



Fault lines:

Human rights in

New Zealand

Judy McGregor, Sylvia Bell and Margaret Wilson

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

sbell@aut.ac.nz

mwilson@waikato.ac.nz

Chapter Ten Conclusions and recommendations

10 Background

Evaluating the effect of the ratification of the major international human rights treaties on the implementation of human rights in New Zealand is a complex and difficult exercise that reflects multiple perspectives. There is little consensus in the wider human rights community about the level and scope of the impact, if any, of the treaties on the domestic promotion, protection and fulfilment of human rights. Much human rights commentary relates to a particular court case, a topical human rights issue or an individual complaint of discrimination. This research has attempted to provide a more systematic mapping using a variety of methods. It has used information obtained from analysing archival data available domestically and internationally, applied evaluative frameworks where appropriate, examined human rights case law referencing treaty body comment, assessed policy change and development, sought insights from key influencers through interviews and commented on the roles played by non-governmental organisations and the New Zealand Human Rights Commission. It concludes that the human rights landscape in New Zealand has significant fault lines.

Although the exercise has been as comprehensive as possible, it faced a limitation in the absence of a complete archive of material relating to New Zealand's international treaty commitments with a single point of access. This meant that the researchers had to move between the Ministry for Women for information on Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Ministry of Justice (to obtain information on the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), the Ministry of Foreign Affairs and Trade (the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Ministry of Social Development (the Convention on the Rights of Persons with Disability (CRPD) and the Convention on the Rights of the Child (CRC) to supplement information provided on the United Nations treaty body websites. The impact of public service restructuring on available information services over the years and the lack of continuity in the cycle of treaty body reporting processes by officials also exacerbated the difficulty of locating data.

The analysis of the impact of six of the major international human rights treaties, combined with an evaluation of New Zealand's involvement in the Universal Periodic Review (UPR), led to a number of observations that complement the conclusions reached in relation to each treaty and the UPR. This chapter discusses these findings and outlines a series of recommendations.

10.1 Conclusions

The paradox of New Zealand's human rights profile.

New Zealand is conscientious about international human rights treaty body reporting and participation at the United Nations. It has a deservedly high reputation for global human rights leadership dating from the development of the Universal Declaration of Human Rights and the treaty framework through to its role in the most recent treaty, the CRPD.

At the United Nations in Geneva and New York, New Zealand is seen as a high achiever, a good performer and a participant that punches above its weight. Our choreography is excellent with a well-established practice of ministerial leadership of delegations. Our script is immaculate - during treaty body examinations New Zealand is generally well-prepared, rhetorically active, self-reflective

and respectful of the processes. Internationally, we project a strong self-image of a human rights leader. Paradoxically, though, the New Zealand public is largely unaware of this performance at the United Nations other than having a vague idea that we are good at human rights because we were the first nation state to grant women the vote.

New Zealand is poor at promoting the human rights treaties domestically, and scant media coverage is paid to the reporting processes, either when New Zealand is examined as a state party or to the observations and recommendations made by treaty bodies, despite their significance domestically and their inherent newsworthiness. This invisibility is affirmed and compounded by the absence of parliamentary scrutiny of human rights treaty bodies, either of the instruments themselves and the recommendations made by the United Nations or, significantly, about accountability for implementation in the domestic context.

One way of rectifying this would be to establish a body with specific responsibility for overseeing New Zealand's human rights commitments. Yet the Government has consistently rejected the idea of a parliamentary select committee for human rights since 2010 when it was first raised by the NZHRC and more recently by civil society organisations in the second cycle of the UPR in 2014. Efficiency is usually cited, coupled with the argument that New Zealand is a small country and does not need a plethora of select committees. Alternatively, the Government advances the idea that the scope of human rights is so far reaching that debate could span the content of all of the existing select committees. As a result, the ideal of parliamentary discussion has not been achieved and there appears little prospect of it in the future.

New Zealand's startling lack of parliamentary scrutiny could be cured by formally adding the role of overseeing human rights to the functions of an existing select committee. The Justice and Electoral Select Committee is probably the most appropriate committee given the increasingly close relationship between human rights and electoral issues and the fact that the Ministry of Justice has primary responsibility for reporting on the ICCPR, ICESCR and the UPR. It could effectively co-ordinate other population agencies in treaty body reporting.

Positive impact of human rights treaty body ratification.

Overall, treaty body ratification in New Zealand has impacted positively on human rights through changes to legislation, policy and practice. While the influence of the Concluding Observations and Recommendations of the treaty body committees has been variable and in some cases limited, there is also clear evidence of progress and positive changes. Whether these gains would have been made without ratification is a moot point. There is no way of knowing with any confidence what the situation in New Zealand would have been like without the State's commitment to the human rights instruments and whether legislators, policy makers and practitioners would still have acted to remove discrimination and protect human rights.

A survey of treaty body reports, legislative reform domestically, lifting of treaty body reservations and accompanying changes in policy and practice, suggests there has been a positive impact on human rights in New Zealand. A number of examples are cited in this report. For example, the introduction of paid parental leave legislation was associated with the withdrawal of the related reservations to ICESCR and to CEDAW and the repeal of section 59 of the Crimes Act, prohibiting corporal punishment of children, had been consistently called for by the CRC Committee. An amendment to immigration legislation revoking a discriminatory policy that had prevented children from accessing education if they were in New Zealand without lawful authority,

lessened the effect of one of the reservations under CRC. There has also been a discernible rise in the consciousness of disabled people about their rights as a consequence of the CRPD, and the New Zealand Human Rights Commission (NZHRC) has become increasingly active in intervening in human rights issues before the Courts. It has relied on the direction in the long title to monitor protection of human rights in New Zealand in terms of the international human rights treaties - for example, the *Zaoui* case.⁵⁵⁹ The Commission was also responsible for a number of public inquiries, for example, *To Be Who I Am*, an inquiry into transgender rights.⁵⁶⁰ All relied on the international standards and were catalysts for positive change in human rights domestically in either legislation, or policy and practice.

Human rights implementation in practice, particularly in the area of economic, social and cultural rights has plateaued and is at a turning point, raising the spectre of regression in some areas.

Available data and analysis of key variables suggest that human rights implementation, particularly in the area of economic, social and cultural rights may have plateaued, and there are worrying signs of regression. Fault lines have become evident.

The most obvious example of this is the Public Health and Disability Amendment Act which was enacted under emergency in 2013 in response to the Court of Appeal's decision in the *Atkinson* case. The effect of this amendment not only undermined the existing legal structure by ousting the right to complain to the NZHRC, but alienated many disabled people who had hopes of finally realising their rights through the international treaty process.

Further signs of regression include the drop in the age of prosecution in the Youth Court to 12 and young people being dealt with in the adult criminal justice system from the age of 17; the dismantling of state mechanisms to close the gender pay gap (against the urgings of the CEDAW committee); and some prisoners losing the right to vote. The undermining of the right to an adequate standard of living for some children as a result of changes to the welfare system and child poverty is also a concern.

Regression in part is occurring because of the inherent vagueness of progressive realisation and the ability for States to retreat to the political rationale of economic priorities to justify inadequate performance. It also reflects the fact that the most difficult human rights issues relate to structural inequalities, disparities and disadvantages. Some groups also have a limited ability to achieve change through policy channels. It follows that people must be able to challenge the inadequacies of government through individual cases where there are perceived abuses of human rights – as happened, for example, in the *Atkinson* case. To give full effect to New Zealand's international commitments, therefore, there needs to be some recognition of an individual's right to complain about government action. The ratification of the Optional Protocols to ICESCR and CRPD is an essential first step.

⁵⁵⁹ *Zaoui v Attorney-General (No. 2)* [2005] NZSC 38; [2006] 1 NZLR 289

⁵⁶⁰ Geiringer & Palmer, above n 35 at 12

Although Māori have been the focus of consistent and continuing human rights treaty body concerns about structural inequalities and disadvantage, New Zealand has not consistently drawn down on the recommendations in response.

A striking feature of the Concluding Observations and Recommendations from the time New Zealand first reported on a human rights treaty to the United Nations until the present is the attention paid to discrimination against, and inequalities of, Māori. For example, concern has been expressed about the poor living standards of Māori children because of welfare programmes that depend on recipients being employed.

The government's response has often been to describe programmes or activities that theoretically address the issues without analysing the effectiveness of their implementation. While the government can justify its approach by relying on the concept of progressive realisation, there appears to be little recognition or understanding of the role that New Zealand's constitutional arrangements play in the economic and social inequalities experienced by Māori. In this sense the response to the recommendations of the human rights treaty body system has been inadequate in addressing Māori issues.

Māori civil society has a weak tradition of NGO participation in the shadow reporting processes and there has not been a sustained critical consciousness among Māori groups of the Concluding Observations and Recommendations made by human rights treaty body committees in relation to health, education, disproportionate rates of incarceration, and higher rates of domestic violence, to name just some of the disparities that negatively impact on Māori and their whanau. While it is on the fringes of the six major human rights treaties that are the primary focus of this research, New Zealand's tardy response to the United Nations Declaration on the Rights of Indigenous People (UNDRIP), is symptomatic of a wider malaise.

Māori focus primarily on the Treaty of Waitangi and ultimately the settlement process, to ensure implementation of civil, political, economic, social and cultural rights. But the increasingly directive nature of treaty body recommendations relating to Māori inequalities and disparities, including child poverty, represent a legitimate but missed opportunity for monitoring State party accountability on measures to close the gaps.

The concept of "progressive realisation" which has allowed successive administrations to ward off criticism of the slow implementation of economic, social and cultural rights can no longer be advanced as ideological justification for disparities in fulfilment between advantaged and disadvantaged groups. It is simply not an appropriate response to inequalities in health, education, and employment, for example, between Māori and others in New Zealand. Transparent and readily available data is needed to assess the realisation of social and economic rights for Māori along with an understanding of the importance of self-determination in achieving genuine equality.

New Zealand's history as a human rights champion is often driven by individual leaders.

It is notable that New Zealand's commitment to, and involvement with, the major international human rights treaties is that progress has often been linked to a particular individual. History demonstrates the power of far-sighted and progressive individuals in driving a rights-based agenda, occasionally against the prevailing political and socio-economic current of the times. For example, in the early days there was the leadership of Prime Minister Peter Fraser and Ralph Hanan when he was Minister of Justice and, more recently, Sir Geoffrey Palmer's promotion of the NZBORA.

Not all of the players have been politicians. Judges such as Sir Kenneth Keith, Dame Silvia Cartwright and Lord Robin Cooke of Thorndon, had a significant part in endorsing the international treaty obligations in the courts. Others were diplomats, bureaucrats, academics, intellectuals and activists. Examples of legislative change led by individuals include the Homosexual Law Reform Act, inclusion of sexual orientation as a ground of unlawful discrimination, the repeal of corporal punishment, the introduction of the Prostitution Amendment Bill and same sex marriage. Disability rights have been advanced internationally by New Zealand diplomats and domestically by civil society champions and individual Cabinet ministers. The establishment of the institutional machinery for women's rights was subject of specific leadership, and an individual aged care worker, Kristine Bartlett, has become the face of union-led litigation on equal pay.

The point is the power of the individual. While we know and understand that human rights progress is often contingent and conjectural, what is striking from this overview is how often one person has driven or influenced legislative change, pushed for policy reform, been responsible for pursuing a legal case with wider ramifications or acted as a catalyst for reform. The examples which are found in the analyses of the selected treaties are not exhaustive but illustrative.

A renaissance of civil society activism is evident through involvement in new monitoring mechanisms for disability rights, evolving interest in the Universal Periodic Review, and greater coordination among non-government organisations (NGOs)

Civil society activism has mobilised public opinion on, and political responses to, many significant human rights concerns in New Zealand in the last 35 years demonstrating that human rights consciousness can be developed from 'below'. Women's NGOs have perhaps been the most consistent participants in New Zealand international responses to human rights treaties. While women's rights were not a significant part of human rights consciousness in developed countries in the 1970s,⁵⁶¹ activists from the women's movement are now among the most determined users of the relevant human rights treaties. The New Zealand National Council of Women, for example, is a consistent and engaged civil society participating in shadow reporting to the United Nations specifically in relation to CEDAW but also to other treaty committees.

The research reveals signs of a renaissance of civil society interest in relation to the human rights treaty body processes. There is evidence of coalition building in preparing and presenting shadow reports - not just of women's groups in relation to the CEDAW Coalition of New Zealand NGOs - but also the CRC coalition, the Ad Hoc NGO Group made up of ACYA, Youth Law, UNICEF, and Save the Children, which relates to children's rights and the Domestic Violence and Disability Working group which consisted of Auckland Disability Law, CCS Disability Action Northern Region, and Peace Movement Aotearoa to the Universal Periodic Review (UPR). The Human Rights Foundation undertook a specific NGO coordination role in the second cycle of UPR from 2012-2014 and the New Zealand Law Foundation has provided welcome funding to NGOs wanting to make shadow reports. Professionally linked NGOs, such as the New Zealand Law Society, are also promoting domestic legislative and constitutional issues in the international arena.

Civil society expectations of the treaty body reporting process have increased, evident in relation to the UPR and the CRPD, in particular. Such aspirations and the momentum they engender could be under-estimated by the State party. A traditional feature of shadow reports from New Zealand NGOs has been a generosity of spirit to successive administrations in their reports and country

⁵⁶¹ Moyn, above n 4 at 223

examination processes in New York and Geneva. Funding support to NGOs both for international and domestic activities has resulted in an uneasy complicity between NGOs and the government. Some of them have been funded by the New Zealand government to participate at the United Nations, for example. The reality is that NGOs' participation in the treaty body context reflects constraints of resourcing, leadership and organisational capacity – both domestically and internationally. Account needs to be taken of the fact that NGOs almost inevitably will depend to some extent on government funding to participate at international fora.

Civil society representatives do not wish to be ungracious about New Zealand's gains nor undermine its international reputation and are constantly discussing the best strategies to employ with treaty body committees. However, the civility is fragile and could easily be supplanted by frustration with the lack of pace and limited scope of implementation, especially with the UPR, and the advent of mid cycle reporting by some treaty bodies. There is no guarantee that politeness will continue to be the dominant norm when more sophisticated evaluation frameworks and indicators are developed by civil society and applied more rigorously.

The absence of a central, national archive of human rights treaty body reporting reflects lack of coordination.

To analyse the effect of ratification of the international treaties on the human rights of ordinary New Zealanders it is necessary to access archival material from relevant departments. The recent restructuring of the public sector has made this task extremely difficult both because material is scattered among a variety of agencies – which themselves have often been restructured internally – and because within those departments there is usually no one person responsible for a particular treaty. The discontinuity and resulting loss of institutional knowledge can make it difficult to comment on progress in relation to certain treaties, particularly where there is no population Ministry responsible for reporting. It was much easier to locate material relating to CEDAW through the Ministry for Women - although even that was incomplete.

To hold the government accountable for implementation of the treaty body recommendations and for purposes of scholarship, research, training and informing civil society, structural change is necessary. A national repository that holds all the relevant material (including shadow reports) needs to be designated and a single government agency, and officials at an appropriate level, need to be tasked with responsibility for collating, maintaining and coordinating reporting on, and to, the treaty bodies.

Although certain treaties clearly fall within the mandate of some Ministries or departments – women's issues in the Ministry for Women and disability in the Office of Disability Issues - the Ministry of Justice has primary responsibility for reporting on the ICCPR, ICESCR and the UPR and would therefore be the most logical agency to take responsibility for coordination of treaty body reporting and the development and maintenance of a freely accessible archive.

News media silence about human rights treaty body reporting.

The limited visibility and impact of Concluding Observations and international human rights obligations in New Zealand, and the effect of this on adherence to these obligations, is troubling.

When British broadcaster Jon Snow wrote the foreword to *Reporting Human Rights, A Practical Guide for Journalists* published by the Media Trust in the United Kingdom, he wrote of the British legislation that, "It would be hard to exaggerate the depth of the media's ignorance over just about

everything to do with the Act”. That could equally apply to human rights in general in New Zealand.

Despite the inherent newsworthiness of the international treaty body committees’ Concluding Observations and Recommendations, the silence from the news media in general, largely dictates the tepid political response and results in a vacuum of public debate on the implications of the recommendations. While young journalists tend to be curious about human rights and the underpinning ideals they often lack both the conceptual frameworks and knowledge of applying a rights-based approach to reporting. Journalism and media organisations could sponsor the development of a practical toolkit on the reporting of human rights and New Zealand’s international obligations. It would be appropriate for the Journalism Educators Association of New Zealand (JEANZ) to lead the development of the resource so it was both accessible, practical and relevant to the curriculum of tertiary level journalism schools.

New Zealand’s constitutional arrangements and the human rights implications are poorly understood. More needs to be done domestically and internationally to promote understanding of our constitutional arrangements.

New Zealand’s human rights legislation consists of the Human Rights Act (HRA) and the NZBORA. Neither is entrenched and both have problems, the NZBORA possibly more so because it does not include all the rights in the ICCPR - despite reaffirming the Covenant in the long title - and makes no mention of economic and social rights. It also does not provide a remedy, cannot be used to strike down inconsistent legislation and allows proposed legislation to be passed even if a breach of one of the rights in the NZBORA has been identified.

The Concluding Comments and Recommendations of the Human Rights Committee have frequently expressed concern about New Zealand’s constitutional arrangements recommending entrenchment of the NZBORA and seeking clarification about the legitimacy of passing inconsistent legislation and the inability of the Courts to issue declarations of incompatibility. The government usually justifies its position in ways which do not withstand scrutiny. For example, the government consistently maintains that the vetting procedure under s.7 of the NZBORA is adequate even though legislation found to be inconsistent with a right in the NZBORA can still be passed and the Attorney-General - on whom the vetting obligation rests – is required to vote in favour of what is proposed even if the vet is negative.

A good illustration of this is the amendment to the Public Health and Disability Act 2013. The Attorney-General reported to Parliament under section 7 that the Bill was inconsistent with the right to judicial review and potentially inconsistent with the right to freedom from discrimination. Despite such concerns, the Bill was passed into law under urgency in a single sitting day, bypassing select committee scrutiny, and denying public participation or informed debate.

This ability to effectively circumvent the stated purpose of section 7 continues to trouble the Human Rights Committee which, in the sixth report, has again asked the Government to strengthen the NZBORA to allow the revision of laws that have been enacted but are inconsistent with the Act.

In a similar vein the government justifies the inability to formally issue a declaration of incompatibility by reference to ss. 4, 5 and 6 NZBORA which allow a Court to issue a declaration

that an enactment conflicts with a right in the Act, even though it must then give effect to the inconsistent provision. It is doubtful that the treaty bodies consider this is an effective remedy.

The Recommendations and Concluding Observations highlight a lack of understanding of New Zealand's constitutional arrangements by the international treaty bodies. Given it is unlikely that there will be any changes to the NZBORA in the near future, the international treaty bodies need to have access to an agreed accurate and credible description of New Zealand's constitutional arrangements to allow them to decide whether claims made by the State party about constitutional protections are accurate.

The Human Rights Act 1993 (HRA) is overdue for a comprehensive review.

There are specific problems with the existing human rights legislation that have the potential to undermine compliance with the international treaty body framework. The HRA needs substantive and structural changes. For example, to fully comply with the Paris Principles the Commission needs to be truly independent, possibly reporting directly to Parliament as an Officer of Parliament rather than via the Ministry of Justice. The Commission also needs to be properly resourced. Furthermore, the boundary between public and private activities is becoming increasingly blurred making the Part 1A/Part 2 dichotomy in the HRA no longer viable - the very prescriptive exceptions in Part 2 fit uneasily with the wider justification test in the NZBORA that is used in Part 1A and which applies to activities of the public sector. There is also no equality provision in either the NZBORA or the HRA.

The Human Rights Amendment Bill, which is currently awaiting a third reading, is flawed legislation that does not enjoy the level of public or political support that fundamental change to legislation of this type should strive for. It focuses principally on the disestablishment of certain defined Commissioner roles (while not creating a Disability Commissioner which was originally touted as the principle reason for the amendment). The appropriate level of public consultation has not been undertaken on what is proposed.

Certain aspects of what is proposed would, however, enhance treaty body reporting. For example, section 5(2) is amended by specifically allowing the Commission *to make public statements in relation to any matter that may affect or infringe human rights (whether or not those human rights are affirmed in New Zealand domestic human rights law or international human rights law), including statements commenting on the position of the Government in relation to that matter.* This provision would help cure Cabinet disapproval of Commission statements or positions which are embarrassing for a government (such as occurred when the Commission criticised the proposed electoral finance legislation.) A new provision would also allow the Commission *to promote and monitor compliance by New Zealand with, and the reporting by New Zealand on, the implementation of international instruments on human rights ratified by New Zealand,* giving it a more defined role in promotion and monitoring.

10.2 Recommendations

These conclusions lead to the proposed agenda for change that strengthens the institutional framework as well as legislation, policy and practice.

Institutional Mechanisms

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

Legislation

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

Policy

- New Zealand pro-actively nominates candidates for the United Nations Human Rights Council, the Human Rights Committee, treaty body committees and special procedures, and institutes a cross party mechanism on UN representation.
- An accurate, well-reasoned and comprehensively researched explanation of New Zealand's unique constitutional arrangements is prepared with help from human rights academics to accompany all country reports to human rights treaty bodies.

Practice

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