Fault lines:

Human rights in New Zealand

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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.