



Fault lines:

Human rights in

New Zealand

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

5 Background

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

CEDAW was adopted by the United Nations General Assembly on 18 December 1979 by a vote of 130 states in favour, none against and 10 abstentions. It entered into force on 3 September 1981.²²⁵ It was a product of universal participation, drafted by the Commission on the Status of Women, whose members included representatives of Great Britain, United States and Canada, among others. The United Nations General Assembly adopted an Optional Protocol to the Convention, containing a procedure for consideration by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) of individuals' complaints of violations of CEDAW rights, as well as a procedure under which the Committee may undertake an inquiry into serious, 'grave or systematic' violations of the Convention rights by a State party.²²⁶

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

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

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

The Commission said:²²⁹

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

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

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

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

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

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

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

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

Also in 1984 the Ministry of Women's Affairs was established. A series of meetings held throughout the country to determine the priorities and work programme of the new Ministry sharpened some of the debate about the Convention. Nonetheless the Government ratified the Convention on January 10, 1985.²³² The ratification was subject to three reservations relating to women working in underground mines, to Article 11(2)b in relation to paid maternity leave, and women's service in armed combat roles in the Defence Forces. The reservations were lifted respectively in 1989, 2003 and 2007.²³³

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

5.1 Treaty body reporting

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

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

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

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

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

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

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

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

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

This research has paid specific attention to the issue of equal pay and pay equity²³⁵ in treaty body reporting and the influence of CEDAW on legislative change around paid parental leave.

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

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

Various International Labour Organisation (ILO) Conventions such as ILO C100, Equal Remuneration Convention and ILO C11, Discrimination (Employment and Occupation) Convention specify equal pay and pay equity obligations. Both the treaties on racial discrimination, the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) and on the rights of disabled people, the Convention on the Rights of Persons with Disabilities (CRPD), also refer to equal pay. New Zealand has ratified all of these treaties. In the case of the most recent convention, the CRPD, it led the international community in the development and acceptance of the treaty, providing further evidence of its positive self-image as a human rights leader.

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

5.1.1 First report, 1986

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

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

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

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

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

5.1.2 Second report, 1993

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

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

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

²³⁶ Committee on the Elimination of Discrimination against Women, 1988

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

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

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

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

5.1.3 Third and fourth reports, 1998

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

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

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

5.1.4 Fifth report, 2002

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

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

²³⁹ Committee on the Elimination of Discrimination against Women, 1998

²⁴⁰ Ministry of Women's Affairs, 2002

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

5.1.5 Sixth report, 2006

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

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

5.1.6 Seventh Report, 2010

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

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

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

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

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

²⁴¹ Committee on the Elimination of Discrimination against Women, 2003a

²⁴² Committee on Elimination of Discrimination Against Women, 2003b

²⁴³ Committee on the Elimination of Discrimination against Women, 2007

²⁴⁴ Committee on the Elimination of Discrimination against Women, 2010

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

5.1.7 Analysis of CEDAW reports on equal pay

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

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

5.2 Legislative change

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

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

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

²⁴⁵ Committee on the Elimination of Discrimination against Women, 2012

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

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

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

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

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

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

It is likely that paid parental leave will continue to be a feature of CEDAW treaty body reporting given New Zealand's low rate of payments by OECD countries' standards. Australia, which currently has two weeks more than New Zealand's 16 weeks at 18 weeks,²⁵⁰ intends to raise the period of paid parental leave to 26 weeks in 2014.²⁵¹ The New Zealand Government indicated paid parental leave cover would improve but it has also stated it would veto the Labour Opposition's Parental Leave and Employment Protection (Six Months Paid Leave) Amendment Bill that proposes 26 weeks leave. Of the 3,809 submissions to the select committee looking at this bill, 99.6 per cent favoured 26 weeks and women's civil society has coalesced around increased payments.

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

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

²⁴⁹ Interview with Joy Liddicoat for this research.

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

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

5.3 Use of human rights norms in policy and practice

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

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

My first memory of becoming the Government was the Governor of the Reserve Bank walking in saying 'the cupboard is bare. If you think as an incoming government that you can fulfil a whole lot of commitments, think again. There's been a run on the dollar and the economy is in an appalling shape.' For someone who had left a high-paying job as deputy chair of the Commerce Commission to enter politics with six years in Opposition working hard, this came as a cruel blow to me and to everybody.

So as new Ministers were sworn in our first jobs, the thought of setting up a new Ministry with no funding was a bit daunting. However, it was clear to me that from a strategic point of view we had made an absolute commitment to the electorate at large and had been elected with a significant women's vote. I believed that it was perfectly reasonable to assess that we were partly government on the backs of women, and therefore had to have the Ministry of Women's Affairs.

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

The first was with some of my colleagues including the former Prime Minister David Lange. Their commitment to equality of women, to feminism and their election commitment turned out to be a tad thin. I do not know to this day whether that was because of the thinness of their own commitment to the equality of women and the place of women in the Party, who some felt threatened by, or it was genuinely because the country could not afford it. The opposition was unhelpful particularly as I had three portfolios and had to negotiate through a number of difficult areas. I did not want the Ministry to be a trade-off.

The second battle occurred when I struck a brick wall from the State Services Commission which made it clear in a number of ways that it did not support small standalone Ministries. It tried very hard to persuade some of my less helpful colleagues that what we could do is just tuck into Internal Affairs or be a branch office of some kind. This undermining was absolutely improper on the part of public servants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.4 The use of CEDAW in judicial proceedings

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

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

²⁵⁹ Committee on the Elimination of Discrimination against Women (2012). *Concluding observations of the Committee on the Elimination of Discrimination against Women. New Zealand*. CEDAW/C/NZL/CO/7 [16]

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

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

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

5.5 Engagement of civil society

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.6 The role of the NHRI

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

²⁶⁰ E/CN.6/2008/CRP.1, Annex II.

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

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

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

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

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

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

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

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

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

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

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

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

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

5.7 Conclusion

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

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

²⁶⁶ Pillay, above n 76 at 66

²⁶⁷ New Zealand Human Rights Commission (2012) *New Zealand Census of Women's Participation, 2012*. Wellington. New Zealand Human Rights Commission.

²⁶⁸ Ford, above n 1 at 102

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

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

²⁶⁹ Above n 263

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

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