Fault lines:

Human rights in New Zealand

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Chapter Four Convention on the Elimination of all forms of Racial Discrimination (CERD)

4 Background

The International Convention on the Elimination of Racial Discrimination (CERD) was the first thematic treaty in the international human rights framework. CERD came into force in 1969 and requires States Parties to:

- Not engage in any act or practice of racial discrimination against groups or individuals;
- Not sponsor, defend or support racial discrimination by persons or organisations;
- Review government, national and local policies and to amend or repeal laws and regulations which create or perpetuate racial discrimination;
- Encourage organisations and movements to eliminate barriers between races, as well as to discourage anything which tends to strengthen racial division.

New Zealand signed CERD in 1966 and ratified it in 1972.

The Government registered no reservations to CERD although it did to Art.20 of the ICCPR which relates to inciting racial hostility and reads:

> *The Government of New Zealand having legislated in the areas of the advocacy of national and racial hatred and the exciting of hostility and ill will against any group of persons, and having regard to the right to freedom of speech, reserves the right not to introduce further legislation with regard to Article 20.*

The apparent inconsistency – namely, the Government's position that domestic legislation complies with CERD by prohibiting incitement of racial hostility in the Human Rights Act 1993 (HRA) – has led the Human Rights Committee to consistently request New Zealand remove this reservation.

As became the norm with later treaties, an analysis of domestic legislation was first carried out to ensure New Zealand could comply with the obligations in the treaty in good conscience on ratification. CERD requires access to a complaints process to address complaints of racial discrimination in certain areas of public and private life.[198] As there was no existing mechanism, the Race Relations Act 1971 (RRA) was enacted. The RRA created the role of the Race Relations Conciliator and established a conciliation process. The Courts were seen as a last resort and best used as a threat to achieve settlement, the rationale being that:[199]

> *Conciliation and investigation procedures have better chances of reaching solutions of positive redress while sanctions resulting from judicial procedures can be reserved in particular for cases where the former procedures have failed.*

Conciliation and investigation procedures were also considered to be more educational and had the advantage of being more accessible to the interested parties but, despite the almost universal

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[198] Article 6

[199] Ken Keith, "The Race Relations Bill" in *Essays of Race Relations and the Law in New Zealand*, Sweet and Maxwell (1971) referring to Report of the Meeting of Experts on Discrimination in Employment and Accommodation, ILO, 231 October 1966 quoted in *Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres* 23 July 1970 E/CN.4/Sub.2/307at [108]

endorsement of this approach at the time the RRA was enacted, reservations were already being expressed about how efficient conciliation was in achieving societal change in areas such as structural discrimination.

The RRA was amended in 1977 when the Human Rights Commission Act 1977(HRCA) was introduced. The HRCA extended the grounds of unlawful discrimination to sex, marital status and religious or ethical belief in anticipation of New Zealand's ratification of the ICCPR and ICESCR. Some amendments were made to the RRA to ensure the compatibility of the legislation and it RRA was strengthened by providing a new procedure for pursuing complaints that could not be resolved by conciliation, extending the Conciliator's jurisdiction and increasing the penalties for infringement.

The HRCA was primarily an antidiscrimination statute. When the Minister of Justice reviewed the Act after 10 years, the Commission recommended a substantial overhaul including structural, procedural and jurisdictional changes. A Human Rights Amendment Bill was introduced in 1992 and came into effect in 1993. The 1993 Act created a new provision relating to racial harassment and introduced section 61 to replace section 9A of the RRA which had been repealed in 1989.

The HRA has been amended a number of times - in 1994 the status of the Race Relations Conciliator was formalised and in 2001 a major overhaul of the Act merged the Office of the Race Relations Conciliator with the Human Rights Commission and replaced the role of Conciliator with that of the Race Relations Commissioner. A Bill currently before Parliament will do away with the title of Race Relations Commissioner (although substantially retaining the functions) making the incumbent simply another Commissioner.

4.1 Reporting

Successive governments have complied with the requirement to submit periodic reports to the CERD Committee (the Committee), beginning with the first report in 1973 to CERD's ninth session. Since 1986, government reports have been consolidated – for example, the eighth and ninth reports were submitted as one document in 1990. The quality of reporting varies, as do the consistency and quality of the Committee's observations.

The Committee's major concerns which emerge from the Concluding Observations since 1995 are:

- The status of the Treaty of Waitangi and its relationship to the HRA;
- Disparities in terms of health, housing and education between Māori, Pacific people and European New Zealanders;
- The disproportionately high representation of Māori and Pacific people in the prison population;
- Concern about systematic consultation of minorities in decision making processes;
- Unsatisfactory response to the implementation of Article 4, the need for the Attorney-General's consent to institute criminal proceedings in cases of incitement to racial hatred and lack of proscription of racist organisations. (It is worth noting however that this concern is not unique to the CERD Committee. The explanation that the A-Gs consent is a systemic safeguard for a range of offences involving rights or other complex issues and must be exercised consistently with New Zealand's human rights obligations has been accepted by at least some of the treaty bodies);

- Lack of knowledge by the general public of avenues of redress and need to raise public awareness.

Emerging issues related to increased migration flows include:

- Concern about possible interethnic conflict among refugees;
- Immigrants presenting a threat to nationals.

4.2 Implementation of CERD – Article 14

De jure compliance with CERD appears good and indicators demonstrate that over the past 25 years New Zealand has adopted a great number of policies to give effect to the recommendations suggested by the CERD Committee.[200]However, outcome indicators which measure the *defacto* qualitative enjoyment of rights, suggest that the policies need to be strengthened in order to be genuinely effective. As the former Race Relations Commissioner put it, *"It's a lot about what we do, but there's not much of what has changed"*.[201]

One issue that the CERD Committee repeatedly includes as a Recommendation is that the government should make a declaration under Article 14. Article 14 recognizes the competence of the CERD Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by a State Party. The procedure is optional, so States have to explicitly recognise the Committee's competence to receive complaints. New Zealand's omission to do so compares unfavourably with its acceptance of the Human Rights Committee's recommendation to consider complaints about breaches of human rights in relation to their respective Covenants and Conventions where such provisions exist.

There has never been a satisfactory explanation for the Government's position on Article 14. One reason for it may be that the Government simply considers existing domestic and international complaint procedures (including under the ICCPR) are adequate, particularly when coupled with the early warning and urgent action procedures that allow those who are (or are about to be) subjected to racial discrimination by a State party to have their situation considered by the CERD Committee - these procedures were invoked in 2005 when the Committee considered a communication about the Foreshore and Seabed legislation and requested the State to closely monitor the implementation of the Act, its impact on Māori and the developing state of race relations in New Zealand. The CERD Committee invited the government to report on the implementation of the Act in its report to the Committee the following year.

In its first submission to the UPR in 2009, the Government stated that it "recognised the importance of individual complaint procedures, particularly in relation to issues as serious as racial discrimination under Article 14 ..."[202]and while recognition of Article 14 had not been actioned at the time of the second UPR in 2014, the chart on progress towards compliance in 2011 stated that New Zealand had accepted the recommendation and that the Ministry of Justice was considering whether to recognise the competence of the CERD Committee to hear individual communications.

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[200] See Appendix 5: Responses to Committee's recommendations 2011

[201] Interview with Joris de Bres: 18 June 2013

[202] *National report submitted in accordance with paragraph 5 and the annex to Human Rights Council resolution 16/21 – New Zealand* A/HRC/WG.6/18/NZL/1

4.3 Special Procedures

The Special Rapporteurs on the Rights of Indigenous People have twice visited New Zealand.[203] In 2005, Rodolfo Stavenhagen visited to gain a better understanding of the situation of indigenous people and issues such as the treaty settlement process, the implications of the Foreshore and Seabed Act, public policies designed to reduce social inequalities between indigenous people and others, the provision of basic social services such as education, housing and health care and the revitalisation of Māori. His recommendations included building on constitutional debates to ensure constitutional reform that would recognise the right to self-determination, granting the Waitangi Tribunal legally binding enforceable powers and allocating it more resources, entrenching the NZBORA and amending or repealing the Foreshore and Seabed Act. A number – such as the issues relating to the Foreshore and Seabed Act - were also reflected in the recommendations of the CERD Committee.[204]

Rodolfo Stavenhagen's successor, James Anaya, visited in 2010 partly to follow up on the work of his predecessor, but the main purpose of his visit was to examine the process for settling historical and contemporary claims based on the Treaty. In his report he described the Treaty Settlement Process as "*one of the most important examples in the world of an effort to address historical and ongoing grievances of indigenous peoples*." While noting that settlements already achieved had provided significant benefits in several cases[205]he reiterated concerns about the status of the Waitangi Tribunal, the high rates of Māori incarceration and the continuing social and economic disadvantage of Māori.

4.4 The role of NHRIs and civil society

As with the other treaty bodies the CERD Committee considers that NHRIs have an important role to play in the reporting process. They can provide information on issues relating to the consideration of reports of States Parties in both formal and informal meetings outside the Committee's working hours to members of the Committee, as well as respond to requests to clarify or supplement such information. NHRIs are also recognised as fundamental to the dissemination and implementation of the Treaty Body Recommendations on the ground. As one commentator has observed:[206]

> *NHRIs, due to their special status, make their interventions more palatable to governments, therefore facilitating accountability and compliance. This role is intensified and extremely relevant in dire situations where there is a breakdown in communication between governments and civil society.*

Although it is now generally accepted that NHRIs and civil society have a useful contribution to make to the cyclical treaty body reporting processes[207]this was not always the case. NHRIs have only had speaking rights at the UN since 2005 and even now this is limited to those with

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[203] There had also been earlier official visits by UN human rights experts, for example, Erica-Irene Daes, Chairperson-Rapporteur of the Working Group on Indigenous Populations in 1992, and Miguel Alfonso Martínez, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations in 1997.

[204] Although the Foreshore and Seabed legislation was eventually repealed, the former Race Relations Commissioner, Joris de Bres, credits the Maori Party rather than the UN mechanisms with achieving the change - albeit with the added credibility provided by the UN criticism. Interview with Joris de Bres, 18 June 2013

[205] *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of Maori People in New Zealand*, A/HRC/18/XX/Add.Y at para [67]

[206] Frans Viljoen, "Exploring the Theory and Practice of the Relationship between International Human Rights Law and Domestic Actors" *Leiden Journal of International Law*, 22 (2009) at 187

[207] Pillay above n 76 at 4.2.8

appropriate accreditation under the Paris Principles. Following the Durban conference in 2001 the Committee specifically noted that NHRIs can play an important role in combating racism and racial discrimination but needed to be strengthened and provided with greater resources to help them do so.

It was only after the rules of procedure were changed allowing NHRIs to make a statement directly to the Committee that the New Zealand Human Rights Commission (NZHRC) began to consciously engage with the CERD Committee.[208] The NZHRC's involvement increased after 2007 following a direct invitation from the Secretary to become involved, possibly as a way of neutralising the Government's concern at the Committee's comments on the Foreshore and Seabed legislation. It was also intended to ensure greater participation by groups other than Māori.[209]This subsequently translated into a more constructive role with the NZHRC liaising between the Committee, the Rapporteur and the Government. This was particularly important in the case of CERD because there is no obvious public sector agency to take the lead in compiling the report and monitoring implementation of the Convention. Until 2008 the report was prepared by the Ministry of Foreign Affairs which represents the Government but the Ministry did not take an active role in promoting it after it was presented and recommendations made. The most recent report was prepared by the Ministry of Justice and presented by the Minister of Justice, itself an improvement since the Justice Ministry has responsibility for human rights within New Zealand rather than New Zealand's reputation with the UN. From 2008 to 2013 the NZHRC monitored compliance with the Committee's recommendations through the publication of an Annual Race Relations Report which tracked the progress of race relations in New Zealand.

The former Race Relations Commissioner views the relationship between treaty bodies and NHRIs as critical principally because NHRIs act as the eyes and ears of the Treaty body domestically while the treaty body itself provides an external source of support for the NHRI. The significance of the role of NHRIs was also reinforced by one of the Crown Counsel[210]who routinely provides advice on compliance with human rights treaties. He observed that one of the usual requirements by the UN Treaty monitoring body is that publicity to the concluding observations and recommendations of the body be given by the state party. The extent to which New Zealand observes this in practice is low. While publicity may be given to the Concluding Observations and Recommendations by posting them on the relevant Ministry website, the level of comment and the implications for New Zealand appear to be poorly understood. He considered that New Zealand could usefully improve realisation of human rights domestically by an organisation such as the NZHRC that was independent of Government, undertaking an education exercise for relevant media personnel on human rights, including treaty body monitoring.

Civil society organisations can also play a significant role in the treaty body process through the provision of shadow body reports but very few do so in practice whether because of resourcing, time constraints or lack of understanding of the UN system. As Joris de Bres observed:[211]

[208] The Race Relations Conciliator has always been given the opportunity to comment on the Country reports before they were sent to the CERD Committee

[209] Interview with Joris de Bres: 18 June 2013

[210] Interview with Andrew Butler: 8 April 2013

[211] Interview with Joris de Bres: 18 June 2013

> *A weakness of civil society organisations in New Zealand is that they are not well resourced generally and many rely on contracts to deliver certain services that the Government should deliver ... and in race relations in particular there's really not much of anything.*

Although having said this, he considers that they will become more relevant as the treaty bodies make approaches to NGOs and technology improves. A lawyer who has attended a number of country examinations as part of the Government delegation suggested that video link participation would allow a larger group of specialist officials to participate alongside delegation representation which would make the examination of specific issues more efficient and in depth.[212]

The number of NGOs that provided shadow reports to CERD has increased since the perceived success in achieving repeal of the Foreshore and Seabed Act (in 2004). There were no NGO submissions in 2002 but by 2007, in addition to Peace Movement Aotearoa, the Human Rights Foundation and ACYA, Aotearoa Indigenous Rights Trust, the Treaty Tribes Coalition and a collective of four iwi Māori/indigenous peoples Authorities in Tai Tokerau submitted reports to CERD. To some extent the nature of this representation reflects the concerns of the Race Relations Commissioner that there was a disproportionate focus on issues relating to Māori over other ethnicities who, arguably but for the Commissioner's efforts, would have remained invisible.[213]

4.5 The use of CERD in judicial proceedings

Although the Courts play a significant role in promoting and protecting human rights, this is tempered to some extent in New Zealand by the fact that a "duallist" approach to international norms is assumed to apply.[214] The most overt reflection of this position can be found in *Ashby v Ministry of Immigration*[215]in which Cooke J (as he then was) referred to CERD and refused to accept that the treaty obligations created under the Convention were binding domestically since the treaty had not been incorporated into New Zealand law by an Act of Parliament . However, the position in fact is much more nuanced than this comment suggests, Cooke himself (by then President of the Court of Appeal) observing in a later case[216] that inviting the Court to ignore the international instruments was an *"unattractive argument that New Zealand's adherence to the international instruments had been at least partly window dressing*".

In *Northland Regional Health Authority v Human Rights Commission*[217]Cartwright J noted that the Courts in New Zealand have increasingly been prepared to look to international instruments and authorities to gain a better understanding of domestic human rights legislation, going on to state that "*where international principles are the foundation for domestic legislation the logical path to follow is one that*

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[212] Interview with Ben Keith: 8 April 2013. Keith indicated that while the delegation was well prepared and able to answer most of the Committee's questions it would have been helpful to call on subject specialists on points which the reviewing body wished to explore further. Specialists such as the Chief Paediatrician of the Ministry of Health who attended the CRC review can find it difficult to free up the time to travel the necessary distance. We understand that the matter has been raised informally with treaty body staff.

[213] It is worth noting that a survey, conducted annually by UMR Insight Ltd since 2000, showed in 2011 that 77 per cent of New Zealanders consider that Asians are discriminated against more than any other group. This figure is up from 75 per cent in 2009 and 74 per cent in 2008.

[214] That is international norms are only directly enforceable when implemented by national legislation. Under a monist system international norms do not need to be translated into national law. The act of ratifying an international treaty immediately incorporates that international law into national law allowing courts to enforce international law domestically. Neither approach adequately describes the situation in New Zealand

[215] [1981] 1 NZLR 222 at 224

[216] *Tavita v Minister of Immigration* 1 HRNZ 30

[217] (1997) 4 HRNZ 170

provides the international framework and understanding to illuminate and assist local decision-making."[218]Interestingly, although the Judge accepted that CERD had a part to play as the progenitor of the RRA and therefore race discrimination, she opted for the wider definition of discrimination in the ICCPR stating that the definition should not be read down to exclude a group that might not fall within the more limited definition.

In *Quilter v Attorney-General*[219], although all the Judges of the Court of Appeal approached the question of same sex marriage differently, at least three referred to the international framework as a way of clarifying the definition of discrimination. Thomas J in particular addressed the question of influence of the international covenants and conventions as not providing the complete answer but assisting to indicate the underlying nature or essence of discrimination and expressing basic values which the community, in ordering its affairs, is to observe.[220]

CERD was also mentioned, but not developed further, in *Wheen v Real Estate Agents Licensing Board* [221]and *Mendelssohn v Attorney-General.*[222]

However, despite increasing reference to international obligations by the courts which has led some commentators to claim that international human rights obligations have "moved centre-stage",[223] it is still arguable how influential treaties such as CERD are in practice. One reason for this may be the lack of understanding of the international human rights treaty framework and its significance among legal practitioners – something that itself reflects the lack of publicity given to the treaty body reports and their conclusions.

4.6 Conclusion

Despite New Zealand's apparently good record of compliance, it is unclear whether ratification of the Convention has significantly altered its behaviour. It may well be that the most important impact of the Convention was the introduction of the RRA and its subsequent incorporation in the HRA.

As with other treaties the nature of the obligation and how difficult or costly it is to implement will be relevant. A commitment that is comparatively easy to give effect to or which reflects ongoing work will be easily accommodated whereas one which would involve greater disruption will either be the subject of a reservation, or deflected by ambiguous comment about observance. Given this, it is difficult to understand New Zealand's reluctance to accept Article 14 since it would not demand undue resources in practice.

A researcher from the Netherlands who recently carried out a project on domestic compliance with international commitments observed that only two of CERD's Concluding Observations appear to have contributed in any way to bringing about change - the overrepresentation of Māori in

[218] At [4]
[219] [1997] 4 HRNZ at 170
[220] At 182, line 40
[221] [1997] 4 HRNZ at 15
[222] [1999] 5 HRNZ at 1
[223] Andrew Butler & Petra Butler, "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173 at 187

prisons and repeal of the Foreshore and Seabed Act.[224] Even this is contestable, however, given the overrepresentation of Māori in the justice system is an ongoing issue that is resistant to easy resolution, and the repeal of the Foreshore and Seabed Act had an added impetus as a condition of the Confidence and Supply Agreement between National and the Māori Party in 2009.

While the CERD Committee and Special Rapporteurs may not have directly influenced the Government's decision making, the Government has certainly been aware of their criticism and NGOs have relied on the recommendations to inform their advocacy.

[224] Jasper Krommendijk, *The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper Pushing or Policy Prompting?* School of Human Rights Research Series, Vol.63 (2014) at 297