Fault lines:

Human rights in New Zealand

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Acknowledgements:

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

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Chapter Two The International Covenant on Civil and Political Rights (ICCPR)

2 Background

The international human rights framework has its origins in the UDHR. The Declaration is made up of a number of agreed humanitarian principles designed to provide the foundation for international peace and security. To make it legally binding, two mutually reinforcing treaties were developed - the International Covenant on Civil and Political Rights (ICCPR) which dealt with civil and political rights, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which addressed economic, social and cultural rights.

Drafting of the treaties began in 1951 but it was 1966 before agreement was reached on the texts and, although the treaties were adopted by the UN General Assembly and opened for signature in 1966, it was another decade before they came into force. New Zealand signed both Covenants in 1968 and ratified them in 1978.[55] Together with the UDHR they make up the International Bill of Rights.

The Human Rights Commission Act 1977 (the HRCA), which was enacted before New Zealand ratified the Covenants, was primarily an anti-discrimination statute that provided a mechanism for dealing with complaints of discrimination in certain areas on a limited number of grounds. Its introduction was timed to ensure that New Zealand had the necessary legislation in place to give effect to the rights in the treaties and provide an effective remedy if those rights were violated.[56] The HRCA, together with the Race Relations Act 1971 (which prohibited incitement of racial hatred), was considered to provide adequate protection for the rights in the ICCPR.[57] This was debateable. A number of the rights in the ICCPR were not reflected in domestic law until the introduction of the NZBORA in 1990 and even now not all the civil and political rights in the Covenant are available domestically[58]. It is also not entrenched – and therefore does not have the constitutional status that many consider such legislation should[59] - and lacks a remedies provision.[60]

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[55] The Conventions have a preamble in common. Articles 1, 3 and 5 are the same and article 2 guarantees the rights in the Covenants to everybody equally although article 26 ICCPR refers specifically to non-discrimination

[56] This was a precursor to what was to become best practice for ratifying a treaty. In 1997 the Foreign Affairs and Trade & Defence Select Committee reported to Parliament recommending that all treaties subject to ratification should be tabled in the house for approval and a National Interest Analysis (NIA) prepared which addresses the reasons for New Zealand becoming party to the treaty, the implications for New Zealand of becoming party, and the means of implementing the treaty. This is now reflected in the Standing Orders.

[57] Plus the 4 reservations

[58] While not all the rights in the ICCPR are reflected in the NZBORA – for example, the right to property; protection of the privacy of family, home and correspondence; the right to liberty and security of the person and a general right to equality are not included– there is a qualification in section 28 which states that "an existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part" – potentially enlarging the scope of the legislation. The permissible derogations in the Covenant are addressed through the s.5 process which allows restriction of the rights in the NZBORA if the restriction can be justified in a free and democratic society.

[59] See for example, Geoffrey Palmer *Bridled Power: New Zealand Government under MMP* (3d.) OUP, Auckland (1997) 282-283

[60] The Courts have developed a remedial jurisdiction in part by reliance on the reference to the ICCPR in the long title - for more on this see Rodney Harrison "The Remedial Jurisdiction for Breach of the Bill of Rights" in *Rights and Freedoms,* Huscroft & Rishworth, above at 405. Although the Courts have further developed *Baigent* style remedies, it is a moot point whether this is congruent with the treaty provision: Conte, A. *From Treaty to Translation: the Use of International Instruments in the Application and Enforcement of Civil and Political rights in New Zealand.* See also Elizabeth Evatt

2.1 Reservations

New Zealand entered four reservations to the ICCPR.

Reservation one: Age mixing

It reserved the right not to apply Article 10(2)(b) or Article 10(3) which require juveniles to be kept separate from adults in prison facilities where the shortage of suitable facilities makes it unavoidable; or where the interests of other juveniles require the removal of a particular juvenile offender or mixing is considered of benefit to the person concerned.

Reservation two: Ex gratia payments

The government reserved the right not to apply Article 14(6) to the extent that it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice.

Reservation three: Exciting hostility on the ground of race or national origin

Having legislated in the areas of advocacy of national and racial hatred and the exciting of hostility or ill will against any group or persons, and having regard to the right to freedom of speech, the government reserved the right not to introduce further legislation with regard to Article 20.

Reservation four: Trade union representation

New Zealand also reserved the right not to apply Article 22 relating to trade unions as it considered that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, were not fully compatible with that Article.

The existence of the reservations continues to concern not just the Human Rights Committee (the Committee) but other treaty bodies. For example, the CRC Committee has recommended that New Zealand should finalise its position on age mixing in prisons with a view to withdrawing the reservation. Although the Government's response has been positive and there are indications that adequate facilities are available, financial constraints continue to be cited as reasons for not being able to comply totally and remove the reservation.

In relation to the second reservation, the Government has stated that it is part way to removing the reservation by recognising the right to award compensation to torture victims. An award is at the discretion of the Attorney-General. Tony Ellis, a barrister who has taken a number of cases to the Committee – of which two have been successful, at least in part – considers that the need to obtain agreement of the Attorney-General is at odds with the government's most recent report in which it suggests that New Zealand complies for the most part with Art.14. He considers the State's position is further undermined by the way in which the Courts calculate the level of compensation for cruel and unusual treatment[61] and the Prisoners' and Victims' Claims Act 2005 which allows a prisoner's compensation for ill treatment to be awarded to his or her victim rather than the prisoner personally – a position defended by the State as consistent with the right to an effective remedy.

"The Impact of International Rights in Domestic Law" in *Litigating Rights: Perspectives from Domestic and International Law* (2002) Hart Publishing at 284

[61] *Taunoa v Attorney-General* [2006] 2 NZLR 457 (CA)

In relation to recommendations by the CERD Committee and the Committee for New Zealand to take steps towards removing the reservation on compliance with Article 20, the government has repeatedly asserted that the existing legislation is adequate because of ss.61 and 131.[62]

Finally the reservation relating to trade union membership has been an issue both under the ICCPR and ICESCR but the government appears to have little incentive to remove the reservation despite changes to the law introduced with the enactment and subsequent repeal of the Employment Contracts Act.

At the time of writing, none of the reservations have been removed despite recommendations by the Committee responsible for monitoring the ICCPR as well as by the CRC and CERD Committees. The Government continues to state that they are working towards removal. The list of issues identified by the Committee for answer in the sixth periodic report again asks whether the State envisages withdrawing its reservations and, if not, to provide detailed reasons why it does not intend to do so.[63]

2.2 The Optional Protocols

The two Optional Protocols to the ICCPR have both been ratified by New Zealand.

New Zealand acceded to the **First Optional Protocol** on 26 May 1989.The Optional Protocol allows citizens of countries that have acceded to it to submit complaints to the Human Rights Committee requesting a determination that they have been the victims of a violation by the State Party of any of the rights in the Covenant. The Optional Protocol can only be invoked when domestic remedies have been exhausted.

The Committee has released General Comment 33 on the obligations of State parties to the First Optional Protocol to the ICCPR.[64]In the General Comment the Committee emphasises the importance of the Committee's concluding Views in communications made to it under the Protocol and that "parties must use whatever means lie within their power in order to give effect to the Views issued by the Committee." Although the Committee has asserted that its Views are legally binding, this remains questionable.[65]A finding that there has been a violation does not mean that the relevant State party concerned is obliged to address it although it may be hard to reject, particularly if the State values the opinion of its international peers and the international

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[62] To some extent the position adopted by the Committee is validated by the fact that very few complaints relating to exciting racial disharmony are successful under the HRA as they rarely reach the threshold required when the right to freedom of expression is factored into the mix.

[63] CCPR/C/NZL/QPR/6 at [4]

[64] CCPR/C/GC/33

[65] Scott Davidson "Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee*"* [2001] NZ Law Review at 140. But see Geoffrey Palmer in "Human Rights and the New Zealand Government's Treaty Obligations*"* (1999) 29 VUWLR at 68 quoting Cooke, P in *Tavita v The Minister of Immigration* [1994] 2 NZLR 257 in which His Honour was considering the Optional Protocol and the right to submit a communication to the Committee and observed it was "in substance a judicial body of high standing" and that it was "in a sense part of this county's judicial structure ... A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them". He does, however, go on to say that this approach did not enjoy "enthusiastic endorsement" by Ministers or their advisers. In *Tangiora v Wellington District Legal Services Committee* (1999) 5 HRNZ 201 the Privy Council stated (albeit obiter) that there is much force in the argument that the UN Human Rights Committee has an adjudicative function "...when the Committee reaches a decision that a party is in breach of its obligations under the ICCPR, it has made a definitive and final ruling which is determinative of the issues concerned."

opprobrium or censure that could result from non-compliance by a country that boasts of its human rights record. Self-evidently, compliance is necessary to render the Optional Protocol effective.

In an article written in 2001 (and before the Committee had found any violations in relation to New Zealand), Scott Davidson speculated on the government's response in the face of an adverse ruling and noted that unless the Committee was manifestly wrong or had acted in bad faith: [66]

> *…it would seem politically unwise to argue that such views are not technically legally binding on the state, especially since the State is able to muster all of its legal resources to contest any communication.*

Since ratifying the Optional Protocol, 23 complaints against New Zealand have been considered by the Committee.[67] Most have been dismissed as inadmissible or no violation has been found, although at least one of these was considered to have made a significant contribution to the Committee's jurisprudence.[68]

Three communications have found violations of the Covenant:

In ***Rameka et al v New Zealand***[69] the authors had been sentenced to preventive detention for serious sexual offences. They argued that the principles directing the sentencing were vague and arbitrary because they imposed a discretionary sentence on the basis of evidence of future dangerousness which was difficult to predict. They also claimed that there was insufficient regular review of their condition and detaining them on the basis of future offending violated the presumption of innocence – two factors that had concerned the Committee when considering New Zealand's third periodic report on compatibility of the preventive detention regime and Arts. 9 and 14 of the Covenant.

The Committee dismissed the claims of two of the authors that their detention was arbitrary but found that the inability of the remaining complainant to challenge the existence of substantive justification for his continued detention for preventive reasons amounted to a violation of his right under Art. 9(4). It required the New Zealand Government to provide him with an effective remedy including the ability to challenge the justification for his continued detention once his actual sentence had been served and to ensure that the situation did not arise in the future. The Government was asked to provide evidence within 90 days about the measures taken to give effect to its Views.[70]

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[66] Davison above at 144. The author also suggests that if New Zealand has concerns about the way in which the Committee operates (see Don MacKay, "The UN Covenants and the Human Rights Committee" (1999) 29 VUWLR 11) it should promote vigorous debate about human rights within New Zealand, and for every area of government, especially the Executive, to take its responsibilities seriously.

[67] See appendix 3 which lists the communications from New Zealand and provides some indication of the length of time it takes for the Committee to hear a case.

[68] *Drake v New Zealand* Communication no. 601/1994 (1997) was a claim of violation by New Zealand of Arts. 2(3) & 26 The authors had been detained by the Japanese in prisoner of war camps and alleged that, by entering into a peace treaty with Japan releasing the Japanese from further reparation obligations, NZ had violated the ICCPR because it had failed to provide appropriate compensation for the disabilities and incapacities suffered by the authors.

[69] CCPT/C/79/D/1090/2002 (views adopted 6 November 2003)

[70] The Committee's response has been criticised as having major deficiencies because of its lack of understanding of the complexities of the sentencing regime in New Zealand. Claudia Geiringer *Case Note: Rameka v New Zealand* (2005) 2

The government's response was to amend s.25(3) of the Parole Act which allowed the Minister of Justice to designate certain classes of offenders who had not reached the date at which they were eligible for parole for early consideration by the Parole Board. This led to review of the justification for continued detention for preventive purposes. The designation under section 25(3) would ensure that the author had the ability to challenge his continued detention when the notional finite sentence period mentioned in the Court of Appeal judgment had expired. In relation to future violation, the designation under s.25(3) of the Parole Act would ensure that there was no violation in relation to other offenders in a similar position to the author. The government also advised that the law on preventive detention had been amended since the author was sentenced. Under the Sentencing Act 2002 the Court is required to make an order at the time a sentence of preventive detention is imposed as to the minimum period of detention, which must be for a period of not less than five years. The offender becomes eligible for regular review of their sentence once the minimum period of detention has expired.

In ***EB v New Zealand***[71], the Committee found there had been a violation of Art.14 of the ICCPR. EB had brought a claim alleging that New Zealand had violated arts. 2,14,17,23, 24, and 25 of the Covenant by denying him access to his children after prolonged proceedings in the Family Court. In its decision, the Committee said that New Zealand had an onus to ensure prompt resolution of such proceedings and concluded the State had not demonstrated justification for the protracted delay in the resolution of the access proceedings.

The Committee concluded that the Family Court's decision not to grant EB access to two of his children did not violate his rights as a father under arts. 17 and 23 of the Covenant. One of the Committee dissented from the views of the majority on Art.14. The Committee member considered that the Committee had given insufficient weight to the wider factual context relating to the dispute including allegations of sexual assault and the gravity of potential harm to the child was a factor weighing in favour of lengthier proceedings. It had also failed to take into account the difficulties in case management where there are parallel criminal and civil proceedings. She concluded that it was not appropriate for the Committee to "deride the conscientious attempt of the state party to reach a just result in this case."

The government did not accept the Committee's View that there had been a breach of art.14 but that of the dissenting member of the Committee. It noted that the Family Court was running a pilot scheme aimed at resolving cases in a less adversarial manner and reducing delay by shortening families' involvement in litigation. It repeated this position at the country examination in 2010. Among the list of issues to be answered in the sixth report, the Committee has asked for information about the case flow management system and, again, what had been done to implement the Committee's views (including the provision of reparation).[72]

Dean v New Zealand[73]also involved a sentence of preventive detention and alleged violation of Art. 9(4). The author had been convicted of a serious sexual offence carrying a maximum penalty of seven years imprisonment. However, because of his demonstrated and substantial risk of reoffending, he was sentenced to preventive detention. As a result he was not eligible for

NZYIL 185. She attributed this in part to limited resources and the fact that treaty body members are not paid for their services

[71] CCPR/C/89/D/1368/2005 (views adopted 16 March 2007)

[72] Which the Committee appears to equate with the provision of an effective remedy

[73] CCPR/C/95/D/1512/2006 (views adopted 17 March 2009)

consideration for release on parole at the time the applicable sentence would have expired. Following its decision in *Rameka,* the Committee concluded that the ineligibility for parole was contrary to Article 9(4), confirming however that the sentence of preventive detention does not in itself amount to a violation of the Covenant.

The Government reaffirmed its position in *Rameka*, noting that the measures taken to remedy the situation in that case applied to Mr Dean's situation although also observing that the Committee had misunderstood the period after which he was eligible for parole consideration. Dean's situation was reviewed on numerous occasions but parole was declined on each occasion on the basis that he continued to pose an undue risk to the community and had chosen not to undertake necessary rehabilitation plans. Given this the Government considered that the violation of Article 9(4) did not amount to arbitrary detention and compensation or some other additional remedy was unnecessary. Further the systemic measures introduced in 2004 (as a result of *Rameka*) ensured the violation would not be repeated.

The **Second Optional Protocol** relates to the abolition of the death penalty. The Optional Protocol was adopted by the UN General Assembly in 1989 and came into force in July 1991. New Zealand ratified the Optional Protocol on 22 February 1990.

2.3 Reporting

New Zealand has reported on the Covenant five times. As with the other treaties, the country reporting has tended to focus on descriptions of what has been done, or plans for doing it, rather than actual achievements, even though the obligations of the Covenant at international law are *obligations of result, not conduct; of ends, not means.*[74]

The Committee itself has consistently emphasised structural matters (i.e. *de jure* compliance) over *deacto* compliance. The lack of emphasis on outcomes and the failure to follow up on the Government's response in particular situations is most obvious in issues such as the impact on labour relations following the introduction of the Employment Contracts Act. The Committee was content to accept the answers provided by the government at face value rather than questioning how it impacted on affected employees.[75] This highlights the important role that Civil Society and National Human Rights Institutions can play in ensuring the Committee is adequately informed. It also reflects the Committee's increasing concern about an adequate mechanism for disseminating the concluding comments, given that such comments can help NGOs, in particular, hold the government accountable for commitments they have made internationally.

2.4 Government response to committee's concluding recommendations

The Concluding Observations and Recommendations have been criticised as reflecting a poor understanding of the New Zealand context and legislative framework, particularly where it is obvious the Committee members cannot identify with the substance of the matters before them.

However, New Zealand is not the only country which this applies to. There have been difficulties with the concluding comments generally, causing Navanethem Pillay, the UN High Commissioner for Human Rights, to suggest that they could better fit the particular situation of the State they are

[74] Ken Keith "The New Zealand Bill of Rights Act 1990 – An account of its preparation" (2013) 11 NZJPL 3 at 11

addressing,[76] focus more on priority concerns and be more user-friendly for State parties, as well as for stake holders that might monitor implementation of the process.[77]

The country reports themselves also inevitably influence the final recommendations.[78] In the earlier reports it was clear from the questions asked that the Committee did not have sufficient understanding of the domestic context. This has been addressed to some extent in MFAT's Core document, but the reports can still misrepresent the actual situation or provide selective material.[79] While reporting has become increasingly more sophisticated it still focuses principally on what is being done or planned, rather than providing a realistic description of the situation on the ground. As Sir Geoffrey Palmer commented to one of the authors "*we spoke a good game but we did not observe a good game".*

The following examples provide an indication of how New Zealand has responded to specific requests by the Committee.

2.4.1 New Zealand Bill of Rights Act (NBZORA) – Entrenchment and provision of a remedy

Appropriate reflection of the rights in the ICCPR in domestic legislation is a constant theme in the Committee's Concluding Observations. Beginning with the earlier reports calling for a Bill of Rights to set the constitutional framework,[80] the Committee has refined its questions in relation to Art.2, seeking clarification on the vetting of inconsistent legislation, the ability of the Courts to issue formal declarations of incompatibility and the absence of remedies in the NZBORA.[81] In response the Government has variously reported that there was public resistance to entrenchment, further consultation was necessary and that the vetting role under s.7 NZBORA was adequate.

In relation to the question of introducing statutory provision for a declaration of incompatibility, the government has relied on the approach of the Court of Appeal to ss.4, 5 and 6 NZBORA in *Moonen v Film and Literature Board of Review*[82]as a valid remedy. The Court in *Moonen* observed that if a provision in an enactment conflicted with the NZBORA and could not be interpreted consistently with the Act or justified under s.5 (i.e. amounts to a reasonable limitation in a free and

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[76] Navanethem Pillay (2010) *Strengthening the United Nations Human Rights Treaty Body System: A report by the United Nations High Commissioner for Human Rights* (2010) at 4.2.6

[77] The current UPR process (discussed at chapter 8) is seen as a way of better monitoring the realisation of human rights on the ground.

[78] Jasper Krommendijk "Can Mr Zaoui Freely Cross the Foreshore and Seabed? The Effectiveness of UN Human Rights Monitoring Mechanisms in New Zealand" (2012) 43 VUWLR at 601; McKay, above n 66 at.12

[79] Other issues that have been identified as affecting the quality of the recommendations include inadequate funding of the treaty bodies; insufficient engagement by individual States despite formal commitments to a treaty; failure to implement treaty body recommendations; fragmentation of treaty body system with the result that concluding observations can be inconsistent between different treaties even though dealing with the same subject matter and lack of visibility of and accessibility of the system itself: Amrei Muller & Lisa Seidensticker, *The Role of National Human Rights Institution in the United Nations Treaty Body Process*, (2007) German Institute for Human Rights, at 30: accessible at www.institut-fuer-menschenrechte.de

[80] Janet MacLean considers there are three reasons for the Committee adopting the view that it does: first, it is possible to pass laws in New Zealand that are inconsistent with rights protected by international conventions; second, remedies for individuals are linked to or depend on the ability to invalidate primary legislation; and that courts are considered to provide better human rights protection than legislatures: "Legislative Invalidity, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] *NZ Law Rev* at 424

[81] For example, the lack of a remedy was the subject of criticism by the Committee to New Zealand's third report. In response the fourth report simply outlined the legislation which protected human rights in New Zealand rather than addressing the lack of a remedy in the NZBORA

[82] [2000] 2 NZLR 9

democratic society), then it must be given effect to irrespective of the inconsistency but the Court is able to issue a declaration advising that, although the enactment must be given effect, it is inconsistent with the right(s) or freedoms(s) contained in the NZBORA. Whether this is what the Committee considers an effective remedy is contestable and even local academics and commentators are divided on whether this is a valid power.[83]

The inadequacy of the responses is reflected in the most recent list of issues for the sixth periodic report[84]which has again asked the Government to identify what measures had been taken to strengthen the NZBORA to revise laws that have been enacted but are inconsistent with that Act.[85]

2.4.2 Article 20 – advocacy of racial hatred

The reservation relating to Article 20 involves the incitement of racial hatred. Article 20(2) of the ICCPR establishes that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law'. Advocacy of national, racial or religious hatred itself is not a breach of Art.20 of the ICCPR. It only becomes an offence when it amounts to incitement. That is, when the speaker seeks to provoke reactions on the part of the audience and there is a close link between the expression and the resulting risk of discrimination, hostility or violence.[86]

Under Article 4 of CERD State Parties are required to make an offence punishable by law of (i) disseminating ideas based on racial superiority or hatred, (ii) inciting racial discrimination, (iii) inciting acts of violence against any race or group of person of another colour or ethnic origin, and (iv) participating in organisations and propaganda activities which promote and incite racial discrimination. Before New Zealand ratified CERD it introduced the Race Relations Act 1971 and a provision which criminalised incitement of racial disharmony.

General Comment 11[87]stipulates that to be fully compliant with the Convention States need to have a law making it clear that propaganda and advocacy as described in the Covenant are contrary to public policy and that an appropriate sanction in case of violation of the Article is available. On ratifying the Convention the New Zealand Government reserved the right not to legislate further in relation to advocating racial or religious hatred because it had done so under Art.4 of CERD with the introduction of section 131 of the Human Rights Act 1993 (or more accurately its predecessor).

In the context of the third report the Committee expressed concern about the non-inclusion of advocacy of religious hatred in the HRA. The Government's response in the fourth report suggested that the NZHRC had advised that such an amendment was unnecessary as New Zealand was not experiencing difficulties and the Commission had not received any significant complaints. Despite this, the fifth report noted the Government Administration Select Committee's inquiry

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[83]Claudia Geiringer, "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" VUWLR (2008) cf. Andrew Butler, "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" NZ Law Rev [2000] at 43. Since *Moonen* the Court has not only faced argument from Crown counsel that such a remedy does not exist, but has also refused to confirm the existence of such a remedy: Andrew Butler & Petra Butler, *The New Zealand Bill of Rights Act: A Commentary (*2005) LexisNexis at 1111

[84] CCPR/C/NZL/QPR/6

[85] at [6]

[86] Special Rapporteur on Freedom of Expression at [28]

[87] *www.ohchr.org/Documents/Issues/.../CCPRGeneralCommentNo11.pdf*

into the laws on hate speech and whether or not further legislation was warranted. The Inquiry was discontinued with the incoming Government, a fact that went unremarked by the Committee when it was omitted in the following report.

The list of issues for the next report on the Covenant again includes questions on whether the Government envisages withdrawing its reservations to the Covenant and if not, asking for detailed reasons why not, along with information on how the reservations are compatible with the object and purpose of the Covenant and, more specifically, whether measures were being taken to address the problem of incitement to racial hatred on the internet.[88]

2.4.3 Lack of enjoyment of Covenant rights by Māori

Concern at the status of Māori as a disadvantaged group is also relatively consistent.

How compliance with articles which apply across different treaties is assessed - particularly articles such as Arts.2 and 26 in ICCPR which relate to non-discrimination - inevitably raises questions about Māori and Pacific inequalities in relation to social and economic rights such as education and health. Conceptually, there are problems in such cases given the nature of the treaties (e.g. the notion of progressive realisation in ICESCR compared to immediate realisation of civil and political rights in ICCPR). In theory it is easier for the State to answer questions about compliance with ICESCR because it can always argue that it recognises there is an issue but is attempting to deal with it. Identifying programmes and policies designed to address an issue are often considered sufficient to demonstrate that the State is realising the right but as one commentator noted, "*The enjoyment of the right is less important than the fact that means had been identified to effect that enjoyment.*"[89]

At New Zealand's most recent examination the Committee asked the Government very specific questions on this point. For example, what measures had been taken to address the high level of incarceration of Māori, in particular women? Had the State fixed specific targets and timelines for reducing the high number of Māori in prisons? What measures had been taken to reduce levels of reoffending by Māori? The response again was to describe various programmes without answering the specific questions, leading the Committee to conclude that New Zealand should strengthen its efforts to reduce the over-representation of Māori, in particular Māori women, in prisons and continue addressing the root causes of this phenomenon. The Committee also suggested it should increase its efforts to prevent discrimination against Māori in the administration of justice, and law enforcement officials and the judiciary should receive adequate human rights training, in particular on the principle of equality and non-discrimination.

For the next report the Committee has asked New Zealand to provide an update on achievements of various initiatives aimed at reducing the disproportionately high incarceration rate of Māori, particularly Māori women, and information on whether there has been an improvement in the underlying social causes and concerns regarding discrimination in the administration of justice that is responsible for the high proportion of Māori among accused persons and the victims of crime.

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[88] CCPR/C/NZL/QPR/6 at [12]

[89] Ann Janette Rosga & Margaret L Satterthwaite, "The Trust in Indicators: Measuring Human Rights", Berkley Journal of International Law, Vol.27:2 [2009] at 266

2.4.4 Role of NHRISs in the treaty body process[90]

NHRIs play a significant role in the treaty reporting as they can highlight issues of concern thereby allowing States to be held to account for matters that may otherwise not be raised before the Committee.[91]They provide a vitally important contribution that complements and widens the policy discourse, resulting in better and more legitimate decisions clarifying the realities of the domestic situation.

The role of NHRIs and their relationship to the international human rights mechanisms is outlined in the Paris Principles.[92]A NHRI's contribution to the reporting process can include providing information for preparation of the list of issues and in the follow up to the Concluding Observations. Receiving information from NHRIs at an early stage is considered critical as it provides the Committee with an evaluation of how well the State is complying with implementing the committee's recommendations. NHRIs are encouraged to submit shadow reports and NGOs to submit their own reports. To help them carry out these roles the Committee secretariat has undertaken to inform NHRIs in a timely manner when there are opportunities for them to contribute.[93]

The NZHRC has only engaged with the treaty reporting process (including the ICCPR) in any meaningful manner over the past decade. The Commission provided its own report to the 2010 examination and has commented on drafts of the country reports. It also met with representatives of the Ministry of Justice to discuss the response to the list of issues for consideration at the fifth periodic report in 2010. As part of its role in promoting the Concluding Comments, the Commission refers to the Recommendations and concluding comments of the Treaty bodies in submissions to Select Committees and in its own publications such the 2004 and 2010 reports on the state of human rights in New Zealand.[94]

2.4.5 Involvement of civil society

NGOs play a critical role in the monitoring of state compliance as they can provide the Committee with valuable information about the situation on the ground and lobby the State to ensure follow up to the recommendations. The increasing number of NGOs that have become involved in the treaty body reporting is a comparatively recent phenomenon and many are still on a learning curve. As an NGO attendee at the recent CEDAW examination commented:[95]

> *The take home lesson I learnt (from attending) was the need for absolute rigour in shadow reporting. Anecdotal and unsubstantiated comments just don't cut it and anything you have to say has to really be supported and demonstrated with a rigorous evidence base. That's a real*

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[90]The mode of interaction differs between treaty bodies, for example, the CERD Committee involves NHRIs in their official sessions. Other committees involve NHRIs and NGOs in a more informal way, engaging with them outside the official meetings. An NHRI will generally have speaking rights if it is accredited by the International Co-ordinating Committee of NHRIs.

[91] NGOs can also overemphasise particular issues and mislead the Committee, e.g. the CEDAW Committee's most recent comments on forced marriage following a report by Shakti which led to recommendations about reform of the Marriage Act in New Zealand

[92] OHCHR *Information Note: National Human Rights Institutions (NHRIs) interaction with the UN Treaty Body System*, 5 April 2011 at 3

[93] CCPR/C/106/3: *Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session (15 October – 2 November 2012)*

[94] NZHRC: *Human Rights in New Zealand: Nga Tika Tangata O Te Motu* (2004); *Human Rights in New Zealand 2010: Nga Tika Tangata O Aotearoa*

[95] Christy Parker an NGO attendee at the CEDAW examination in an interview with the author

challenge when a lot of the issues that we're trying to report on feel a bit amorphous or emergent and we don't always have the evidence to support them ... you also need to select your issues. The thinner you spread yourself over a range of issues, the less traction you get from the Committees. It is incredibly difficult to get consensus from the NGO community but you could use the treaty body process more strategically to get greater traction.

As part of the initial consideration of the fifth report on the Covenant, four local NGOs submitted reports to the Committee, as well as one international NGO (Amnesty International) and one private individual (Tony Ellis).

The input of both NHRIs and NGOs is considered essential if the treaty bodies are to be fully informed about the true nature of the human rights situation in New Zealand. The UPR system (which is discussed later) reinforces the roles of both NHRIs and NGOs by creating a specific mechanism for their participation. The impact that NHRIs and NGOS can have on the Committee's deliberations can be seen in the following chart which identifies the most recent list of issues and the recommendations made by the Human Rights Commission and different NGOs.

Table 2. List of issues for sixth periodic report and those identified by HRC and NGOs

Issue	HRC	NGOs
Info on significant legal developments including case law		
Significant policy measures		
Measures to disseminate recs.		
Withdrawal of reservations		☒
NPA	☒	
Strengthen & ensure consistency with BORA	☒	☒
Update on compliance with Views under OP		
Designations under Terrorism legislation		
GCSB & privacy	☒	
National security & telecommunications Act	☒	
Closing equal pay gaps & women in managerial positions	☒	
Racial stereotypes /racial hatred on internet/ inequalities of Māori in employment & education	☒	
Elimination of violence against women		
Use of tasers	☒	☒
Prosecution under Op 8	☒	
Non-refoulement & detention of mass arrivals	☒	☒
Combating trafficking		☒
Drug possession & presumption of innocence	☒	
Privatisation of prisons	☒	☒
Resourcing of Waitangi tribunal		
Reduction of Māori women in prison	☒	
Measures to combat child abuse		☒
Underage & forced marriage in immigrant communities		☒
Extinguishing of Māori rights in Marine & Coastal Area legislation		☒
Use of TOW in domestic law		☒
Equal participation of Māori in local govt.	☒	☒
Effective decision making involving Māori		☒

2.5 Domestic application of the Covenant by the courts[96]

The use of the international treaties by the courts in interpreting legislation is a reflection of their acceptance and impact domestically.

As a matter of international law New Zealand is required to give effect to the standards in the Covenant, however the fact that international treaties are usually not incorporated into New Zealand law means - on one view - that they are not directly enforceable by local Courts.[97]Most of the human rights treaties are not specifically referenced in domestic legislation. The exceptions are the Commissioner for Children Act 2003 which refers to the Convention on the Rights of the Child in the purpose statement, the Immigration Act 2009, of which Part 5 refers to codification of New Zealand's obligations under the ICCPR, and the long title of the NZBORA which was enacted to "affirm New Zealand's commitment to the ICCPR" – even though (as noted earlier) not all of the rights in the Covenant are found in the NZBORA and there is no provision for a remedy – an essential requirement of the Covenant.

The use of the international instruments as interpretative aids by the Courts has changed significantly since the days of *Ashby v Minister of Immigration*[98]when Richardson J stated that "if the terms of domestic legislation are clear and unambiguous they must be given effect in our Courts whether or not they carry out New Zealand's international obligations." Although Courts were referring to the Covenant before the NZBORA was enacted,[99] it has been increasingly referenced in the years since[100]and it is now accepted practice for the judiciary to strive to interpret legislation consistently with New Zealand's treaty obligations if possible.[101]

Over the past decade the Courts have been more willing to accept that international treaty law can be used to supplement interpretation of domestic statutes – particularly in the case of human rights treaties which are considered to have a special status because of the nature of the rights that they protect. Cartwright J, for example, observed on a number of occasions that the long title of the NZBORA is quite transparent in acknowledging its genesis in the ICCPR and the intention of encapsulating the principles in the Covenant.[102] Some decisions (notably *R v Goodwin*[103]*, Simpson v*

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[96]The cases examined were limited to those reported in the NZLR and HRNZ.

[97]This situation also highlights the distinction between the theory of dualist and monist approaches although in the author's view this is far from conclusive in how the judiciary has responded to international treaties. See also the comments by Sir Geoffrey Palmer in "Human Rights and the New Zealand Government's treaty obligations" (1999) 29 VUWLR 57 at 60

[98] [1981] 1 NZLR 222, 229 (CA)

[99] See, for example, *Broadcasting Corporation of New Zealand v A-G* [1982] 1 NZLR 120; *R v Uljee* [1982] 1 NZLR 561

[100] Of all the treaties the ICCPR has been cited most frequently in New Zealand courts. At the time of the fifth report, there were 156 judgments of the superior courts that mentioned the ICCPR: *Replies to the List of Issues to be taken up in Connection with the Consideration of the fifth Periodic Report of New Zealand*

[101] This is consistent with the New Zealand Law Commission's prediction in *Report 34: A New Zealand Guide to International Law and its Sources* (1996) at para [71] that in future Courts may be willing to have regard to a treaty in interpreting legislation, even if the treaty has not been incorporated into national law or the treaty did not exist when the statute was enacted. For a discussion on this latter point see *Smith v Air New Zealand Ltd* [2011] NZCA 20; [2011] 2 NZLR 171 at [25] where the Court was required to construe the reasonable accommodation provisions in the Human Rights Act in accordance with the recently ratified Convention on the Rights of Persons with Disability.

[102] *Bailey v Whangarei District Court* (1995) 2 HRNZ 275, 287; *NRHA v Human Rights Commission* (1997) 4 HRNZ 37(HC)

[103] [1993] 2 NZLR 153 (exclusion of evidence/rights of persons detained)

A-G[104], *R v Poumako*[105], *Hosking v Runting*[106], *Taunoa v A-G*[107], *R v Mist*[108]and *Ministry of Health v Atkinson*[109]) have made a significant contribution to the development of the law. Apart from this, a review of cases where the ICCPR has been referred to suggests that in many cases its use remains relatively superficial.[110]

The majority of references to the Covenant have been in relation to criminal matters rather than the more substantive rights[111]and where such rights have been invoked, the Courts' approach has been relatively conservative. An example of this is *Shortland v Northern Health Ltd*[112]which involved a decision not to provide access to life saving dialysis treatment. Although the decision complied with medical and ethical guidelines, Mr Shortland sought unsuccessfully to argue that the denial amounted to a breach of the right not to be deprived of life under s.8 NZBORA. In interpreting s.8 the Court of Appeal invoked Article 6(1) of the ICCPR which states:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be ***arbitrarily*** *deprived of his life* (emphasis added by the Court).

The right to life in Art.6 (and by extension s.8 NZBORA) was also relied on in a case involving the impact of the housing restructuring in the 1990s on low income tenants. Although *Lawson v Housing New Zealand*[113]was more properly classified as an economic and social issue, Mrs Lawson argued the ICCPR was relevant because civil and political rights could only be enjoyed if conditions (such as adequate affordable housing) were created for their enjoyment. The High Court found that "*it was unduly strained to construe the right not to be deprived of life under s.8 as including the right not to be charged market rent ...*"[114]but even if it was wrong about this, the Court considered that the policy could be justified under s.5. The Court went on to elaborate on the implications of the international instruments for the formulation of policy and the role of the court in assessing compliance with the resulting obligations, noting that "*Whether New Zealand has fulfilled its international obligations is a matter on which it may be judged in international forums but not in this Court*".[115]

By contrast, in *R v Bain, application by Television New Zealand*[116] a question arose about lifting a suppression order in the interests of open justice and freedom of expression. In examining the issue, Keith J noted that the openness of the justice system was mandated by both s.25(a)

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[104] [1994] 3 NZLR 667(unreasonable search and seizure/ right to an effective remedy)

[105] [2000] 2 NZLR 695 (retrospective penalties)

[106] [2005] 1 NZLR 1 (right to privacy /omission in NZBORA)

[107] [2008] 1 NZLR 429 (cruel and unusual punishment /right to be treated with humanity and dignity/appropriate remedy)

[108] [2006] 3 NZLR 145 (retrospective penalty)

[109] [2012] 3 NZLR 456 (equality rights)

[110] See Andrew Butler and Petra Butler "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173

[111] There have been 13 references to liberty and security of the person (art.9) and 31 to rights of persons charged with an offence (art.14) compared to Art.6 (right to life) which was only invoked 6 times

[112] [1998] 1 NZLR 443. See also *CPAG v A-G* [2013] 3 NZLR 729 in which CPAG argued that the lack of consideration of New Zealand's international commitments should result in less deference to the government's choice of a measure to alleviate child poverty. The Court noted that while that was important, the key focus was whether the right to discrimination was minimally impaired

[113] [1997] 2 NZLR 474

[114] at [50]

[115] at [40]

[116] 22/7/96 (CA 255/95)

NZBORA and art.14(1) of the ICCPR and relied on them to allow the removal of the order following conclusion of the criminal trial process. He subsequently commented that *"... in this case the provisions of the Bill of Rights, the Covenant and indeed basic common law principles were aligned"*.[117]

As noted already, David Erdos has suggested that the dichotomy which results in civil liberties being considered as more legitimately falling in the domain of the judiciary than public law anti-discrimination claims relating to social policy, is probably predictable, reflecting as it does "*a British-descended judicial culture that prioritises, first, those civil liberty values already cognizable by the common law and, second, rights connected with the policing of parliamentary and legal processes"*.[118] If this is indeed the case, then it may also explain to some extent the significantly greater number of references to the ICCPR than the ICESCR in judicial proceedings.

The ICCPR has also shaped other legislation which does not directly refer to the Covenant such as the Mental Health (Compulsory Assessment and Treatment Act) (MHCAT Act) the long title of which refers to defining the rights of people who fall within the MHCAT Act and is designed to afford better protection for those rights. Part 6 of the Act is dedicated to the rights of patients and must be interpreted consistently with the NZBORA.[119] Again Cartwright J in an early decision under the MHCAT Act held that the legislation should be interpreted consistently with the standards in the international instruments, particularly the right to be treated with dignity and respect if detained[120]and to comply with procedural requirements to prevent allegations of arbitrary detention.[121]

2.6 Use of General Comments

General Comments are statements issued by the Treaty Bodies on a specific article or general issue which are designed to clarify the scope and meaning of the provisions in a particular treaty and help States in implementing it. They are considered the definitive legal interpretation of the application of the treaties and can be a useful tool for the Courts in deciding the meaning of statutory provisions which have their origins in the international treaties.[122]

Possibly the most extensive discussion on the application of a General Comment is found in *Quilter*[123]where the Court referred to General Comment 18[124]in an effort to define the meaning of discrimination in relation to same sex marriage. Three of the five judges referred to the Covenant and General Comment, albeit arriving at different conclusions. Thomas J, in particular, relied on the international material for assistance to identify the underlying nature of discrimination. In doing so he explicitly endorsed a "progressive" and modern interpretative approach to discrimination[125]that required s.19 of the NZBORA to be interpreted consistently with the "*principles of equality before the law, the equal protection of the law and the prohibition of discrimination underlying*

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[117] Ken Keith, *Application of International human rights Law in New Zealand*: paper given at the Judicial Colloquium on the Domestic Application of International Human Rights Norms in Guyana, September 1996 at 13

[118] Erdos, above n 28, 95-127

[119] *PS v North Shore Family Court [Mental Health: examination by judge]* [2011] NZFLR 647

[120] *Innes v Wong* [1996] 3 NZLR 238

[121] *PS* [2011] NZFLR 647

[122] Butler & Butler, above n 83, note that while there have been a large number of references to the ICCPR itself in decisions rendered by the New Zealand Courts, reference to the General Comments and jurisprudence of the HRC has been significantly less frequent: 3.6.21

[123] *Quilter v Attorney-General* [1998] 1 NZLR 523

[124] Human Rights Committee *General Comment No.18: Non-Discrimination,* 37th Session, 9 November 1989

[125] *Quilter* above n125 at [35]

art.26 and confirmed by the Human Rights Committee".[126] A similar approach was also adopted by Tipping J who noted that the committee's approach to the concept of discrimination was of direct relevance to New Zealand jurisprudence on the subject.[127]

The same General Comment was also used to interpret discrimination in a more recent case. *Ministry of Health v Atkinson*[128] involved a Ministry policy that prevented family members from being paid to care for their adult disabled children. The policy was found to discriminate on the grounds of family status, the Court of Appeal citing with approval the General Comment. In *Shortland*[129] the Court of Appeal referred to General Comment No. 6[130] to explain the duty imposed by s.8 of the NZBORA - possibly because it is more explicit about the ability to limit the right than the balancing exercise in s.5 NZBORA - and the High Court in *Martin v Tauranga District Court*[131] referred to a General Comment of the Committee (in this case, General Comment 13) as instructive on how similar matters had been treated in international forums.

A number of decisions by the Human Rights Review Tribunal have also invoked the General Comments to explore the meaning and extent of ICCPR rights.[132] Three recent cases - *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland*[133], *Nakarawa v AFFCO New Zealand Ltd*[134] and *Meulenbroek v Vision Antenna Systems Ltd*[135] - required the Tribunal to consider accommodation of the right to manifest one's religion and the right to freedom of thought, conscience and religion (one of the few non-derogable rights in the Covenant). Reference to the international comments was considered by the Tribunal to be compatible with the purpose of protecting human rights in New Zealand consistently with the long title to the HRA.

2.7 Intervention in legal proceedings by the NZHRC

The NZHRC's litigation powers were increased with the 2001 Amendment to the HRA as a way of complementing the tools available for use in its human rights advocacy and educative functions.[136] It was given the power to join litigation as a party as well as appear as intervener or amicus where complaints were of particular public importance. This is consistent with - and in some sense anticipatory of - developments in other common law jurisdictions where there have been moves to accommodate third party interventions in human rights litigation in the public interest.[137]

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[126] At [40]

[127] At [20]

[128] [2012] 3 NZLR 456

[129] *Shortland* above n 114 at [57]

[130] Human Rights Committee *General Comment No.6: Article 6 (the right to life)* HRI/GEN/1/Rev.9 (Vol.1)

[131] [1995] 1 NZLR 490

[132] This is a marked change from the previous Tribunal which in at least one case dismissed international references stating the reality is that the tribunal had to work with the legislation as enacted in New Zealand: *Trevethick v Ministry of Health (No. 2)* HRRT 13/2006 citing *BHP New Zealand Steel Ltd & Anor v O'Dea* [1997] ERNZ 667 although this was arguably because the decision focused on the wording of disability in the HRA. The Tribunal noted that in another case "argument about how the legislation ought to be interpreted might very well be assisted by reference to all the material and conventions canvassed in argument": at [35]

[133] [2013] NZHRRT 36

[134] [2014] NZHRRT 9

[135] [2014] NZHRRT 51

[136] Confidential draft to cabinet: *The Human Rights Commission's Litigation Powers*

[137] Sangeeta Shah, Thomas Poole & Michael Blackwell, "Rights, Interveners and the Law Lords" Oxford Journal of Legal Studies, Vol.34, No.2 (2014) 295-324 at 297

Over the past decade the Commission has increasingly intervened in cases where human rights issues have been raised. Consistent with its role in the long title, the Commission raises the international standards where relevant in its submissions. This has given greater prominence to the international treaties and in some cases dictated or contributed to a "rights consistent" outcome. For example, in *Atkinson*[138]the Court of Appeal endorsed the approach to discrimination adopted by the Commission and the respondents which was consistent with that in the ICCPR and the General Comment; and in *Service & Food Workers Union Nga Ringa Tota Inc v Terranova Homes & Care Ltd*[139]the Employment Court, having been asked to decide what criteria dictate whether an element of differentiation in the remuneration of men and women based on sex exists as a preliminary issue, unequivocally accepted the approach in the relevant international instruments and the concern to eliminate all forms of discrimination in payment based on gender. It specifically endorsed the NZHRC's view that the principles they espoused extended to the prohibition of such discrimination.[140]

2.8 NZBORA vets

Any analysis of the impact of the ICCPR would be incomplete without a mention of section 7 NZBORA. Section 7 requires the Attorney-General to report to Parliament if he or she considers a provision of a proposed bill is inconsistent with any of the rights or freedoms in the Bill of Rights. The process is designed to minimise the chances of infringing legislation being passed either unwittingly or deliberately. The opinions (called "vets") are provided by the MOJ team or Crown Law - in the case of bills introduced by Justice itself. At the time of writing there had been 59 s.7 reports.

The Attorney-General's obligation to report on inconsistent provisions arises only on introduction of the Bill. This means that when inconsistent provisions are added at committee stages or by way of Supplementary Order Papers there is no express requirement for a report by the Attorney-General. There have been repeated calls for a reform of the process to ensure that s. 7 reports are made in these situations, but so far the Attorney-General has not been receptive.

Despite the fact that interpretation of the NZBORA may reflect the rights in the ICCPR, the Covenant has been referenced relatively infrequently in the vets. Although most engage with the subject matter of the treaty, few have mentioned it specifically.[141] Those vets that have include the vet of the Criminal Procedure Bill and the rule against double jeopardy and, in particular, the circumstances when it is permissible and the application of s.5; the Criminal Justice (Parole Offenders) Amendment Bill which sought to impose penalties for people subject to certain sentences who offended while on parole and whether the penalties could be considered proportionate for the purpose of s.5; and the proposal to extend the Prisoner and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill in 2011 to prevent the payment of compensation to prisoners for breaches of the NZBORA by the Crown. The vet specifically referred to New Zealand's obligations under the ICCPR and the obligation to provide a remedy. It also referred to the fifth report and the Committee's concerns about the impact of the existing

[138] *Ministry of Health v Atkinson* at [133]

[139] [2013] NZEmpC 157

[140] At [66]. Although on appeal the Court of Appeal, while recognising the importance of the international standards as useful interpretative devices declined to apply them in interpreting the meaning of equal pay in the Equal Pay Act: *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc.* CA631/2013 [2014] NZCA 516

[141]9 referred to the UNHRC and the ICCPR

Act on the right to an effective remedy, commenting that if enacted the proposal could "attract further negative attention".

The number of NZBORA vets and the limited use of the ICCPR, suggest that the international standards have had little impact on the development of policy and legislation particularly since a negative NZBORA vet does not stand in the way of subsequent enactment of the legislation.

The Committee has criticised New Zealand on a number of occasions[142]for passing legislation that is inconsistent with the NZBORA (and by extension the ICCPR) because the s.7 vets can be disregarded although one commentator has suggested that a negative s.7 vet is not necessarily determinative of inconsistency with the ICCPR or the NZBORA since Courts are not bound by them and can (in fact, must) give a NZBORA consistent interpretation if possible.[143]

2.9 Conclusion

The impact of New Zealand's ratification of the ICCPR has not been as significant as might have been expected. Arguably the most important effect has been the reference to the Covenant in the long title of the New Zealand Bill of Rights Act.

In a key note speech delivered in 2006 when he was president of the Law Commission, Sir Geoffrey Palmer observed that while New Zealand had prided itself on respecting fundamental human rights before the enactment of the NZBORA, there was a tendency for politicians to claim that New Zealand always honoured fundamental human rights without looking to see whether the claim was valid and, too often, it was not. However, he went to note that:[144]

> *New Zealand is now a highly pluralist society with many diverse sets of values shared among its inhabitants which places pressures on fundamental rights but also provides the essential need for their protection. It is not too much to say that the Bill of Rights has changed New Zealand's legal culture and widened its horizons. Analysis has replaced rhetoric.*

The provenance of the NZBORA suggests that it was primarily designed to give statutory recognition to fundamental rights and freedoms that already existed at common law in New Zealand rather than the ICCPR as it is now referenced.[145]The original version of the Bill in the White Paper did not refer to the ICCPR in the long title (although it did in the preamble and accompanying commentary)[146]and the paper suggested that, had the Bill been entrenched, it would have ensured a greater guarantee of compliance with New Zealand's important international obligations.[147] However, despite the fact that it does not have superior status and the Courts cannot strike down inconsistent legislation, the ICCPR via the NZBORA has had an effect on the development of jurisprudence in the criminal area, although its role in relation to more substantive rights is less significant. Earlier this year, an interview with one of the members of this project, Sir Geoffrey stated that he considered the courts were "gutless" in enforcing international obligations.

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[142] Third periodic report CCPR/C/64/Add 10; Fourth periodic report CCPR/CO/75/NZL; Fifth periodic report CCPR/C/NZL/Q/5/Add.1

[143] Paul Rishworth et al. *The New Zealand Bill of Rights* (2003) OUP at 201

[144] Sir Geoffrey Palmer, "The Bill of Rights fifteen years on", *Keynote Speech Ministry of Justice Symposium: The New Zealand Bill of Rights Act 1990* (2006)

[145]Above n19 at 5

[146] at 30

[147] at 31