



# Fault lines:

Human rights in  
New Zealand

Judy McGregor, Sylvia Bell and Margaret Wilson

### Acknowledgements:

The New Zealand Law Foundation funded the three year research project and we are enormously grateful for their financial and moral support. We would like to thank the stakeholders who contributed to the research and to those experts who read individual chapters and provided feedback. We appreciate the work of Kyle Stutter of the New Zealand Human Rights Commission and Kirsty Whitby in the School of Social Sciences and Public Policy at AUT for money matters. Millie Wall patiently formatted the report and designed the cover. Heidi Jones and Anne-Marie Laure provided valuable research in the early stages of the project. Sir Geoffrey Palmer undertook the overall peer review and John Harvey proof read the report several times. Any errors of fact or grammatical imperfections are ours alone and will be corrected in web-based versions of the report.

Contact details:   judy.mcgregor@aut.ac.nz

                          sbell@aut.ac.nz

                          mwilson@waikato.ac.nz

## Chapter Eight New 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.<sup>473</sup> The United Nations Secretary General Kofi Annan in 2003 chastised the Commission for its “divisions and disputes” that had weakened the Commission’s voice.<sup>474</sup> In his report in 2005 calling for major reform of the United Nations’ human rights promotion efforts, The Secretary General referred to the declining professionalism and the consequential impact on credibility.<sup>475</sup>

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.<sup>476</sup> Previous reviews of human rights situations were mandated on a case-by-case basis through a variety of mechanisms, including resolutions and special procedures.<sup>477</sup> 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”.<sup>478</sup>

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).<sup>479</sup> This has been described as an “innovative new mechanism for considering state compliance with norms of international human rights”<sup>480</sup> 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

---

<sup>473</sup> 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](http://www.int/usa/o6jrb0125) on July 27, 2014.

<sup>474</sup> 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.

<sup>475</sup> 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]

<sup>476</sup> Human Rights Council (2007). *Institution-building of the United Nations Human Rights Council*. Resolution 5/1. United Nations GAOR. 5<sup>th</sup> session, 9<sup>th</sup> meeting. 1. U.N. Doc. A/HRC/5/1.

<sup>477</sup> New Zealand Ministry of Foreign Affairs and Trade (2008). *New Zealand Handbook on International Human Rights*. Ministry of Foreign Affairs and Trade, Wellington.

<sup>478</sup> 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.

<sup>479</sup> 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

<sup>480</sup> 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.<sup>481</sup>

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).<sup>482</sup> 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

---

<sup>481</sup> 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

<sup>482</sup> Sen, above n 44

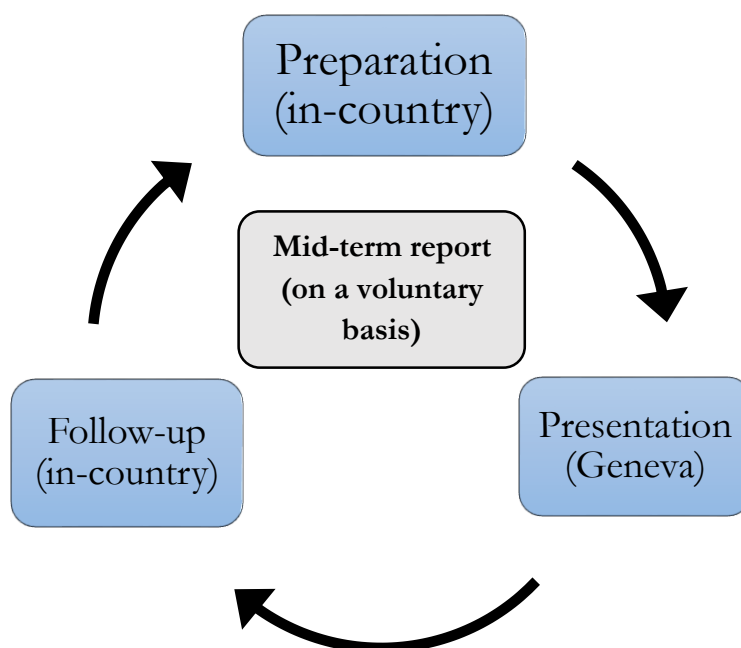
the state party under review undertaken within the working groups and convened by the troika in accordance with the published scheduled for each cycle of the UPR.

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.<sup>483</sup> 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.<sup>484</sup> 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."<sup>485</sup>

**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

<sup>483</sup> Sen, at 9

<sup>484</sup> Statement of the Republic of Macedonia on behalf of Group of States, 27<sup>th</sup> session of the Human Rights Council, Item 6:general debate. Accessed from UPR Info.

<sup>485</sup> 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.”<sup>486</sup> 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.<sup>487</sup> 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.<sup>488</sup>

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.”<sup>489</sup> 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:<sup>490</sup>

*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,<sup>491</sup> 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;

<sup>486</sup> 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.

<sup>487</sup> 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.

<sup>488</sup> Manfred Nowak, (2011). “It’s time for a World Court of Human Rights” in Bassiouni & Schabas above at 23

<sup>489</sup> Dominguez-Redondo, above n 487 at 694.

<sup>490</sup> UPR Info UPR-Info.org. Accessed on 31/07/2014 (2014) at 13.

<sup>491</sup> 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’Ivoire, 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:<sup>492</sup>

*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;<sup>493</sup> Goodman and Jinks, 2003;<sup>494</sup> Landman, 2004;<sup>495</sup> Ignatieff and Dersomeau, 2005; <sup>496</sup>Gready, 2009 <sup>497</sup>). 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

---

<sup>492</sup>Office of the Minister of Justice (2014) *Cabinet Social Policy Committee: Responses to the UN Periodic Review Recommendations*.

<sup>493</sup> Hathaway above n 39

<sup>494</sup> Goodman & Jinks above n 40

<sup>495</sup> Landman above n 36

<sup>496</sup> Ignatieff & Dersomeau above n 41

<sup>497</sup> Gready, above n 48



from the UPR process.<sup>498</sup> 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;<sup>499</sup> and the state's progress toward meeting the millennium development goals adopted by the United Nations General Assembly.<sup>500</sup>

## 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.<sup>501</sup> 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

---

<sup>498</sup>Smith, above 481 at 11.

<sup>499</sup> *Voluntary human rights goals*, Human Rights Council Resolution 9/12, U.N.GAOR, Human Rights Council, 9<sup>th</sup> session, U.N.Doc. A/HRC/RES/12 (2008).

<sup>500</sup> *United Nations Millennium Declaration*, adopted 18 September, 2000, G.A. Res. 55/2, U.N. GAOR, 55<sup>th</sup> Session, U.N. Doc. A/RES/55/2 (2000).

<sup>501</sup> 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.<sup>502</sup>

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.”<sup>503</sup>

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:<sup>504</sup>

*...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.

---

<sup>502</sup> Human Rights Council. (2008) *Resolution 9/12 Voluntary human rights goals*. U.N. GAOR, Human Rights Council 9<sup>th</sup> session. A/HRC/RES/9/12.

<sup>503</sup> 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

<sup>504</sup> Above

In its National Report in the second UPR, New Zealand stated that it:<sup>505</sup>

*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.<sup>506</sup> 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

---

<sup>505</sup> 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.

<sup>506</sup> 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.<sup>507</sup>

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:<sup>508</sup>

*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.

---

<sup>507</sup> 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.

<sup>508</sup> Human Rights Council (2014) *Report of the Working Group on the Universal Periodic Review. New Zealand*. A/HRC/26/3.

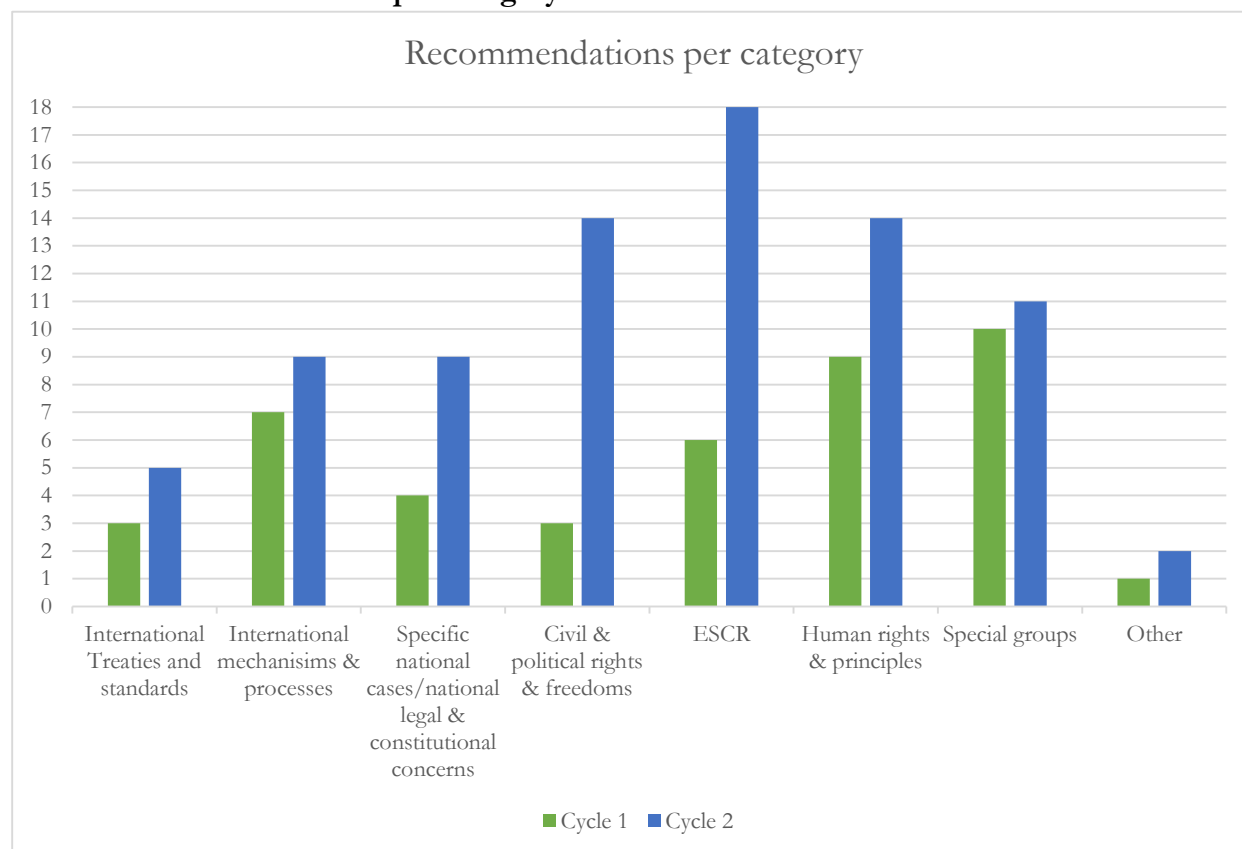
**Table 4. Themes raised in New Zealand's UPR**

| 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.<sup>509</sup> 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<sup>510</sup>. 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

<sup>509</sup> Report of First Working Group at [22]

<sup>510</sup> 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”.<sup>511</sup>

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.<sup>512</sup> 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.<sup>513</sup> 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

---

<sup>511</sup> Human Rights Council (2010) Report of the Human Rights Council on its twelfth session. 25 February 2010. A/HRC/12/50 at 113 [335]

<sup>512</sup> 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]

<sup>513</sup> 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**

| <b>Levels of action from New Zealand's response to UPR 2014.</b> |                            |
|--|----------------------------|
| No action  | 22 recommendations         |
| Minimal action   | 72 recommendations         |
| Specific action  | 61 recommendations.        |
| <b>Total Recommendations</b>                                     | <b>155 recommendations</b> |

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.<sup>514</sup> 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."<sup>515</sup> 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.

<sup>514</sup> Salama in Sen, above n 44 at 8

<sup>515</sup> 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.<sup>516</sup>

### 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<sup>517</sup>, 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:<sup>518</sup>

*...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:

<sup>516</sup> The CEDAW Coalition of New Zealand NGOs formed in 2013 and comprising 26 civil society organisation.

<sup>517</sup> New Zealand Ministry of Foreign Affairs and Trade (2008) *New Zealand Handbook on International Human Rights*, Wellington, at 104.

<sup>518</sup> 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:<sup>519</sup>

*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."<sup>520</sup> 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:<sup>521</sup>

*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 Maori 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.*

---

<sup>519</sup> 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.

<sup>520</sup> At [16]

<sup>521</sup> At [10]

The second is an openness to improvement. The Commonwealth Secretariat stated that:<sup>522</sup>

*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 an 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. This 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 Aotearoa. 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.<sup>523</sup> 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

---

<sup>522</sup> Salama in Sen, above n 44

<sup>523</sup> 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.<sup>524</sup>

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

---

<sup>524</sup> 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.<sup>525</sup> 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.<sup>526</sup>

### 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:<sup>527</sup>

*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."<sup>528</sup> UPR Info went on to express the hope that:<sup>529</sup>

*...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.*

---

<sup>525</sup> Attendance by researcher.

<sup>526</sup> 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.

<sup>527</sup> Mathew Davies (2010) "Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations." *Alternatives*, 35, 449-468.

<sup>528</sup> Richard Chauvel (2010) "A view from two NGO's in Sen above n 44

<sup>529</sup> 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:<sup>530</sup>

*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

---

<sup>530</sup> 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*. 19<sup>th</sup> 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.<sup>531</sup>

*...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.”<sup>532</sup> 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.<sup>533</sup> 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:<sup>534</sup>

*...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 become 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.<sup>535</sup>

## 8.12 Enhanced expectations?

Increased involvement of NGOs and the accompanying covenant awareness raising may heighten expectations that the UPR should have been 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.<sup>536</sup>

---

<sup>531</sup> Human Rights Foundation (2013) *Comments on the Government’s Universal Periodic Review draft report*. 19 September. [www.humanrights.co.nz](http://www.humanrights.co.nz).

<sup>532</sup> HRC, 3 [III] 8.

<sup>533</sup> HRC, above at 2, 1(A) 7.

<sup>534</sup> HRC, above at 15, [126]

<sup>535</sup> Civil society comment at UPR meeting held by the NZHRC, 2013.

<sup>536</sup> 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.<sup>537</sup>

A similar commitment has been again to consultation. With the Government’s commitment to a mid-term progress report in 2016<sup>538</sup> 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**

|                       | Follow-up                     | National Consultation Stage      | NGO report drafting  | Lobbying            |
|-----------------------|-------------------------------|----------------------------------|--|---------------------|
| Last UPR<br>27/1/2014 | Mid-term reporting<br>10/2016 | National Consultation<br>04/2017 | Drafting period<br>12/2017<br><br>NGO submission<br>01/02/2018 | Next UPR<br>10/2018 |

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.<sup>539</sup> This requires greater investigation outside of this research.

<sup>537</sup> HRF above at 3 [3.2]  
<sup>538</sup> Cabinet Social Policy Committee (2014). *Minute of Decision: Response to the United Nations Universal Periodic Review Recommendations*. SOC Min (14) 8/2.  
<sup>539</sup> 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:<sup>540</sup>

*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.”<sup>541</sup>

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.<sup>542</sup> 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”<sup>543</sup> 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.<sup>544</sup> 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).

---

<sup>540</sup> Davies, above n 528 at 464.

<sup>541</sup> UPR Info, above at 13.

<sup>542</sup> 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.

<sup>543</sup> At 462.

<sup>544</sup> 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”.<sup>545</sup> 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.<sup>546</sup> 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:<sup>547</sup>

*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

---

<sup>545</sup> UPR Info (2014) at 7

<sup>546</sup> Above at [42]

<sup>547</sup> UPR Info (2014) above

nature of parliamentary committee and “all committees consider human rights implications of relevant legislation.”<sup>548</sup> 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.

---

<sup>548</sup> At 515.