



# Fault lines:

Human rights in

New Zealand

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

### 3 Background

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

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

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

This reservation remains in force.

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

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

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

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

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<sup>151</sup> MacKay above n 66 at 5

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

uncertain and not justiciable and better implemented through legislative and administrative means.<sup>153</sup>

### 3.1 Progressive realisation

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

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

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

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

Mary Robinson has noted that<sup>158</sup>

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

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<sup>153</sup> Above n 19 at 112.

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

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

<sup>156</sup> Committee on Economic Social and Cultural Rights, *General Comment No 3 1990*, 3 and 9

<sup>157</sup> Committee on Economic Social and Cultural Rights, *General Comment No 20, 1990*, 13

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

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

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

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

### **3.2 Treaty body reporting**

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

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

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

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

<sup>160</sup> *Draft report of the Working Group on the Universal Periodic Review: New Zealand* 2014, 128.30, 128.31, 128.32, 128.33, 128.34, 128.35

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

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

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

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

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

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

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

### **3.3 First Periodic Report – Concluding Observations<sup>167</sup>**

#### **3.3.1 Positive aspects**

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

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

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

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

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

<sup>165</sup> Above n 66 at 4.

<sup>166</sup> At 7, 8, 18, 19, 25-30.

<sup>167</sup> *Committee on Economic Social and Cultural Rights* (1994) E/C. 12/1993/13.

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

### **3.3.2 Principal areas of concern**

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

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

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

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

### **3.3.3 Suggestions and recommendations**

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

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

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

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

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

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

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

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

### **3.4 Second Periodic Report – Concluding Observations<sup>168</sup>**

#### **3.4.1 Positive aspects**

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

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

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

#### **3.4.2 Principal subjects of concern**

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

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

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

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

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

#### **3.4.3 Suggestions and recommendations**

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

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

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

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

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

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



The Committee encouraged measures to increase reporting in employment cases.

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

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

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

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

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

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

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

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

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

### **3.5 Third Periodic Report – Concluding Observations<sup>169</sup>**

#### **3.5.1 Positive aspects**

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

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

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

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<sup>169</sup> *Committee on Economic, Social and Cultural Rights* 2012 E/C.12/NZL/CO/3.

### **3.5.2 Principal subjects of concern and recommendations**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **3.6 Policy, practice and legislative change**

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

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

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<sup>170</sup> Aikman above n 9 at 5

*understood why we emphasize the right to work, the right to a standard of living adequate for health and wellbeing, and the right to security in the event of unemployment, sickness, widowhood and old age. Also the fact that the common man is a social being requires that he should have the right to education, the right to rest and leisure, and the right to freely participate in the cultural life of the community.*

*These social and economic rights can give the individual the normal conditions of life, which make for the larger freedom. And in New Zealand we accept that it is the function of government to promote their realisation.*

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

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

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

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

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<sup>171</sup> (20 July 1977) NZPD 1257.

There is a reference to enact legislation and policy consistent with the NZBORA and the HRA but only the Cabinet Manual makes a reference to compliance with “international obligations”.<sup>172</sup>

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

### 3.7 The use of ESCR in judicial proceedings<sup>174</sup>

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

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

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

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

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<sup>172</sup> At [5.35] – [5.36]

<sup>173</sup> Geiringer & Palmer above n.35 at 12

<sup>174</sup> A selection of cases in which economic, social and cultural rights are referred is included in Appendix 4.

<sup>175</sup> Erdos, above n 28

<sup>176</sup> Erdos, at 96

<sup>177</sup> Joss Opie, (2012) “A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990” 43 *VUWLR* 471 at 473.

<sup>178</sup> *Lawson v Housing New Zealand* [1997] 2 NZLR 474

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

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

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

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

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

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<sup>179</sup> Opie, above 177 at 501-2.

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

<sup>181</sup> *Daniels v Attorney General* [2002] 2 NZLR 742 at 766.

<sup>182</sup> at [83]

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

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

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

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

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

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<sup>183</sup> Royden Hindle, *The Human Rights Review Tribunal: Problems and Possibilities*, (2013) [www.roydenhindle.co.nz](http://www.roydenhindle.co.nz).

<sup>184</sup> *Atkinson v Ministry of Health* [2012] NZCA 184.

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

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

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

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

A recent application of this principle is found in *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* where the judgment of Full Court noted:<sup>187</sup>

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

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

The Employment Court judgment implicitly, if not explicitly, acknowledges progressive realisation of ESCR. The Court said:<sup>189</sup>

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<sup>185</sup> *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the New Zealand Public Health and Disability Amendment Bill (No2)* (6 May 2013)

<sup>186</sup> *Spencer v Attorney General* [2013] NZHC 3 October 2013

<sup>187</sup> [2014] NZCA 516 at[56]

<sup>188</sup> ILO 100

<sup>189</sup> At [110]



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

The Employment Court decision was appealed to the Court of Appeal that dismissed the appeal. In the course of the judgment the Court affirmed:<sup>190</sup>

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

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

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

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

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

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<sup>190</sup> At [227]

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

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

<sup>193</sup> at 191

<sup>194</sup> Sir Ken Keith, (2013) "New Zealand and International Law: 1963-2013" 25 NZULR 718 at 736

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

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

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

### **3.8 The role of civil society**

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

### **3.9 The role of the NHRI**

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

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

<sup>196</sup> Vanushi Walters, "The Work of NGOs in Advancing Economic, Social and Cultural Rights", in Bedgood & Gledhill Above n 162, 389

<sup>197</sup> Geiringer & Palmer, above n 35

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

### **3.10 Conclusion**

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