and Rehabilitation,* 12(2), http://www.ijdcr.ca/Vol 12-02/articles/lord.shtml

[368] Sha Zukang, (2007) "Promoting the Convention on the Rights of Persons with Disabilities: The Role of DESA". *International Rehabilitation Review*, 56(1), 11.

[369] Louise Arbour, (2007) "The Role of the OHCHR in Promoting the UN Convention on the Rights of Persons with Disabilities". *International Rehabilitation Review* , 56(1), 12

[370] Paula Pinto, (2011). "Monitoring Human Rights: A Holistic Approach" in Marcia Rioux, Lee Ann Basser and Melinda Jones (eds.) *Critical Perspectives on Human Rights and Disability Law.* Leiden, Martinus Nijhoff Publishers at 451-477.

[371] Maria Reina and Stefan Tromel, S. (2007) "A Unified Disability Community: the Key to Effective Implementation of the Convention". *International Rehabilitation Review*, 56(1), 9

[372] Don MacKay, (2007) "The Convention on the Rights of Persons with Disabilities: A Benchmark for Action". *International Rehabilitation Review*, 56(1), 2-4.

[373] Melinda Jones, (2011). "Inclusion, social inclusion and participation." in Rioux, M. et al (eds.) above at pp 57-82.

[374] Frederic Megret, F. (2008) "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?" *Human Rights Quarterly,* 30(2), 494-516

does a number of things such as affirming the applicability of existing human rights; reformulating existing human rights; extending a number of existing rights; and it "also comes very close to creating new rights….specific to persons with disabilities."[375]Other commentators suggest that the Convention does not "intentionally create new rights"[376] while Byrnes argues that because it is a comprehensive and integral treaty the CRPD does in fact create new hybrid rights.[377]

The CRPD is wide-ranging covering accessibility, awareness-raising to combat stereotypes, living independently, personal mobility, habilitation and rehabilitation, statistics and data collection as well as health, employment and education and articles for children with disabilities and women with disabilities. The right to life is a separate article.

Accessibility, inclusiveness and changing societal attitudes are recurring themes and the Convention reflects a shift in thinking from viewing disability in terms of social welfare to a human rights paradigm. As a signatory of the Convention, New Zealand has committed itself to "take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise".[378] A former chair of the UN Committee on the Rights of Persons with Disabilities, Ron McCallum, notes that it is equally important to appreciate that people with disabilities can also rely on the human rights provisions contained in other UN treaties as well as in many other supra-national covenants, charters and treaties.[379]

The CRPD differs from other human rights treaties in a number of ways. First, there is a difference in detail, with 30 substantive articles, many far more explicit than corresponding articles in other population-based treaties. For example, Article 27-Work and Employment - has 11 sub clauses. Second, the enlarged scope is coupled with a more detailed articulation within the convention articles themselves, what one scholar calls "substantial extra semantic texture to certain rights"[380] and reflects a maturing of definitions of contentious human rights concepts such as "reasonable accommodation". This could have implications for future treaty-based jurisprudence. For example, Article Two defines "reasonable accommodation" as both a positive and negative duty with its denial constituting discrimination.

Third, it introduces a new range of monitoring mechanisms, including national implementation and monitoring by State parties through the establishment of a framework of an independent mechanisms with a specific role for civil society (Article 33).

A fourth element that distinguishes the CRPD, is the depth of the involvement of disabled people, the affected population group, in its drafting. On 30 November 2001, the Mexican President made a speech to the United Nations General Assembly introducing the idea of a new convention. He said: "*It would be impossible to make this world more just if we allow the exclusion of the most vulnerable groups."* This prompted the OHCHR to review international human rights treaties, standards and

[375] at 498

[376] Rioux et al., above n 373 at 482.

[377] Andrew Byrnes, (2008). *Monitoring the fulfilment of CRPD Rights in Australia: Issues and challenges*. Transcript from the Queensland Advocacy Inc. Human Rights Seminar 20 August 2008. Online http//www.qai.or.au/content/online-library-documentscfm?ID=69.

[378] Article 4. Convention on the Rights of Persons with Disabilities.

[379] Ron McCallum in Rioux et al, above n 373

[380] McCallum, above at 503

mechanisms in relation to disability. The resulting Quinn-Degener report recommended strengthening current mechanisms and developing a separate convention.[381]

The international consensus that the existing human rights system had neither promoted nor protected the rights of people with disabilities was reflected in the United Nations High Commissioner for Human Rights, Louise Arbour's comment to the UN committee negotiating the new Convention in 2006: [382]

> *There is also no doubt that the existing standards and mechanisms have in fact, failed to provide adequate protection in the specific case of persons with disabilities. It is clearly time for the United Nations to remedy this shortcoming.*

While world leaders by 2005 recognised the need to finalise a convention, DPOs and others were frustrated by both the pace of progress of realisation of civil, political, economic, social and cultural rights for people with disabilities and the failure of governments to apply existing instruments in any specific or targeted way to implement them practically for people with disabilities. This frustration, coupled with the opportunity provided by the development of a new convention in and of itself, generated new forms of disability advocacy at international and national levels which led to an "unprecedented involvement of DPOs in crafting the CRPD".[383]The International Disability Caucus (IDC) which represented people with disabilities on the Ad Hoc Committee drafting the new treaty coordinated about 80 global, regional and national DPOs and related NGOs from across regions including different disability groups.[384]

> *Legitimised by its broad constituency, DPO leadership and consensual agenda, IDC's advocacy included a broad range of tactics, from developing an alternative Draft Convention to making a unified intervention on each issue during the plenary sessions.*

The level of involvement of DPOs meant that the final text of the Convention represented real life experiences of people with disabilities and led to a new level of civil society politicisation about expectations for the Convention's implementation.

7.1 The New Zealand context

New Zealand signed the CRPD on 30 March 2007 but ratification of the Optional Protocol is "under consideration".[385]The Government has told the UN that it expects to provide an update on New Zealand's implementation of the Optional Protocol in 2015.[386]

By the late 1990s there was a growing momentum in New Zealand to progress disability rights. In 1999 a Minister for Disability Issues was created and in 2002 a mechanism - the Office for Disability Issues (ODI) within the Ministry of Social Development - was established as part of the fifth Labour Government's social policy framework. In 2000 a new Public Health and Disability Act foreshadowed the development of the *New Zealand Disability Strategy: Making a World of Difference:*

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[381] Gerard Quinn & Theresia Degener, (2002). *Human Rights and Disability*. New York and Geneva, United Nations.

[382] Quoted in Mackay, above n 372

[383] McKay above at 9.

[384] At 9.

[385] New Zealand Ministry of Foreign Affairs and Trade (2008) *New Zealand Handbook on International Human Rights.* Wellington (2008) at 245.

[386] Office of the High Commissioner for Human Rights (2014) *Committee on the Rights of Persons with Disabilities considers initial report of New Zealand.* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15042&la Accessed on 27/11/2014.

Whakanui Oranga. The strategy was regarded internationally as socially progressive both in its content and in the process of its development. A Strategy Reference Group, co-chaired by the Director of ODI and Robyn Hunt, a disabled person who later became a Human Rights Commissioner, took the draft to the disability sector for consultation. A central theme of the strategy was the idea of New Zealand as fully inclusive society. The leadership role taken by representatives of disabled people in the development of the strategy and the expertise and experience gained as a result, transferred into the development of CRPD.

The role of civil society in the development of the CRPD, particularly by DPO representatives, is significant in New Zealand's human rights history. It is, however, a story that has not yet received appropriate public or political recognition. The UN had established an Ad Hoc Committee in December 2001 which first met in 2002 and reaffirmed the need for a new treaty. In May 2003 Cabinet agreed that New Zealand take an active role in the development of the CRPD. A Cabinet paper at the time of the Committee's second meeting in June said that:[387]

> *The inclusion of non-official representatives contributed breadth and special knowledge to the delegation. This breadth of expertise ensured that New Zealand played an influential role. The New Zealand delegation delivered six statements outlining ideas for the content of a convention based on experience with the New Zealand Disability Strategy and advocating for an approach that draws upon the mandatory authority of the human rights covenants. We recommended expanding on the provisions in these existing covenants with explicit recognition of what they mean for disabled people and it was acknowledged that this would inevitably require social development and affirmative action.*

The Cabinet paper also outlined New Zealand's contribution to a process for developing CRPD which promoted the full and active participation of disabled people in partnership with State parties. The European Union had put forward a proposal to establish an "experts" group to work on the convention text but this was opposed by other States and perceived by civil society as a delaying tactic. New Zealand proposed an alternative inter-sessional arrangement comprising a small group of government representatives and DPOs working in partnership which gained widespread support as the preferred process after intense lobbying.

New Zealand's official position on the scope of the proposed Convention is intriguing given its approach to implementation post ratification. New Zealand said:[388]

> *Many States assert that it is neither necessary nor desirable for the convention to invent new rights or detract from existing rights provided for all people, including disabled people, in existing treaties. Rather, it is proposed the convention should clarify for States the measures required to ensure disabled people are able to experience existing rights and fundamental freedoms. This entails the explicit recognition and understanding of disability in a rights framework rather than the historically more common welfare framework.*

The Cabinet paper stated that a comprehensive treaty would go further than a statement of the right to equality and non-discrimination recommended by some States and provided in the New Zealand Human Rights Act 1993. It involved consideration of the social, cultural, economic, civil

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[387] Ruth Dyson, (2003) *Cabinet Social Development Committee. Negotiations on a Convention on the Rights of Disabled People.* (CAB Min (03) 17/5)

[388] At [13]

and political conditions necessary to ensure the full and diverse population of disabled people were able to exercise their universal human rights.

The Minister for Disability Issues, Hon Ruth Dyson, then sought Cabinet consideration for the support for DPOs in the convention development and asked for a transparent funding pool to resource the activity in 2003. This meant that disabled people were able to be part of negotiating teams outside of government influence in the CRPD process. Gary Williams, Chief Executive of the Disabled Persons Assembly, and Robyn Hunt were actively involved in this process. New Zealander Robert Martin, who was Vice-President of Inclusion International, a self-advocacy group, also spoke at the United Nations during the development of the CRPD.

Reporting on ongoing engagement in the CRPD development, the Minister of Foreign Affairs and Trade, Phil Goff, and the Minister for Disability Issues, Ruth Dyson, said that New Zealand was able to support the main thrust of the draft Convention under negotiation although there were a few issues that were inconsistent with existing legislation or required clarification. These related to forced interventions, the rights of disabled people illegally in New Zealand and remedies for breaches of rights.[389]

New Zealand was one of 27 States represented on the Working Group, which included 12 international non-governmental organisations representing disabled people and one representative of national human rights institutions. The group met in January 2004 and was chaired by the New Zealand Permanent Representative to the UN in New York. The Ministers observed that *"New Zealand efforts and its views on the scope and substance of the Convention have been highly regarded*."[390]The broad approach to the negotiations had been to promote partnerships between the government and non-governmental organisations in national and international negotiations and promote outcomes consistent with the New Zealand Disability Strategy, domestic legislation and international human rights instruments.

There were eight meetings of the Ad Hoc Committee between 2002 and 2006. The United Nations General Assembly adopted the Convention by consensus on 13 December 2006.

The Cabinet paper authorising New Zealand's signing of the CRPD urged the attendance of a high level delegation when the Convention first opened for signing on 30 March 2007 as a "continuation of our leadership role" and to send a strong signal to other States.[391] It was claimed that "New Zealand modelled participation by disabled people by including in every delegation to the United Nations at least two representatives of the disability sector. Funding was provided by government for disability sector representatives to attend meetings in New York."[392]

In 2007 New Zealand won the prestigious Franklin Delano Roosevelt International Disability Award which the Minister for Disability Issues, Ruth Dyson, said acknowledged both the New Zealand Disability Strategy and "in shaping and negotiating the intent of the UNCRPD over a

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[389] Phil Goff and Ruth Dyson, (2004) *Cabinet Social Development Committee. Progress in Negotiating a Disability Rights Convention.* (CAB Min (04) 40/5).
[390] At [9]
[391] Ruth Dyson and Winston Peters, (2007) *Cabinet Social Development Committee. Signature of the Convention on the Rights for persons with Disabilities.*
[392] at 3, [22]

number of years".[393] Civil society representatives also saw the award as a result of their efforts and role in developing the Convention.[394] The Disabled Persons Assembly NZ said that *"we were recognised internationally for this work (influential in creation of CRPD) in 2007 by jointly winning the Franklin Roosevelt Award."* The DPA was awarded a US $50,000 grant as part of the award given to an outstanding non-governmental disability organisation selected by the winning country. DPA's application, one of 24, was supported by People First and CCS Disability Action.[395]

Given its reluctance to enter reservations, New Zealand aims to ensure that its domestic legislation is compliant before ratification.[396] After signing the CRPD the Government carried out a National Interest Analysis ('NIA'). The NIA found that it was not necessary to introduce specific legislation but there were 19 statutes where there was a presumption of incapacity in certain situations, six where disability prevented the appointment to statutory boards, and 10 with provisions which used inappropriate language.[397]The changes were considered "minor and technical" and able to be effected through an omnibus Bill that principally involved removing statutory references to an individual's status under the Mental Health (Compulsory Assessment and Treatment) Act 1992.[398]

Subsequent to ratification, substitute decision making – and in particular capacity and the implications of the Protection of Personal and Property Rights Act 1988 (PPPR Act) - has emerged as a significant issue in Convention compliance. While there was no specific reference to the PPPR Act in the NIA, one of the Cabinet papers prepared by the Office for Disability Issues and the Ministry of Foreign Affairs and Trade during the negotiation of the Convention noted that substitute decision-making did not prohibit the use of personal representatives under the PPPR Act.[399] However, as the PPPR Act was not listed in the NIA as a law that was potentially inconsistent with the Disability Convention, it invites the inference that the Executive considered that it did not infringe the capacity provisions in Article 12 which should therefore be interpreted in a Convention compliant manner.

The NIA was relatively superficial as there was a push for New Zealand to ratify as soon as possible given its role in promoting the Convention.[400] A cabinet paper on the NIA prepared by the ODI in 2008 suggests there was no real attempt to address the more subtle implications of the Convention. Issues such as access to buildings or reasonable accommodation in education were considered to be adequately addressed by existing legislation such as the Building Act 2004 and the Education Act 1989 – despite the fact that there had been, and continue to be, ongoing issues with both.

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[393] Ruth Dyson (3 December, 2007). *NZ wins Roosevelt International Disability Award.* Press Release. http://www.beehive.govt.nz/release/nz-wins-roosevelt-interntional-disability-award. Accessed 1/12/2014.

[394] Disabled Persons Assembly NZ. *Our achievements*. Accessed at http://dpa.org.nz on 1/12/2014.

[395] Ruth Dyson (4 April, 2008) "NZ disability group awarded $US 50,000 grant." New Zealand Government Press Release. Scoop.co.nz. Accessed on 1/12/2014.

[396] If there is a provision in a treaty which a State does not agree with or if the State cannot bring its domestic legislation into line with its international obligations, it may enter a reservation to prevent the provision from applying to it. A reservation cannot be entered if it would undermine the effect of the treaty.

[397] Ruth Dyson and Winston Peters (2007) Cabinet External Relations and Defence Committee. *Towards ratification of the United Nations Convention on the Rights of Persons with Disabilities at*.3 [15][16][17]

[398] Office for Disability Issues *Convention on the Rights of Persons with Disabilities: National Interest Analysis* at [56 et seq]

[399] Office for Disability Issues and Ministry of Foreign Affairs and Trade *Towards a Disability Rights Convention* at [25]

[400] Cab paper: *Towards ratification of the United Nations Convention on the Rights of Persons with Disabilities* September 2007 at [26]

New Zealand passed the Disability (United Nations Convention on the Rights of Persons with Disabilities) Act in 2008 to effect the necessary changes allowing New Zealand to ratify the Convention on 26 September 2008 in time for New Zealand to participate in a Conference of State parties in November of that year.

The ebb and flow of political will that so strongly characterises New Zealand's commitment to human rights is especially evident in progress for disabled people. Without strong Ministerial leadership from the first Minister for Disability Issues, Hon. Ruth Dyson, and her successor, Hon. Tariana Turia, it is unlikely that New Zealand would have played such a pivotal role in the development of the CRPD. Ministerial backing was required for the funding of representatives of the disability community for travel to New York and Hon Dyson was a formidable champion of disability rights. Once the CRPD had been signed, Hon Turia quickly established the institutional framework for implementing the CRPD and showed that she was both a passionate advocate for change within government departments and equally dismissive of bureaucratic stonewalling.[401]

The increasing salience of the implementation of human rights for disabled people is demonstrated by the increasing number of New Zealanders who report that they are limited in their daily activities by a range of impairments. The New Zealand Disability Survey from Statistics New Zealand in June 2013 identified 1.1 million people representing 24 per cent of the population as disabled. This was an increase from 20 per cent in 2001 involving 11 per cent of children and 27 per cent of adults.[402]

7.1.1 Article 33

Article 33, National implementation and monitoring, is a mechanism that has been described as "unique in an international human rights instrument" that "triangulates between executive efficiency, independent scrutiny and voice."[403] It purports to distinguish between national implementation and monitoring and is intended to link the norms of the CRPD and international treaty law with domestic progress and change for people with disabilities. The Asia Pacific Forum (APF) states that Article 33 was included in the CRPD largely as a result of the contributions of national human rights institutions (NHRIs), together with representatives of people with disabilities and this was a "first" in human rights instruments.[404]

> *This is much more specific than the general obligations clauses contained in previous human rights instruments, which require States to use "all appropriate means, including particularly the adoption of legislative measures" (ICESCR) or to "adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant" (ICCPR).*

The APF said the recognition of the importance of a national monitoring mechanism in addition to the combination of domestic legislative measures and international monitoring was important:[405]

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[401] Personal observation by one of the authors, who was a NZ Human Rights Commissioner with joint responsibility for disability rights when the IMM was established, at the first IMM meeting with the Ministerial Advisory Group.

[402] Statistics New Zealand (2014) New Zealand Disability Survey 2013. Retrieved from http://www.stats.govt.nz/~/media/Statistics/Browse%20for%20stats/DisabilitySurvey/HOTP2013/DisabilitySurvey2013HOTP.pdf

[403] Gerard Quinn, (2007). Article 33: A catalyst for domestic change. *International Rehabilitation Review, 56*(1), 34-36. Retrieved from http://www.unicef.org/RI_Review_2007_Dec_web.pdf

[404] Asia Pacific Forum (2007) Annual Conference: Disability Issues Paper, Sydney Australia 24-27 September 2007.

[405] At 4.

> *The express incorporation of this insight into a major human rights instrument is both a necessary response to the specific issues raised by disability, and a welcome precedent for the development and implementation of human rights law more generally.*

Under Article 33(1) States Parties are expected to designate one or more focal points within government for matters relating to the implementation of the Convention and establish or designate a coordination mechanism within government to facilitate related action in different sectors and at different levels. One of the main problems identified by commentators was the 'silo effect' of individual public service departments operating individually and variably. Article 33(1) *"locked onto the existing institutional architecture of change by engaging implementation bodies and seeking their co-ordination*".[406]

Under Article 33(2) States Parties are expected to establish and maintain a framework, including one or more independent mechanisms, to promote, protect and monitor implementation of the Convention " tak[ing] into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights." The principles are the Paris Principles relating to the Status of National Human Rights Institutions adopted by the United Nations General Assembly in 1993 and which form a framework against which NHRIs such as the NZHRC are accredited.[407]

The Office of the United Nations High Commissioner for Human Rights produced a thematic study on the structure and role of national mechanisms which identified three key requirements.[408] These were the inclusion of independent mechanisms, a framework capable to carrying out the mandate to promote, protect and monitor and the involvement and full participation of civil society in the monitoring process. The study also defined promotion, protection and monitoring. Promotion included a broad range of activities from awareness-raising to a more strategic engagement in the promotion of the implementation of the Convention and included activities such as scrutiny of existing legislation and draft bills to ensure consistency with CRPD and provision of technical advice to public authorities and other agencies in applying the Convention.[409] Protection covered a wide range of activities such as the investigation and examination of individual and group complaints, court cases, inquiries and issuing reports.[410]Monitoring the implementation of CRPD ranged from developing indicators and benchmarks to monitor implementation, estimating progress or regression over time to monitoring human rights violations through the complaints filed by alleged victims of discrimination with NHRIs, other agencies and quasi-judicial or judicial complaints mechanisms.[411]

Article 33(3) states that, "Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process." Gerard Quinn

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[406] At 36.

[407] The NZHRC is an A-accredited NHRI.

[408] Human Rights Council, Thirteenth session, Agenda item 2, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Thematic study by the Office of the United Nations High Commissioner for Human Rights on the structure and monitoring of the Convention on the Rights of Persons with Disabilities: Summary*, A/HRC/13/29, 22 December 2009.

[409] At [64]

[410] At [66]

[411] At [67]-[68]

suggests that the majority of treaty monitoring bodies would look with disfavour on States that do not involve civil society in the drafting of their periodic reports. [412]

> *This goes further. It explicitly requires such engagement with respect to national 'monitoring' which is quite crucial in keeping a domestic dynamic of reform going. As such it reflects a general requirement with respect to the consultation of persons with disabilities in Article 4 (3).*

A paper for the ODI in 2008 provided three options for consideration on how New Zealand could meet the obligations of Article 33[413]noting that because New Zealand was an early adopter of CRPD there were few precedents for guidance. Two of the options preferred the ODI as the designated focal point within central government to provide leadership and monitoring of the New Zealand Disability Strategy and take responsibility for the New Zealand Government's reporting obligations under Article 35 of the Convention. Option Two also proposed that ODI take on the coordination role and decide best how to involve people with disabilities and civil society. In Option Three, however, the Ministry of Justice was to be designated as the central government focal point and fulfil the international reporting requirements, while the Ministry of Health would assume leadership and monitoring of the Disabilities Strategy.

Options for implementing Article 33(2) in terms of promoting, protecting and monitoring, ranged from a new Disabilities Commission established as an independent crown entity to a Disabilities Commissioner situated within the NZHRC.

Article 33(3) explicitly refers to the participation of civil society and people with disabilities. DPOs were consulted about the development of options to implement Article 33. The options paper stated:[414]

> *It would be hard to overstate the concern that the DPOs have about the knowledge needed, ability and as importantly the willingness of agencies to form an active partnership with DPOs. This concern was raised without exception by all DPOs. This partnership needs to be radically different from the model that has been employed for consultation with civil society in New Zealand until now in regard to the Disability Strategy……. The current monitoring of other UN human rights conventions (e.g. the ICCPR, ICESCR, CRC) is not considered by any DPO as a possible framework for monitoring the Convention.*

The Options Paper said the central government agencies canvassed with civil society options within government from the Ministry of Health, the Ministry of Social Development (MSD), the ODI which reports into the MSD, and the Ministry of Justice. Preferences were split. To fulfil Article 33 (2) the DPOs preferred the role was shared between the NZHRC and the Office of the Ombudsmen. An issues paper by the Asia Pacific Forum also contemplated a shared function with NHRIs and others. It said:[415]

> *Article 33(2) does not simply contemplate designation of a single mechanism (such as an NHRI) for monitoring, protection and promotion of implementation. Although establishment*

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[412] Quinn, above n 411 at 36.

[413] Petra Butler, (2008). *Report on the Implementation Options of Article 33 United Nation Convention on the Rights of Persons with Disabilities.*

[414] At 15

[415] At 7

> *or designation of a mechanism or mechanisms is called for, this is set within a broader requirement to establish a framework for promotion, protection and monitoring.*

Subsequent European scholarship suggests that "NHRIs should not be blindly designated independent mechanisms" and that often it will be advantageous if the role and responsibilities are shared.[416]

In the end New Zealand opted for a different option with one novel feature. Hon Tariana Turia, the Minister for Disability Issues outlined in a Cabinet paper how New Zealand would meet its obligations under Article 33.[417]Unsurprisingly, she proposed that the ODI be identified as the government focal point, because it had the "mandate, skills and acceptance among disabled peoples' organisations to lead a whole-of-government approach to implementing the Convention".[418] However, she suggested that the relatively newly created Ministerial Committee on Disability Issues be designated as the co-ordinating mechanism, because *"co-ordination at Ministerial level will demonstrate New Zealand's continued commitment to taking a leadership role."*

A Ministerial Committee on Disability Issues had been agreed to by Cabinet in February 2009 as part of the Government's response to the Social Services Select Committee's report on its inquiry into the quality of care and services provision for people with disabilities. Cabinet had tasked the Committee with determining the priority and timeframes for implementing the Government response and improving effectiveness of government agencies' implementation of the New Zealand Disability Strategy. Its aim was to improve the leadership, co-ordination and accountability of government as it affected disabled people.[419]Expanding its mandate would provide a forum where all participants, Government and non-Government, with a Convention role could meet to discuss "progress, priorities, and the linkage with action plans."[420]The mandate of the existing public service Chief Executives' Group on Disability Issues would also be extended offering the "opportunity for a positive and collaborative approach at governance and implementation levels."[421]In the Cabinet paper Minister Turia said that the establishment of a committee that can "work with the independent participants offers the potential to develop a fully collaborative framework in keeping with the intent of the Convention".[422]

The NZHRC was to have a broad role across all three elements of promotion, protection and monitoring in accordance with its existing functions in the human rights area, under Article 33(2). It was proposed that:[423]

> *The Office of the Ombudsmen will have a more confined role in the areas of protection and monitoring, to the extent that these roles can be achieved throughout the Ombudsmen's existing functions to investigate the administrative conduct of agencies in the State sector.*

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[416] Gauthier de Beco, (2011) "Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions" *Netherlands Quarterly of Human Rights*. 29 (1) 84-106 at 106.

[417] Office for the Minister of Disability Issues (2010) *Framework to promote, Protect and Monitor Implementation of the Convention on the Rights of Persons with Disabilities*. Cabinet Social Policy Committee.

[418] At [4]

[419] At [15]

[420] At [16]

[421] At [19]

[422] At [8]

[423] At [4]

A group of DPOs that had been involved in the CRPD drafting, signing and ratification process, called the Convention Coalition that had been formed as a governance–level steering group by six major NGOs provided the civil society component of Article 33. The groups were the Disabled Persons Assembly (DPA), the Association of Blind Citizens, People First, Deaf Aotearoa, Ngati Kapo and Nga Hau E Wha (a network of organisations of people with experience of mental illness.) The mental health group, Balance New Zealand, and Deafblind (NZ) Incorporated were added later.

The proposed framework therefore "provide[d] for three independent and equal partners-the Human Rights Commission, the Office of the Ombudsmen and the Convention Coalition-working in full collaboration with government to ensure that the Convention is monitored in a manner that will have the confidence of disabled people and the New Zealand public."[424]

The Cabinet minute also identified what the three groups would do. The NZHRC would lead an ongoing programme to identify areas where disabled people are vulnerable to abuse or denial of their rights and it would advocate for solutions and remedies by government agencies or the private sector. It would also develop a "strong, formal and visible domestic role" promoting and protecting the implementation of the Convention and advocating for disability rights.[425]

The principal focus of the Office of the Ombudsmen would be monitoring the performance of the wider State sector in implementing the Convention "through the own-motion investigation function, making recommendations and publishing reports as appropriate."[426]The Office was to be given explicit recognition in its existing mandate to investigate State sector administrative conduct in relation to disabled people.[427]

The Convention Coalition would lead disabled peoples' work on monitoring and was "committed to ensuring that the Treaty of Waitangi is upheld and reflected in its activities."[428]The importance of sharing its monitoring work with regional and global disability communities was also recognised. The Convention Coalition provided an "ethical mechanism for disabled peoples' input into the monitoring of disability rights as spelled out in the Convention".[429]

The Independent Monitoring Mechanism (IMM) has reported twice since its establishment. The first report covered the five years until June 30, 2012 and the second the period from July 2012-to 31 December 2013.[430]The first report focussed on developing a baseline profile of the rights of disabled people in New Zealand and contained seven key recommendations. It urged the Ministerial Committee on Disability Issues to ensure that action on the recommendations was completed by the end of 2014. The Minister responded by stating that the hard-hitting conclusions were just what the Government had asked for when it set up the independent organisations to

[424] At [5]
[425] At [27]
[426] At [34]
[427] At [35]
[428] At [39]
[429] At [40]
[430] *Making disability rights real Whakatuturu ngā tika hauātanga. Summary Report. Second Report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities. Aotearoa, New Zealand.* July 2012-December 2013. New Zealand Human Rights Commission, Ombudsman, New Zealand Convention Coalition.

undertake monitoring. Government would be carefully considering "these suggestions" in the coming year as it further developed and implemented the Disability Action Plan.[431]

The second report returns to many of the themes in the first report with five broad areas requiring particular attention. These were:

- data and the absence of statistics and information relating to disabled people;
- accessibility to services, transport, communication and the physical environment;
- building a people-driven system;
- violence, neglect and abuse directed at disabled people;
- education, including the absence of an enforceable right to inclusive education, the way in which schools report on inclusiveness and exclusion, isolation and bullying.

Other matters of concern were also identified during the most recent reporting period. They were reliance on substituted decision-making and Article 12 of CRPD, the right to equal recognition before the law; the significant health disparities and life expectancy issues for disabled people particularly those with learning/intellectual disabilities and discrimination against disabled children in relation to out of home care arrangements under certain sections of the Children, Young Persons and their Families Act 1989. The report also urged the Government to repeal the New Zealand Public Health and Disability Amendment Act 2013 that effectively removed any potential domestic legal remedy for unlawful discrimination relating to the Government's family care policy. Specific key recommendations identified which public service departments and government agencies were responsible for action.[432]

The IMM asked "that the Government provide the IMM with a progress report, as at the end of 2014, on implementing the recommendations of the IMM's 2011/12 report."[433] To date there has been no official government response to either of the IMM reports, other than carefully considering the "suggestions" of the first report. Ombudsman Ron Paterson in an interview for this research said:

> *I think if the Government didn't respond, then the IMM would be left in the position of having to make the same points again, presumably more loudly, in the next report in another two years.*

The absence of an official response suggests that while the IMM is a unique monitoring mechanism, the Government can treat it as a discretionary internal mechanism choosing when and if it wishes to respond. It both funds the monitoring mechanism, appoints and constitutes it, and can equally disregard it if it so wishes. However, it cannot ignore accountability by way of international treaty body reporting in quite the same way as with other treaties without incurring international disapproval. Ombudsman Ron Paterson said:

> *We're very good at producing beautiful reports but we have to ask whether that is the most effective way of making change and holding people to account. I think we are identifying the need to better target issues. Our role is monitoring, not implementation, and as a monitor then*

[431] Newsletter from the Office for Disability Issues (14 December, 2012) "Making Disability Rights Real". We understand that a response can be expected by April 2015

[432] At 10, 11.

[433] At 11.

you need to have some clear stakes in the ground so you can say 'this is how it was in 2014, and New Zealand has to do a better job.

It is too early to judge the effectiveness of the IMM as a process and in terms of outcomes. In addition to the issue of accountability, there is also a sense of "insiders" and "outsiders" within the disability community around the composition of the Convention Coalition of DPOs. This is recognised by the Disability Commissioner, Paul Gibson, while acknowledging the value of the CRPD reporting process as a whole. *"There has been tension between DPOs and other organisations involving disabled people at the other ends of the community that are not in the inner circle."* While there was still some way to go, the CRPD provides an opportunity to build consensus in the community, as well as a framework for the government response and action on disability issues, he said. Convention Coalition chair, Mary Schnackenberg said ideally the coalition needs more Pacific involvement, additional Māori representation, youth participation and representation of wheelchair users.

As the IMM and CRPD reporting matures it may be necessary for the UN to develop guidelines and advice around Article 33 and specifically, the monitoring role. What does "monitoring" mean and against what indicators and benchmarks should State parties be measured?

7.1.2 Treaty body reporting

New Zealand submitted its initial report on 31 March 2011.[434] In its overview New Zealand noted the shift in policy over several decades from exclusion and care outside of mainstream society to an inclusive social model of disability with monitoring as the default option and supplementary support services for disabled people as required.[435] The Disability Strategy had advanced this vision and the principles reflected in the strategy aligned with those in the Convention. New Zealand also claimed the existing statutory framework was "sound and comprehensive" citing the NZBORA and the HRA in addition to other specific legislation.[436] The report emphasised Government's engagement with disabled people as members of the New Zealand delegation for the CRPD negotiations, and a standing disability sector reference group comprised of more than 70 disabled people, family members, advocates and providers.[437]

The report also noted continuing challenges with disabled people who were disadvantaged and experiencing poorer outcomes in health, education and employment and that these challenges were often greater for women, Māori and Pacific people. Other barriers included social discrimination and attitudinal barriers, as well as physical and environmental barriers which were exacerbated in rural areas. The limited range of data available about disabled people and the need for increased cultural sensitivity and different cultural frameworks were also identified.

During its consideration of New Zealand's report Committee members' questions covered a wide range of issues relating to violence, education, the provisions and limits of reasonable accommodation, digital hate speech and how the Canterbury earthquakes and rebuilding was impacting on people with disabilities. Ombudsman Ron Paterson said that the process of the constructive dialogue seemed quite unfocussed with every committee member:

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[434] Committee on the Rights of Persons with Disabilities (2013) *Implementation of the Convention on the Rights of Persons with Disabilities. Initial reports submitted by States parties under article 35 of the Convention. New Zealand* (31 March 2011). CRPD/C/NZ/1.

[435] At [1]

[436] At [4]

[437] At [5(b)]

> *…keen to be pulling their weight so their questions were all over the map. There would be five rapid fire questions from one committee member and then you'd switch to another committee member.*

Groups of Articles were taken at one time. Many of the replies given were very general although the Committee specifically asked whether the Government was going to repeal the Public Health and Disability Amendment Act with New Zealand indicating it did not intend to repeal the controversial legislation.

Paul Gibson, the Disability Rights Commissioner of the NZHRC, who attended the country examination said that because of New Zealand's history of involvement with the CRPD development, there was a "huge level of expectation from the committee."[438]

> *Observers said the committee was more engaged with New Zealand than what it usually is with most countries. But it also might have been that we were the first country up during a two or three week session, so there was more energy at the start. But because of what we did during the development of the convention, there was greater engagement, greater expectation.*

As a Human Rights Commissioner he was invited to be part of the Government's presentation and part of the delegation, but also able to act independently. He believes that if he had a longer opportunity to speak he could have been of more value to the Committee. He said there was a range of different responses across government departments reflecting a range of knowledge and expertise of disability issues.

Mr Gibson said he would characterise much of the government's engagement as authentic and genuine but that there was some "spin and omissions" partly because of lack of expertise. As a result, the Concluding Observations were kinder to the government on certain issues but also harder in several areas because the government representatives did not know of some of the work which was being undertaken domestically which could have led to a more positive response to specific questions. Occasionally some of the New Zealand rhetoric grated on the CRPD committee, he said. One member asked a question about the numbers of young disabled people in aged care facilities. The response was that while until a few years ago there were approximately 600 in aged care facilities, now only approximately were. While the New Zealand representatives had a sense of achievement in the reduced number, there was a rumble around the room that a more desirable outcome would be for younger disabled people to be able to choose where to live, rather than being "put" somewhere.

The composition of the government delegation, given New Zealand's history of supporting active involvement from disabled people, was also of interest to the committee. He said there was an expectation of lived experience within government delegations these days.

Country rapporteur, Ronald McCallum, in his concluding remarks said that New Zealand had a good record in implementing the Convention. He said the dialogue was part of an international process long term and that while Government had expectations, so, too, did disability organisations.

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[438] Interview for this research with Paul Gibson, Disability Rights Commissioner of the New Zealand Human Rights Commission.

In its Concluding Observations on New Zealand's initial report the Committee welcomed the Disability Strategy and the accompanying Action Plan 2014-2018, sign language developments, media and cinema captioning and increased entry into universities and other tertiary institutions. Improvements in voting arrangements were noted and New Zealand was commended for establishing an IMM to fulfil the requirements of Article 33.

The Committee did, however, recommend that New Zealand ratify the Optional Protocol as soon as possible, reconsider its decision not to repeal the Public Health and Disability Act 2013 and consider amending the Human Rights Act 1993 to include a definition of reasonable accommodation that conformed with Article 2 of CRPD.

In relation to accessibility (Article 9) the Committee recommended that New Zealand enact measures to ensure that all public buildings, as well as public web pages, were made accessible to people with disabilities and that consideration be given to making all new future private houses fully accessible. The Committee also recommended that the exemption for factories and industrial premises employing less than five people be discontinued.

Other significant recommendations included:

- Replacement of substituted decision-making with supported decision-making in relation to Article 12 allowing informed consent to medical treatment, access to justice, marriage and work.
- Amendment of the Mental Health (Compulsory Assessment and Treatment) Act 1992 to ensure all mental health services are provided on the basis of free and informed consent; and all necessary legislative, administrative and judicial measures taken immediately to ensure no one is detained against their will in a medical facility on the basis of disability.
- Elimination of the use of seclusion and restraints in medical facilities
- Enactment of legislation prohibiting the use of sterilisation on boys and girls with disabilities, and on adults with disabilities, in the absence of their prior, fully informed and free consent.
- Repeal of s. 8 of the Adoption Act 1955 and amendment laws to ensure people with disabilities were treated on an equal basis with other parents with respect to adoption.
- Establishment of an enforceable right to inclusive education and implementation of anti-bullying programmes for people with disabilities.
- Re-examination of legislation to ensure that children with disabilities had the same safeguards as other children when they are placed in out-of-home care.
- Strengthen measures to improve health outcomes for disabled Māori and Pacific.
- Increase employment levels of people with disabilities and examine alternatives to minimum wage exemption permits for the employment of people with disabilities.
- Provision of a report from the Disability Survey 2013 that compared human rights outcomes of disabled and non-disabled men and women.
- Publication of disaggregated data by government departments, crown entities and local authorities in their annual reports.

The Committee urged New Zealand to send the Concluding Observations 'for consideration and action" to MPs, the Government, relevant ministries, local authorities, and members of relevant

professional groups such as education, medical and legal professionals, as well as the media, "using modern social communication strategies."[439]

Disabled women were also a focus of the Concluding Observations of the Committee on the Elimination of All Forms of Discrimination against Women following New Zealand's seventh periodic report. The Committee recommended to the State party that within two years it provide written information on steps taken to implement two specific recommendations including data and information on disabled women.[440]

A prominent women's NGO that has consistently been involved in treaty body reporting, Pacific Women's Watch (New Zealand) provided information to the UN Committee highlighting a number of concerns for disabled women including the lack of coverage in domestic violence legislation for all disabled women, the limited funding for prevention of violence against disabled women, health care discrimination, difficulties in access to education, complexities of the welfare system and forced sterilisation of disabled girls without consent.[441] Two other issues raised by the NGO were New Zealand's slow response to urgings to sign the Optional Protocol and the fact that a single Commissioner was responsible for Health and Disability with no separation despite distinctly different scenarios.[442]

7.2 Fundamental concepts

Although a number of the UN Committee's recommendations involve concepts such as reasonable accommodation, capacity and involuntary treatment that are fundamental to the Convention there is no uniform agreement on their correct interpretation. It remains an issue whether the Committee's recommendations reflect a realistic understanding of the situation domestically in light of some of the Concluding Observations, particularly in relation to capacity where New Zealand has ground breaking legislation in the form of the PPPR Act since it was introduced in the 1980s.

7.2.1 Reasonable accommodation

Reasonable accommodation is central to the Convention as Article 2 defines disability discrimination as including denial of reasonable accommodation. It is described further as:

> *…necessary and appropriate modifications not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.*

The Convention clearly anticipates that people with disabilities will be accommodated so that they can enjoy the same rights as others, requiring States to take appropriate steps to ensure that this occurs. However, it is silent on how this will be achieved in practice.

Before ratifying the Convention some changes were made to Part 2 of the HRA involving reasonable accommodation but they did not include a general obligation to accommodate. The

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[439] Concluding Observation at [73]

[440] Committee on the Elimination of All Forms of Discrimination against Women (2012) *Concluding Observations of the Committee on the Elimination of Discrimination against Women. New Zealand* CEDAW/C/NZ/CO/7

[441] Pacific Women's Watch (New Zealand) (2014) *Non-Governmental Organisation Alternative Interim Report, Status of Women, Comments to the UN CEDAW Monitoring Committee on progress by the New Zealand Government with respect to their implementation of CEDAW recommendations 36 and 38*, July 2012.

[442] At 3.

HRA creates a defence (with a comparatively low threshold). This is significant given the inclusion of reasonable accommodation in the definition of disability discrimination. For example, there is an ongoing issue about access to education for disabled children. This was recognised before ratification but changes were not made to all the relevant sections in the HRA and the legislation still only allows for educational facilities to refuse admission to students with disabilities if it is not reasonable for the school to provide them, rather than imposing a positive obligation to accommodate students with disabilities.

The difficulty is when a person will be considered to have been accommodated and the implications of adopting such a low threshold. A good example is the case of *Smith v Air New Zealand Ltd.*[443] Ms Smith had a condition which meant she required extra oxygen when she flew. She had to organise and pay for her own oxygen on domestic flights and for extra oxygen on international flights. The Tribunal found that Air New Zealand had treated her less favourably by reason of her disability but there was no breach of the HRA because the airline could not reasonably be expected to provide the service without requiring more onerous terms. The case eventually reached the Court of Appeal which found that there was discrimination but the standard to accommodate was one of reasonableness not undue hardship. Although recognising the importance of the Convention, the Court noted that there were dangers in placing too much reliance on it commenting at para [104] that:

> *…no matter how important a particular accommodation may be for a disabled person or disabled persons generally, failure to provide it is not a breach of the Act per se. Rather [it] has the effect that a discriminator does not necessarily escape a finding of discrimination by asserting that the actual circumstances involved apply equally to those with and without disabilities. No doubt as a practical matter, the discriminator may have to take steps to provide the accommodation to escape a finding of discrimination. But that is different from asserting the Act imposes an obligation to provide accommodation for the disabled.*

Given such an approach, it was probably predictable that the Committee recommended consideration be given to amending the HRA to include a definition of reasonable accommodation that better complied with the Convention. It also recommended that guidelines were developed on the application of reasonable accommodation – a matter that the Ministry of Justice has been working on for some time.

7.2.2 Article 12 – legal capacity

Article 12 - the right to equal recognition before the law - requires States parties to reaffirm that people with disabilities have the right to recognition as persons before the law in the same way as everyone else, that they enjoy the same legal capacity, and to commit to providing the support they may require to exercise their legal capacity. It is considered one of the most important articles of the Convention because without it many of the other rights - such as the guarantee of free and informed consent,[444] the right to marry[445]and the right to political participation[446]- are effectively rendered meaningless. The problem is how capacity should be interpreted and applied in practice and where to draw the line when some form of substitute decision-making is required.

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[443] [2011] 2 NZLR 171

[444] *United Nations Convention on the Rights of Persons with Disabilities* GA RES/61/106 LXI A/RES/61/106 (2006), art 25

[445] Article 23

[446] Article 29

More often than not it is simply asserted that Article 12 encapsulates the concept of supported decision- making without further elaboration. While it is clear that a paradigm shift in how capacity and decision–making have been viewed historically is now necessary in light of the Convention, this is complicated by the lack of agreement on how capacity should be interpreted. The Committee issued a draft General Comment on Article 12 in 2014.[447]One of the incentives for developing the Comment was that the initial reports of different State parties reviewed by the Committee at that point reflected a general misunderstanding of the scope of the obligations under Article 12 - including failing to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one based on supported decision-making.[448]

The Comment distinguishes between mental and legal capacity, adopting an interpretation that is consistent with the approach of other UN bodies such as the CEDAW committee - namely, the ability to hold rights and duties and to exercise them. It describes mental capacity as differing from person to person depending on a variety of factors some of which may be environmental and social[449]and explicitly states that mental and legal capacity should not be conflated. Absence or impaired decision making is not a reason for denying a person their right to exercise legal capacity. Article 12 states that:

> *Legal capacity is an inherent right accorded to all people including people with disabilities. As noted, it consists of two strands. The first is the legal standing to have rights, to be recognised as a person before the law. ..The second is the legal agency to act on those rights, and to have those actions recognised by the law. It is this component that is frequently denied or diminished for persons with disabilities ... legal capacity means that all people, including persons with disabilities, have legal standing and legal agency simply by virtue of being human. Therefore, both these strands of legal capacity must be recognised for the right to legal capacity for persons with disabilities to be fulfilled; they cannot be separated.*

Article 12 requires support be provided to exercise that capacity (if necessary).[450]States must both refrain from taking measures that have the effect of denying people legal capacity while ensuring that they have the necessary support to make decisions which involve exercising that capacity. The Comment is equivocal about the type of support that should be made available, noting that it may vary from person to person. It also suggests that substitute decision-making regimes, and mechanisms that deny legal capacity and discriminate in purpose or effect against persons with disabilities, should be abolished.[451]

However, there will be some people for whom supported decision-making is simply not an option and no amount of support will allow them to make or communicate a decision. In such cases some form of substitute decision-making is almost inevitable. This was recognised by the Working Group on the Convention by the inclusion of safeguards in Article 12 to prevent the misuse of supported decision–making. Explicit mention of substitute decision-making was considered unnecessary because the requirements for the provision of support proportionate to the person's needs would encompass the whole range of support from highest to lowest.[452]There will always be

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[447] *General Comment No.1 (2014) Article 12 – Equal Recognition before the Law*, adopted by the UN Committee on14/4/2014 (CRPD/C /GC/1)

[448] At [3]

[449] At [12]

[450] At [13]

[451] At [46(a)]

[452] UN Enable *Contribution by New Zealand* at www.un.org/esa/socdev/rights/wgcontrib-NewZealand.htm

a need for some measure of protection for particularly vulnerable people who might otherwise be exploited in various ways.

One of the Committee's recommendations following the second report by the IMM was that New Zealand should take immediate action to revise laws that involved substitute decision-making by introducing a range of measures which respected a person's autonomy, will and preferences and conformed fully with Article 12.

The most relevant legislation in this context is the Protection of Personal and Property Rights Act 1988 (PPPR Act) which provides for guardianship of adult people. It is based on an assumption of capacity and the extent to which it dictates a person's ability to make decisions about their welfare and property. The Act has been touted since its inception as legislation designed to ensure that a person who is subject to the Act has the same legal rights and capacities as any other person[453]but while much of the PPPR Act is consistent with the obligations under the Convention, it includes broad discretionary powers which allow the Family Court to grant Welfare Guardianship orders and make decisions on behalf a person with some sort of disability. Such powers have the potential to be applied inconsistently with the Convention if the Courts do not properly engage with the obligations and discretions conferred in interpreting the Act and it may have been this that the Committee picked up on when it made its concluding observations.

The Committee's comments appear to indicate a lack of understanding of the aim and purpose of the Act since the legislation itself cannot be faulted. It is the way it is applied – both by the judiciary and those who are conferred with statutory powers – that has some way to go. In this context the recommendation by the IMM – that further research be undertaken by the ODI to determine whether the provisions in the PPPR Act relating to substitute decision-making are understood and applied, is timely.

7.2.3 Involuntary treatment

The issue of capacity is also integral to the question of involuntary treatment and when – and under what circumstances – some sort of substitute decision-making is permissible. The issue is most often raised in relation to mental disorder, particularly the application of the Mental Health (Compulsory Assessment and Treatment) Act 1992 ('MH (CAT) Act').

One of the Committee's Concluding Observations related to the lack of human rights principles in the MH (CAT) Act, and recommended that the Act be amended to comply with the Convention. It also called on New Zealand take the necessary measures to ensure that no one was detained against their will in any medical facility on the basis of actual or perceived disability and that mental health services were provided with the free and informed consent of the person in accordance with the Convention.

The Convention does not specifically refer to involuntary treatment. It needs to be read in through other articles including Article 14 which protects the right to liberty of the person; Article 17 which states that every person with disabilities has the right to respect for his or her physical and mental integrity on an equal basis with others; Article 25(d) which provides that health professionals must provide the same quality of care as to others, including on the basis of free and informed consent; and Article 12 itself.

[453] See Appendix 7

As with the PPPR Act it is a moot point whether the MH (CAT) Act is inconsistent with the Convention. The MH (CAT) Act sets out the circumstances in which, and the conditions under which, people may be subjected to compulsory psychiatric treatment. It also sets out the rights of those people. When an analysis of the Act was commissioned before ratification to identify any inconsistencies with the Convention,[454]the reviewer concluded that most provisions of the MH(CAT)Act were not inconsistent with the Convention although the concept of release from compulsory status - as interpreted by the Court of Appeal in *Waitemata Health v Attorney-General*[455]- raised concerns that the Act could be used to sanction arbitrary detention (contrary to Article 14) and there was an argument that certain provisions in Part 5 (relating to compulsory treatment which required a patient to accept treatment directed by the Responsible Clinician) amount to unjustified limits on the right to healthcare on the basis of free and informed consent (art.25). He also found that there was reason to be concerned about the frequency of independent reviews of a patient's continued compulsory status, particularly if the patient was subject to detention, although this fell short of amounting to arbitrary detention as envisaged in Article 14 of the Convention.

The analysis was based on a conventional interpretation of the law and mental disorder but there is a growing body of opinion which considers that mental health legislation by its very nature is discriminatory and separate mental health legislation is outdated and inappropriate.[456] To be more consistent with the Convention some type of capacity based law that is "de-linked" from disability and which only allowed coercive psychiatric treatment to be administered to patients who genuinely lacked decision-making capacity, was warranted. This does not mean that involuntary treatment is not permissible but rather that criteria which allow it must be non-discriminatory and "disability-neutral". When one aspect of the necessary criteria for involuntary treatment is the presence of mental illness or mental disorder (itself a form of disability), unacceptable discrimination is introduced.[457] On this reading, the New Zealand legislation could be said to be non-Convention compliant. However, it could also be argued that the Committee's apparent acceptance of the legislation with certain changes means that some form of separate mental health law is permissible.

The Government has consistently argued that New Zealand law only provides for compulsory assessment and treatment in exceptional circumstances where a person presents a high level of risk; is subject to judicial authorisation and continuing scrutiny; provides for independent representation and rights of review and complaint for the person concerned as well as court-ordered assessment and treatment and does not negate the need for clinicians to obtain informed consent if possible at each stage of assessment and for all treatment. If this is correct then there is unlikely to be a significant review of the MH (CAT) Act within the next few years despite the Committee's recommendations.

7.3 Legislative change

Despite issues such as the lack of an obligation to accommodate, agreement on what is meant by capacity and problems relating to compulsory treatment, there has been little positive legislative change as a result of the Convention. This cannot be explained simply by the comparative newness

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[454] Andrew Butler, A *Report for Mental Health Commission on consistency of the Mental Health Act and the CRPD*

[455] (2001) 21 FRNZ 216, [2001] NZFLR

[456] See, for example, George Szmukler, Rowena Daw & Felicity Callard, "Mental Health Law and the UN Convention on the rights of persons with disabilities" Int. J Law Psychiatry, May 2014; 37(3): 245; Bernadette McSherry (ed) *Rethinking Rights-Based Mental Health Laws* (2010)

[457] Office of the High Commissioner for Human Rights '*Persons with Disabilities' Dignity and Justice for Detainees Week*, Information Note No.4 (2008) available at www.ohchr.org/EN/UDHR/Documents/60UDHR/detention_infonote_4.pdf.

of the Treaty itself since there have already been two significant legislative moves that are seen as regressive by the disability community.

The first relates to the statutory recognition of a fulltime disability commissioner and the proposed Human Rights Amendment Bill which had a second reading but failed to make the cut for legislative passage before the 2014 general election. Civil society groups have expressed concerns that the proposed legislation enjoys neither cross party support nor civil society endorsement and appears to have been largely driven by officials.[458] Ironically the Amendment Bill's general policy statement of the Explanatory Note states that the purpose of the Bill is to enable the establishment of the position of a full-time Disability Rights Commissioner, although the proposed legislation does not do this. There is nothing in the amendment that creates a Disability Rights Commissioner, similar to jurisdictions such as Australia and as intended by the spirit of New Zealand's ratification of the CRPD. Instead section 6(1)(A) of the proposed amendment bill simply states that:

> *There must be a Commissioner, other than the Chief Commissioner, appointed to lead the work of the Commission in each of the following priority areas: (a) disability rights …*

Perhaps more concerning is the amendment to the Public Health and Disability Act (PDH Act). In 2012 the Court of Appeal affirmed that the policy of not paying family members to provide the necessary support services to their disabled adult children constituted unjustifiable discrimination on the basis of family status. The Government's response was to push through Part 4A to the PHD Act under urgency, reversing the Court's decision and preventing complaints of unlawful discrimination being made to the Human Rights Commission on certain grounds including disability and age. The Committee recommended the repeal of the amendment but, as noted above, the Government is resisting the call claiming funding will continue to be provided consistently with Part 4 A.

The PHD Act contravenes the CRPD in two ways. Firstly, the right of disabled persons to be treated equally found in Article 5 since, as the Court found, the policy is inherently discriminatory, and it infringes Article 19, the right to live independently and to the independent choice of living arrangements. Secondly it ousts the jurisdiction of the NZHRC in relation to a group which is considered one of society's most disadvantaged. This is a significant regression.

7.4 Use of human rights norms in policy and practice

The Disability Strategy is designed to provide guidance for government policy and services that impact on people with disabilities. Among other things it aims to improve attitudes towards people with disabilities, remove environmental barriers experienced by people with disabilities (such as making transport, housing and workplaces accessible) and create a disability support system that is focused on the individual. Although the Government has claimed significant levels of activity in implementing policy and practice in certain areas,[459] people with disabilities and their families consider that progress is too slow. Four challenges in particular have been identified:

- society's attitudes to persons with disabilities;
- absence of a national implementation plan and linked funding;
- size and status of the Office of Disability Issues;

[458] CEDAW Coalition of New Zealand NGOs submission to the Justice and Electoral Select Committee on the Human Rights Amendment Bill, 2014.

[459] New Zealand Submission to the 2nd Conference of States Parties to the Convention on the Rights of Persons with Disabilities at para [24]

- embedding knowledge about disability issues and responsiveness to persons with disabilities in government agencies.

To some extent it is difficult to assess the success of the disability strategy in policy implementation given the absence of one overarching law addressing Convention rights. In the Concluding Observations the Committee commended New Zealand on the Disability Strategy and the more recent Disability Action Plan for 2014-2018 but also criticised discrete aspects of the government's performance - such as assisting women with disabilities to obtain employment and education and combatting domestic violence – recommending they be strengthened.

7.5 Use of CRPD in judicial proceedings

Although the CRPD is a relatively recent treaty, it has already figured in a number of decisions - possibly reflecting the increasing recognition and understanding of the treaty body system among practitioners and the relative lack of domestic jurisprudence in the area of disability.

The first case in which there was an attempt to rely on the Convention predated ratification and related to the interpretation of disability. *Trevethick v Ministry of Health (No.2)*[460]involved a complaint about the different funding available to people who have an accident and those with degenerative diseases. In order to claim discrimination, the plaintiff had to bring her complaint within the definition of disability in the HRA. To do so the definition had to be construed as including the "cause" of disability. To support her argument the plaintiff referred to the Convention and comment that describes disability as an evolving concept that is no longer premised on a medical model emphasising a person's medical condition but one that addresses the person's interaction with their environment. The argument was unsuccessful, the Tribunal (and subsequently the High Court and Court of Appeal) holding that allowing the plaintiff's argument would involve an interpretation of the HRA that Parliament had not contemplated. The Tribunal did, however, pave the way for future reference on the influence of the international material, when it noted that:[461]

> …*the definition of disability in the New Zealand legislation should be interpreted in a broad and purposive way, having regard to the objects of the HRA, and that any interpretation exercise needs to be approached with an eye to the international and domestic context of the legislation.*

The facts of *Smith v Air New Zealand Ltd* have already been outlined in the context of reasonable accommodation. Both the appellant and the Human Rights Commission, which had intervened in the case, cited the Convention as an indication that an appropriate level of accommodation was necessary to meet the requirements of the Convention and relied on the background history to ratification. Although the Court of Appeal considered that the legislative history was consistent with the approach preferred by the Court, it also noted that "there were dangers in drawing too much from this sort of material in the present context".[462]

Finally, in *Ministry of Health v Atkinson,*[463] the case relating to the decision not to pay family members caring for their adult disabled children, the Court referred to the Convention as an indication of what was envisaged in the long title to the HRA, linking it to the preamble and the requirement

[460] (2007) 9 HRNZ 1
[461] At [33]
[462] At [26]
[463] [2012] NZCA 184, [2012] 3 NZLR 456

that persons with disabilities and their families "should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities". It went on to cite a number of articles in support and emphasising article 23.5 which provides that:[464]

> *State Parties, shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and, failing that, within the community in a family setting.*

Although it did not state explicitly that the CRPD influenced its decision, the Court stressed the importance of context in identifying the application of key concepts in the HRA particularly when a policy was alleged to be discriminatory, noting that the funding in this case "provided an opportunity for some disabled people to manage the personal support services they require in the way they believe meets their needs best"[465]– an approach that is consistent with the requirements of the CRPD.

There are also several cases in which counsel drew the Court's attention to the Convention and while there was no specific reference in the decision, there is some suggestion that the submissions were taken into account in reaching the final outcome. Identifying any future influence of the Convention in relation to capacity is likely to be particularly difficult in the context of the PPPR and MH (CAT) Acts since they are Family Court proceedings and not open to the public.

It is worth noting, too, that there has been a significant change overall in judicial attitudes to international treaty commitments over recent years. This can be attributed to a number of things including the growth of the "global village", the great increase in the development of international human rights standards and obligations, the development of libraries and legal information sources, changes in legal education and major differences in the experience of lawyers in private and government practice and on the bench.[466]This change can be expected to be reflected in application of the Convention in future legal proceedings particularly in light of the oft quoted dictum that where the wording allows legislation should be read in a way which is consistent with New Zealand's international obligations.

7.6 The role of civil society

Civil society has two distinct roles in relation to CRPD, unlike other treaty bodies. DPOs have a traditional advocacy role, both in relation to government implementation and to UN committees on the nature of the recommendations that could be made to the State party. Lobbying is central to this form of DPO advocacy. It has been most evident, for example, in DPO activity in advocating the human rights issues for disabled people following the Christchurch earthquakes.

As described in greater detail above, DPOs have a formal monitoring role through the Convention Coalition in relation to Article 33. In this role the Convention Coalition, under the terms of its contract with the Government, has been told it must not advocate but only to report on the voice and experience of disabled people. The Chair of the New Zealand Convention Coalition Monitoring Group, Mary Schnackenberg, states:

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[464] At [42]

[465] At [17]

[466] Ken Keith, "Roles of the Courts in giving effect to International Human Rights – with some History" (1999) 29 VUWLR 27 at 43

> *We can have findings, we're allowed to pull things together to point in the right direction, but we're not allowed to say 'and this information says that you, the government, should do X'. So no advocacy.*

Since 2010 the Convention Coalition has received government funding for research that reflects the voices of disabled people using a methodology developed by Disability Rights Promotion International (DRPI). The methodology is based on interviews carried out by disabled people designed to reflect the lived experience of disabled people through consultation workshops and surveys. Transcription and analysis is primarily undertaken by disabled people as a way of building their capacity of disabled people in research and monitoring. The findings of the research are also subject to consultation with disabled people and their organisations.

In the first report in 2010 the Convention Coalition identified four significant areas of concern: social participation, bureaucratic barriers, access to work and reasonable accommodation and getting out and about. The report also identified bureaucratic barriers noting:[467]

> *…bureaucratic expediency is often used as a rationale for disablement. People are acting in a rational manner and following the rules but the net effect of the rules is clearly discriminatory. The most obvious example of this is disabled people having to demonstrate year after year that they still have their lifelong impairments. The cumulative effect of this is that time and money is wasted proving the obvious.*

In 2012 six areas were identified: social inclusion, health, employment, access to disability related services and supports; barriers to making complaints and lack of disability awareness. Key findings included the concept of cumulative discrimination.

> *…discrimination in one area can also adversely affect a person's experience in other areas. Lack of access to transport and disability support services has a direct impact on access to employment. Exclusion from employment has implications for accessing health services and social inclusion. Being unable to access quality health care may in itself be a barrier to making complaints. Taking into account all of these flow-on effects, the whole is far greater than the sum of the parts.*

The report noted that the implementation of the Disability Strategy and the CRPD was somewhat disorganised with each government department developing their own implementation plans, and lacking consistency or coherence. The 2012 report was a more mature document and identified specific articles of the CRPD which needed to be implemented by the Government.[468]

Two other pieces of research have been undertaken by the Convention Coalition Monitoring group - one on youth in relation to Article 7 of the CRPD on disabled children's rights and the other on the media's responsibilities to portray people with disabilities in a positive manner as identified in Article 8.

A total of 27 young people aged between 16-25 years were interviewed in the youth monitoring project. The report concluded that if the ability to live an 'ordinary life' was a yardstick for people

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[467] New Zealand Convention Coalition (2010) *Disability Rights in Aotearoa New Zealand: A Report on the Human Rights of Disabled People in Aotearoa New Zealand* at 66.

[468] It also noted one of the weaknesses of the DRPI research methodology as it only captured the stories of those disabled people who can give consent: New Zealand Convention Coalition (2012) *Disability Rights in Aotearoa New Zealand 2012: A systematic monitoring report on the human rights of disabled people in Aotearoa* New Zealand at 98.

aged between 16-25 years, then an ordinary life included being part of a peer group; developing independence from family; developing romantic attachments and preparing for, and taking on, employment. The lack of opportunities common to many disabled young people included the lack of accessible or age appropriate housing, isolation and exclusion within the school system and intimidation and bullying at school and beyond.

The media monitoring research involved content analysis, consultation with 12 media representatives via conversation, and consultation with disabled people via survey and meetings. Its recommendations included the provision of disability rights awareness to journalists; ensuring the accessibility of all media complaints mechanisms; better portrayal of disabled people; more recruitment of disabled staff and the appointment of suitably qualified disabled people to statutory bodies regulating and delivering broadcasting.

7.7 The role of the NHRI

The NZHRC has a continuing commitment to the rights of disabled people that was evident both prior to, and after, the ratification of the CRPD. The NZHRC's annual reports shows that disability is the principal ground of complaints of discrimination under s 21 of the HRA. In 2013-2014 30.2% of inquiries and complaints of unlawful discrimination made to the Commission, 455 were on the grounds of disability.[469]This equalled all of the race-related grounds aggregated together including the large number of traditional complaints about racial disharmony which tend to inflate race inquiries and complaints. Of the 49 decisions by the Office of Human Rights Proceedings made under the grounds of potential unlawful discrimination of the Human Rights Act 1993, 22 were on the grounds of disability, far ahead of the next ground of family status with seven.[470]

The Commission and its associated Office of Human Rights Proceedings have been involved in significant human rights cases on behalf of disabled people, including *Spencer v Ministry of Health,* a case in which the Commission intervened in the High Court, representing people who had complained about the Ministry's policy of not paying family members to care for their disabled adult children.[471]

Half of the national human rights inquiries undertaken by the Commission in the last ten years have focussed on disability issues - one on the accessibility of public transport for disabled people and a more limited inquiry into New Zealand Sign Language. The Commission also took a significant leadership role in international events involving NHRIs around the development of the CRPD, and encouraging New Zealand's early ratification of the Convention.

This does not mean that the Commission is always seen by the disability community as its most logical or effective champion, primarily because of the absence of a fulltime disability commissioner that enjoys the same statutory status as the Race Relations Commissioner and the Equal Employment Opportunities Commissioner; the competition for resources for disability issues within the Commission; and the variable nature of human rights leadership which is expressed on a day-to-day basis in the setting of priorities for advocacy, policy analysis and litigation. A distinction can be made between how DPOs have seen recent disability rights commissioners as strong and effective representatives of disabled people and the Commission itself as the

[469] New Zealand Human Rights Commission (2014) *Annual Report*, p. 28. Retrieved from http://www.hrc.co.nz/ wp-content/uploads/2012/06/AnnualReport2014-webpdf.pdf
[470] At 31.
[471] At 32.

institutional machinery for the fulfilment of the human rights of disabled people which has to cover a spectrum of human rights issues. The Commission is seen as both an ally and also, at times, a source of frustration.

For several years since the establishment of the IMM the Commission has been reporting on its performance under Article 33. In 2014 it listed the output as the provision of an "annual report to Parliament in collaboration with the other two parties in the Disability Convention monitoring mechanism - the Disability Convention Coalition and the Ombudsman". The performance measures were soft, for example the production of the report met quality measures of thoroughness and "is valuable in its recommendations for government action as assessed by the parties to the independent monitoring mechanism."

The Commission's annual report stated that the "quantity measure" had been met and that there was 100 per cent agreement by parties to the IMM with the content of the annual report and with its thoroughness and value. However, the annual report also notes that following advice from the Office of the Minister for Disability Issues, "the report was not required to be tabled in Parliament, and the IMM partners agreed to launch the report at a public event in Christchurch in early August 2014."[472] The lack of parliamentary scrutiny of the 38 recommendations including the need for better disaggregated data, accessibility issues for disabled people, building a people driven system, and issues of violence and abuse and education, is worrying given the promise of an independent monitoring mechanism, the unique feature of the CRPD, and the Commission's function as an NHRI.

The NZHRC's role in promotion, advocacy and protection of the rights of disabled people is hampered significantly by the lack of reliable data allowing comparison between disabled people and others. The absence of a concerted effort within the public service in particular to provide high quality and easily accessible disaggregated data about disabled people restricts the ability to provide evidence-based advocacy and policy formation. Nowhere is this more evident in the difficulty the Commission has had over a number of years in providing business case data to supplement rights-based arguments about resource prioritisation.

7.8 Conclusion

From the existing literature, archival material, analysis of New Zealand's initial CRPD report, and from interviews undertaken it is possible to make several observations. First, there are positive flow on effects from the CRPD's development and ratification.

The CRPD had greater salience to many people with disabilities as a charter for a better life than many other UN human rights treaties that focus on specific population groups. The most marginal people in the world now have a detailed set of human rights to own that they can daily compare with their lived experience. The high expectations of CRPD by people with disabilities to actually deliver them more inclusive lives and equal opportunities, is referred to by all of the experts interviewed on the effect of the CRPD. Paul Gibson states:

> *The disability community has set its aspirations, its future pathway around this convention, perhaps in a way that differs from the ways that other communities see their respective*

[472] At 58.

> *conventions (women and CEDAW; ethnic communities and CERD). So expectations are quite high and a lot of energy has gone in from DPOs into the shadow reporting process.*

Mary Schnackenberg states:

> *…what's very helpful is that you don't have to read the convention from start to finish, it is not like the Bible. But whenever you dip in there's a part of the article that sings to you, and it is much easier than trying to dredge your way through legislation, regulations, interpretations, and court decisions.*

The formation of the Independent Monitoring Mechanism (IMM), commented on favourably by the UN Committee in 2014, and the involvement of DPOs as a partner in the IMM with the Office of the Ombudsmen and the NZHRC is of considerable significance in terms of progressing disability rights. It is evident from the reports produced that the research and monitoring capacity of DPOs engaged in the Convention Coalition has been greatly enhanced by the DRPI methodology, despite its limitations. Increasing numbers of disabled people are involved in data gathering and analysis. Disabled people themselves are also experiencing the challenges of effective, evidence-led research into issues and of monitoring of implementation by the State party and other stakeholders.

The IMM and the institutional framework appears to have also helped partially thaw relationships between DPOs and government officials. Progressing the human rights of disabled people has been hindered for years by variable policy responses and/or indifference to disability consciousness and issues across some ministries. However, this appears to be changing. Mary Schnackenberg said that in July 2013 at a meeting with the Chief Executives' Group on Disability Issues, Convention Coalition member Rachel Noble said that disabled people had been talking to public servants for the past 30 years about the major issues and had not been listened to. The Chief Executive of the Ministry of Social Development, Brendan Boyle, responded by establishing working groups between government officials and the DPO network to develop the Disability Action Plan 2014-2018. The involvement of disabled people in this way has led to increased confidence that the Disability Action Plan will be a better model than the strategy that preceded it. In addition, the current strategic leadership of the Office for Disability Issues, is strong, she said.

Involvement in the IMM is, though, not without contradictions, ambiguities and frustrations. The enforced distinction between reporting findings only, and advocacy in which lobbying, publicity, and activism play an integral part, insisted on by the Government as part of its funding arrangements, is an artificial separation. The 2010 and 2012 reports contained recommendations which surely constitute a form of advocacy or would do so if disabled people other than the DPOs represented on the Convention Coalition took them up. Equally the absence of an official response to the annual monitoring reports and the continuing invisibility of the IMM recommendations in parliamentary scrutiny is a missed opportunity to generate political and public debate.

If the three partners of the IMM can devise valid monitoring protocols, indicators and effectively publicise them both domestically and internationally, it could deliver on its promise to be a catalyst for change and be a welcome precedent for monitoring implementation of human rights treaties generally. However, the possibility of dilution by the State party through non-responses to reports and recommendations or through funding cuts to any of the three partners - but specifically to DPOs - is a potential risk to the IMM's effectiveness.

Elsewhere, there is evidence that the promise of CRPD is not matched by the reality of implementation. First, the concept of regression. Ombudsman Ron Paterson said that New Zealand's reporting in Geneva took place against a backdrop of an almost palpable sense of anger from disabled people about the Public Health and Disability Amendment Act. The legislation is a significant risk in relation to New Zealand's implementation of CRPD.

> *This came through very clearly from civil society, the risk is an enormous loss of trust because the passage of the Public Health and Disability Amendment Bill has created enormous distrust within the disability community, and that, despite some good progress in other areas, is like a major road block and it has taken on a symbolic force.*

Mary Schnackenberg uses the term "graffiti legislation, because that's what you do when you don't want people to see you bung it through under urgency."

> *I actually think of all the pieces of legislation that have occurred in New Zealand, that rates as the worst because it basically tells me I don't count, I don't matter. I need to be very open with the Minister and government and tell them all the good work has been undone by that legislation.*

Second, strong ministerial leadership around development of the treaty and establishment of mechanisms to ratify it, has not translated into an equivalent, broader political momentum. As Paul Gibson notes, "*the changes in the last 15 years or so have been driven by one or two passionate individuals at Cabinet level who have taken on board the issues. It hasn't been owned by the whole of Cabinet or the whole of Parliament*". He goes further to suggest that Parliament has yet to understand the fundamental shift which underpinned CRPD, from a medical model to a social model of disability. "*Even the word 'social' has limited connotations because the new model is about human rights, civil, political, economic and cultural not just social and some are hung up on the social aspect".* Mary Schnackenberg notes that there is a sense she had when she attended the Ministerial Committee on Disability Issues that "*it is perfunctory. It is the thing they have to do. It lasts 45 minutes. We talk to each other but there is no real engagement."*

The complexity of disability issues is also a feature in the pace and scope of implementation, said Paul Gibson:

> *The resistance to change, the barriers…it's about complexity, it's about ignorance, it's about lack of information, it's about complacency. And the more we can share the information, expose decision-makers to new thinking about what is possible, not just reaction to how things are now, we can make change.*

Third, somewhat surprisingly given New Zealand's ability to claim ownership of its human rights heritage in other areas, the story of its role in the development of CRPD has not entered general public consciousness. This 'under celebration' in itself, inhibits public clamour for, or support of, progressive change. Matt Frost, then a policy and information researcher for CCS Disability Action in Wellington, wrote:

> *…why are we not celebrating this as a core part of our national identity and our national story, as being a good international citizen? There was very little media coverage around the Convention and its signing…..The underwhelming reaction perhaps says something about our ambivalence towards our attitude to disability and disabled people.*

Chapter EightNew Zealand and the Universal Periodic Review

8 Background to the Universal Periodic Review

The Universal Periodic Review (UPR) mechanism was introduced under Resolution 5/1 by the Human Rights Council (HRC) in 2007. Both the Council and the UPR mechanism were largely aimed at eliminating the perceived and real politicisation of the previous United Nations Commission on Human Rights that examined and monitored human rights concerns on a country-by-country basis. The Commission had been described as a "completely broken mechanism for intergovernmental decision-making" by the United States Ambassador to the United Nations, John Bolton.[473] The United Nations Secretary General Kofi Annan in 2003 chastised the Commission for its "divisions and disputes" that had weakened the Commission's voice.[474] In his report in 2005 calling for major reform of the United Nation's human rights promotion efforts, The Secretary General referred to the declining professionalism and the consequential impact on credibility.[475]

The HRC as part of the revitalisation process introduced a procedural innovation, the UPR that had no precedent and was intended to work in its constituent parts co-operatively with States and not divisively against them. It was designed to prompt more regular reporting within a four year period with 48 members to be reviewed every year, to be more inclusive, to be fairer and to be universal. All United Nations members are reviewed in much the same manner and by the same process and much the same criteria.[476] Previous reviews of human rights situations were mandated on a case-by-case basis through a variety of mechanisms, including resolutions and special procedures.[477] The enjoyment of all human rights in all states is reviewed and this is considered to be one of the major benefits of the UPR because "it epitomises the unity of human rights".[478]

The UPR process "has meant that all countries' human rights policies and situations are scrutinised and that every state is subject to equal treatment by the international community" (Salama, 2009).[479] This has been described as an "innovative new mechanism for considering state compliance with norms of international human rights"[480] while at the same time there is a general consensus internationally that commitment to human rights treaties is often more rhetorical than real.

8.1 What is the UPR?

The basis of the review is the Charter of the United Nations; the Universal Declaration of Human Rights (UDHR); Human Rights instruments to which the State is a party and other voluntary

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[473] Press release, "On the Record Briefing by United States Permanent representative to the United Nations John Bolton, January 25, 2006, accessed at www.int/usa/o6jrb0125 on July 27, 2014.

[474] Kofi Annan, (2003). "UN Secretary General to Commission on Human Rights: We Must Hope a New Era of Human Rights in Iraq will Begin Now." Statement, April 24, 2003, Geneva.

[475] Kofi Annan, (2005). "In Larger Freedom: Towards Development, Security, and Human Rights for All," *Report of the Secretary General, May 26, 2005*, A/59/2005, [182]

[476] Human Rights Council (2007). *Institution-building of the United Nations Human Rights Council.* Resolution 5/1. United Nations GAOR. 5th session, 9th meeting. 1. U.N. Doc. A/HRC/5/1.

[477] New Zealand Ministry of Foreign Affairs and Trade (2008). *New Zealand Handbook on International Human Rights.* Ministry of Foreign Affairs and Trade, Wellington.

[478] Christian Tomuschat, (2011). "Universal Periodic Review: A New System of International Law with Specific Ground Rules?" In Ulrich Fastenrath et al. (eds.) *From Bilateralism to community interest. Essays in honour of Judge Bruno Simma.* Oxford University Press, New York. 609 at 614.

[479] Ibrahim Salama (2009) "Introduction to the Universal Periodic Review Process" in Sen, P. (ed.) *Universal Periodic Review of Human Rights.* Commonwealth Secretariat, United Kingdom at 5

[480] Rona Smith, (2013) "To See Themselves as Others See Them": the Five Permanent Members of the Security Council and the Human Rights Council's Universal Periodic Review. *Human Rights Quarterly,* 35(1), 1-32.

pledges and commitments made by States. States cannot avoid the UPR and the universality and absence of selectivity in electing which states to examine, which was a flawed characteristic of the Commission of Human Rights, have been welcomed.[481]

The principles of the UPR include that it:

- should promote the universality, interdependence, indivisibility and inter-relatedness of all human rights;
- is a co-operative mechanism based on objective and reliable information and on interactive dialogue;
- be an intergovernmental process that is UN member-nation driven and action-oriented;
- fully involves the country under review;
- complements but does not duplicate other human rights mechanisms;
- not be overly burdensome on the State, not be overly long; be transparent, objective and non-confrontational and non-politicised;
- fully incorporates a gender perspective;
- takes country development into account without derogating from basic human rights;
- ensures the participation of all relevant stakeholders including non-governmental organisations and (NGOs) and national human rights institutions(NHRIs). Stakeholders which are referred to in Resolution 5/1 include human rights defenders, academic institutions and research institutes and regional organisations, as well as civil society representatives as well as NGOs and NHRIs.

The objectives of the UPR are:

- the improvement of human rights on the ground;
- the fulfilment of the State's human rights obligations and commitments and assessments of positive developments and challenges faced by the State;
- enhancing the State's capacity and technical assistance;
- the sharing of best practice.

The UPR is often described as a "mechanism and a process" and there are three sets of documents on which the review is largely based: information prepared by the State which can be a national report of 20 pages which should be information prepared through broad consultation at the national level with relevant stakeholders; a compilation prepared by the Office of the High Commissioner for Human Rights (OHCHR) of the information contained in treaty body reports and special procedures and comments by the State; and additional credible and reliable information provided by other relevant stakeholders which the OHCHR compiles into a ten page summary (Sen, 2011).[482] If the State fails to submit a written national report or elects not to provide one, an oral report, is possible.

A troika of three states, selected by lottery to head up the working group, considers these reports and reviews each state, as a further expression of parity. The troika then reports its findings to the full HRC to complete the processes. Central to the UPR process is the interactive dialogue with

[481] Paul Gordon Lauren (2007), "To Preserve and Build on its Achievements and To Redress its Shortcomings: The Journey from the Commission on Human Rights to the Human Rights Council" *Human Rights Quarterly*, 29(2), 307-345

[482] Sen, above n 44

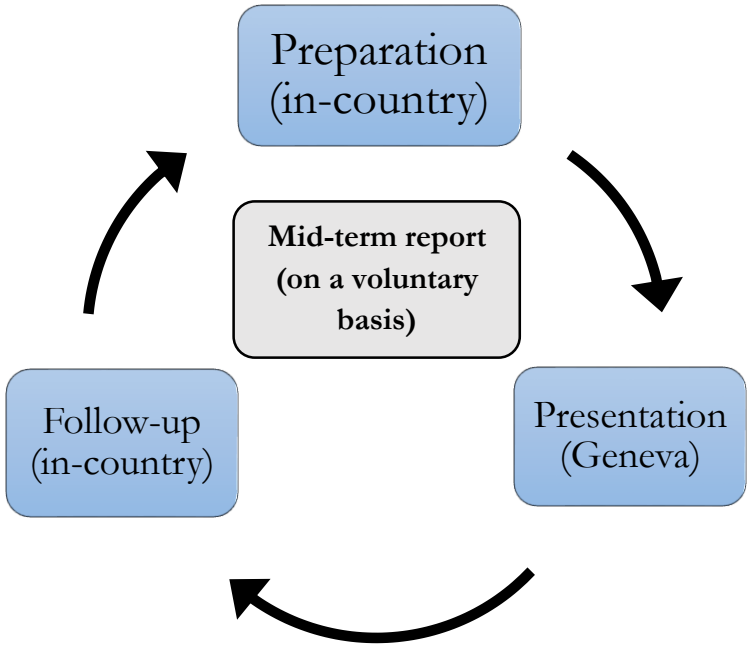
the state party under review undertaken within the working groups and convened by the troika in accordance with the published scheduled for each cycle of the UPR.

The state presents its report during the dialogue, other states are able to comment on it, make recommendations, or ask questions. The time allocated for the review is three hours only with each state commenting for two minutes followed by the response of the state party under review.

Two elements of the UPR process are not Geneva–based, prior to the presentation and after it. The following is adapted from the Commonwealth Secretariat's research into the first cycle and shows that the UPR mechanism is designed to form a technical but significant element in the promotion of human rights in member states.[483] The principle of consultation and co-operation between stakeholders and state parties before and after Geneva is an integral feature of the UPR.

Mid-term reporting has also become a feature of the UPR process. Macedonia told the HRC that 49 countries had submitted mid-term reports on their implementation of the accepted UPR recommendations.[484] States have four and a half years between reviews to take action on recommendations and states are encouraged to furnish mid-term reports, in accordance with resolution 16/21, but it is not a mandatory requirement. UPR Info states that, "only at the following review, is the state held accountable for the implementation, or lack thereof, of the UPR recommendations."[485]

Figure 2. UPR cycle



8.2 Support for, and criticism of, the UPR.

Dominguez-Redondo has described and analysed the major fears and criticism of the UPR which essentially rest on its difference, that it relies on a co-operative model to catalyse human rights

[483] Sen, at 9
[484] Statement of the Republic of Macedonia on behalf of Group of States, 27th session of the Human Rights Council, Item 6:general debate. Accessed from UPR Info.
[485] UPR Info (2014) *Beyond Promises - The impact of the UPR on the ground.*p.13. Accessed from http://www.upr-info.org. on 6/11/2014.

implementation rather than the traditional confrontational model of "naming and shaming". She suggests that the "non-confrontational, peer-review features of the UPR have been subject to significant criticism even before their merit could be assessed."[486] Some of the criticisms referred to relate to the reliance on the goodwill of the state under review, concerns by civil society groups and NGOs working on human rights that it would negatively affect their work, fears of duplication and/ or of resource diversion expressed by treaty bodies and special procedures. Two influential human rights scholars express significant concerns. Olivier de Frouville targets the quality and strength of questioning during the UPR and states that better questions are asked by treaty bodies (independent experts) than by members of the HRC.[487] Manfred Nowak suggest that states take the UPR more seriously than other human rights treaty bodies but he suggests that political bodies such as state parties are less rigorous than a system or reporting reliant on independent experts.[488]

On the other hand other writers are enthusiastic about the UPR and its potential. For example, the first cycle was described as, "incontestably an overwhelming and unprecedented success in terms of state engagement with a human rights review process."[489] UPR Info which researched the concrete and immediate results of the promises made in the first cycle of the UPR which came to an end in 2012 states: [490]

> *Several aspects of the UPR were deemed successful. Firstly, all 193 UN member states had participated in a review of their human rights records, voluntarily subjecting their national activities to international scrutiny. Secondly, over 21,000 recommendations were issued and 74 per cent of those recommendations were accepted by the states under review. Hopes were running high for the youngest child of the UN family. However, while the participation in the mechanism and the acceptance of recommendations are integral to the effectiveness of the mechanism, the main purpose of the UPR is to improve human rights in the member states through the implementation of the recommendations.*

The Mid-term Implementation Assessments (MIAs) that UPR Info have developed and provide information from 165 countries involved show that two and a half years after the initial review of those states 48 per cent of UPR recommendations triggered action. However, as this research shows, a more nuanced approach to what is meant by the language of recommendations used in the UPR, the degree of specificity of recommendations and the meaning of words and descriptions attached to "acceptance" make critical the need for a continuing refinement of evaluation.

8.3 Global overview of the UPR.

As this research was being completed the UPR was in its second cycle of United Nations members. In its statistics on the Universal Periodic Review,[491] the Geneva-based NGO, UPR Info states that the top five issues raised in the UPR are: International Instruments; Women's Rights; Rights of the Child; Torture and Other CID treatment; Justice;

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[486] Elvira Dominguez-Redondo (2012) "The Universal Periodic Review- is there life beyond naming and shaming in human rights implementation?" *New Zealand Law Review*. 673-706.

[487] Oliver de Frouville, (2011). "Building a Universal System for the Protection of Human Rights: the Way Forward" in Mahmoud Bassiouni and William Schabas (eds.) *New Challenges for the UN Human Rights Machinery*. Intersentia, Cambridge 241 at 253.

[488] Manfred Nowak, (2011). "It's time for a World Court of Human Rights" in Bassiouni & Schabas above at 23

[489] Dominguez-Redondo, above n 487 at 694.

[490] UPR Info UPR-Info.org. Accessed on 31/07/2014 (2014) at 13.

[491] UPR Info above

It notes that of the total recommendations made 73.69 per cent were accepted, 24,378 recommendations, while 8702 were "noted' at 26.31 per cent. UPR Info ranks the action categories of the more than 33000 recommendations that have currently been made in the UPR process. It used five action categories which are:

- General action (12924 total recommendations) 39.07 per cent
- Specific action (11098 total recommendations) 33.54 per cent
- Continuing action (5520 total recommendations) 16.69 per cent
- Considering action (2972 total recommendations) 8.98 per cent
- Minimal action (568 total recommendations) 1.72 per cent.

8.4 New Zealand context.

New Zealand moved through the second cycle of the UPR in 2014. In its earlier engagement in 2009 New Zealand's delegation was headed by Hon. Simon Power, Minister of Justice, and the troika of rapporteurs selected were Italy, Mauritius and the Philippines. In his introduction to the national report the Minister emphasised New Zealand's serious and long-standing commitment to human rights exemplified by New Zealand's ratification of all major international human rights instruments. He also highlighted the Treaty of Waitangi, and said that civil and political rights received protection primarily under the Bill of Rights Act and the Human Rights Act, while economic, social and cultural rights were protected and promoted through legislation and government policies. Among the identified challenges were the Treaty of Waitangi settlement process, disparities for Māori in education, health, employment, crime statistics and income, and the previous Government's lack of support for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The lack of women in senior, leadership positions in the public and private sectors; child deprivation and abuse and neglect; young New Zealanders who left school without qualifications; and crime reduction were other concerns.

In 2014 the New Zealand delegation was also headed by the Minister of Justice, Hon. Judith Collins, and the troika to facilitate New Zealand's review was Cote d`Ivorie, Japan and the Russian Federation. Again New Zealand emphasised its commitment to human rights and its record; emphasised the Bill of Rights and the Human Rights Act as protection for the civil and political rights of New Zealanders. Addressing an advance question from Germany on economic, social and cultural rights, New Zealand said it relied on legislative mechanisms, including publicly funded education, health care and social assistance. New Zealand acknowledged that the 'story of Māori achievement was not consistently positive'; acknowledged family violence involving women and children, and referred to legislation allowing marriage between any two people regardless of gender identity, sex or sexual orientation.

In relation to international human rights instruments, New Zealand said it had in 2010 supported UNDRIP in 2010, and in 2011 had ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC-SC).

In the New Zealand Government's response in 2014, 121 recommendations were accepted and 34 recommendations were rejected. This compared with 64 recommendations received in the first UPR in which 33 were accepted outright, 12 were agreed to with discussion, New Zealand gave a qualified response to 11 and rejected eight. However, during the first round of the UPR, States

were able to accept, reject or partially accept recommendations. In the second round only acceptance or rejection were allowed. In a Cabinet paper Minister Collins said:[492]

> *Some recommendations are split across multiple areas. We have rejected these in their entirety in situations where we cannot accept a certain aspect of the recommendation. Others, we accept the spirit behind the recommendation, but must reject them as we cannot commit to a specific proposed method of implementation. For example, some recommendations asked New Zealand to ratify conventions without first considering them at the executive or parliamentary level.*

New Zealand told the HRC that:

> *Accepted recommendations are those where we fully support the recommendations and implement it in practice. We reject recommendations for several reasons. With recommendations split across distinct areas we may accept only one part of that recommendation. Others, we accept the spirit behind the recommendation, but cannot commit to a specific proposed method of implementation.*

The Government also said it was aware of issues raised by the NZHRC and NGOs in their UPR submissions which were not reflected in the interactive dialogue and Working Group recommendations. These included legal abortion and the rights relating to sexual orientation, gender identity and intersex people. The Government said it intended following up on these issues separately as part of the commitment to ongoing engagement with civil society on the UPR.

8.5 Methodology

8.5.1 Research questions

A large and evolving scholarship has discussed the best way to measure the effectiveness of international human rights treaty implementation (Hathaway, 2002;[493] Goodman and Jinks, 2003;[494] Landman, 2004;[495] Ignatieff and Dersomeau, 2005; [496]Gready, 2009 [497]). However, there is a general agreement that valid, authoritative and effective assessment of the state of human rights reporting can encourage greater accountability for implementation. This links to an objective of the UPR, to improve human rights on the ground.

In this report the researchers address two questions:

- What progress has New Zealand made under the UPR?
- How effective is the UPR in ensuring New Zealand's human rights treaty body compliance?

8.5.2 Evaluative frameworks

Two evaluative frameworks were used to analyse and discuss New Zealand's UPR reporting by comparing and contrasting the first and second cycles of UPR reporting. The first is Smith's (2013) three indicators of progress. As Smith (2013) has noted in her analysis of the record of the five permanent members of the Security Council, a number of indicators of progress have emerged

[492]Office of the Minister of Justice (2014) *Cabinet Social Policy Committee: Responses to the UN Periodic Review Recommendations.*

[493] Hathaway above n 39

[494] Goodman & Jinks above n 40

[495] Landman above n 36

[496] Ignatieff & Dersomeau above n 41

[497] Gready, above n 48

from the UPR process.[498] She states that these measures are typically examined through paper documents and statistics available in the public domain. The indicators she identified are the ratification of core treaties; compliance with the United Nations voluntary human rights goals proclaimed by the United Nations Human Rights Council;[499] and the state's progress toward meeting the millennium development goals adopted by the United Nations General Assembly.[500]

8.6 Ratification of treaties

The ratification of international human rights treaties is relatively easily measured because of the compilation by the Office of the United Nations High Commissioner for Human Rights on New Zealand that is a feature of the UPR.[501] This identifies in a table format the ratification, accession or succession of international human rights treaties, the reservations, declarations and understandings and the complaint procedures, inquiry and urgent actions the State party has committed to and the treaty status during the previous cycle. It also identifies any actions taken after the last review, and explicitly identifies the treaties that are not accepted or not ratified. The second cycle of UPR in 2014 showed the scope of New Zealand's ratifications. (See Appendix 8 and 9).

The second cycle compilation also referred to the UPR recommendations in 2009 in which New Zealand was encouraged to consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); the International Convention for the Protection of All Persons from Enforced Disappearance (CPED); the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights OP-ICESCR; the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD); The Optional Protocol to the Convention on the Rights of the Child on a communications procedure OP-CRC-IC; and ILO conventions 138 and 169; to make the declaration provided for in article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); and to extend the application of CRC to the territory of Tuvalu. Recommendations were made to New Zealand to consider withdrawing its reservations to article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 8 of ICESCR and article 10, paragraphs 2(b) and 3, of the International Covenant on Civil and Political Rights (ICCPR), and to consider withdrawing all other reservations to ICCPR as well as withdrawing the general reservation and the reservation to article 32, paragraph 2, and article 37(c) of CRC.

Between the first and second cycles of UPR New Zealand ratified the OP-CRC-SC in 2011 and moved to support the UNDRIP in 2010. It indicated it was considering ratification of CPED, much the same position it took in 2009. There is no movement, though, on some of the fundamental international human rights treaties that New Zealand has yet to ratify relating to

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[498] Smith, above 481 at 11.

[499] *Voluntary human rights goals*, Human Rights Council Resolution 9/12, U.N.GAOR, Human Rights Council, 9th session, U.N.Doc. A/HRC/RES/12 (2008).

[500] *United Nations Millennium Declaration*, adopted 18 September, 2000, G.A. Res. 55/2, U.N. GAOR, 55th Session, U.N. Doc. A/RES/55/2 (2000).

[501] Human Rights Council. (2013). *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21. New Zealand.* A/HRC/WG.6/18/NZL/2.

migrant workers, the ILO conventions and the Optional Protocols to ICESCR, CRPD, and OP-CRC-IC or the declaration in Article 14 of CERD.

8.7 Compliance with voluntary human rights goals.

The General Assembly said that states could report on the goals as specified by the Human Rights Council during the UPR. The goals are:

- universal ratification of the core international human rights instruments
- strengthening of the legal, institutional and policy framework at the national level
- establishment of human rights national institutions
- elaboration of national human rights programmes and plans of action
- programmes of action eliminating discrimination and all forms of violence against women, children, indigenous populations, migrants and people with disabilities
- adoption and implementation of programmes of human rights education
- increasing cooperation with all UN human rights mechanisms, including special procedures and treaty bodies
- strengthening of mechanisms to facilitate international cooperation in the field of human rights.[502]

In its first National Report in the first cycle of UPR New Zealand stated it was party to the majority of the major international human rights instruments and party to a number of Optional Protocols, and other UN and ILO instruments. It was a member of the Commonwealth "which has a strong commitment to the promotion and protection of human rights. As a founding member of the Pacific Islands Forum, New Zealand contributes to the strengthening of cultural diversity and human rights in the region."[503]

In an instance of self-reflection, New Zealand addressed long standing concerns about constitutional protection in New Zealand. It acknowledged that a number of UN treaty body mechanisms and the New Zealand Human Rights Commission (NZHRC) had raised the absence of an:[504]

> *…over-arching or an entrenched constitution that protects human rights in New Zealand. They have also commented on the lack of legislative protection for certain rights, particularly economic, social and cultural rights. The United Nations Human Rights Committee has expressed concern that it is possible to enact legislation incompatible with the provisions of the New Zealand Bill of Rights Act 1990.*

The first report then went on without further comment to describe the New Zealand Bill of Rights Act 1993 (BORA)and the Human Rights Act 1993 and remedies and compensation available.

The report outlined in a descriptive manner the institutional and human rights infrastructure covering the NZHRC, the Ombudsman, Privacy Commissioner, Children's Commissioner, Families Commission, Health and Disability Commissioner and Independent Police Conduct Authority.

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[502] Human Rights Council. (2008) *Resolution 9/12 Voluntary human rights goals*. U.N. GAOR, Human Rights Council 9th session. A/HRC/RES/9/12.

[503] Human Rights Council. (2009). *National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1. New Zealand.* A/HRC/WG.6/5/NZL/1 at 3

[504] Above

In its National Report in the second UPR, New Zealand stated that it:[505]

> *Engages and cooperates constructively with treaty bodies and special procedures, and supports the work of the OHCHR, including through the provision of annual non-earmarked financial contributions. New Zealand has a standing open invitation to all United Nations Special Procedures mandate holders, which will continue without restrictions. The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples visited New Zealand in 2010.*

The state party also referred to the visit of the Sub-Committee on the Prevention of Torture and the pending visit of the Working Group on Arbitrary Detention.

Several recommendations related to these voluntary human rights goals. For example, in the second cycle three countries Tunisia, Bangladesh and Egypt all urged New Zealand to increase its official development aid to reach the international norm of 0.7 per cent of GDP. International development aid is a voluntary human rights goal. Three countries also referred to human rights plans of action. Burkina Faso recommended the development of a new human rights action plan under the auspices of the New Zealand Human Rights Commission; Cote d'Ivoire wanted the continued implementation of the second national human rights action plan and Spain asked for strengthened inter-ministerial co-ordination for a better implementation of the current Children's Action Plan.

8.8 Thematic analysis

The second evaluative framework is the methodology employed by the Commonwealth Secretariat to examine the first cycle of UPR of UN member states that are Commonwealth countries, including New Zealand. The Commonwealth Secretariat analysed the recommendations submitted to 25 Commonwealth countries that underwent UPR in 2008 and 2009 in the first cycle. A total number of 111 themes were identified grouped under the following:

International treaties and standards; National/international processes and mechanisms; Specific national cases/ national legal and constitutional concerns; Civil and political rights and freedoms; Economic, social and cultural rights and freedoms; Human rights principles; other. Each recommendation did not necessarily equate to one theme, because in many instances recommendations received by the state under review related to multiple themes.

Application of the Commonwealth Secretariat's methodology provides an insight into the common themes of interest on which state parties being reviewed were questioned and where recommendations were made. Sen (2011) states that there were four dominant themes in the first year for Commonwealth members: increasing ratifications; establishing or strengthening National Human Rights Institutions; promoting the rights of the child, and promoting gender equality and ending violence against women.[506] Similar and additional themes were identified by New Zealand Government officials after the state party received recommendations in the second cycle. They identified core areas of focus as gender equality, and domestic violence and violence against

[505] Human Rights Council. (2013). *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21. New Zealand.* A/HRC/WG.6/18/NZL/1.

[506] Sen, above at n 44

women; protection of children and child poverty; economic disparities particularly as they related to Māori; constitutional matters and Optional Protocol signing.[507]

The following analysis shows that of the 111 themes identified in the Commonwealth Secretariat analysis of the first cycle of UPR, 52 were relevant to New Zealand's country context. The chart below shows which themes were referred to in recommendations in the first and second cycles of UPR reporting of New Zealand. Each recommendation did not necessarily equate to one theme, because in many instances recommendations received by New Zealand related to multiple themes. For example, recommendation 56 in the first cycle reads:

> *Record and document cases of trafficking in women and children as well as the exploitation of migrant women and girls in prostitution, and share the information with other countries in the region to facilitate greater co-operation in combating this problem*

In terms of the Commonwealth Secretariat's thematic categories this recommendation would be coded at least three times and possibly four: *migrant rights*; *violence against women (trafficking*); *share experience* and *women's rights* or *sexual offences* to cover prostitution.

Equally in the second cycle, Recommendation 70 read: [508]

> *Further strengthen actions to ensure that economic and social rights of vulnerable people are protected, and women's rights and gender equality, and especially take specific policy measures to prevent child poverty and child abuse.*

This was coded four times against ESC rights, vulnerable groups, women's rights and children's rights.

[507] Themes identified by Ministry of Foreign Affairs official in a meeting with civil society organisations involved with UPR reporting held at the New Zealand Human Rights Commission's Auckland office, June 2013.
[508] Human Rights Council (2014) *Report of the Working Group on the Universal Periodic Review. New Zealand*. A/HRC/26/3.

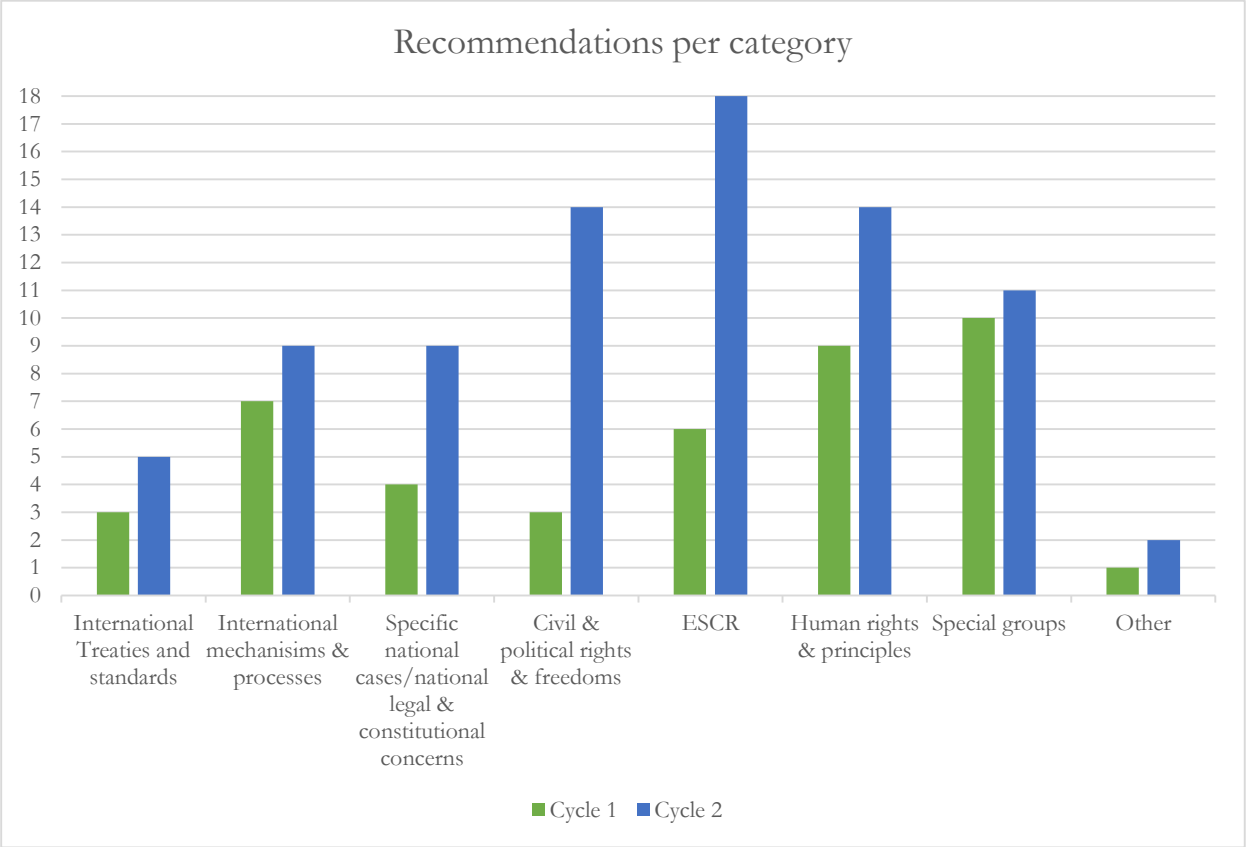
Table 4. Themes raised in New Zealand's UPR

Theme/Recommendation Raised	Cycle 1	Cycle 2
Children's rights	☒	●
Conflict resolution		●
Constitutional reforms		●
Counter terrorism and HR	☒	●
CP Rights	☒	●
CSO's	☒	
Detainee rights	☒	●
Disappearances	☒	●
Domestication	☒	●
Durban review conference	☒	
Equality & non-discrimination	☒	●
ESC rights	☒	●
Freedom of religion		●
Gender equality	☒	●
HR education/training/awareness raising	☒	●
HRC	☒	
ILO conventions	☒	●
Indigenous rights	☒	●
International students	☒	●
Justice	☒	●
Juvenile justice	☒	●
Labour rights/decent work	☒	●
Land rights	☒	●
Marriage rights		●
Migrant rights	☒	●
Minority rights	☒	●
NAP	☒	●
NHRI's		●
Poverty reduction and eradication		●
Racism	☒	●
Ratifications	☒	●
Refugee/asylum seekers rights		●
Religious tolerance		●
Resources to address HRs	☒	●
Right to education	☒	●
Right to health	☒	●
Right to housing	☒	●
Rights of persons with disabilities	☒	●
Rights of religious minorities		●
Rights of young people		●
Sexual offences	☒	●
Share experience		●
Special procedures	☒	
Treaty bodies	☒	●
Treaty of Waitangi	☒	●
Tribal rights	☒	●
UN HR mechanisms	☒	●
UPR follow up	☒	
VAW: including FGM, RIM, DV, Rape, Trafficking	☒	●
Victims support		●
Vulnerable groups		●
Women's rights	☒	●

8.8.1 Recommendations per category.

Comparing the two cycles of UPR by the number of recommendations in each category indicates both an increase overall and the growing salience of economic, social and cultural rights which underpin many of the human rights concerns of vulnerable groups and of structural discrimination. Constitutional issues, such as the Treaty of Waitangi, the constitutional conversation and the legislative framework including the status of the Bill of Rights Act contributed to the significant increase in civil and political rights and freedoms.

Table 5. Recommendations per category



8.8.2 Level of action required by the recommendation.

The second element of the Commonwealth Secretariat's analytical research on the first cycle of Commonwealth countries undertaking the UPR used a ranking system according to the level of action required by the recommendation in question. The method was developed by Professor Edward McMahon of the University of Vermont and UPR Info, an NGO based in Geneva. The methodology involves an assessment of the use of verbs and the overall action contained in the recommendation using one to five:

- Calling on the state under review to share information or request technical assistance;
- Recommendations emphasising continuity using verbs such as continue, maintain, pursue;
- Recommendations to consider change using verbs such as consider, explore, revise, review
- Recommendations of action that contains a general element using verbs such as accelerate, address, encourage, ensure, promote, speed up; take steps, and
- Recommendations of specific action using verbs such as conduct, develop, eliminate, abolish, accede, adopt implement, enforce and ratify.

In the second cycle of UPR, only one of the 156 recommendations called on the state to share information. Using the Commonwealth Secretariat's methodology it is clear that the majority of the recommendations made to New Zealand were either for action or specific action.

Table 6. Number of recommendations made against levels of action.

Share	Continuity	Consider Change	General action	Specific action	Total
1	41	17	47	49	155

8.8.3 Level of action indicated in the response.

A significant limitation relating to the use of language needs to be acknowledged in considering the level of action promised by New Zealand in response to the second cycle of UPR recommendations. This compounds the problem of comparison posed by the difference between the two UPR cycles in relations to three categories accept, reject or partially accept recommendations dropping to two categories only; accept or reject. A comparison for the first report in 2009 and the second report in 2014 is made difficult by the changes to language used by New Zealand in the two cycles. In its response in 2009 to the Recommendations of the Working Group on the Universal Periodic Review New Zealand used the following levels of action, New Zealand; **accepts** the recommendation (31 recommendations); **accepts in part** (2); **does not accept** the recommendation (9); has indicated that the Government would like to **move to support** (1); **agrees** that (8); **agrees to consider** (1); is **working towards** (1); and **does not agree** (1).

In other cases the verb **agrees** is being used aspirationally in terms of wide societal aims, almost at an intuitively obvious level. For example recommendation 29: New Zealand **agrees** with the recommendation to address all forms of political, economic and social discrimination against Māori.[509] There is no specificity about what this means.

In 2014 the New Zealand Government used a different terminology. It said of the 155 recommendations it accepted 121 and rejected 34. The Cabinet paper on New Zealand's response stated that during the first round of the UPR states were able to accept, reject or partially accept recommendations. In the second round State parties were only able to accept or reject recommendations[510]. However, New Zealand also used the terminology **accepted in full**, a tautological device implying there were degrees of acceptance. For example, 14 recommendations were accepted in full. Looking at the language used denoting acceptance, a wide range of verbs and tenses are employed. For example, the following phrases and words connote acceptance by the New Zealand government in addition to 'acceptance in full'. New Zealand;

is exploring; is working towards; will consider; is beginning to; will be able to; will continue, continues to; is committed to; is developing, has developed; has established; will meet; already ensures; and has placed….

The variable and ephemeral nature of the language used across the two cycles was compounded by lack of clarity when recommendations were rejected in 2014. Four recommendations asked New

[509] Report of First Working Group at [22]

[510] Cabinet Social Policy Committee (2014) *Response to the UN Universal Periodic Review Recommendations*. Office of the Minister of Justice at [13]

Zealand to ratify the International Convention for the Protection of All Persons from Enforced Disappearance (CPED). The Government said "New Zealand accepts the spirit of these recommendations, but is unable to accept them in full. New Zealand Parliament must consider all treaties before ratification." In other words acceptance of the spirit and acceptance through action were also differentiated. Again the Cabinet paper explains New Zealand's thinking.

> *Some recommendations cover a range of areas. Since we are only able to accept or reject we have had to reject recommendations where we cannot accept only part of the recommendation.*

In its response around international treaties, the New Zealand Government stated it had accepted recommendations from Montenegro, Uruguay and Argentina, which had all used more tentative language around CPED, such as "consider becoming a party to…", "accelerate the domestic legislative process…" and "continue efforts towards…" It had also said under "Acceptance" "New Zealand will consider acceding to the CPED, in accordance with its domestic processes, prior to New Zealand's third UPR."

These three levels of meaning in the response of the New Zealand government to CPED recommendations need close textual reading so a distinction can be made by civil society, in particular, between agreement to a continuing process which might have a positive outcome in four years' time, and explicit state party acceptance of the need for treaty ratification with a firm deadline. This is relevant for monitoring purposes given that the state party made similar CPED promises in 2009 in which it stated "New Zealand was also examining which legislative reforms would be required to move towards ratifying the CPED".[511]

In addition to the different language used between reports which makes comparative analysis difficult, the varying contexts in which the verbs apply adds to the complexity of the rhetoric. In some cases New Zealand's agreement or disagreement is with interpretation or with a broad principle. In other instances New Zealand is in agreement with broad principles but has then disagreed with the mode of implementation recommended. For example, take the New Zealand Government's response to Recommendation 16 in the first UPR cycle. It stated: New Zealand **agrees** that all international human rights obligations should be appropriately implemented in domestic legislation, policy and practices.[512] But it went on to say in the next paragraph, New Zealand **does not accept** the recommendations that legislation must be in accordance with the Bill of Rights Act and cannot limit the Act's scope.[513] Does this mean it agrees in principle, and that the international community must accept the state party's more limited view of constitutional paramountcy and protection as an expression of national sovereignty, or does it mean something else?

For these reasons it is difficult to compare the response to levels of action indicated by the recommendations across the two cycles of New Zealand's reporting. This research therefore uses the following levels of action against the New Zealand Government's response in relation to the second UPR: no action (often equating to rejection in the state's response); minimal action; specific action (often equating to acceptance in the New Zealand government's response). This provides a more effective analysis of what the New Zealand Government intends doing in terms of

[511] Human Rights Council (2010) Report of the Human Rights Council on its twelfth session. 25 February 2010. A/HRC/12/50 at 113 [335]
[512] Human Rights Council (7 July 2009) Report of the Working Group on the Universal Periodic Review, New Zealand. A/HRC/12/8/Add.1 [12]
[513] at [13]

implementation than mere acceptance or rejection. So while the New Zealand Government's response indicated that the state party accepted 121 and rejected 34 recommendations this more nuanced analysis using the text of the responses to recommendations shows the following:

Table 7. Levels of action from New Zealand's response to UPR 2014

Levels of action from New Zealand's response to UPR 2014.	
No action	22 recommendations
Minimal action	72 recommendations
Specific action	61 recommendations.
Total Recommendations	**155 recommendations**

The Commonwealth Secretariat notes that the State under review is sovereign in determining which of the suggestions and recommendations made to them they are willing to accept.[514] However, analysis demonstrates that New Zealand often did not make a simple acceptance or rejection of recommendations in just less than half the recommendations, which were coded as minimal implementation or activity promised. The tortuous nature of terminology is further compounded by the HRC Resolution 5/1 which provides that, "Recommendations that enjoy the support of the State concerned will be identified as such. Other recommendations…will be noted". Noted appears to involve rejection as well as providing states with an opportunity of acceptance in the future.

The difficulties are not confined to New Zealand. UPR Info reports that only 31 per cent of all recommendations made in the second cycle are considered as specific and while the number of recommendations made overall has increased between cycles the number of specific recommendations has dropped from 35 per cent to 31 per cent. In a seminar for diplomats on the role of "Recommending States" run by UPR Info it was stated that "vague recommendations are counterproductive in general and it is harder to assess the level of implementation achieved."[515] Diplomats were urged to adopt the SMART (specific, measurable, achievable, relevant and time-bound) approach to the recommended action to produce real changes to human rights on the ground.

The two existing evaluative frameworks (Smith and the Commonwealth Secretariat) were complemented in this research by the following methods; Participant observation from an NGO perspective of the second cycle of UPR; selected interview data and statistical and textual analysis of documents. In addition reference was made where appropriate to observations made by UPR Info in its assessment mid-term of promises made in the first cycle of the UPR.

8.9 How effective is the UPR?

The second research question posed related to the effectiveness of the UPR in ensuring human rights treaty body compliance.

[514] Salama in Sen, above n 44 at 8

[515] UPR Info (2014) Seminar on the role of "Recommending States" for diplomats. Press release. http://www.upr-info.org/en/news/seminar-role-recommending-states-diplomats. Accessed 4/11/2014.

The question of how effective the UPR has been must be judged in several ways, partly against its own established objectives which include the improvement of human rights on the ground and the fulfilment of the State's human rights obligations and commitments, partly as a process, and partly in terms of outcomes. While human rights evaluation methodology has matured, work on the UPR is in its adolescence, merely because it is relatively new and is evolving. Nor can the UPR be considered in isolation from other international human rights treaty body work. For example, during participant observation for this research which involved attending the Geneva presentation on behalf of a large group of women's civil society organisations it was apparent that involvement in CEDAW country examination in New York in 2012 provided the experience, confidence and motivation to be involved in the UPR. The women's coalition formed for the UPR was also born of frustration with New Zealand's pace of implementation of CEDAW recommendations.[516]

8.9.1 Ratification and compliance

If New Zealand's ratification of international human rights treaties is an indicator, it is clear that there has been little progress since the first UPR cycle. This partially reflects the fact that New Zealand has historically been an early adopter of many significant human rights treaties and is regarded as a good international citizen for doing so. More recently, though, the UN identifies only one action after the first review ratification of the OP-CRC-SC in 2011. It identified the following as not ratified or not accepted in 2014- ICRMW; CPED; ICERD, art.14; Op-ICESCR; OP-CRC-IC; ICRMW; OP-CRPD; CPED; ILO Conventions no 87 and 138, 169 and 189; Additional Protocol III to the 1949 Geneva Conventions and 1954 Convention Relating to Stateless Persons.

In addition to treaty ratification, New Zealand now accepts the non-binding Universal Declaration on the Rights of Indigenous Peoples. When it was introduced in 2007, 143 countries voted in favour and 11 countries abstained. New Zealand was one of four countries in the CANZUS club, along with Australia, Canada and the United States which voted against. While it was claimed that "some provisions of the text were incompatible with our democratic processes, legislation and constitutional arrangements" by the Ministry of Foreign Affairs and Trade in 2008[517], by 2010 the declaration was acceptable to the New Zealand Government. However, the acceptance was tempered by the following statement made by Dr Pita Sharples, the Minister of Māori Affairs to the United Nations in relation to self-determination:[518]

> *…where the Declaration sets out principles for indigenous involvement in decision-making, New Zealand has developed, and will continue to rely upon, its own distinct processes and institutions that afford opportunities to Māori for such involvement. These range from broad guarantees of participation and consultation to particular instances in which a requirement of consent is appropriate.*

8.9.2 Maturing of processes.

Looking at the UPR as a process across the two UPR cycles that New Zealand has been involved in, there is clear evidence of a maturing of the process which includes:

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[516] The CEDAW Coalition of New Zealand NGOs formed in 2013 and comprising 26 civil society organisation.

[517] New Zealand Ministry of Foreign Affairs and Trade (2008) *New Zealand Handbook on International Human Rights*, Wellington, at 104.

[518] Pita Sharples, (2010). *New Zealand Statement. Ninth Session of the United Nations Permanent Forum on Indigenous Issues, 19-30 April.* New Zealand Permanent Mission to the United Nations at 7.

- increased involvement of civil society through NGO activity in consultation processes; reporting to the UN with 15 stakeholder submissions (some joint submissions) in 2009 increasing to 54 stakeholder submissions (many of them joint submissions) in 2014. Civil society involvement is referred to in more detail later in this report.
- Greater civil society lobbying of other state parties in both Geneva and New Zealand and of the New Zealand government. For example four civil society representatives and the New Zealand Human Rights Commission presented a summary of concerns to 11 country delegations in Geneva prior to the interactive dialogue.
- greater involvement by the New Zealand Human Rights Commission in consultation processes with civil society, with the state party at all phases of the UPR and with country delegations in Geneva and New Zealand including the hosting of roundtables with embassies;
- wider engagement of the international community in the interactive dialogue which saw a more than a doubling of delegations making statements from 36 in 2009 to 76 in 2014.
- and a larger number of recommendations made to the New Zealand Government, 64 recommendations in the first cycle and 155 in the second.

8.9.3 Role of the State party

New Zealand is conscientious in ratifying and implementing human rights treaties, conventions and undertaking various voluntary commitments. It began its National Report to the second cycle of UPR with the statement:[519]

> *New Zealand has a proud tradition of promoting and protecting human rights at home and overseas. As the first State in the world to give women the right to vote in national elections, New Zealand celebrated 120 years of women's suffrage in 2013. At the same time, the Government recognises where there are on-going challenges and works to address these.*

The statement reveals two elements which are characteristics of most of New Zealand's international human rights treaty body reporting responses. The first is a strong self-regard as a human-rights compliant nation. This is implicitly acknowledged in the Cabinet paper on New Zealand's response to the recommendations in which the Minister of Justice said, "Although responses to recommendations are not legally binding, they carry significant moral force. The more recommendations New Zealand rejects, the more this affects our reputation as a leader in the field of human rights."[520] Intriguingly, New Zealand's self-image has taken on a life force of its own and has become the dominant political narrative about human rights. For example, in the Cabinet paper on the UPR in 2014, the Minister of Justice said of the second cycle: [521]

> *The outcome of this dialogue was overwhelmingly positive for New Zealand. Countries such as the United States commended our efforts to strengthen the partnership between Māori and Government. Others such as Germany applauded our ongoing progress in protecting women and children against violence. We were commended for our efforts to enhance the rights of same-sex couples, promote gender equality, combat child poverty, and improve the rights of persons with disabilities.*

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[519] Human Rights Council (2014) *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21.* Eighteenth session, 27 January-7 February, 2014. A/HRC/WG.6/18/NZL/1.

[520] At [16]

[521] At [10]

The second is an openness to improvement. The Commonwealth Secretariat stated that:[522]

> *Those states that reported finding the Geneva dialogue most useful and productive for their work in the promotion of human rights were also those that took am open and honest approach to the discussion of their achievements and challenges. They were the states that did not avoid difficult topics, that had done some preparation in terms of what subjects might be raised in their Dialogue and that acknowledged work still to be done.*

New Zealand has sent high-level delegations to the UPR led by high ranking Ministers of Justice on both occasions. The signifies the symbolic importance New Zealand attaches to the UPR and provides an opportunity for ministerial sponsorship of its importance back home when the Geneva experience is a positive and reinforcing experience. (See appendix 10)

While the UPR was regarded as an arena in which economic, social and cultural rights were afforded an equal place with civil and political rights on the platform, New Zealand's delegations have not featured officials from health, education, or social development, although in 2014 Te Puni Kokiri was represented. Officials from Justice and Foreign Affairs and Trade officials dominate.

The UPR's difference as a unique mechanism and its non-adversarial, persuasive nature, means the States under review have much greater control over the process including the consultation phases, the report compilations, the interactive dialogue and the final report. There is evidence reported below that in the second cycle New Zealand recognised the potential of the UPR to showcase achievements. Ultimately the State party, too, determines whether it will accept or reject (or "note") recommendations made by other states, without consequences.

8.9.4 Role of civil society

Analysis of New Zealand's two cycles of reporting shows that the UPR has been a significant catalyst for increased civil society agency and mobilisation. Examples of this include coalition building, lobbying of states and the New Zealand government, and impact on state party recommendations to New Zealand.

First, coalitions of non-governmental organisations joined together expressly for the UPR in groupings of iwi-based, union and human rights groups; women's civil society organisations as previously mentioned; and groups connected to the survivors of the Canterbury earthquakes. Disabled people also linked together. For example, one of the most detailed and comprehensive civil society reports was a joint submission on the abuse of disabled people in New Zealand made by Domestic Violence and Disability Working Group, Auckland Disability Law, CCS Disability Action Northern Region, and Peace Movement Aoteaora. The UPR process clearly has raised covenant consciousness generally with civil society in New Zealand. Some of the groupings were facilitated by the NZHRC.

Second, NGOs were active in UPR submissions and in the UPR pre-session in Geneva meeting in November 2013, attended by 19 representatives of Permanent Missions.[523] Partly guided by advice from UPR Info who held the pre-session, NGOs were encouraged to lobby diplomats of attending countries and other State parties both in Geneva and back in New Zealand. NGOs themselves agree the UPR has increased NGO capacity and capability in relation to the international human

[522] Salama in Sen, above n 44

[523] Argentina, Austria, Brazil, Canada, Cote d'Ivoire, Czech Republic, Cyprus, Estonia, France, Germany, Hungary, Ireland, Mali, Moldova, Netherlands, New Zealand, Poland, Spain and Switzerland.

rights treaty body framework. To this extent it can be claimed that the UPR contributes to affirming and not undermining existing human rights obligations for civil society groups.

Evidence of the greater impact of civil society on the UPR process is shown in the recommendations made. In some cases a recommendation made by an NGO turned up in very similar language as a recommendation from another State party to New Zealand in the Report on the Working Group. For example, the CEDAW Coalition of New Zealand NGOs asked state parties to recommend the following, *develop with civil society involvement an action plan for New Zealand women with authentic targets and strong accountabilities. The plan must target violence against women, pay inequality and pay inequity, the status of Māori and Pacific women, and the importance of welfare and employment-related reforms on the lives of women and their families. The status of disabled women must also be addressed.*

Ireland's recommendation read, *develop, in partnership with civil society, a national action plan for women with defined targets, to address issues such as violence against women, pay inequality, the situation of Māori and Pacific women, and women with disabilities.*

Another example comes from the Human Rights Foundation Coalition's recommendations: *Establish a Human Rights Commissioner appointments process that provides for the involvement of Parliament;* and *establish a Parliamentary Select Committee for Human Rights.* Ukraine recommended; *Consider participation of the Parliament in a human rights commissioner's appointment process,* and Turkey recommended the establishment of a parliamentary human rights select committee.

8.9.5 Role of the New Zealand Human Rights Commission

Equally the New Zealand Human Rights Commission (NZHRC) took a far more proactive role in New Zealand's second cycle of UPR than in the first cycle. Its role covered education and awareness raising, monitoring, advocacy, plus liaison with government both domestically and in Geneva.

A more sophisticated NHRI engagement is evident in the comprehensive report provided, in meetings held with government agencies and with political parties about engagement with the UPR process, and in its interaction with NGOs. It also met and lobbied diplomats and embassies in Wellington as well as in Geneva. The NZHRC also provided an assessment of steps taken to implement the recommendations made to the State party in the first UPR in 2009. A major section of the Summary prepared by the Office of the High Commissioner for Human Rights, which is part of the pre-Geneva part of the UPR process, was devoted to the NZHRC's information.

In that Summary the NZHRC endorsed greater recognition of the Treaty of Waitangi in constitutional arrangements; noted significant gaps in incorporating human rights in domestic legislation and urged explicit statutory recognition of economic, social and cultural rights. The NZHRC noted the absence of transparent assessment of New Zealand's international human rights obligations in the development of legislation; stated that 70 pieces of legislation had been passed under urgency in Parliament; and was concerned about the absence of mainstreaming of human rights in policy and lack of statistical and indicator data.[524]

In its National Report, New Zealand stated that prior to drafting, public consultation was held in six centres across New Zealand, managed by the Ministry of Foreign Affairs and Trade with

[524] Human Rights Council. (2014). *Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 16 (6) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21*. Eighteenth Session. A/HRC/WG6/18/NZL/3 at 2.

substantive involvement from Te Puni Kokiri, the Ministry of Justice and the NZHRC. In Geneva the NZHRC took part in the NGO pre-session as well as its advocacy work with permanent missions. It also distributed video material of the Geneva pre-session to NGOs who were unable to travel and participate.

After the report of the Working Group was received and prior to New Zealand's commitments to the recommendations, the NZHRC hosted a meeting of NGOs with officials from the Ministries of Justice and Foreign Affairs and Trade in Auckland. The officials were responsible for a Cabinet paper recommending actions of the core areas of focus that other state parties had identified in the recommendations. NGOs were told they had until June 10, 2013 to make submissions.[525] When it responded to the recommendations New Zealand stated that following the review in January 2014 the Government met with NGOs, interested individuals and the NZHRC and received 11 civil society submissions.[526]

8.10 Time and quality of dialogue

The strict time allocation of the UPR process curtails on some occasions State parties who wish to comment, ask questions and participate in the dialogue. This has prompted criticism that the review process devotes insufficient time to go into detail about the countries that are under review and that the interactive dialogue is in name only. Davies states that:[527]

> *This renders the review more of a schematic overview of the situation in any given country, rather than a detailed appraisal. This enforced brevity is also clear when one considers the amount of information that goes into a review.*

The webcast of the second cycle dialogue also indicates that while it was hoped the second UPR cycle would turn its attention to implementation and scheduling of a state's follow-up work, there was little sense of that happening in effect and this remains a significant challenge for the effectiveness of the UPR.

8.11 Form and substance of recommendations

After the first cycle of UPR, NGOs among others, called for recommendations to be more specific and action-orientated, rather than generic statements. UPR Info, said that unfortunately during the first UPR cycle many of the recommendations made to State parties were lost in the system due to a lack of State response. "The process will be ineffective if States do not confirm whether they intend to accept or reject recommendations; accountability will not be possible and the reporting and lobbying efforts by NGOs will be lost."[528] UPR Info went on to express the hope that:[529]

> *…recommendations which request States under review to 'continue' current state policy will be discouraged at future review sessions. Recommendations framed in this manner do not address problem areas and therefore are ineffective in improving the human rights situation.*

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[525] Attendance by researcher.

[526] Human Rights Council. (2014). *Report of the Working Group on the Universal Review: New Zealand. Views on conclusions and/ or recommendations, voluntary commitments and replies presented by the State under review.* Twenty-sixth session, Agenda item 6. 26 May, 2014. A/HRC/26/3/ Add.1.

[527] Mathew Davies (2010) "Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations." *Alternatives,* 35, 449-468.

[528] Richard Chauvel (2010) "A view from two NGO"s in Sen above n 44

[529] UPR Info (2014) at 56.

It appears that little may have changed between the first and second cycle in this regard.

New Zealand NGOs have been critical, too, of the substance of the recommendation made in the second cycle and New Zealand's response to them, too. The Women's International League for Peace and Freedom (WILPF) representing 11 additional non-governmental union and iwi organisations said that while New Zealand's response to the 155 recommendations might seem impressive, unfortunately on closer examination it is not so positive:[530]

> *Firstly, where recommendations have been accepted, we are concerned that New Zealand's responses are lacking in sincerity. Its response frequently does not address the point of the respective recommendation- for example, the response regarding the UN Declaration on the Rights of Indigenous Peoples, or is misleading or both. Secondly, most of the rejected recommendations relate to international human rights instruments and to the constitutional or legislative framework, indicating a lack of commitment by New Zealand to meaningful protection and promotion of human rights both now and in the future.*

And the justice group, rethinking Crime and Punishment described New Zealand's response as disappointing.

> *Five countries (Ireland, Cabo Verde, Canada, Thailand, and Iran) all drew attention to the existence of structural discrimination with the criminal justice system, and urged New Zealand to take active steps to address the issue. New Zealand has once again skirted around the issue, and refused to acknowledge that structural discrimination exists within the system. Instead, it promised to focus on Māori and Pasifika groups in the context of work to reduce crime. We have tracked back over the last seven years, and find that this has been the standard New Zealand response over that time.*

A related substance issue is the clarity of responses to ongoing follow-up. For example, civil society urged New Zealand to make plain its position on a number of issues such as its commitment to a National Action Plan on Human Rights. In its report New Zealand stated:

> *New Zealand's 1st National Action Plan on Human Rights (2005-2010) was prepared by the New Zealand Human Rights Commission and other stakeholders. The Government instructed agencies to consider implementing the Action Plan's priorities as part of normal business. Departments were encouraged to respond to requests from the Commission for information and to identify work meeting the Action Plan's priorities in organisational documents. The Commission is currently preparing the 2nd National Action Plan on Human Rights in close consultation with the Government and stakeholders. The Government has committed to work with the Commission, NGOs and civil society to develop the 2nd Plan, which will follow on from, and be directly informed by, New Zealand's second UPR process.*

But as the Human Rights Foundation notes the New Zealand Government did not adopt the NZHRC first Action Plan and has not implemented some of its priorities. The Foundation believes

[530] Women's International League for Peace and Freedom (2014) *NGO Intervention on the Adoption of the Outcome Document of the second Universal Periodic review of New Zealand.*19th June. Accessed: http:www.converge.org.nz/pma/nzupr-ngos-2014.

that simply referring to the fact that the NZHRC is preparing a second Action Plan having declined to adopt the first plan:[531]

> *…does not meet Human Rights Council expectations that the national report should be open and honest. The report should acknowledge that the government has not adopted the Action Plan. If the national report is to mention that a second plan is under preparation, it should indicate its approach to that plan.*

In response to two recommendations urging a second National Action Plan on Human Rights New Zealand said: "The Human Rights Commission is developing a second national human rights action plan."[532] The State party was silent about its approach to the plan and nor was it asked by other states at any point of the UPR process. In the summary prepared by the Office of the High Commissioner as part of the pre-Geneva element of the UPR, the NZHRC provided information about the second plan.[533] The compilation read: "the Human Rights Council should note the Government's commitment to work with NZHRC, non-governmental organisations and other members of civil society to develop, actively and implement New Zealand's second National Plan of Act for Human Rights", which is again unspecific about whose action plan it is- the State party's or the NZHRC's. In the report of the HRC Working Group on New Zealand's UPR, reference is made to the NZHRC: [534]

> *…currently preparing the Second Action Plan on Human Rights, a key human rights policy document that would identify issues to consider over the forthcoming five years. The timing of the document had been calibrated so that recommendations from the UPR could inform the Second Action Plan.*

NGO representatives have also expressed concerned that New Zealand's second National Action Plan on Human Rights to be developed by the NZHRC will became a default mechanism or constitute a convenient holding pattern for other human rights implementation identified by the UPR, and/or may suffer the fate of non-adoption.[535]

8.12 Enhanced expectations?

Increased involvement of NGOs and the accompanying covenant awareness raising may heighten expectations that the UPR should have be more effective than it is both in terms of process and outcomes. For example, under the UPR principle of co-operation, States have no obligation to answer questions and can be selective in their responses. Equally, the UPR has no power of sanction, rather it is regarded as a road map for the future. However, the increased engagement of civil society carries with it the implicit promise of faster progress. This is particularly in light of the UPR objective outlined in Resolution 5/1 that it aimed to improve the human rights situation on the ground. As an early assessment commented, from an NGO perspective what matters most is whether the UPR can deliver on its primary objective.[536]

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[531] Human Rights Foundation (2013) *Comments on the Government's Universal Periodic Review draft report.* 19 September. www.humanrights.co.nz.

[532] HRC, 3 [III] 8.

[533] HRC, above at 2, 1(A) 7.

[534] HRC, above at15, [126]

[535] Civil society comment at UPR meeting held by the NZHRC, 2013.

[536] Gareth Sweeney and Yuri Saito (2009). An NGO Assessment of the New Mechanisms of the UN Human Rights Council. *Human Rights Law Review* 9 (2) 203-223.

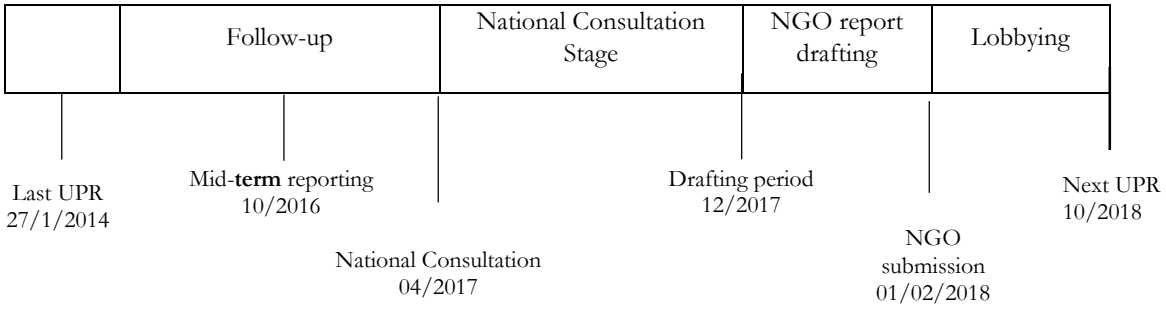
A sense of frustration was evident in the relatively few press releases issued by civil society following the UPR, referred to above. The NZHRC recommended during the UPR that the Government:

> *Establish a comprehensive UPR and treaty body process, linked to the Government's own planning process and periodic development of National Plans of Action for Human Rights, that includes engagement with civil society, greater integration across public agencies, including clearer accountability for coordinating and publicising reports and following up on their recommendations.*

However, history shows that international treaty body reporting cycles see specific periods of attention to meet reporting deadlines followed by a waning of interest until next time. The Human Rights Foundation, for example, noted that during the first UPR, the Government agreed to have regular consultation with civil society about follow up to the recommendations made and that New Zealand's second report stated that regular consultation had occurred. However, the HRF said in Auckland where the largest number of NGOs were based, only one meeting for civil society took place and three quarters of the allotted time was taken up by the NZHRC and ministry officials leaving very little time for input from civil society representatives present.[537]

A similar commitment has been again to consultation. With the Government's commitment to a mid-term progress report in 2016[538] and advance knowledge of the timeline for the third cycle of UPR (see Table 7), there is no excuse for inadequate or intermittent consultation in future. Increased emphasis on the UPR by the NZHRC and an increasingly sophisticated response from civil society groups will doubtless generate pressure for improved and more regular consultation between the Government and other human rights stakeholders.

Table 8. Timeline for New Zealand's UPR engagement



At the NZHRC meeting between civil society and ministry officials to talk through New Zealand's response to the recommendations made to it in the second cycle of UPR, civil society representatives present also claimed that NGOs who received public funding feared they would lose money if they advocated publicly in opposition to current policy development, particularly on important economic, social and cultural rights.[539] This requires greater investigation outside of this research.

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[537] HRF above at 3 [3.2]

[538] Cabinet Social Policy Committee (2014). *Minute of Decision: Response to the United Nations Universal Periodic Review Recommendations*. SOC Min (14) 8/2.

[539] Researcher's notes from meeting attendance.

8.13 Conclusion

Given the infancy of the UPR, it is premature to evaluate its effectiveness in terms of outcomes. However, as a recent human rights scholar noted:[540]

> *The novelty of the review is not a reason to pose questions as to its potential success over the longer term, although it does caution against drawing any emphatic conclusions at this point.*

It is evident that as a process, the UPR mechanism has been wholeheartedly adopted by State parties with universal engagement and high-level ministerial participation. Its cooperative dimension is in keeping with a diplomatic approach to human rights implementation that underpins the Human Rights Council. State leadership by asking questions of each other and holding each other to account for promises has politicised in a new way the reporting of progress in implementing human rights. New behavioural norms are in vogue. What is more difficult to assess, however, is the extent to which the UPR is changing human rights on the ground. Even UPR Info, which is generally optimistic about the promise of the UPR states, " Unfortunately, it is not always clear as to the efforts that the states are or are not making because an official follow-up mechanism does not exist at the UN."[541]

The regularity of the UPR cycle and its timeframe, the increased civil society agency in New Zealand, the greater involvement of the NZHRC, have all been positive outcomes looking at the two cycles overall. The jury remains out, though, on whether the newer working processes and practices have actually improved the human rights situation on the ground.

New Zealand's relative sophistication in human rights treaty body reporting, the fact that it has signified the importance of the UPR with high-level delegations, and its apparent self-reflection in response to comments from other states, ensure that it is regarded as "rhetorically active" in the Human Rights Council.[542] There is a sense, though, that New Zealand's continuing non-ratification of some important international human rights treaties, ongoing concerns about women's and children's rights, structural discrimination and constitutional issues, all of them difficult and complex human rights issues, need more significant, sustained and cross-government attention. New Zealand's self-regard as a human rights exemplar has also taken on its own life force as a dominant narrative and this story may disguise plateauing of progress or regression.

Avoiding a "worrying silence"[543]of more than four years between 2014, the mid-term report in 2016, and 2018 when New Zealand will be undertaking the third cycle of UPR, is a significant challenge. The role of the NGOs and the NZHRC in the assessment is crucial. During the review of the Human Rights Council in 2011 the role of civil society in the process was strengthened.[544] This included, *Other relevant stakeholders are encouraged to include in their contributions information on the follow-up to the preceding review* (Annex, 8, Process and Modalities of the review) and ….*States are encouraged to conduct broad consultations with all relevant stakeholders*…..(Annex 17, Follow-up to the review).

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[540] Davies, above n 528 at 464.

[541] UPR Info, above at 13.

[542] Rhetorical action is explored in theoretical depth by Mathew Davies (above, n 428). It rests on the use of language to convey information and preferences from actor to actor.

[543] At 462.

[544] UPR Info. Universal Periodic Review. Civil society Follow-up Kit, 2014.

UPR Info has produced a helpful kit for civil society follow-up which includes making the outcome of the review public, initiating a dialogue with the State, monitoring the implementation of the recommendations and a reporting on the status of the implementation. These all appear practical and reasonable activities and as UPR Info notes the "UPR offers more legitimacy to NGOs".[545] However, in addition to funding and resource constraints faced by civil society, there are other inhibitions to potential follow-up activity. These include the existing indifference of the mainstream news media to human rights treaty body reporting in terms of publicity and promotion. The Minister of Justice described the media attention given to the UPR as a "moderate amount" which somewhat overstates the publicity.[546] The lack of any parliamentary mechanism for treaty body reports to be reported back on a systemic basis so that political awareness of, and accountability for, human rights is enhanced is another obvious and significant barrier. It would be desirable if the newer coalition-building by NGOs prompted by UPR reporting, can now effectively transform into one or more monitoring mechanisms, but this will require leadership and commitment.

As well as NGOs, there are other organisations and agencies that could take an active role in monitoring. UPR Info states that while:[547]

> *Fact-finding is resource consuming it is a condition sine qua non before engaging in an international mechanism of any kind. The more precise NGOs are in their follow-up of the domestic human rights evolution on the ground, the more their advice will be sought after and taken into account. This will increase the chance of domestic action.*

Academic researchers and graduate students could be better engaged as partners in fact-finding; in addition to legal practitioners, and experts working in health, education, with women, iwi, children and vulnerable groups.

The NZHRC is a powerful catalyst to push the State to sustain more regular consultation with civil society on UPR progress than was evident after the first cycle. Given the wide-ranging scope and number of the recommendations, priority-setting in implementation will be required. UPR Info suggests "an outcome charter detailing the responsibilities of each Ministry and governmental agency, the timeline to implement, and indicators of achievement." This role is arguably better suited to the national human rights institution than civil society. It fits with the NZHRC's recommendation that the Government:

> *Establish a comprehensive UPR and treaty body process ….. that includes engagement with civil society, greater integration across public agencies, including clearer accountability for co-ordinating and publicising reports and following up on their recommendations.*

While New Zealand sends high-level Ministerial delegations to the United Nations and there is typically a conversion to covenant-consciousness by political representatives who attend Geneva and New York, this is often short-lived. The relatively rapid change in recent Ministers of Justice has resulted in an intermittent and variable human rights leadership in Parliament and follow-through with Cabinet ministers and government agencies. New Zealand rejected the recommendation that New Zealand establish a Parliamentary Select Committee for Human Rights in the 2014 UPR, despite widespread support for the idea by a variety of civil society organisations and by other state parties. New Zealand said that Parliament and not Government determined the

[545] UPR Info (2014) at 7
[546] Above at [42]
[547] UPR Info (2014) above

nature of parliamentary committee and "all committees consider human rights implications of relevant legislation."[548] A comprehensive UPR and treaty body process would not only allow examination of the record of parliamentary select committees in examining the human rights implications of relevant legislation, it would also allow better assessment of the primary objective of the UPR, whether human rights in New Zealand are improving "on the ground".

New Zealand, too, has a role in moulding the UPR as it moves into its third phase. As researchers have noted the UPR phenomenon has meant the human rights record of every state has been scrutinised providing a body of information on states that is unprecedented. However, information alone without relevant follow-up action will not achieve the requisite improvement of human rights on the ground. The nature of recommendations including their specificity, greater sophistication in monitoring state party promises, and increased accountability for lack of implementation are only three necessary improvements that will determine whether the UPR is ultimately successful as a different but effective human rights monitoring mechanism. These remain challenges for members of the Human Rights Council and the wider United Nations family if the UPR is to deliver on its promise.

[548] At 515.

Chapter Nine Stakeholder views

9 Introduction

During the course of the project 21 interviews were conducted in New Zealand, at the United Nations in New York and at an international meeting in Jordan with elite stakeholders involved in international human rights treaty body processes either at international, diplomatic, political, legal, policy and administrative levels or through work as human rights commissioner or civil society representatives. Material from these interviews has been used in specific chapters on individual treaties in the report. Additionally, they have been content analysed and various themes identified.

9.1 Methodology

A semi structured interview format with 13 questions was employed which allowed for follow-up and probing questions (see Appendix 2). Interviews were conducted when researchers were involved in New Zealand's seventh periodic report of CEDAW covering the pre-session in Geneva 2011 and country examination in New York in 2012. The proximity of the interviews with the reporting experience maximized the recall of interviewees and tended to enhance the quality of the information. In addition to the interviews, two expert evaluations were undertaken at the International Conference of International Coordinating Committee of National Human Rights Institutions (ICC) in Amman, Jordan in November 2012. Some of the interviewees made comments about the international human rights treaty body process in general, as well as CEDAW specific comments.

Other interviews were conducted in relation to ICCPR, ICSCER, CERD, and to the UPR. Three interviews were undertaken with IMM members relating to New Zealand's first CRPD report to the UN committee.

A thematic analysis was conducted of the transcribed and verified interviews of the interviews in relation to New Zealand's ratification and implementation of the six treaties. It built on existing and evolving research and the evaluative framework developed for the research, to develop keywords and concepts against which the interviews were analysed. Inevitably the interviews reflected the access to, and the availability of politicians, officials, international experts, legal counsel and members of the NGO and NHRI communities with relevant and contemporary experience. However, the interviewees included the majority of representatives of New Zealand's delegation and of the NGO representatives who attended the country examination by the CEDAW committee of the seventh periodic report conducted in New York in 2012, all of the IMM members for CRPD, a Commissioner who was involved with CRPD, and prominent political, diplomatic and legal identities who have influenced human rights legislation, policy and practice.

9.2 Major themes

The major themes identified were:

- The importance of **ministerial leadership** in the actual process of country examination but an arguably weaker political commitment to promotion and implementation of Treaty body committees' Concluding Observations and Recommendations in New Zealand.
- The **lack of continuity** and **short term focus** of State parties, civil society and others around reporting periods and the lack of continuity of personnel and expertise at both political and administrative levels in treaty body reporting and periodic examinations. This impacts even at the level of archiving of records and accessibility of official reports.

- The **absence of national promotion** of either the State party's report to treaty body committees and of the UN's corresponding Concluding Observations and Recommendations of treaty body committees. This compounds and affirms the general domestic media indifference to international human rights conventions and human rights fulfilment.
- Opinions on how treaty body Recommendations and Concluding Observations should be **reported to Parliament** and debated, and whether a dedicated human rights select committee would be useful as an effective accountability mechanism.
- The need and desire of NGOs for **formal training** in treaty body processes.
- Recommendations for **improving treaty body processes** at both international and domestic levels.

9.2.1 The imperative of ministerial leadership

Interviewees identified both the symbolic and representational importance of ministerial leadership of country delegations to the United Nations for periodic examination. This was summed up by the comment, "always send a Minister, never send anything less than a Minister." A former Minister of Women's Affairs, Hon. Lianne Dalziel, who appeared before the 39th session of the Committee on the Elimination of Discrimination Against Women that examined New Zealand's sixth periodic report said, *"Ministerial leadership is important because I think that says the treaty body process is important for the Government*." She said that in relation to CEDAW if it was not the Minister of Women's Affairs who participated, then it should be the Minister for Foreign Affairs or another Minister of high standing. The Hon. Jim McLay, head of New Zealand's Permanent Mission in New York, said "*those who I have spoken to, individuals both in the Human Rights Committee and on the CEDAW committee certainly seem to appreciate ministerial presence."* The significance of ministerial leadership was acknowledged by Dr Niklas Bruun, CEDAW committee member and Rapporteur on New Zealand in its seventh periodic report, who said it *"sends a good signal as it means the Minister has some commitment to the process".*

Former Prime Minister, Attorney General and architect of NZBORA, Sir Geoffrey Palmer, noted that the appearance of Ministers before United Nations Committees is relatively recent and that in the past the Ministry of Foreign Affairs undertook that role. He considered that the appearance of Ministers was a good development because it highlighted the need to have a good knowledge of the issues**.**

Another interviewee identified the element of ministerial performance and the fact that State party ministerial presence and leadership of delegations affirmed the CEDAW committee's status. Joy Liddicoat, a former New Zealand Human Rights Commissioner, who had accompanied as a technical expert the then Minister of Women's Affairs, Hon. Ruth Dyson, to New Zealand's fifth periodic examination said:

> *The CEDAW committee definitely took it much more seriously having the Minister there. The Minister worked very hard to get the process right. The Minister took it seriously and the Mission in New York took it seriously. They wanted New Zealand to perform well and the Minister wanted to perform well. She very much brought her experience from parliamentary select committees and saw it as a way of going before a committee to be accountable.*

New Zealand's fifth periodic examination occurred when the CEDAW committee was under pressure from a backlog and political pressures relating to representation of committee members.

The Turkish chair of the committee at the time, Dr Farida Acar, had visited New Zealand at the invitation of New Zealand's former CEDAW committee representative, Dame Sylvia Cartwright. Joy Liddicoat said:

> *There was a reasonably strong connection and relationship between individual members of the committee and New Zealand, and they were looking for a strong performance from New Zealand because they were under siege, really, from other governments like Iran wanting to appoint their own 'independent experts' to the committee.*

A significant feature of ministerial presence relates to policy commitment**.** A former Director of Policy at the Ministry of Women's Affairs, Deb Moran, one of two senior officials assisting the Minister of Women's Affairs in New Zealand's country examination in 2012, said "*officials will always be more reticent because they're not the decision-makers whereas if the Minister is there she can make a decision if she wants to."* This was confirmed by Professor Michael O'Flaherty, then vice-chair of the United Nations Human Rights Committee and chair of the Northern Ireland Human Rights Commission, who said the presence of Ministers as heads of country delegations changed the nature of the dialogue in terms of policy commitment. Ministers were able to speak and commit in a way that civil servants were unable to. He also said he had observed as a committee member, and in relation to New Zealand specifically, that the personal engagement of Ministers in treaty body periodic examination was an educative experience likely to increase their commitment to human rights. No Minister attended New Zealand's examination of CRPD which poses the risk of an indifferent response to the Concluding Observations and Recommendations.

This ministerial 'conversion' to human rights consciousness was acknowledged by most of the Ministers who were interviewed and who had attended treaty body examinations, both in terms of their own learning curves and an increased commitment to human rights. Some Ministers found it hard to convert their colleagues, however. Hon. Ruth Dyson recalls that the CEDAW Committee's report read a lot less favourably than the Committee's oral praise of New Zealand during the examination.

> *So it felt good, the discussion was good and we got a lot of praise from the chair but when the report came I felt it reflected a lot of negatives, perhaps more negativity than Cabinet members could accept in respect of their own country.*

9.2.2 The lack of continuity and short term focus

Continuity as a best practice element in country reporting was identified by Heyns and Viljoen (2001) in their examination of the impact of United Nations human rights treaties at the domestic level. The *"hallmarks of a country engaged in constructive dialogue as far as reporting is concerned seem to be participation and continuity in the process….continuity is achieved when reporting is not seen as a series of once-off international encounters among strangers (starting again and again from the beginning) but as part of an ongoing process with domestic objectives, including implementation.*"[549]

Since New Zealand ratified CEDAW in 1985 until the present day there have been 15 Ministers of Women's Affairs (now the Ministry for Women), and only four have lasted the full parliamentary term of three years in the portfolio. Seven of the Ministers held the women's affairs portfolio for a year or less[550]. No Minister has ever been involved twice in the periodic dialogue in relation to

[549] Heyns & Viljoen, above n 3 at 526.

[550] Information supplied by the Ministry of Women's Affairs library.

New Zealand. The lack of continuity at ministerial level is also evident in the bureaucracy. There have been nine Chief Executives of the Ministry of Women's Affairs since it was established in 1986[551] with an average tenure of three years. Only one had the opportunity to twice be involved as an official with New Zealand's periodic examinations but travelled to New York only once.

Former Cabinet ministers interviewed acknowledged lack of continuity as a problem both in terms of their own preparation and in terms of outreach afterwards. Ruth Dyson said:

> *Having someone who had been there before would have been great. I didn't realise, for example, that it was a case of 'answer the questions now' and that I wouldn't have another opportunity to do so. A proper briefing about the process would have been useful.*

Lianne Dalziel said:

> *If I had stayed Minister the CEDAW report to New Zealand was a really good report for taking out and working through with communities. When I got back I was holding seminars all around the country. I remember 70/80 women turning up to a hall on the West Coast (rural South island of New Zealand). There was a hunger for this information. It wasn't something people had a passing interest in, they were intensely interested in it. I really can't say enough about how good it was to get out there amongst groups of women and even talk about the structure of the ministry of women's affairs and why it did what it did. But then I was replaced as the Minister, so I got stopped in my tracks.*

The reality of politics is that officials identify both preparation and the absence of succession planning as issues relating to continuity and its impact on implementation. Deb Moran said, *"Has there ever been successive officials travelling to report or successive Ministers travelling to report? We had to learn over and again from the beginning."* She cites the proximity of New Zealand's seventh periodic report, with ICESCR reporting also in 2012, as a bonus because the Ministry of Women's Affairs was able to access the ICESCR briefing notes.

> *We were able to build on some of the background information provided by Ministry of Justice officials involved in ICESCR, particularly some of the more general human rights issues which aren't our particular expertise. We also looked at the questions the ICESCR committee had asked because we thought that the same issues were likely to be raised with us.*

Equally, members of the IMM who travelled to Geneva for New Zealand's first CRPD examination, acknowledged the proximity of the second UPR report and the help provided in preparation by New Zealand Human Rights Commission legal staff in their preparation.

Ministers change and change regularly and New Zealand also lacks an administrative legacy of human rights treaty body engagement plus a limited continuity of personnel from civil society engaged in treaty body processes. However, at least one representative of the National Council of Women of New Zealand (NCWNZ), an umbrella non-governmental organization, has been involved in the preparation of three shadow reports in 2002, 2007 and 2012. Beryl Anderson was also present at the New Zealand examination and dialogue in 2007 and 2012 as an NCWNZ representative. Her experience as a civil society representative is unique. In 2012, most of the civil society representatives present in New York from New Zealand had never been previously present at periodic reporting.

[551] This includes the 2012 appointment of Dr Jo Cribb.

The short term focus of the State Party on most treaty body processes is at odds with the fundamental premise of 'progressive realisation' of human rights which implies a continuing commitment to the realisation of economic, social and cultural human rights. However, it is perhaps an inevitable consequence of a reporting cycle that requires the State party to marshal information and resources around report writing for the periodic examination and then relaxes its guard until the next cycle. It will be useful to assess as the Universal Periodic Review process matures whether difficulties of short term focus and lack of continuity of personnel equally apply to this newer and more streamlined approach to human rights reporting internationally.

The political reception of a treaty body report domestically is also a factor in whether a specific treaty maintains a short or longer term focus for a particular administration. First, The Ministry for Women is a smaller population ministry and in 2012 was led by a Minister outside of Cabinet. There are no dedicated ministries for either children or disabled people, who are organisationally structured within the Ministry of Social Development. In addition, New Zealand Governments have adopted a familiar pattern of political expediency and convenience, promoting the positives and ignoring or dismissing the negatives, of treaty body Concluding Observations and reports of special procedures.

Ruth Dyson spoke of a somewhat negative reception for the sixth periodic report when she returned from the country examination.

> *I reported to Cabinet, and there was a bit of discussion about it at the Cabinet table but my colleagues were a little bit grumpy that they sort of got told off. They just didn't like the report. There wasn't proper recognition of New Zealand's progress. This has the potential to devalue the contribution a treaty body report might make.*

Sir Geoffrey Palmer also commented that criticism from United Nations Committees was not well received by Government because it was interpreted as being dictated to from abroad.

9.2.3 The absence of national promotion

Perhaps the most enduring theme in international human rights treaty body committee Recommendations to New Zealand since it ratified the major human rights treaties, is the need to better publicise and promote each treaty domestically. For example, stock paragraphs such as the latest from the CRPD Committee is generally inserted into committee documents:[552]

> *It recommends that the State party transmit the Concluding Observations for consideration and action to members of the Government and Parliament, officials in relevant Ministries, local authorities, members of relevant professional groups, such as education, medical and legal professionals, as well as the media, using modern communication strategies.*

In addition the Committee:[553]

> *Requests the State party to disseminate these Concluding Observations widely, including to non-governmental organisations and representative organizations of persons with disabilities, as well as to persons with disabilities themselves and members of their families, in English and*

[552] Committee on the Rights of People with Disabilities (2014) *Concluding observations on the initial report of New Zealand.* CRPD/C/NZL/CO/1 at.8 [73]
[553] At 8 [75]

> *Māori and in New Zealand Sign Language, and in accessible formats, and to make them available on the government website on human rights.*

The role of the State party, political ignorance, media disinterest, lack of understanding among policy planners and analysts, and the engagement of younger people were all identified by participants as issues that would need to be addressed to improve the profile of the human rights treaty framework and human rights generally.

Former Minister of Women's Affairs Jo Goodhew said after New Zealand's examination of its seventh periodic report in 2012 she wrote to all Members of Parliament to talk to them about what CEDAW is about and offered the links to read the report, and encouraged them to do so. She undertook to do this to members of the CEDAW committee and stated "*I'm not sure other Ministers have done it in the past."*

The Minister said:

> *There is no doubt in my mind that the best way to get the message out is through the groups that feel very strongly about it. You could have a roadshow and advertise it but it is not the easiest thing to attract people to a meeting. Whereas when I read the newsletter of the women's groups around the country they all talk about CEDAW, so I do think they get the word out.*

The other participants were of one voice that more needed to be done in terms of promotion, publicity and profile, regardless of whether they were formerly accountable as Ministers at some point, members of civil society or experts.

Former Crown Counsel with New Zealand's Crown Law Office and now a human rights lawyer, Andrew Butler said:

> *One of the usual requirements in Concluding Observations made by the UN treaty monitoring bodies is that publicity to the Concluding Observations and Recommendations is provided by the State party. The extent to which New Zealand observes this, in practice, appears to me to be low. While publicity is given to the Concluding Observations and Recommendations by way of posting on the relevant Ministry website, and perhaps by provision of it to media outlets, the level of media comment on concluding observations suggest that the media are not well acquainted with the process or its significance and implications for New Zealand.*

The media were also identified by Beryl Anderson who saw publicity for CEDAW in terms of a wider picture of current gendered relations.

> *I think that the news media is almost completely switched off about CEDAW, something about the language and the feeling that there is something of a backlash against women's rights.*

She also identified the low key way the New Zealand Government did respond to its obligations. *"While CEDAW might be on the Ministry of Justice and Ministry of Women's Affairs websites that's all they do. It is just providing information in a passive way."*

The inter-generational dynamics of women's rights in general and the different priorities of younger women, also pervade knowledge and understanding of formal women's rights and the CEDAW legacy. Ruth Dyson said:

> *I don't think young women in New Zealand would have a clue what CEDAW is about, or for or why. It may be irrelevant to them but what we have to show is why it is relevant. So many things have changed for young women, so the relevance of any international agreement has to be the lives of young people and their future. For many women in New Zealand their interest is likely to be triggered by how our achievements can help women in other countries.*

Her successor in the portfolio, Lianne Dalziel agreed.

> *We are just not even connecting with that group. You walk into a school and ask a reasonably intelligent, well-informed group, or ask first year university students, what CEDAW stands for, and they wouldn't know.*

There is some preliminary evidence that suggests links can be drawn between the invisibility of CEDAW and the lack of political knowledge. Beryl Anderson stated that the NCWNZ had wanted to get a feel for the level of understanding of Members of Parliament (MPs) and in 2009 the United Nations Association of New Zealand (UNANZ) had surveyed the 122 MPs asking them about their personal knowledge of the International Bill of Human Rights, and of CEDAW.

UNANZ repeated the process in February 2012 after only 7 of 122 MPs had responded the first time. UNANZ stated that *"non-return of surveys would be taken as an indication of lack of knowledge.*" Of the nine respondents when the exercise was repeated (members of the Māori Party, the Green Party and the Labour Party - all opposition parties) two did not know of CEDAW and only seven of the nine knew anything of the treaties. Two questions related to CEDAW. The first was, 'What do you know about CEDAW and its implementation?' which yielded five positive responses, including from a former Minister of Women's Affairs, through to party spokespeople on women's issues. The second was 'How does CEDAW relate to your portfolio or parliamentary role?' which was also answered by five MPs and with a range of 'no impact' through to 'high relevance.'

Strong criticism of the state of political understanding of the content of treaties, the international treaty body reporting process and the domestic and international consequences of ratification, was made by Sir Geoffrey Palmer. He said:

> *I have no sympathy with Members of Parliament who seem to spend their lives making political points but never do any work and don't do any analysis and would never know what our obligations are. And they won't care if they did know.*

Julie Radford Poupard, a civil society representative from Women's Health Action, who attended New Zealand's seventh periodic report in New York in 2012, pin-pointed political ignorance as a critical concern.

> *First of all it would be great for MPs to actually know what CEDAW is, or any of the treaty bodies. I actually think the lack of knowledge is outrageous. It should be in schools and part of our curriculum.*

Her colleague, Christy Parker, another NGO representative who was part of the Pacific Women's Watch delegation at the seventh periodic report said, "*I think that it is completely invisible-the person in the street wouldn't have any idea what CEDAW was about."*

Political ignorance may be matched by a lack of awareness of the human rights framework both as guiding theory and as a mechanism for integration into policy planning and analysis. Deb Moran said she detected a general lacuna.

> *I'm not sure there's much knowledge of human rights in general in New Zealand at the moment. I must say when I've been interviewing analysts the human rights framework and analysis is not well understood by them. They struggle with human rights. For most analysts coming through they don't touch the relevant human rights instruments like CEDAW.*

Several interviewees raised possible interventions and activities aimed at raising the publicity of human rights treaties.
Andrew Butler said:

> *One useful step that could be taken by New Zealand in order to improve realising human rights through treaty body reporting processes would be for an organisation outside of government, perhaps the Human Rights Commission, to undertake an education exercise for relevant media personnel on human rights, including treaty body reporting processes.*

Reflecting on her experiences over several reporting cycles Beryl Anderson identified civil society as also having a role.

> *I think a key question for the NGO representatives is how can you socialise the CEDAW experience when you get back home, and how do you hold the government to account for progress.*

Joy Liddicoat was cautious about the inherent newsworthiness of CEDAW as a treaty body in terms of the contemporary news values that celebrate personality, human interest, and today's happenings over systemic issues, trends and seemingly timeless patterns.

> *I think the question of publicising CEDAW as a treaty is an interesting one. I think about the famous New Zealand women who will publicly back child cancer but not women's under-representation or who want to back green, environmental issues but not systemic discrimination against women.*

9.2.4 Lack of Parliamentary scrutiny

Interviewees unanimously wanted greater Parliamentary scrutiny of treaty body Concluding Observations and accountability for implementation of Recommendations. Currently the Ministry of Women's Affairs reports to the Government Administration Committee of the New Zealand Parliament, a committee that has a very limited scope. Fundamental women's rights issues cover all major select committees such as health, justice, education, labour and transport, foreign affairs. They are often considered in an ad hoc way during legislative reform and other processes, often raised in response to outsider submissions. This is compounded by the limited nature of gender impact reporting in the parliamentary process, with papers before the Social Policy Committee only being required to have gender impact statements in contrast to the vets under s.7 of the NZBORA which require analysis of any inconsistency with the BORA and whether it can be justified.

In 2010 the NZHRC submitted to Parliament's Standing Orders Review Committee that it was time that the Parliament added a new, separate human rights select committee, one that would

debate treaty body reports in a standardised and dedicated forum.[554] Such a Committee would allow for broad human rights scrutiny of proposed legislation and have the ability to carry out thematic inquiries enhancing systematic Parliamentary oversight and strengthening accountability. Although the SOR Committee did not support the establishment of a dedicated Human Rights Committee, it did recommend enhanced analysis of NZBORA rights and other constitutional matters (at p.37).

Subsequently the Working Group on the Universal Periodic Review recommended that New Zealand establish a Parliamentary Select Committee for Human Rights, but this was rejected by the Government in 2014, despite growing support for the idea within civil society. A United Kingdom project investigating the effectiveness of Parliamentary oversight of human rights said much debate had occurred about the wisdom of a committee or not and there were potential benefits as well as potential risks.[555] Whatever model was chosen to oversee human rights, it should be based on effectiveness criteria.[556]

The majority of those interviewed wanted a specific mechanism, a select committee devoted to human rights. Sir Geoffrey Palmer said:

> *I think we need a select committee on human rights. I did not used to think so but we are so remiss and so negligent and so hopeless that we ought to have somebody that calls us out on it in Parliament.*

Andrew Butler said:

> *If it were possible to convene a dedicated Parliamentary Human Rights Select Committee there could be real advantages to such a committee. It would be able to provide accountability within Parliament on a range of human rights issues which arise both at the legislative level (through the examination of bills and regulations) together with accountability from Ministries and other Crown entities in their human rights performance.*

Ruth Dyson in supporting a human rights select committee or a formal mechanism for debating international treaty body reports said that both the Ministry and the authors of shadow reports could appear before a dedicated select committee and answer questions. Lianne Dalziel said while she had suggested to the Prime Minister that the CEDAW Concluding Observations should be tabled in Parliament and that it should be subject of a debate; that did not happen.

Joy Liddicoat extended the concept of improved accountability beyond reporting back suggesting that the Government's draft periodic reports should be tabled and debated before they were submitted to the United Nations.

> *It would be an interesting thing to do and there should be enough time in parliamentary processes. Why does accountability have to happen at the end of the process given that it is such a long reporting cycle?*

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[554] New Zealand Human Rights Commission (2010). *Strengthening Parliamentary Democracy: a Discussion Paper* retrieved from http://www.hrc.co.nz/wp-content/uploads/2011/05/Strengthening-Parliamentary-Democracy-final-17June11.pdf

[555] Philipa Webb and Kirsten Roberts, (2014). *Effective parliamentary oversight of human rights. A framework for designing and determining effectiveness.* Kings College, London, United Kingdom: University of London.

[556] At 4, [12]

She said that in a Mixed Member Proportional system the argument for having party political positions around international reporting seemed quite flawed.

> *Yes, they're speaking for New Zealand and they are the Government of the day, but in a five year cycle like that of CEDAW, it is likely that different parties are going to be worthy of praise or embarrassed by condemnation at some time.*

However, Jo Goodhew said the Standing Orders Committee had looked at the idea of a dedicated human rights select committee in 2011, and that all legislation was vetted for compliance with the NZBORA and the HRA.

> *One of the things other countries don't recognise when they compare us to them is that for what we achieve we're a very small population and actually in our Parliament there's a small number of parliamentarians by comparison with many states. I'm sure that's one of the reasons why we don't willy-nilly go after a whole lot more select committees, because there are not enough Members of Parliament to go around.*

The question of accountability cannot be considered without acknowledging the variable and diffuse nature of the treaty body bureaucracy in New Zealand. There is no one Ministry responsible for all treaties and both the Ministry of Foreign Affairs and the Ministry of Justice have at times taken a leadership position. CEDAW as a Treaty and in terms of the preparation of the Government report and official responses is the responsibility of the Ministry for Women. Children's and disability issues are housed in the Ministry for Social Development, and race relations is handled by the Ministry of Justice. Both the structures and the lack of a formal, standard domestic process around treaty body reporting in terms of Concluding Observations and the progress of Recommendations clearly inhibit both political, agency and civil society awareness of implementation or the lack of it.

Andrew Butler wanted the New Zealand Government to:

> *Clarify, through the making of a general policy position statement, what its general attitude or orientation is likely to be in principle towards concluding observations and recommendations made by treaty monitoring bodies. If government were prepared to signal clear desire to engage with Concluding Observations and Recommendations- even those with which the government does not agree- then this would, in my view, increase the visibility and public traction of those concluding observations and recommendations. As a matter of its good faith implementation of the relevant human rights treaties, the New Zealand Government ought to commit to a plan to give effect to the Recommendations made by treaty monitoring bodies and through a select committee accountability mechanism. As an absolute minimum, the importance of treaty body monitoring processes would be greatly enhanced by commitment to having the Concluding Observations and Recommendations of those bodies permanently referred to a relevant select committee of Parliament.*

9.2.5 Need for training of civil society

The role of civil society in treaty body reporting processes remains under-researched in the New Zealand context and internationally. However lack of funding and resourcing, issues of representation, the extent to which civil society feels prepared and equipped for committee dialogues and the challenges of shadow reporting are all well recognised.

Civil society interviewees identified adequate training and preparation as critical to how effective they felt they had been. Two NGO groups, NCWNZ with one representative and Pacific Women's Watch that included representatives from Women's Health Action and from Shakti, the ethnic and migrant women's group attended the seventh periodic report and country examination in New York. Those who attended cite training by the International Women's Rights Action Watch Asia-Pacific (IWRAWAP) and mandated by the Office of the Human Rights Commissioner for Human Rights to provide CEDAW training to NGOs as the difference between them being effective or ineffective at the session. NGO representative Christy Parker said:

> *I think if we hadn't participated in that training programme we would have struggled. I really can't imagine that the NGO representatives could use CEDAW in the way they were able to in New York without that training. They would be lost in the process.*

Julie Radford Poupard, said:

> *We had no mentoring beforehand, little understanding and really no idea of the process prior to arrival at the United Nations. Without the training we would have been clumsy, done some things wrong, ignored protocols such as when you could approach committee members, and worst of all, not realised how much we could have approached them and how influential we could be.*

Beryl Anderson, said that the IWRAW course included details about interaction with the Committee, the provision of biographical details about Committee members and their interests, and that IWRAW had arranged side events during the country examination for NGOs to interact with committee members, usually over lunch. It also brokered with the Committee secretariat the allocated speaking time for NGO interventions. *"The training helps massively with the preparation and two facilitators critiqued my oral submission in a constructive way*."

9.2.6 Improving treaty body processes domestically and internationally

Interviewees identified a range of improvements that could be made domestically and internationally to treaty body processes, from the general to the specific. The interviews were conducted during the period that the United Nations was examining strengthening and harmonising the treaty body system[557] and the Human Rights Committee released a report on its relationship with National Human Rights Institutions.[558] Additional interviews were conducted with several international experts and their comments are included where they have identified possible improvements. The improvements suggested relate to the role of the treaty bodies, of national human rights institutions, of State parties and of the media.

Role of the treaty bodies.

Interviewees identified the profile of treaty bodies and interaction with them as well as the quality of membership as issues. The visibility and accessibility of the treaty bodies was debated. The NGO representatives identified the cost of air travel from New Zealand to the United Nations and accommodation as barriers to participation. Therefore they saw both merits and challenges in increased use of video-conferencing, proposed by Navi Pillay, particularly as it could increase the diversity of interaction. But at the same time the virtue of face-to-face dialogue with committee members was acknowledged. Julie Radford Poupard said:

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[557] Pillay, above n 76

[558] Human Rights Committee (2012). *The relationship of the Human Rights Committee with National Human Rights Institutions.* CCPR/C/106/R.2

> *There is nothing like being there because of the opportunities that provides over and above the formal ten minute question time allocated to NGOs. I also think the personal interaction increased our credibility and this meant that committee members were more confident in using our material.*

Beryl Anderson said, *"The use of technology could be increased but a lot of the work done at the time demands personal interaction."* While oral presentations and lunchtime sessions with Committee members, and even the Government's presentation could be undertaken by videoconferencing, one-on-one contact with the Committee could not. *"It is the way in which we lobby, done on the spot and at the time."*

Ruth Dyson was critical of the country understanding by Committee members during the fifth periodic report and of the absence of international comparative indexing in the CEDAW process. She said her experience was that it was clear some Committee members knew little about New Zealand and may not have read the country report comprehensively so they had a single-issue focus that attached to their knowledge/interest/or discipline base. What would be useful, she suggested, was more of a focus on international comparisons and more sophisticated progress tracking.

> *If the Committee is saying 'this is where New Zealand should be' then the starting point of the Committee should be 'how do you rate?' How come other similar countries are going so much faster or slower?*

Human Rights Commission legal and policy analyst, Michael White, who was actively engaged in the Commission's UPR work, raised the issue on what New Zealand's role could be in strengthening the UPR as a coherent and robust monitoring framework which would require both a maturing of processes and improving the specificity of Recommendations and the monitoring long term of country responses and urgings from the international community.

Role of National Human Rights Institutions

International human rights experts who participated in the research identified improvements for national human rights institutions in the treaty body reporting process. The NZHRC has only recently invested resources in parallel report writing and attendance in Geneva and New York at proceedings relating to New Zealand. For example, the NZHRC did not formally attend either the fifth or sixth country examinations, and did not provide a parallel report during the sixth parallel report under CEDAW, but travelled both to Geneva for the pre-session briefing in relation to the seventh periodic report in 2010, wrote several parallel report, and intervened and took an active part at New York in the country examination. This reflects maturing of the NZHRC thinking around investment in the international treaty body process. Joy Liddicoat said:

> *You can see how much things have moved on now and how integrated national human rights institutions are to those treaty body reporting processes, whereas at the time I was involved (fifth report) there was a feeling that this is politically sensitive and we (NZHRC) shouldn't really been seen to go, whereas in fact, NHRIs are really part of the machinery. There's been an evolution in Government and NZHRC thinking and why national institutions should be present.*

Maturity of engagement is clearly evolving internationally. Professor Michael O'Flaherty was asked what distinguished quality NHRI engagement with treaty bodies during an interview for this research project. He said, "*The first thing that would help, is that they show up for a country's periodic examination by the committee. Most don't".* If the NHRI does attend it is *"given the assumption of credibility if they are an A-status Paris principle accredited institution, which is not necessarily accorded to NGOs."* He

estimated that at least 80 per cent of NHRIs did not attend the State party's dialogue. For example, the German NHRI had not attended when Germany was examined under ICCPR in 2012.

CEDAW committee member and New Zealand rapporteur for the seventh periodic report, Dr Niklas Bruun, described NHRIs as a 'mixed bag'.

> *NHRIs are not frequent visitors, about one in every second session. Some are very formal and not much use and the quality of the reporting can depend on the age of the NHRI.*

He said that the situation for some NHRIs can be delicate in countries with significant human rights abuses and where there are activities such as extra judicial killings, for example.

Andrew Butler believed that the NZHRC had a specific role in addressing the invisibility domestically of the Concluding Observations of relevant treaty body committees and of special procedures. He said:

> *One useful step that could be taken by New Zealand to improve realising human rights through treaty body reporting processes would be for an organisation outside of government, perhaps the Human Rights Commission, to undertake an education exercise for relevant media personnel on human rights, including treaty body monitoring processes.*

Sir Geoffrey Palmer was critical of the effectiveness of the NZHRC and asked the question "how can you make it effective". He then noted:

> *…parliamentary sovereignty seems to be what stops you doing anything effective. ….You know though when Cabinet is told to do something because of the United Nations or courts say then they get upset and just do not want to know. We need a policy review of the whole area because the Human Rights Commission do not have the clout to do anything.*

9.2.7 Improving State party reporting

A number of different ideas were expressed about State party reporting. Niklas Brunn identified "good structure" and the quality of the State party's report as critical to an effective examination. He stated:

> *For example, New Zealand's seventh periodic report focussed on what had and had not been achieved since the sixth report and therefore there was a clear structure. The report outlined what the State party had done in order to implement the Convention. The starting point should be the last concluding observations and should build on this in reporting on those issues. The Committee can then make its assessments.*

Jo Goodhew saw a need for a 'level playing field' during the process of the country periodic examination so that the State party could also observe the engagement between the CEDAW committee and civil society. This was echoed by Deb Moran who said that there seemed to be a lot of opportunity for engagement with NGOs and NHRIs, but the only engagement in addition to the country report with the State party was the oral statement and dialogue on the day.

> *I would have appreciated the opportunity to have some more informal engagement and dialogue with the committee rather that the current process in which it is very difficult to give considered responses. There were over 100 questions, some written out, but we did not get a copy of written questions which would have assisted. We were dependent on the New Zealand Mission*

> *representatives writing them down and bringing them up to us. It seems to me to be a rather inefficient way to do it.*

She suggested fewer questions from the Committee, more opportunity for dialogue and Committee questions in writing to avoid misunderstanding about what was asked.

Domestically Deb Moran identified increased inter-governmental consideration of CEDAW as a potential improvement, "*not just every four years but every six months or annually and also to have more engagement on CEDAW at senior levels of the public service.*"

There is no doubt country examinations are improved by genuine self-reflection and honest exchange with Committee members at the UN. New Zealand generally performs well in this arena. The current concerns for New Zealand lie not in participation in treaty body reporting processes where we have been good international citizens, but in implementation of treaty body recommendations and progressive realisation of economic, social and cultural rights as experienced every day by people on the ground. The current absence of profile of human rights, engendered by complacency and self-regard, contributes to New Zealand's rhetorical commitment to treaty body reporting that is not yet matched by the reality of fulfilment.

Chapter Ten Conclusions and recommendations

10 Background

Evaluating the effect of the ratification of the major international human rights treaties on the implementation of human rights in New Zealand is a complex and difficult exercise that reflects multiple perspectives. There is little consensus in the wider human rights community about the level and scope of the impact, if any, of the treaties on the domestic promotion, protection and fulfilment of human rights. Much human rights commentary relates to a particular court case, a topical human rights issue or an individual complaint of discrimination. This research has attempted to provide a more systematic mapping using a variety of methods. It has used information obtained from analysing archival data available domestically and internationally, applied evaluative frameworks where appropriate, examined human rights case law referencing treaty body comment, assessed policy change and development, sought insights from key influencers through interviews and commented on the roles played by non-governmental organisations and the New Zealand Human Rights Commission. It concludes that the human rights landscape in New Zealand has significant fault lines.

Although the exercise has been as comprehensive as possible, it faced a limitation in the absence of a complete archive of material relating to New Zealand's international treaty commitments with a single point of access. This meant that the researchers had to move between the Ministry for Women for information on Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Ministry of Justice (to obtain information on the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), the Ministry of Foreign Affairs and Trade (the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Ministry of Social Development (the Convention on the Rights of Persons with Disability (CRPD) and the Convention on the Rights of the Child (CRC) to supplement information provided on the United Nations treaty body websites. The impact of public service restructuring on available information services over the years and the lack of continuity in the cycle of treaty body reporting processes by officials also exacerbated the difficulty of locating data.

The analysis of the impact of six of the major international human rights treaties, combined with an evaluation of New Zealand's involvement in the Universal Periodic Review (UPR), led to a number of observations that complement the conclusions reached in relation to each treaty and the UPR. This chapter discusses these findings and outlines a series of recommendations.

10.1 Conclusions

The paradox of New Zealand's human rights profile.

New Zealand is conscientious about international human rights treaty body reporting and participation at the United Nations. It has a deservedly high reputation for global human rights leadership dating from the development of the Universal Declaration of Human Rights and the treaty framework through to its role in the most recent treaty, the CRPD.

At the United Nations in Geneva and New York, New Zealand is seen as a high achiever, a good performer and a participant that punches above its weight. Our choreography is excellent with a well-established practice of ministerial leadership of delegations. Our script is immaculate - during treaty body examinations New Zealand is generally well-prepared, rhetorically active, self-reflective

and respectful of the processes. Internationally, we project a strong self-image of a human rights leader. Paradoxically, though, the New Zealand public is largely unaware of this performance at the United Nations other than having a vague idea that we are good at human rights because we were the first nation state to grant women the vote.

New Zealand is poor at promoting the human rights treaties domestically, and scant media coverage is paid to the reporting processes, either when New Zealand is examined as a state party or to the observations and recommendations made by treaty bodies, despite their significance domestically and their inherent newsworthiness. This invisibility is affirmed and compounded by the absence of parliamentary scrutiny of human rights treaty bodies, either of the instruments themselves and the recommendations made by the United Nations or, significantly, about accountability for implementation in the domestic context.

One way of rectifying this would be to establish a body with specific responsibility for overseeing New Zealand's human rights commitments. Yet the Government has consistently rejected the idea of a parliamentary select committee for human rights since 2010 when it was first raised by the NZHRC and more recently by civil society organisations in the second cycle of the UPR in 2014. Efficiency is usually cited, coupled with the argument that New Zealand is a small country and does not need a plethora of select committees. Alternatively, the Government advances the idea that the scope of human rights is so far reaching that debate could span the content of all of the existing select committees. As a result, the ideal of parliamentary discussion has not been achieved and there appears little prospect of it in the future.

New Zealand's startling lack of parliamentary scrutiny could be cured by formally adding the role of overseeing human rights to the functions of an existing select committee. The Justice and Electoral Select Committee is probably the most appropriate committee given the increasingly close relationship between human rights and electoral issues and the fact that the Ministry of Justice has primary responsibility for reporting on the ICCPR, ICESCR and the UPR. It could effectively co-ordinate other population agencies in treaty body reporting.

Positive impact of human rights treaty body ratification.

Overall, treaty body ratification in New Zealand has impacted positively on human rights through changes to legislation, policy and practice. While the influence of the Concluding Observations and Recommendations of the treaty body committees has been variable and in some cases limited, there is also clear evidence of progress and positive changes. Whether these gains would have been made without ratification is a moot point. There is no way of knowing with any confidence what the situation in New Zealand would have been like without the State's commitment to the human rights instruments and whether legislators, policy makers and practitioners would still have acted to remove discrimination and protect human rights.

A survey of treaty body reports, legislative reform domestically, lifting of treaty body reservations and accompanying changes in policy and practice, suggests there has been a positive impact on human rights in New Zealand. A number of examples are cited in this report. For example, the introduction of paid parental leave legislation was associated with the withdrawal of the related reservations to ICESCR and to CEDAW and the repeal of section 59 of the Crimes Act, prohibiting corporal punishment of children, had been consistently called for by the CRC Committee. An amendment to immigration legislation revoking a discriminatory policy that had prevented children from accessing education if they were in New Zealand without lawful authority,

lessened the effect of one of the reservations under CRC. There has also been a discernible rise in the consciousness of disabled people about their rights as a consequence of the CRPD, and the New Zealand Human Rights Commission (NZHRC) has become increasingly active in intervening in human rights issues before the Courts. It has relied on the direction in the long title to monitor protection of human rights in New Zealand in terms of the international human rights treaties - for example, the *Zaoui* case.[559] The Commission was also responsible for a number of public inquiries, for example, *To Be Who I Am,* an inquiry into transgender rights.[560] All relied on the international standards and were catalysts for positive change in human rights domestically in either legislation, or policy and practice.

Human rights implementation in practice, particularly in the area of economic, social and cultural rights has plateaued and is at a turning point, raising the spectre of regression in some areas.

Available data and analysis of key variables suggest that human rights implementation, particularly in the area of economic, social and cultural rights may have plateaued, and there are worrying signs of regression. Fault lines have become evident.

The most obvious example of this is the Public Health and Disability Amendment Act which was enacted under emergency in 2013 in response to the Court of Appeal's decision in the *Atkinson* case. The effect of this amendment not only undermined the existing legal structure by ousting the right to complain to the NZHRC, but alienated many disabled people who had hopes of finally realising their rights through the international treaty process.

Further signs of regression include the drop in the age of prosecution in the Youth Court to 12 and young people being dealt with in the adult criminal justice system from the age of 17; the dismantling of state mechanisms to close the gender pay gap (against the urgings of the CEDAW committee); and some prisoners losing the right to vote. The undermining of the right to an adequate standard of living for some children as a result of changes to the welfare system and child poverty is also a concern.

Regression in part is occurring because of the inherent vagueness of progressive realisation and the ability for States to retreat to the political rationale of economic priorities to justify inadequate performance. It also reflects the fact that the most difficult human rights issues relate to structural inequalities, disparities and disadvantages. Some groups also have a limited ability to achieve change through policy channels. It follows that people must be able to challenge the inadequacies of government through individual cases where there are perceived abuses of human rights – as happened, for example, in the *Atkinson* case. To give full effect to New Zealand's international commitments, therefore, there needs to be some recognition of an individual's right to complain about government action. The ratification of the Optional Protocols to ICESCR and CRPD is an essential first step.

[559] *Zaoui v Attorney-General (No. 2)* [2005] NZSC 38; [2006] 1 NZLR 289

[560] Geiringer & Palmer, above n 35 at 12

Although Māori have been the focus of consistent and continuing human rights treaty body concerns about structural inequalities and disadvantage, New Zealand has not consistently drawn down on the recommendations in response.

A striking feature of the Concluding Observations and Recommendations from the time New Zealand first reported on a human rights treaty to the United Nations until the present is the attention paid to discrimination against, and inequalities of, Māori. For example, concern has been expressed about the poor living standards of Māori children because of welfare programmes that depend on recipients being employed.

The government's response has often been to describe programmes or activities that theoretically address the issues without analysing the effectiveness of their implementation. While the government can justify its approach by relying on the concept of progressive realisation, there appears to be little recognition or understanding of the role that New Zealand's constitutional arrangements play in the economic and social inequalities experienced by Māori. In this sense the response to the recommendations of the human rights treaty body system has been inadequate in addressing Māori issues.

Māori civil society has a weak tradition of NGO participation in the shadow reporting processes and there has not been a sustained critical consciousness among Māori groups of the Concluding Observations and Recommendations made by human rights treaty body committees in relation to health, education, disproportionate rates of incarceration, and higher rates of domestic violence, to name just some of the disparities that negatively impact on Māori and their whanau. While it is on the fringes of the six major human rights treaties that are the primary focus of this research, New Zealand's tardy response to the United Nations Declaration on the Rights of Indigenous People (UNDRIP), is symptomatic of a wider malaise.

Māori focus primarily on the Treaty of Waitangi and ultimately the settlement process, to ensure implementation of civil, political, economic, social and cultural rights. But the increasingly directive nature of treaty body recommendations relating to Māori inequalities and disparities, including child poverty, represent a legitimate but missed opportunity for monitoring State party accountability on measures to close the gaps.

The concept of "progressive realisation" which has allowed successive administrations to ward off criticism of the slow implementation of economic, social and cultural rights can no longer be advanced as ideological justification for disparities in fulfilment between advantaged and disadvantaged groups. It is simply not an appropriate response to inequalities in health, education, and employment, for example, between Māori and others in New Zealand. Transparent and readily available data is needed to assess the realisation of social and economic rights for Māori along with an understanding of the importance of self-determination in achieving genuine equality.

New Zealand's history as a human rights champion is often driven by individual leaders.

It is notable that New Zealand's commitment to, and involvement with, the major international human rights treaties is that progress has often been linked to a particular individual. History demonstrates the power of far-sighted and progressive individuals in driving a rights-based agenda, occasionally against the prevailing political and socio-economic current of the times. For example, in the early days there was the leadership of Prime Minister Peter Fraser and Ralph Hanan when he was Minister of Justice and, more recently, Sir Geoffrey Palmer's promotion of the NZBORA.

Not all of the players have been politicians. Judges such as Sir Kenneth Keith, Dame Silvia Cartwright and Lord Robin Cooke of Thorndon, had a significant part in endorsing the international treaty obligations in the courts. Others were diplomats, bureaucrats, academics, intellectuals and activists. Examples of legislative change led by individuals include the Homosexual Law Reform Act, inclusion of sexual orientation as a ground of unlawful discrimination, the repeal of corporal punishment, the introduction of the Prostitution Amendment Bill and same sex marriage. Disability rights have been advanced internationally by New Zealand diplomats and domestically by civil society champions and individual Cabinet ministers. The establishment of the institutional machinery for women's rights was subject of specific leadership, and an individual aged care worker, Kristine Bartlett, has become the face of union-led litigation on equal pay.

The point is the power of the individual. While we know and understand that human rights progress is often contingent and conjectural, what is striking from this overview is how often one person has driven or influenced legislative change, pushed for policy reform, been responsible for pursuing a legal case with wider ramifications or acted as a catalyst for reform. The examples which are found in the analyses of the selected treaties are not exhaustive but illustrative.

A renaissance of civil society activism is evident through involvement in new monitoring mechanisms for disability rights, evolving interest in the Universal Periodic Review, and greater coordination among non-government organisations (NGOs)

Civil society activism has mobilised public opinion on, and political responses to, many significant human rights concerns in New Zealand in the last 35 years demonstrating that human rights consciousness can be developed from 'below'. Women's NGOs have perhaps been the most consistent participants in New Zealand international responses to human rights treaties. While women's rights were not a significant part of human rights consciousness in developed countries in the 1970s,[561] activists from the women's movement are now among the most determined users of the relevant human rights treaties. The New Zealand National Council of Women, for example, is a consistent and engaged civil society participating in shadow reporting to the United Nations specifically in relation to CEDAW but also to other treaty committees.

The research reveals signs of a renaissance of civil society interest in relation to the human rights treaty body processes. There is evidence of coalition building in preparing and presenting shadow reports - not just of women's groups in relation to the CEDAW Coalition of New Zealand NGOs - but also the CRC coalition, the Ad Hoc NGO Group made up of ACYA, Youth Law, UNICEF, and Save the Children, which relates to children's rights and the Domestic Violence and Disability Working group which consisted of Auckland Disability Law, CCS Disability Action Northern Region, and Peace Movement Aotearoa to the Universal Periodic Review (UPR). The Human Rights Foundation undertook a specific NGO coordination role in the second cycle of UPR from 2012-2014 and the New Zealand Law Foundation has provided welcome funding to NGOs wanting to make shadow reports. Professionally linked NGOs, such as the New Zealand Law Society, are also promoting domestic legislative and constitutional issues in the international arena.

Civil society expectations of the treaty body reporting process have increased, evident in relation to the UPR and the CRPD, in particular. Such aspirations and the momentum they engender could be under-estimated by the State party. A traditional feature of shadow reports from New Zealand NGOs has been a generosity of spirit to successive administrations in their reports and country

[561] Moyn, above n 4 at 223

examination processes in New York and Geneva. Funding support to NGOs both for international and domestic activities has resulted in an uneasy complicity between NGOs and the government. Some of them have been funded by the New Zealand government to participate at the United Nations, for example. The reality is that NGOs' participation in the treaty body context reflects constraints of resourcing, leadership and organisational capacity – both domestically and internationally. Account needs to be taken of the fact that NGOs almost inevitably will depend to some extent on government funding to participate at international fora.

Civil society representatives do not wish to be ungracious about New Zealand's gains nor undermine its international reputation and are constantly discussing the best strategies to employ with treaty body committees. However, the civility is fragile and could easily be supplanted by frustration with the lack of pace and limited scope of implementation, especially with the UPR, and the advent of mid cycle reporting by some treaty bodies. There is no guarantee that politeness will continue to be the dominant norm when more sophisticated evaluation frameworks and indicators are developed by civil society and applied more rigorously.

The absence of a central, national archive of human rights treaty body reporting reflects lack of coordination.

To analyse the effect of ratification of the international treaties on the human rights of ordinary New Zealanders it is necessary to access archival material from relevant departments. The recent restructuring of the public sector has made this task extremely difficult both because material is scattered among a variety of agencies – which themselves have often been restructured internally – and because within those departments there is usually no one person responsible for a particular treaty. The discontinuity and resulting loss of institutional knowledge can make it difficult to comment on progress in relation to certain treaties, particularly where there is no population Ministry responsible for reporting. It was much easier to locate material relating to CEDAW through the Ministry for Women - although even that was incomplete.

To hold the government accountable for implementation of the treaty body recommendations and for purposes of scholarship, research, training and informing civil society, structural change is necessary. A national repository that holds all the relevant material (including shadow reports) needs to be designated and a single government agency, and officials at an appropriate level, need to be tasked with responsibility for collating, maintaining and coordinating reporting on, and to, the treaty bodies.

Although certain treaties clearly fall within the mandate of some Ministries or departments – women's issues in the Ministry for Women and disability in the Office of Disability Issues - the Ministry of Justice has primary responsibility for reporting on the ICCPR, ICESCR and the UPR and would therefore be the most logical agency to take responsibility for coordination of treaty body reporting and the development and maintenance of a freely accessible archive.

News media silence about human rights treaty body reporting.

The limited visibility and impact of Concluding Observations and international human rights obligations in New Zealand, and the effect of this on adherence to these obligations, is troubling.

When British broadcaster Jon Snow wrote the foreword to *Reporting Human Rights, A Practical Guide for Journalists* published by the Media Trust in the United Kingdom, he wrote of the British legislation that, "It would be hard to exaggerate the depth of the media's ignorance over just about

everything to do with the Act". That could equally apply to human rights in general in New Zealand.

Despite the inherent newsworthiness of the international treaty body committees' Concluding Observations and Recommendations, the silence from the news media in general, largely dictates the tepid political response and results in a vacuum of public debate on the implications of the recommendations. While young journalists tend to be curious about human rights and the underpinning ideals they often lack both the conceptual frameworks and knowledge of applying a rights-based approach to reporting. Journalism and media organisations could sponsor the development of a practical toolkit on the reporting of human rights and New Zealand's international obligations. It would be appropriate for the Journalism Educators Association of New Zealand (JEANZ) to lead the development of the resource so it was both accessible, practical and relevant to the curriculum of tertiary level journalism schools.

New Zealand's constitutional arrangements and the human rights implications are poorly understood. More needs to be done domestically and internationally to promote understanding of our constitutional arrangements.

New Zealand's human rights legislation consists of the Human Rights Act (HRA) and the NZBORA. Neither is entrenched and both have problems, the NZBORA possibly more so because it does not include all the rights in the ICCPR - despite reaffirming the Covenant in the long title - and makes no mention of economic and social rights. It also does not provide a remedy, cannot be used to strike down inconsistent legislation and allows proposed legislation to be passed even if a breach of one of the rights in the NZBORA has been identified.

The Concluding Comments and Recommendations of the Human Rights Committee have frequently expressed concern about New Zealand's constitutional arrangements recommending entrenchment of the NZBORA and seeking clarification about the legitimacy of passing inconsistent legislation and the inability of the Courts to issue declarations of incompatibility. The government usually justifies its position in ways which do not withstand scrutiny. For example, the government consistently maintains that the vetting procedure under s.7 of the NZBORA is adequate even though legislation found to be inconsistent with a right in the NZBORA can still be passed and the Attorney-General - on whom the vetting obligation rests – is required to vote in favour of what is proposed even if the vet is negative.

A good illustration of this is the amendment to the Public Health and Disability Act 2013. The Attorney-General reported to Parliament under section 7 that the Bill was inconsistent with the right to judicial review and potentially inconsistent with the right to freedom from discrimination. Despite such concerns, the Bill was passed into law under urgency in a single sitting day, bypassing select committee scrutiny, and denying public participation or informed debate.

This ability to effectively circumvent the stated purpose of section 7 continues to trouble the Human Rights Committee which, in the sixth report, has again asked the Government to strengthen the NZBORA to allow the revision of laws that have been enacted but are inconsistent with the Act.

In a similar vein the government justifies the inability to formally issue a declaration of incompatibility by reference to ss. 4, 5 and 6 NZBORA which allow a Court to issue a declaration

that an enactment conflicts with a right in the Act, even though it must then give effect to the inconsistent provision. It is doubtful that the treaty bodies consider this is an effective remedy.

The Recommendations and Concluding Observations highlight a lack of understanding of New Zealand's constitutional arrangements by the international treaty bodies. Given it is unlikely that there will be any changes to the NZBORA in the near future, the international treaty bodies need to have access to an agreed accurate and credible description of New Zealand's constitutional arrangements to allow them to decide whether claims made by the State party about constitutional protections are accurate.

The Human Rights Act 1993 (HRA) is overdue for a comprehensive review.

There are specific problems with the existing human rights legislation that have the potential to undermine compliance with the international treaty body framework. The HRA needs substantive and structural changes. For example, to fully comply with the Paris Principles the Commission needs to be truly independent, possibly reporting directly to Parliament as an Officer of Parliament rather than via the Ministry of Justice. The Commission also needs to be properly resourced. Furthermore, the boundary between public and private activities is becoming increasingly blurred making the Part 1A/Part 2 dichotomy in the HRA no longer viable - the very prescriptive exceptions in Part 2 fit uneasily with the wider justification test in the NZBORA that is used in Part 1A and which applies to activities of the public sector. There is also no equality provision in either the NZBORA or the HRA.

The Human Rights Amendment Bill, which is currently awaiting a third reading, is flawed legislation that does not enjoy the level of public or political support that fundamental change to legislation of this type should strive for. It focuses principally on the disestablishment of certain defined Commissioner roles (while not creating a Disability Commissioner which was originally touted as the principle reason for the amendment). The appropriate level of public consultation has not been undertaken on what is proposed.

Certain aspects of what is proposed would, however, enhance treaty body reporting. For example, section 5(2) is amended by specifically allowing the Commission *to make public statements in relation to any matter that may affect or infringe human rights (whether or not those human rights are affirmed in New Zealand domestic human rights law or international human rights law), including statements commenting on the position of the Government in relation to that matter*. This provision would help cure Cabinet disapproval of Commission statements or positions which are embarrassing for a government (such as occurred when the Commission criticised the proposed electoral finance legislation.) A new provision would also allow the Commission *to promote and monitor compliance by New Zealand with, and the reporting by New Zealand on, the implementation of international instruments on human rights ratified by New Zealand,* giving it a more defined role in promotion and monitoring.

10.2 Recommendations

These conclusions lead to the proposed agenda for change that strengthens the institutional framework as well as legislation, policy and practice.

Institutional Mechanisms

- The Justice and Electoral Select Committee be re-designated as the Justice, Electoral and Human Rights Select Committee and given responsibility for oversight of New Zealand's human rights treaty commitments.
- The New Zealand Bill of Rights (NZBORA) reporting mechanism is amended to require section 7 vets by the Attorney General to be directly considered by the new select committee. Section 7 vets should apply to bills at their third reading and Supplementary Order Papers and the Attorney General should not be required to vote in favour of legislation that is inconsistent with the NZBORA.
- The Māori Affairs Select Committee takes responsibility for developing indicators to monitor human rights treaty recommendations relating to Māori and reports to the Justice and Electoral Select Committee and to Parliament on their realisation.
- The Ministry of Justice becomes the co-ordinating Ministry to ensure consistency of all New Zealand government reports to treaty bodies and to provide a national archive of all treaty body information that is freely accessible to civil society and individuals.

Legislation

- New Zealand lifts the reservations relating to inciting racial disharmony in International Covenant on Civil and Political Rights (ICCPR); age mixing in prisons in both ICCPR and Convention on the Rights of the Child (CRC), and the reservations in both the ICCPR and International Covenant on Economic Social and Cultural Rights (ICESCR) on collective bargaining and trade unions.
- New Zealand ratifies the Optional Protocols to ICESCR and Convention on the Rights of Persons with Disabilities (CRPD) to comply with international commitments and to ensure that individuals have a remedy for the abuse of executive power.
- New Zealand urgently repeals the Public Health and Disability Act to reinstate the jurisdiction of the New Zealand Human Rights Commission and Human Rights Review Tribunal for all New Zealanders.
- A comprehensive review is undertaken of the Human Rights Act 1993 that covers the incorporation of the principle of equality, the appointments process, independence, the status and functions of Commissioners and resourcing.

Policy

- New Zealand pro-actively nominates candidates for the United Nations Human Rights Council, the Human Rights Committee, treaty body committees and special procedures, and institutes a cross party mechanism on UN representation.
- An accurate, well-reasoned and comprehensively researched explanation of New Zealand's unique constitutional arrangements is prepared with help from human rights academics to accompany all country reports to human rights treaty bodies.

Practice

- The Ministry of Justice establishes a formal process for publicising, considering and responding to Concluding Observations, and takes concrete, targeted steps to improve knowledge of international human rights domestically.
- An autonomous forum of non-governmental organisations (NGOs) funded by the Ministry of Justice be held in association with mid-cycle reporting of the Universal Periodic Review to enhance the co-ordination, capacity and capability of civil society.
- Journalists and media organisation, led by the Journalist Educators' Association of New Zealand (JEANZ) and with help from the New Zealand Human Rights Commission, sponsor the development of a practical toolkit for journalists on the reporting of human rights and the international treaty body system.

Appendices

Appendix 1. Models of evaluation or impact assessment of human rights treaties

Methods of evaluating the impact of the international human rights treaties at the domestic level and the adequacy of a State's implementation of its international commitments have changed significantly since the early 1990s. Until then the prevailing view was that human rights were essentially qualitative and could not be quantified.[562][1] Over the years it has become increasingly evident that any realistic assessment of human rights performance must take a variety of factors into account.

The methodologies outlined in the first part of this review reflect a spectrum of approaches that have been developed in an attempt to assess human rights performance. The second part consists of comment and analysis of the different models, including how successful they have been in evaluating the human rights impact of treaty ratification.

While measurement and statistical information will clearly play a role, to be truly credible both qualitative and quantitative methodologies based on robust information informed by the diverse political factors which affect the interpretation of human rights behaviour are required. The model undertaken was specifically designed to reflect the most recent understanding of how human rights can be meaningfully measured and is unique in focusing on the performance of one country and range of human rights.[563] It needs multiple methods.

Methods and tools relating to measurement of human rights impact.

- Aguilar, G. (2008). *The Local Relevance of Human Rights: A Methodological Approach.* Institute of Development Policy and Management, University of Antwerp (2008). Discussion paper 2008: 04 available at http://www.ua.ac.be/dev

The paper outlines a methodology that attempts to translate the complex theoretical framework of human rights into an accessible and useful tool for researchers. Essentially qualitative it is based on the human rights framework and draws on case studies, systematisation of experiences and participatory human rights assessment.

- Andre, E., & Sano, H. *Human Rights Indicators and Program and Project Level: Guidelines for Defining Indicators, Monitoring and Evaluation* (2006) Copenhagen: The Danish Institute for Human Rights. Available at http://www.humanrights.dk/files/pdf/indicatorMANUAL webPDF.pdf.

A manual which aims to provide human rights workers with a set of tools to plan, monitor and evaluate human rights projects. It contains discussion of the basic concepts relating to indicators as well as monitoring and evaluation; suggestions for monitoring procedures; and a discussion of relevant human rights indicators applicable to the design and implementation of human rights programmes.

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[562] Jean-Bernard Marie, (1973). "Une methodologie, pour une science des droits del'homme", *Revue des droits de l'homme, Human Rights Journa*l 6.

[563] Many of the studies – for example Hathway's study or the Freedom House Index - involve comparisons between countries while those that focus on a single country tend to address implementation of a particular right such as education.

- Cingranelli, D., & Richards, D. (1999). Measuring the Level, Pattern and Sequence of Government Respect for Physical Integrity Rights. International Studies Quarterly, 43:407-417.

The article outlines a scale for measuring the level, pattern and sequence of government respect for physical integrity rights. The sequence or ordering of rights in this way provides researchers with an indication of which rights are more commonly respected and which are more commonly violated. Findings improve on previous studies which have assumed uni-dimensionality and made a priori assertions of patterns of respect.

- Cingranelli, D., & Richards, D. The Cingarelli-Richards (CIRI) Human Rights Data Set (2012) accessible at http://www.humanrights.data.org/

The dataset contains standards-based qualitative information on government respect for 13 internationally recognised human rights for 195 countries and is designed to test theories about the causes and effects of human rights violations, as well as policy makers and analysts who are attempting to estimate the human rights effects of a wide variety of institutional changes and public policies. The information is updated annually.

- Donnelly, J. & Howard, R. (1988). Assessing Human Rights Performance: A Theoretical Framework. Human Rights Quarterly, 10(2), 218-248. John Hopkins University Press.

Establishes a theoretical framework for assessing a State's human rights performance by isolating a set of ten essential rights each of which is intrinsically essential and provides good proxies for almost all the other rights in the Universal Bill of Rights. To implement practically the authors recommend the development of a large-scale, cross-national, aggregated data bank involving qualitative as well as quantitative data.

- Evans, C. & Evans, S. Evaluating the Human Rights Performance of Legislatures, Human Rights Law Review 6:3 (2006), 545-569 OUP

Paper develops a methodology for evaluating the role played by legislatures in protecting human rights through scrutinising proposed legislation. The primary objective is to establish a methodology that enables strengths and weaknesses of existing institutions and law making processes to be identified and improved. The methodology draws on a variety of pre-existing methods and approaches to take account of the conceptual complexities of rights and institutional peculiarities of legislatures.

- Freedom House, Freedom in the world: Survey methodology, accessible at http://www.freedomhouse.org/template.cfm

A survey which provides an annual evaluation of the progress and decline of freedom in 195 countries and 14 related and disputed territories. The survey, which includes both analytical reports and numerical ratings, measures freedom according to two broad categories: political rights and civil liberties. Political rights ratings are based on an evaluation of three subcategories: electoral process, political pluralism and participation, and functioning of government. Civil liberties ratings are based on an evaluation of four subcategories: freedom of expression and belief, associational and organizational rights, rule of law, and personal autonomy and individual rights.

- Fukuda-Parr, S., Lawson-Remer, T., & Randolph, S. Measuring the Progressive Realisation of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment (2008). Economics Working Papers. Paper 200822. Available at http://www.digitalcommons.uconn.edu/econ_wpapers/200822

Paper proposes a methodology for an index of economic and social rights fulfillment. The paper identifies key conceptual and data constraints and recognizes the methodological challenges and existing limitations but aims to contribute to the long term development of a methodology for measuring fulfillment of economic and social rights.

- Global Reporting Initiative, Human Rights Performance Indicators. (2008) Amsterdam: Global Reporting Initiative available at http://www.globalreporting.org.

Human rights performance indicators elicit disclosures on the impacts and activities an organisation has on the civil and political human rights of its stakeholders. The aspects within these performance indicators are based on internationally recognised standards, primarily the UN Declaration of Human Rights and the ILO declaration of the Fundamental Principles and Rights at Work of 1988 (in particular the 8 ILO core conventions).

- Gosling, L., & Edwards, M. Toolkits: A practical guide to planning, monitoring, evaluation, and impact assessment (second edition) 2003, Save the Children, Development Manual 5. Available at http:// www.aidworkers.net/?q=node/268

An all-round introduction to the principles and practice of the project cycle, and an introduction to many of the common tools used.

- Gupta, D, Jongman, A.J. & Schmid, A.P. (1994).Creating a Composite Index for Assessing Country Performance in the Field of Human Rights: Proposal for a New Methodology. Human Rights Quarterly, 16(1), 131-162.

Sets out a new methodology for attributing weight to various indicators of human rights abuse, the authors arguing that existing studies which rely on indicators fall short because they do not attribute weight to the indicators used and thus do not produce a composite indicator and no objective measurement of a State's human rights performance.

- Hathaway, O. (2002). Do Human Rights Treaties make a Difference? Yale Law Journal, 111(8), 1935-2024.

Develops a methodology for identifying whether human rights treaties are complied with and effective in changing States' behaviour. The study involves a large-scale quantitative analysis of the relationship between human rights treaties and countries' human rights practice. It uses empirical data collated from 166 nations over nearly 40 years in different areas of human rights law.

- Hellebrecht, C. Van der Ven C, Munareto, M. Measuring Attainability of UN and Regional Human Rights Bodies Recommendations (2008) Harvard Kennedy School, Carr Centre for Human Rights Policy

Measuring compliance of the recommendations and rulings handed down by the UN treaty bodies, UN special rapporteurs and regional human rights tribunals is the most powerful tool to support the execution of these institutions' recommendations and judgments on the domestic level and

facilitate the tribunals' goal of providing redress for past abuses and establishing stronger human rights protections in the future. Paper seeks to understand how States receive international human rights bodies' recommendations, the challenges they face in implementing them and the successes they have had in attaining the goals set out by the human rights bodies. A multi-method approach, comprised of case studies, surveys and statistical analyses, is designed to produce an indicator of 'recommendation attainability' that States and the human rights bodies can parlay into more effective recommendation and compliance practices.

- Human Rights Impact Resource Centre, Human Rights Tools and Instruments, Human Rights Impact Resource Centre Utrecht, Netherlands. available at http://www.humanrightsimpact.org/hria-guide/overview/toolsets

A resource database containing an extensive list of instruments and tools for assessing the implementation of human rights in specific contexts or policy areas. They include broad frameworks or may be used to facilitate the implementation of a specific part of an assessment.

- Landman, T. (2004). Measuring Human Rights: Principle, Practice and Policy. Human Rights Quarterly, 26(4), 906-931.

Paper demonstrates why measurement of human rights is important, how human rights have been measured and how measurement could be improved. Identifies how they can be measured as outcomes of government policy and stresses the need for continued provision of high quality information and information sharing as well as long term investment in data collection.

- Metagora, Inventory of Initiatives Aimed at Measuring Human Rights and Democratic Governance [online database] OECD, Paris 21 accessible at http://www.metagora.org./html/aboutus/about_inventory.html

A database designed to provide relevant information and networking tools to those implementing evidence-based assessment of human rights and democratic governance. The inventory contains information on the scope, aims, methods and outcomes of recent and current initiatives throughout the world. It is continuously updated. Information is organised under three broad categories – democracy, governance and human rights. Sub-categories include country and human rights themes.

- Office of the High Commission for Human Rights, Report on Indicators for Promoting and Monitoring the Implementation of Human Rights, UN Doc, HRI/MC/2008/3(2008)

Report outlines a conceptual and methodological framework for identifying the relevant quantitative indicators that have evolved since 2006 when the High Commissioner for Human Rights requested the secretariat to undertake validation of the approach on the use of statistical information on State's Parties reports. It reflects on some issues for taking the work forward at country level.

- Office of the High Commission for Human Rights, Training Manual on Human Rights Monitoring. (2001) (OHCHR Professional Training Series No. 7. ISBN 92- 1-154137-9) United Nations: New York. Accessible at: http://www.ohchr.org/Documents/Publications/training7Introen.pdf

This Training Manual provides practical guidance principally for the conduct of human rights monitoring in United Nations field operations, but it may also be useful to other human rights monitors.

- Parson, J., Thornton, M., Bang, H., Estrep, L., Williams, K., & Weiner, N. Developing Indicators to Measure the Rule of Law: A Global Approach (2008) New York: Vera Institute of Justice available at http://www.vera.org.

Recognising that performance indicators are a promising tool for tracking progress in key areas of governance, including the rule of law, the American Bar Association's World Justice Project, the Vera Institute, partnered with members of the Global Alliance to develop a set of 60 indicators to assess the rule of law.

- Poate, D., Riddell, R., Chapman, N., & Curran, T. (2000). The Evaluability of Democracy and Human Rights Projects. Stockholm: Sida. Available at: http://www.sida.org

This assessment has the dual purpose of producing lessons on useful methods for democracy/human rights impact evaluation and good practices for the planning and implementation of human rights projects. The study is complemented by a management response.

- Sen, P. (2011). Universal Periodic Review: Lessons, Hopes and Expectations, Commonwealth Secretariat.

The publication presents the learnings of the Human Rights Unit's engagement with States going through the UPR process and the observation of the interactive dialogues in Geneva. It is designed to consider how the UPR can be used as a tool for change domestically and enhance its effectiveness. To do this, the different recommendations were analysed to identify the themes raised and the country responses.

- Shapiro, J. Monitoring and Evaluation https://www.civicus.org/new/media/Monitoring%20and%20Evaluation.pdf

This toolkit deals with the "nuts and bolts" of setting up and using a monitoring and evaluation system for a project or an organisation. It clarifies what monitoring and evaluation are, and how to plan and design a system that helps monitor and an evaluation process that brings it all together usefully. It looks at how to collect the necessary information and then how to analyse the information in a relatively straightforward way. Finally it raises and attempts to address some of the issues to do with taking action on the basis of what has been learned.

Reports on different models of assessing human rights impact

- Andreassen, B., & Sano, H.O. (2004). What's the Goal? What's the Purpose? Observations on Human Rights Impact Assessment. Norwegian Centre for Human Rights: Oslo Norway. Accessible at: http://www.humanrights.uio.no./forskning/publikasjoner.

This paper addresses the use of indicators is assessing the impact of human rights projects in fulfilling their objectives. The term "human rights projects" refer to development initiatives defined and designated to enhance human rights in societal contexts, and conducted by public agencies or NGOs. It highlights the need for formulating indicators that are accurate and appropriately related to the goals and objectives of human rights projects.

- Barber, C. Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organisations. Hertie School of Governance – Working Papers No.55, September 2010

An article designed to help strategic human rights litigation organisations further their ability to systematically assess the impact of their efforts to promote and enforce human rights through strategic litigation.

- Barsch, R. Measuring Human Rights: Problems of Methodology and Purpose. 15 Human Rights Quarterly 87 (1993)

Criticises ranking methods as unreliable in determining a casual relationship between human rights and growth and suggests a more appropriate approach based on theories of development, rather than an aggregate notion of "human rights". The author notes that quantitative studies purporting to demonstrate links between "human rights" and other variables should be treated with caution.

- Carr Centre for Human Rights, Measurement & Human Rights: Tracking Progress, Assessing Impact. (2005) Cambridge: Harvard University. Accessible at http://www.hjs.hardvard.

A group of papers designed to analyse what had been done to date to make human rights "measurable". Together the papers offer an overview of existing measurement initiatives to clarify who has developed them, what they are being used for, and what aspects of human rights they do and do not capture. They also present some of the basic methodological, practical, and conceptual challenges associated with measuring progress in human rights and offer accounts of why the measurement of progress is so important.

- Cingranelli, D., & Richards, D. Measuring the Impact of Human Rights Organisations in NGOs and Human Rights: Performance and Promise, ed. Welch C. (2000)University of Pennsylvania Press

Addresses the issue of what strategies, tactics, and organizational attributes of NGOs and INGOs are associated with the greatest improvement in the human rights practices of governments. To answer these questions about the effects of NGOs and INGOs on the human rights practices of target governments, research design would need to incorporate four elements: it must isolate the effects of NGOs and INGOs from the effects of other types of human rights organizations working towards similar goals in a given target state; use relatively objective information about the human rights practices of target governments relevant to the mandate of the type of human rights organization over an extended period of time; possess information about human rights organizations from which measures of their efforts in different mandate areas could be constructed, also for an extended period of time; finally, it must control for competing alternative explanations of the human rights practices of governments.

- Claude, R. & Jabine, T. Editors' Introduction, Symposium: Statistical Issues in the Field of Human Rights. Human Rights Quarterly 8(1986) 551

Introduces a special issue devoted to improving the analysis of human rights with the assistance of statistical and other quantitative tools. The relevant contributions, which address many, but not all,

of the possible uses of statistical techniques in the collection, processing and analysis of human rights data, include:

  - Bollen, A. Political Rights and Political Liberties in Nations: An Evaluation of Human Rights Measures, 1950 to 1984;
  - Stohl, M. Carleton, D. Lopez, G. & Samuels, S. State Violation of Human Rights: Issues and Problems of Measurement;
  - Goldstein, R. The Limitations of Using Quantitative Data in Studying Human Rights Abuses;
  - Reiter, R. Zunzunequi, M. & Quiroga, J. Guidelines for Field Reporting of Basic Human Rights Violations;
  - Banks, D. The Analysis of Human Rights Data over Time;
  - de Neufville, J. Human Rights Reporting as a Policy Tool: An Examination of the State Department Country Reports.
- Cortell, A. & Davis, J. (2000). Understanding the Domestic Impact of International Norms: A Research Agenda. International Studies Review, 2(1), 65 -87.

Scholarship on international norms has recently begun to explore how domestic-level structures and processes affect compliance. The literature has identified the domestic legitimacy of an international norm as an important variable in accounting for the effects of norms on state behaviour but insufficient attention has been paid to measuring the legitimacy or salience of international norms in the domestic arena and identifying the pathways that lead to domestic salience. This article offers insights that could lead to more systematic studies of the domestic impact of international norms. First, a framework to measure the domestic salience of an international norm is proposed. Then four pathways are identified by which an international norm can enter the national arena and one factor that conditions its impact on domestic political processes. The paper concludes by suggesting directions for future empirical research.

- Dai, X. Information and leverage: the domestic effects of international human rights law. Paper prepared for conference on domestic consequences of international human rights treaty ratification, Florence, Italy (2009)

A paper which examines how international instruments influence a State's behaviour through domestic mechanisms and non-state actors and concludes that international institutions are facilitators, rather than creators, of domestic compliance.

- De Beco, G., Human Rights Indicators for Assessing State Compliance with International Human Rights (2008) Nordic Journal of International Law Vol.77, No.1-2

The article discusses indicators for assessing human rights compliance with international human rights. It analyses the use of human rights indicators before treaty bodies, how human rights are to be integrated in such indicators and the conceptual framework which must be developed for their establishment.

- Foss, E., The Future of Human Rights Measurement: Towards an International Survey of Rights (2008) Issue paper, Vol.1, Issue 3). Cambridge: Carr Centre for the Study of Human Rights.

After comparing four ways of measuring human rights (events-based, standards- based, proxy–based, survey-based) the paper discusses the benefits of the survey- based approaches and shows the necessity of new, international survey-based data.

- Goodman, R. & Jinks, D. Measuring the Effects of Human Rights Treaties EJIL (2003), Vol.14, No.1, 171-183

Critical analysis of Hathway's study on whether human rights treaties improve human rights conditions in practice which led the author to conclude that ratification is associated with worse human rights practices when other variables are constant. The authors here suggest that there are serious deficiencies in the empirical findings, theoretical model and policy prescriptions and that a statistical approach is inappropriate in such cases.

- Goodman, R. & Jinks, D. Empirical Study of Human Rights Treaty Ratification: The Legal Dimension: Memo prepared for a Mini-Conference on the Domestic Consequences of International Human Rights Treaty Ratification, Florence, Italy (2009)

The article is designed to improve the empirical study of human rights treaty ratification. It discusses several dimensions of international law which the authors argue social scientists should take into account when searching for the reason why States ratify treaties and the effects of ratification on subsequent State practice.

- Gready, P. Reasons to be Cautious About Evidence and Evaluation: Rights- based Approaches to Development and the Emerging Culture of Evaluation. J Human Rights Practice (2009) 1(3): 380-401

This article agrees that the evaluation of human rights practice is necessary but that it could be extremely damaging if done in haste or ignorance and what is required is an informed approach to the strengths and weaknesses of cultures of evaluation. The article also charts the reasons why the human rights movement has historically been ambivalent and inconsistent to evidence –based justification and evaluation of its work.

- Green, M. What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement. Human Rights Quarterly 23 (2001) 1062

The article provides an account of the current state of the field with regard to human rights indicators, including indicators for civil, cultural, economic, political and social rights. It includes a literature survey that deals with both the theory of human rights indicators and the practice of human rights monitoring.

- Hafner-Burton, E. & Ron, J. Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes. World Politics 61(2): 360-401 (2009)

While human rights are a powerful, discursive and institutional force, the full empirical outcomes are often unclear and the real work of impact evaluation has just begun. The authors suggest that the process of evaluation will only advance when scholars from both sides of the methodological debate engage more rigorously by drawing on the theoretical and empirical tools that their individual disciplines have to offer.

- Hafner-Burton, E. Human Rights in a Globalising world: The Paradox of Empty Promises. (2005) AJS Vol.10, No.5 1373-1411

The author examines the impact of the international human rights regime on governments' practices. The statistical analysis, coupled with example of government repression over a 20 year period, suggests that governments often ratify treaties as window dressing but that the emergent global legitimacy exerted by human rights improves States' actual practice.

- Harrison, J. Measuring human rights: Reflections on the Practice of Human Rights Impact Assessment and Lessons for the Future (2010) Legal Studies Research Paper No. 2010-26, Warwick Law School available at http://ssrn.com/abstract=170642

An article on the application of human rights impact assessments (HRIA) to measure human rights. It builds on a number of previous research projects, reports and articles investigating the use of human rights impact assessments in a variety of different contexts and recognises that while they are useful, critical reflection on the practice of HRIA is currently limited.

- Harrison, J. Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment. J Human Rights Practice (2011) 3 (2) :162-187

The article critically examines the current practice and future potential of human rights impact assessment as a means of measuring human rights. It includes suggestions to improve future practice and concludes by arguing that HRIAs should not be rejected as tools of human rights measurement but strengthened and enhanced.

- Hathaway, O. Why Do Countries Commit to Human Rights Treaties? (2007) Journal of Conflict Resolution, Vol. 51, No. 4, pp. 588-621; Yale Law & Economics Research Paper No. 356. Available at: http://ssrn.com/abstract=1009613

This article examines States' decisions to commit to human rights treaties. It argues that the effect of a treaty on a State - and hence the State's willingness to commit to it - is largely determined by the domestic enforcement of the treaty and the treaty's collateral consequences. These broad claims give rise to several specific predictions. For example, States with less democratic institutions will be no less likely to commit to such treaties if they have poor human rights records, because there is little prospect that the treaties will be enforced. Conversely, States with more democratic institutions will be less likely to commit to human rights treaties if they have poor human rights records - precisely because the treaties are likely to lead to changes in behaviour. These predictions are tested by examining the practices of more than 160 countries over several decades.

- Hertel, S. Why Bother? Measuring Economic Rights: The Research Agenda. International Studies Perspectives (2006) 7, 215.

The article provides an overview of contemporary scholarly and policy efforts to measure economic rights. It argues for an approach that captures both policy performance and the process by which economic rights can be realised in different societies over time. It also highlights the political imperative of more effectively measuring such rights.

- Heyns, C. & Viljoen, F. (2001).The Impact of the United Nations Human Rights Treaties on the Domestic Level. Human Rights Quarterly, 23(3), 483-535. John Hopkins University Press

An analysis of a major study by the OHCHR on the effect of the major human rights treaties on human rights practice in twenty different countries. The article assesses their impact through adoption, incorporation or transformation of the constitution or other legislation, or through judicial decisions, policy changes or implementation of the concluding observations and concludes that the assessment depends largely on the vantage point from which they are assessed. The authors work on the domestic impact of the treaties is developed more comprehensively in Heyns, C. & Viljoen, F. (2002). The Impact of the United Nations human rights treaties on the domestic level. Martinus Nijhoff Publishers.

- Hunt, P., MacNaughton, G. Impact Assessments, Poverty and Human Rights: A Case Study Using the Right to the Highest Attainable Standard of Health. (2006) UNESCO, Paris, France.

The report presents a methodology for impact assessment in two parts. The first part presents general principles for performing a human rights-based impact assessment while the second part proposes six steps for integrating the right to health, as a starting point for all human rights, into existing impact assessments.

- International Council on Human Rights Policy, No Perfect Measure: Rethinking Evaluation and Assessment of Human Rights Work (2012) Report of a Workshop available at www.ichrp.org

The paper draws on discussions at a workshop towards facilitating critical reflections on redefining approaches to evaluating and assessing human rights work. It examines questions of power and accountability, the particularities of human rights work and points to approaches that widen the frames of evaluation and assessment and place a greater emphasis on learning rather than judgement.

- International Council on Human Rights Policy, Assessing the Impact of Human Rights Work: Challenges and Choices (2011) An Approach Paper to aid discussions and further research available at http://ihrp.org/fles/papers/186/impact_assessment_human_rights _approach_pa per.pdf

This document is intended to shape a future research project on assessing the impact of interventions to engender change, development and the promotion of human rights. The paper itself is designed as a point of departure for further conversations and discussions and is not an exhaustive survey of literature or practice.

- Kalantry, S. Getgen, J. & Koh, S. Measuring State Compliance with the Right to Education Using Indicators: a Case Study of Columbia's Obligations under the ICESCR (2009) Cornell University Law Faculty Working Papers, Paper 52 available at http://scholarship.law.cornell.edu/clsops_papers/52

The authors propose a methodology to measure State compliance with the right to education seeing it as the only way to evaluate whether a State is progressively realizing its obligations to fulfil the

ECSR. In the absence of a suitable methodology they suggest one which analyses the language of the treaty, defines the scope and obligations of the right in order to identify indicators for measurement, identifies appropriate indicators, sets benchmarks and clearly identifies what amounts to a violation of the right.

- Landman, T. The Scope of Human Rights: From Background Concepts to Indicators. (2005) Background Paper 2 prepared for the AHRI-COST Action Meeting 11-13 March 2005, Turku. Accessible at http://www.abo.fi/instut/imr/indictaors/Background.pdf

- Landman, T. & Hausermann, J. Map Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance (2003) Essex, University of Essex, Human Rights Centre. Accessible at http://ww.oecd.org/dataoecd/0/28/20755719.pdf.

The project collated initiatives for developing indicators for measuring democracy, human rights and good governance. The project, for the Statistical Office of the European Commission evaluates those initiatives and makes recommendations for the development of more efficient measurement tools.

- Malhourta, R. & Fasel, N. Quantitative Human Rights Indicators – A Survey of major Initiatives. Background paper for the Expert Meeting on Human Rights Indicators & Nordic Network Seminar in Human Rights Research, 10-13 March 2005 in Turku, Finland.

This paper provides an overview and assessment of the main categories of initiatives on developing quantitative human rights indicators for monitoring States' compliance with international human rights law. The paper analyses the elements that each category of initiatives could potentially bring to the process and methodology for human rights monitoring and concludes that there is a lack of a general conceptual approach for the design and identification of suitable indicators for monitoring human rights compliance.

- Meyer, W.H. (1996). Human rights and MNCs: Theory versus quantitative analysis. Human Rights Quarterly, 18(2), 368-397.

A study on the effect of multinational corporations on human rights in the third world which analyses two different types of indicators. The author addresses the issue of whether quantification of human rights is appropriate and reliable, concluding that the most effective way of dealing with the impact of human rights is a combination of statistical and meaningful, reliable non-statistical information coupled with good judgement.

- Naval, C., Walter, S., & de Miguel, R. (eds) Measuring Human Rights and Democratic Governance: Experiences and Lessons from Metagora (2008) OECD Journal on Development, Vol.9, No.2

Based on a project designed to strengthen human rights assessment and indicators, the paper demonstrates that measuring human rights and democratic governance is technically feasible and politically relevant. It also attests to the importance of a bottom-up approach in complementing the top down approach used by leading international organisations.

- Neumayer, E. (2005). Do International Human Rights Treaties Improve Respect for Human Rights? Journal of Conflict Resolution 49(6), 925-953. Accessible online at: http://jcr.sagepub.com/content/49/6/925. doi: 10.1177/0022002705281667

Study suggesting that treaty ratification rarely has unconditional effects on human rights. Human rights are more likely to improve the more democratic the country or the more international nongovernmental organizations its citizens participate in. In very autocratic regimes with weak civil society, ratification can be expected to have no effect and is sometimes even associated with more rights violations.

- Office of the High Commissioner for Human Rights, Using Indicators to Promote and Monitor the Implementation of Human Rights, Report of Asian Sub-Regional Workshop, New Delhi , 26-28 July 2007.

A report which presents the proceedings of a workshop which brought together the emerging thinking of relevant practitioners on the process for, and the issues in, identifying and developing indicators for promoting and monitoring the implementation of human rights at the country level. A series of questions and answers is appended.

- Rain, F. (2006). The Measurement Challenge in Human Rights. International Journal on Human Rights, 4(3), 6-29. Accessible at: http://www.surjournal.org/eng/conteneudos /pdf

Paper argues that measurement techniques are problem specific. Recommends that civil society organisations begin developing models to identify how to size the problem and understand how it develops over time and how any impact is understood over time. While recognising the difficulties that civil society organisations face in the process of self-evaluation, the paper proposes certain steps that would guide human rights organisations in increasing their impact.

- Rajeev, M., & Fasel, N. Report on Indicators for Monitoring Compliance with International Human Rights Instruments (2005) Geneva: United Nations: OHCHR. Available at http://www.unhcr.ch/tbs/doc.nsf

Clarifies the notion of human rights indicators and provides a rationale for using quantitative indicators to monitor the implementation of human rights treaties. It also provides a brief outline of the conceptual and methodological framework for identifying indicators and has an annex which lists illustrative indictors in four discrete human rights areas. The final section brings together some issues and observations for the consideration of the inter-committee meeting of treaty bodies that is referred to earlier.

- Riedel, E., Arend, J., & Franco A. Indicators – Benchmarks – Scoping – Assessment: Background Paper (2010) Friedrich Ebert Stiftung, Berlin/Geneva

The purpose of the paper is to give an idea of how benchmarking and scoping look like in practice. The methodology proposed is designed as a starting point for those involved in international human rights monitoring. It also outlines the potential benefits for the process of State reporting.

- Risse, T., Stephen, R., & Sikkink, K. (1999). The Power of Human Rights: International Norms and Domestic Change. New York, NY: Cambridge University Press.

A sophisticated inquiry into when and how international human rights norms change state behaviour, tracing the way transnational advocacy groups, international organisations and domestic opposition groups interact to put pressure on governments. The authors argue that the changed international environment is ultimately more important than specific country features and economics in explaining the spread of human rights norms around the world.

- Robertson, R. (1994). Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights. Human Rights Quarterly, 16(4), 693-714.

A discussion of the difficulties faced in measuring compliance with certain provisions of the International Covenant on Economic, Social and Cultural Rights.

- Rosga, A. & Satterthwaite, M. (2008). The Trust in Indicators: Measuring Human Rights Working paper, Centre for Human Rights and Global Justice, NYU School of Law. A later version of the paper can be found in Berkeley Journal of International Law (2009) Vol.27:2, 253

The authors examine why and how indicators have become important tools in measuring human rights progress, a trend attributable in part to the rise of new audit and standardization practices in diverse global governance regimes including human rights. Their analytic focus is the use of indicators by the U.N. Office of the High Commissioner for Human Rights and U.N. treaty bodies to monitor States' commitment to and compliance with international human rights treaties (and, more recently, to monitor States' own monitoring activities).

- Simmons, B. (1998). Compliance with International Agreements. *Annual Review of Political Science*, 1, 75-93. DOI 10.1146/annurev.polisci.1.1.75

A review of the extent to which international law and institutions has influenced the conduct of international politics. The study examines four perspectives and assesses their contribution to understanding the conditions under which States comply with international agreements. Despite several conceptual and methodological problems the research has contributed significantly to understanding the relationship between international politics and international law and institutions.

- United Nations Development Programme, Using Indicators for Human Rights Accountability (2000) available at http://hdr.undp.org/en/media/hdr_2000

The UNDP's Human Development Report for 2000 recognizes that statistical indicators are a powerful tool in the struggle for human rights. Argues that when based on careful research and method, statistical indicators help to establish strong evidence, open dialogue and increase accountability but they must be handled carefully as they can be distorted in a number of ways. In order to preserve the integrity of the data, statistics must be based on identifiable criteria, be consistently measurable, possible to disaggregate, and relevant. Where possible the indicators must also be produced by someone other than the subject being monitored to reduce conflict of interest.

- Wurth, A. & Seidensticker, F. (2005). Indices, Benchmarks and Indicators: Planning and Evaluating Human Rights Dialogues. German Institute for Human Rights, Berlin. Available at http://www.insitut-fuer-menschenrechte.de

The study elaborates on the instrument of the institutionalised or formalised human rights dialogue. It focuses on the measurement of the impact of human rights dialogues, and contains valuable recommendations for the planning, design, implementation and evaluation of future dialogues.

Appendix 2. Interview schedule for treaty body reporting participants

(to be adapted as required for politicians, public servants, civil society organisations, academic/experts).

1. What was your involvement in treaty body reporting of CEDAW/ ICCPR? (Treaty, date, position/status, did you attend country examination, role before, during and after).
2. Do you think you were adequately prepared for NZ's country examination? If not, what would have improved the preparation?
3. How effective do you think NZ was in its country examination?
4. What are your observations of the shadow reporting processes by civil society organisations and individuals involved in the examination?
5. What impact did the treaty body reporting process have on either responding to or in progressing human rights issues in New Zealand?
6. Can you provide an example(s) of where it made a difference?
7. What follow-up occurred following the Committee's recommendations to New Zealand as a State party?
8. Can you identify any changes to legislation, policy and practice?
9. If you could make one change that would improve the State party's engagement with treaty body reporting what would that change be?
10. How could New Zealand improve its publicity for, and promotion of, human rights through the treaty body reporting process?
11. Should New Zealand's reporting and the recommendations made by treaty body committees be tabled formally and explicitly in Parliament as a matter of course?
12. Do you have a view on whether there is an advantage in a dedicated parliamentary human rights select committee or should human rights considerations be "mainstreamed" throughout select committees?
13. Can you identify anyone else who could valuably contribute to this research?

Proposed interview template for individuals instrumental in New Zealand recognising human rights obligations

1. What was your role, dates, times, treaty signing, ratification?
2. Can you provide any written information/or point to any research etc. that would be useful for this project?
3. What were the objectives (personal, professional) in New Zealand's recognition of its human rights obligations?
4. Who were the drivers in relation to New Zealand becoming a signatory?
5. What were the major influences on New Zealand in relation to ratification?
6. What were the expectations after ratification? For example: (some prompts may be)

a. Provides legal regime of accountability?
b. Enables realisation of human rights?
c. Strengthens adherence to the rule of law?
d. Improves international reputation?
e. Involves meaningful participation of civil society?

7. Can you provide specific examples of the realisation of human rights in legislation, policy and/or practice as a result of ratification?
8. Overall, what are your observations about the outcomes (at the time and in 2012?)
9. Can you identify improvements that New Zealand could make in relation to realising human rights through treaty body reporting processes?
10. How could New Zealand improve its publicity for and promotion of human rights through the treaty body reporting process?
11. Should New Zealand's reporting and the recommendations made by treaty body committees

be tabled formally and explicitly in Parliament as a matter of course?

12. Do you have a view on whether there is an advantage in a dedicated parliamentary human rights select committee or should human rights considerations be "mainstreamed" throughout select committees?
13. Can you identify anyone else who could valuably contribute to this research?

Appendix 3. Communications under the Optional Protocol

Date	Case	Communication No.	ICCPR provision	Conclusion
31/03/1994	SB v NZ	475/1991	26	Inadmissible
3/04/1997	Drake v NZ	601/1994	26	Inadmissible
28/07/1997	Potter v NZ	632/1995	9(3)	Inadmissible
15/07/1999	A v NZ	754/1997	7;9(1),(4)&(5); 10;12(2);14(1);17;18; 19;26	No violation art.9(1),(4),(5) Inadmissible 7,10,12(2),14(1);17,18,19,26
15/03/2000	Tamihere v NZ	891/1999	14	Inadmissible
25/10/2000	Buckle v NZ	858/1999	17,18,23,24	No violation arts. 17,23,24 Inadmissible art.18
27/10/2000	Mahuika v NZ	547/1993	14(1) & 27	No violation
2/11/2000	Toala v NZ	675/1995	12(4);14(3);16;17; 23 & 26	No violation arts.12(4),26 Inadmissible arts.14(3);16;17;23
22/03/2001	Parun & Bulmer v NZ	952/2000	2;14;26	Inadmissible
12/07/2001	Singh v NZ	791/1997	7;10;14,26	Inadmissible
17/07/2002	Joslin a.o v NZ	902/1999	16;17;23(1)(2); 26	No violation
28/03/2003	Sahid v NZ	893/1999	23(1) & 24(1)	No violation 23(1) Inadmissible 24(1)
6/08/2003	Rajan v NZ	820/1998	17;23(1);24(1) & (3) & 26	Inadmissible
6/11/2003	Rameka v NZ	1090/2002	7;9(1)&(4);10(1) (3);14(2)	Violation art.9(4) No violation arts.9(1);10(1); 14(2) Inadmissible: arts.7;10(1)&(3)
28/10/2005	Fa'aaliga v NZ	1279/2004	23(1) & 24(1)	Inadmissible
16/03/2007	EB v NZ	1368/2005	14(1);17;23;24; 26	Violation art.14(1) No violation arts.17(1) & 23(1) Inadmissible arts.14(1),17,23,24,26
18/10/2007	Manuel v NZ	1385/2005	7;9(1)(2)(3)(4);10 (1)(3);14(1)(2)(3) (7);15 & 26	No violation art.9(1) Inadmissible (all other arts.)
22/07/2008	Van der Plaat v NZ	1492/2006	9(1)(4);15 & 26	Inadmissible
17/03/2009	Dean v NZ	1512/2006	7;9(1)(4);10(1)(3);14(1)(2)(3)(5);15 (1)(3);26	Violation art.9(4) No violation arts.7;9(1);10(1) (3);14(3)(c)(5) Inadmissible arts.14(1)(3)(a);15, 26
29/03/2011	Jessop v NZ	1758/2008	2(3);9(1)(3);10(1) (2)(b),(3);14(1)(2) (3)(4)(5);16;17;24 & 26	No violation arts. 14(1)(3)(c)(e),14 (4)(5) Inadmissible (all other arts.)
22/3/2012	X.Q.H v NZ	2197/2012	17;23(1);24(1);14 (1)(2)(3)(a)	Inadmissible
26/3/2012	J.S v NZ	1752/2008	2(2)(3);9(4);14(1)	Inadmissible

Appendix 4. Case law reference to economic, social and cultural rights

Tavita v Minister of Immigration [1994] 2 NZLR 257 (CA) (Immigration)

Winther v Housing New Zealand Corporation [2010] 3 NZLR 56 (housing)

Lawson v Housing New Zealand [1997] 2 NZLR 474 (housing)

Rajabian v Chief Executive of Department of Work and Income New Zealand HC Auckland, CIV 2004 – 485-671 (refugee status)

Clark v Attorney General [2005] NZ NZAR 481 (justiciable)

Ankers v Director General of Social Welfare [1995] 2 NZLR 595 (social security)

Firth & Rowan v Director General of Social Welfare CIV 2003-485-1672 Wellington (social security)

Kelly v Tranz Rail Ltd [1997] 1 ERNZ 476 (right to strike)

Atkinson v Minister of Health [2012] NZCA 184

Child Poverty Action Group Inc v Attorney General [2013] NZCA 402

Appendix 5. Response to the CERD Committee's Recommendations

Areas	Issues	Areas of progress cited by government & reflecting treaty body recs.	Treaty body recommendations – remaining gaps
Civil & political	Discrimination Govt non-interference in sport (1981)	Race Relations Act 1971: access to complaints process in 1977 Activities of racist organisations banned (but not organisations themselves) New legal framework: HRA 1993 – broader definition of racial disharmony NZBORA 1990 Runanga Iwi Repeal Act 1991 Resource Management Act 1991 Fisheries Claims Act 1992 Māori Land Act 1993 Residential Tenancies Act 1986 SSC provided guidance on special measures Discussion on constitutional status of Treaty 2010	Follow up on HRC Action Plan Entrench the NZBORA Incorporate treaty into domestic legislation where relevant Distinguish between special measures and indigenous rights in future CERD reports
Justice	Māori underrepresented on juries because underrepresented on electoral roll Offenders mainly Māori or Pasifika (2001)	Projects and programme to promote reintegration and Māori focused units in prisons Drivers of crime project to prioritise Māori initiatives	Deal with over representation of Māori and Pasifika and racial discrimination in criminal justice system Assess effect of s.27 of Sentencing Act 2002 (rejected) Collect data on racially motivated crime (accepted but not actioned)
Health & Welfare	Inequalities in health stats High infant mortality for Māori in OECD country	State funding to allow Māori & Pasifika to own homes New initiatives to improve Māori health (1983) Development of strategic plan for Māori public health Work underway to address refugee health issues	

Education	Māori & Pacific disparities Increased number of complaints about programmes to assist Māori (1983) Unequal achievement between Māori and non-Māori (2001)	Pacific Islanders Educational Resource Centre established Increased promotion of Māori language Gradual increase in Māori staying longer at school Marae seen as an environment to promote educational programmes Demand for bilingual teaching grows Affirmative action programmes to facilitate entry into mainstream tertiary education Expansion of early childhood education initiatives References to the treaty in the curriculum included (2007) Access to education for undocumented children in Immigration Act 2009	
Employment	Inequalities in employment Disproportionate number of Māori and Pasifika in unskilled jobs Continued difficulties for Māori and immigrants in finding employment. Difficult for immigrants to get skills and qualifications recognised (2001)	Appointment of Māori to key positions Govt grants to help young Māori into employment Increased number of Māori recruited to public service Vocational training courses run by Dept. Māori Affairs Recruiting more Māori teachers Māori commercial forestry – govt funded programmes set up to benefit and employ Māori Development of Job Action programmes for long term unemployed	
Cultural rights	Ownership of Māori land - undisturbed possession sought (1983) Immigration policy and the point system for Business Investment seen as	Increased number of refugees accepted Programme designed to keep Māori youth out of institutions by placing them with tribal groups Introduction of language nests (kohunga reo) 1981	Concern about effect of immigration policy and racial disharmony End detention of asylum seekers in correctional facilities (actioned in part) Grant the Waitangi Tribunal binding powers

	threat to Māori (1995) Post 2001, asylum seekers detained at border	Legislation to enhance role of Waitangi Tribunal (1983) Māori to become official language (1983) Māori Economic Development Conference (1984) to close socio-economic gap and return control of some programmes to tribal control Establishment of ethnic affairs services Consultative process for treaty claims Measures taken to facilitate migrants' integration into NZ Detention of asylum seekers reversed in court proceedings Dialogue of Crown-Māori on foreshore and seabed Act → Coastal & Marine (Takutai Moana) Bill 2010 Cut-off date for lodging historical treaty claims	
Effective remedies	Incitement of racial disharmony criminal offence – still said to be gap in jurisdiction of the Conciliator in relation to Art.4(b) CERD (1995)(2001)	Access to tribunal under HRCA1977 Introduced civil provision relating to racial disharmony (1977) Improved access to HRC complaints process	Consider ratifying ILO 169, the UN Convention on Status of Stateless Persons & the UN Convention on the Rights of All Migrant Workers Consider accepting CERD Art.14 individual complaints procedure (MOJ working on this)

Appendix 6. CEDAW results analysis

12 out of 14 New Zealand Human Rights Commission recommendations taken up in CEDAW's Concluding Observations. The Committee also welcomed the presence and contribution of the New Zealand Human Rights Commission to its work.

Violence against women • Develop a timetable for the implementation of recommendations from the Report of the Taskforce for Action on Sexual Violence, (**Mentioned)** • Improve the level of Government chief executive representation on the Taskforce for Action on Family Violence and ensure adequate resourcing of the Family Violence Unit, -**Rec.(24(d)** • Commit to the publication of regular data collection disaggregated by gender, ethnicity and disability across all forms of violence against women and girls,-**Rec.24(e)** • Ensure that systematic data is collected to monitor the effectiveness of legislation, policy and practice relating to all forms of abuse, violence and harassment within schools, including the gendered aspects of cyber-bullying.- **Rec. 21(b)**	
Pay equality and pay equity • Establish specific measures and indicators relating to the implementation of equal pay and pay equity **– Rec. 32 (a and b)** • Identify a time frame to develop a pay parity mechanism and redress pay inequality for female care workers in the aged care sector • Review the accountabilities of public service chief executives to be good employers and a requirement that they address the issues identified in their pay and employment equity response plans.-**Rec 32 (f)**	
Women's representation and participation • Take seriously the implementation of Articles 2, 3 and 7 of CEDAW and Articles 2, 3, 25 and 26 of ICCPR, with the Ministry of Women's Affairs re-setting urgently indicators for women's representation that expressly acknowledge gender equality. **–Rec. 28(c)**	
Disabled women's status • Review Statistics New Zealand's collection and publication of disability disaggregated data in major statistical information, such as the Household Labour Force Statistics.-**Rec 36(a)**	

Legislative change that impacts on women • Ensure all welfare reforms adhere to international treaty obligations, that they are not regressive and that there is an independent evaluation of their gendered impact.- **Rec 36(b)** • Extend paid parental leave to all women with continuous workforce attachment regardless of multiple employment relationships**-Rec.32(c)**	
The adequacy of targets and benchmarks • Review urgently the measurable targets set for advancing gender equality by the Ministry of Women's Affairs to adequately reflect gender equality articles in major international treaties, and specifically CEDAW, that the State Party has ratified. –**Rec 28(c) and 17 (c)**	
Publication and promotion of CEDAW • Resource a pro-active social marketing campaign in schools and tertiary education institutions to promote and disseminate CEDAW, and establish a Human Rights Select Committee to strengthen Parliamentary oversight.-**Rec.9**	
The impacts of the Christchurch earthquake on women • Ensure gender mainstreaming in the development of government policies and interventions relating to the Canterbury earthquake recovery process, and that monitoring and evaluation of policies and practices includes gender disaggregation and analysis of gender impacts.-**Rec.36(e)**	

Appendix 7. Article 12 and PPPR Act

As the following table indicates, there are considerable synergies between the PPPR Act and the Convention

ARTICLE 12	PPPR ACT
12.1 Right to recognition as a person before the law	s.5 Presumption of competence/ capacity
12.2 Equal legal capacity	s.4 Everyone presumed to have legal capacity
12.3 Provision of support to exercise legal capacity	s.8(b) Primary objective of court to enable or encourage person to exercise & develop such capacity as they have.
12.4 Safeguards to prevent abuse in exercising legal capacity	s.6 Court must be convinced a person lacks capacity before making an order under Act s.8 Primary objectives of the court – least restrictive intervention s.12(2) High jurisdictional threshold before a welfare guardianship order can be considered
12.4 Respect will and preferences of the person	s.12(7) Court to ascertain the wishes of the subject person when deciding welfare guardianship; s.18(4)(c) Requirement to consult with subject person
12.4 Free of conflict of interest and undue influence	s.12(5)(c) Requirement that there should be no conflict of interest when appointment made
12.4 Safeguards proportional and tailored to individual's needs	s.9(2) Need to consider type of order given objectives in s.8 – including ensuring the least restrictive option is adopted s.10 – provides a variety of orders that can be tailored to meet the individual's needs
12.4 Subject to regular review	s.10 (3) Review of personal orders s.12(8) Welfare guardianship order to be reviewed every 3 years
12.5 Right to control finances & property	Part 5 – s.28. In making property orders primary objectives are to make the least restrictive intervention in the person's affairs & encourage them to exercise and develop the competence to manage their own property

Appendix 8. Scope of international human rights treaty body obligations

	Status during previous cycle	*Action after review*	*Not ratified/not accepted*
Ratification, Accession or succession	ICERD (1972) ICESCR (1978) ICCPR (1978) ICCPR-OP 2 (1990) CEDAW (1985) CAT (1989) OP-CAT (2007, non-application to Tokelau) CRC (1993) OP-CRC-AC (2001, extension to Tokelau only upon notification to the Secretary-General) CRPD (2008, extension to Tokelau only upon notification)	OP-CRC-SC (2011, extension to Tokelau only upon notification)	ICRMW CPED
Reservations, declarations and/or understandings	ICESCR (reservation, art. 8; withdrawal of reservation for the metropolitan territory only, 2003) ICCPR (reservations, arts. 10, para. 2 (b), 10, para. 3, 14, para. 6, 20 and 22) CAT (reservation, art. 14) CRC (general reservation; reservations arts. 32, para. 2 and 37 (c), 1993)		
Complaint procedures, inquiry and urgent action[3]	ICCPR, art. 41 (1978) ICCPR-OP 1 (1989) OP-CEDAW, art. 8 (2000) CAT, arts. 20, 21 and 22(1989)		ICERD, art. 14 OP-ICESCR OP-CRC-IC ICRMW OP-CRPD CPED
Ratification, accession or succession	Convention on the Prevention and Punishment of the Crime of Genocide Rome Statute of the International Criminal Court Palermo Protocol [4] Conventions on refugees and stateless persons except 1954 Convention [5] Geneva Conventions of 12 August 1949 and Additional Protocols I and II[6] ILO fundamental conventions except Nos. 87 and 138[7] UNESCO Convention against Discrimination in Education		ILO fundamental conventions Nos. 87 and 138[8] ILO Convention Nos. 169 and 189[9] Additional Protocol III to the 1949 Geneva Conventions [10] 1954 Convention relating to the Status of Stateless Persons [11]

Appendix 9. Notes to Appendix 8

1 Unless indicated otherwise, the status of ratifications of instruments listed in the table may be found in the official website of the United Nations Treaty Collection database, Office of Legal Affairs of the United Nations Secretariat, http://treaties.un.org/. Please also refer to the United Nations compilation on New Zealand from the previous cycle (A/HRC/WG.6/5/NZL/2).

2 The following abbreviations have been used for this document:

ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights;
OP-ICESCR	Optional Protocol to ICESCR
ICCPR	International Covenant on Civil and Political Rights
ICCPR-OP 1	Optional Protocol to ICCPR
ICCPR-OP 2	Second Optional Protocol to ICCPR, aiming at the abolition of the death penalty
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
OP-CEDAW	Optional Protocol to CEDAW
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OP-CAT	Optional Protocol to CAT
CRC	Convention on the Rights of the Child
OP-CRC-AC	Optional Protocol to CRC on the involvement of children in armed conflict
OP-CRC-SC	Optional Protocol to CRC on the sale of children, child prostitution and child pornography
OP-CRC-IC	Optional Protocol to CRC on a communications procedure
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRPD	Convention on the Rights of Persons with Disabilities
OP-CRPD	Optional Protocol to CRPD
CPED	International Convention for the Protection of All Persons from Enforced Disappearance

3 Individual complaints: ICCPR-OP 1, art 1; OP-CEDAW, art. 1; OP-CRPD, art. 1; OP-ICESCR, art. 1; OP-CRC-IC, art.5; ICERD, art. 14; CAT, art. 22; ICRMW, art. 77; and CPED, art. 31. Inquiry procedure: OP-CEDAW, art. 8; CAT, art. 20; CPED, art. 33; OP-CRPD, art. 6; OP-ICESCR, art. 11; and OP-CRC-IC, art. 13. Inter-State complaints: ICCPR, art. 41; ICRMW, art. 76; CPED, art. 32; CAT, art. 21; OP-ICESCR, art. 10; and OP-CRC-IC, art. 12; Urgent action: CPED, art. 30.

4 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

5 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and 1961 Convention on the Reduction of Statelessness.

6 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Convention); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Convention); Geneva Convention relative to the Treatment of Prisoners of War (Third Convention); Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). For the official status of ratifications, see Federal Department of Foreign Affairs of Switzerland, at www.eda.admin.ch/eda/fr/home/topics/intla/intrea/chdep/warvic.html.

7 International Labour Organization Convention No. 29 concerning Forced or Compulsory Labour; Convention No. 105 concerning the Abolition of Forced Labour; Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively; Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; Convention No. 111 concerning Discrimination in respect of Employment and Occupation; Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

8 International Labour Organization Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise; and Convention No. 138 concerning Minimum Age for Admission to Employment.

[9] International Labour Organization Convention No.169 concerning Indigenous and Tribal Peoples in Independent Countries and Convention No.189 concerning Decent Work for Domestic Workers.

[10] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III).

[11] 1954 Convention relating to the Status of Stateless Persons.

Appendix 10. New Zealand delegations

New Zealand	Head of delegation	Total in delegation	Female: male ratio	Geneva: capital ratio	Which ministries Cycle 1	Which ministries Cycle 2
Cycle 1	Hon. Simon Power, Minister of Justice	12	6:6	5:7	1 x Minister of Justice	1 x Minister of Justice
					1 x Private Secretary to Minister	1 x Private Secretary to Minister
Cycle 2	Hon. Judith Collins, Minister of Justice	9	6:3	3:6	1 x Deputy Solicitor-General	
					1 x Justice	2 x Justice
					1 x Labour	1 x Te Puni Kokiri (Māori Development)
					1 x Corrections	
					1 x Foreign Affairs and Trade	1 x Foreign Affairs and Trade
					5 x Geneva mission	3 x Geneva mission